



LABOR & EMPLOYMENT DEPARTMENT

ALERT

TOP LEVEL EXECUTIVES CAN BE ENJOINED FROM COMMENCING EMPLOYMENT WITH A COMPETITOR IF THERE IS A SUBSTANTIAL THREAT OF DISCLOSING TRADE SECRETS

By Lee A. Sevier

In *Bimbo Bakeries USA, Inc. v. Botticella*, the U.S. Court of Appeals for the Third Circuit affirmed the decision of the lower court to enjoin a top-level executive at Bimbo Bakeries from commencing employment with its competitor Hostess, Inc. Bimbo Bakeries manufactures baked goods, including Thomas' English muffins, and sought to enjoin Chris Botticella, a former senior vice-president at Bimbo Bakeries, from accepting new employment with Hostess pending resolution of the lawsuit charging the executive with misappropriation of trade secrets.

Preliminary injunctions, such as the one sought in this case, are granted in order to maintain the status quo and prevent harm to parties prior to the ultimate resolution of the case. In order to obtain a preliminary injunction, Bimbo Bakeries had to show: (1) a likelihood of success on the merits; (2) irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.

Bimbo Bakeries argued that an injunction was needed to prevent Botticella from disclosing trade secrets to his new employer. It argued that it was likely to succeed on the merits of the case because, as a former senior vice-president, Botticella had extensive knowledge of its trade secrets, including those of the famous "nooks and crannies," and he was likely to disclose these trade secrets to Hostess in the course of his employment. Their claim was bolstered by the fact that in the days

immediately preceding Botticella's departure, he accessed sensitive files from his laptop, including cost reduction plans, promotional strategies, launch dates and customers targeted for upcoming bids. In response, Botticella argued that he could only be enjoined if Bimbo Bakeries could establish that it would be "virtually impossible" for him to perform his new job without disclosing trade secrets.

The Third Circuit rejected Botticella's argument that a "virtually impossible" standard should be applied. In doing so, the Third Circuit ruled that it "has discretion to enjoin a defendant from beginning new employment if the facts of the case demonstrate a substantial threat of trade secret misappropriation." Based on Botticella's access to trade secrets and his position as a senior vice-president, the court determined that there was a substantial threat of him disclosing Bimbo Bakeries' trade secrets to Hostess and an injunction was appropriate.

Employers should be aware that the Third Circuit will not apply the more stringent "virtually impossible" standard when determining preliminary injunctive relief. Instead, it will enjoin a prospective employee from commencing employment if there is a substantial threat of trade secret disclosure.

For more information about this Alert, please contact Lee Alexandria Sevier at 973.994.7545 or lsevier@foxrothschild.com, or any member of our [Labor & Employment Department](#).

Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.