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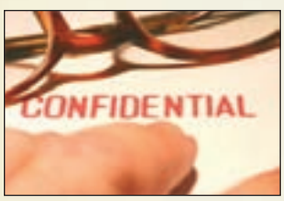
Legal Briefing

Trade Secret Cases Can Backfire

By David C. Baker, Esq.

Trade secrets, by their very nature, can be a company's most valuable asset. When an employee makes off with a former employer's trade secrets, such as confidential prospect and customer lists, secret formulas, computer software code, and the like, it is not uncommon for the employer to file a lawsuit to prevent the employee from using the trade secrets for their own financial gain and, if possible, to recover the secrets. However, a recent California Court of Appeal decision serves as notice that employers must be careful how they proceed, particularly if they do so in "bad faith."



In *FLIR Systems, Inc. v. Parrish,* the Court of Appeals affirmed a $1.6 million attorney fee award to the defendants upon finding that their former employer's suit was brought in bad faith. The decision sets forth the factors that may contribute to a determination of bad faith and highlights the importance of considering carefully whether to bring a misappropriation claim against former employees. This is especially true when there is little or no evidence of actual damage, or threatened or actual misappropriation.

In 2004, FLIR acquired the assets of Indigo, a manufacturer and distributor of electronic devices. The defendants, Parrish and Fitzgibbons, were officers of Indigo and continued to work there after the sale. After about a year, Parrish and Fitzgibbons decided to start a competing company based on a business plan originally developed by Fitzgibbons several years before FLIR acquired Indigo.

In 2006, defendants began negotiations with Raytheon and assured FLIR that they would not misappropriate their trade secrets. Not satisfied, FLIR sued defendants on the theory that they "must" have misappropriated trade secrets in order to compete with FLIR. Raytheon promptly terminated the business discussions with defendants, forcing them to abandon their fledgling business and to sue FLIR.

At trial, the Court found there was no misappropriation or threatened misappropriation of trade secrets because it was undisputed that defendants received no funding for their business, never actually started their new business, had no employees or customers, did not lease any facility or develop technology, and did not design, develop or sell any products. In successfully defending the FLIR misappropriation of trade secrets and California Unfair Competition Act claims, the trial court ultimately denied injunctive relief and awarded defendants over $1.6 million in attorney fees.

In its 2008 Statement of Decision, the Court held that plaintiffs had brought the action based on the doctrine of "inevitable disclosure," essentially arguing that even though there was no evidence of actual disclosure it was likely there would eventually be disclosure of the FLIR trade secrets. However, California courts have repeatedly rejected the "inevitable disclosure" doctrine and the Court found FLIR to have brought the action in bad faith. In issuing its ruling, the Court considered the following factors significant:

- The absence of any economic harm.
- The absence of any evidence of misappropriation or threatened misappropriation of trade secrets.
- Evidence that the defendants had an anticompetitive motive in filing the lawsuit.
- Failure by the plaintiffs to identify what trade secrets would be subject to the permanent injunction.
- The imposition of unnecessary settlement conditions during negotiations.
- Defendant's experts admitted there was no scientific methodology to predict trade secret misuse and agreed that no trade secrets actually had been misappropriated.

The *FLIR* decision is a reminder to employers to exercise caution when deciding to file litigation against former employees for trade secret misappropriation, particularly where it appears the employer is merely fearful or suspicious of wrongdoing. In such cases, the employer risks not only dismissal of its claims but the possibility of significant monetary sanctions.

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Are Your Pay Stubs in Compliance?

By Beau M. Chung, Esq.

The California Labor Code has specific requirements on what must appear on pay stubs. What could be more straightforward? Many employers have been shocked to learn that not including the necessary information can result in some astonishing liability. This can be avoided with virtually no effort on the employer's part – no lengthy training, notices to post, or changes to employee handbooks.

Failure to provide any one of the items listed in Labor Code section 226 can result in fines calculated by each pay period up to a total of $4,000.00 per employee – plus attorneys' fees and costs. This does not include the additional amounts that may be recovered by a litigant under California's private Attorney-General laws.

While it is reasonable to assume that your payroll service would ensure that your employees' pay stubs include the proper information, from our experience, you should not rely solely on a payroll service to ensure compliance with this statute.

The essential items which must appear on each employee's pay statement include:

- gross wages earned;
- total hours worked by the employee (unless properly exempt from overtime);
- the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- all deductions (all deductions made pursuant to a written agreement with the employee may be aggregated and shown as one item);
- net wages earned;
- the inclusive dates of the period for which the employee is paid;
- the name of the employee and the last four digits of the social security number or employee identification number – do not include the employee's entire social security number;
- the name and address of the legal entity that is the employer; and
- all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate.

In addition, the deductions made from payments of wages must be recorded in ink or other indelible form, properly dated, and must show the month, day, and year. A copy of the statement or a record of the deductions must be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

For an example of a correct wage statement, please see the California Labor Commissioner's website at: http://www.dir.ca.gov/dlse/PayStub.pdf

With the stiff penalties that apply per employee for noncompliance, it is definitely worth the time to make sure you are in compliance with this law.

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A Disability Lawsuit Will Now Cost You $4,000 or More

By Andrew C. Kienle, Esq.

In the recent *Munson v. Del Taco* decision, the California Supreme Court made it easier for a plaintiff in a disability lawsuit to collect the statutory penalty of $4,000 for any single ADA violation. Historically, a plaintiff had to prove that a business owner intentionally discriminated against them in order to recover the $4,000 penalty. Without proof of intentional discrimination, a plaintiff could only recover a $1,000 penalty for a violation. Now, based on the *Munson* decision, proof of intentional discrimination is no longer required. Thus, if a disabled plaintiff establishes that they encountered a barrier in accessing a place of public accommodation, the minimum statutory penalty to be paid (in addition to attorneys' fees) is $4,000.00.

While the court tried to temper the significant impact its decision would have by pointing to recent legislative changes to the California statutes concerning disability access, it is apparent that this decision will do nothing but "add fuel to the fire" in the ever-controversial area of ADA law.

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