

NEW JERSEY CHANCERY DIVISION DECISION PROVIDES TEXTBOOK EXAMPLE OF HOW *NOT* TO PART WAYS WITH AN EMPLOYER AND START YOUR OWN BUSINESS

By Kevin J. O'Connor*

In my prior blogs I've addressed the legal remedies available to employers when employees violate confidentiality agreements or restrictive covenants, and unfairly compete. A new opinion by Judge Frederic Kessler, P.J. Ch. (Union County) provides a textbook example of how *not* to part ways with an employer and start your own competing business.

In B&H Securities, Inc. v. Duane D. Pinkney, Docket No. UNN-L-001292-08, the employees in question were former salesmen for B&H, which company provides security and safety systems to businesses. The employees had each signed confidentiality agreements with B&H and agreed to certain post-employment non-disclosure obligations. One of the employees had a non-compete.

According to the opinion, the employees:

- formed a competing company while still employed by B&H, and then proceeded to download the entire database of B&H and use it to unfairly compete against their employer;
- worked with a critical, existing B&H customer prior to their departure to change its contract so that it could more easily transition to the new company; and
- used a "data-wiping" program on their computers to spoliage evidence.

Judge Kessler entered a judgment against certain of the defendants in the amount of \$737,087 in compensatory damages, \$100,000 in punitive damages, and gave leave to file an application for attorneys' fees and costs under the Computer Related Offenses Act.

B&H offers a good summary of the law on the measure of damages for breach of the non-competition and disclosure covenants in the employment agreement (lost profits), as well as the right of an employer to recover attorneys' fees and costs. It also provides a warning to employees who hope to repeat these acts, as the court granted substantial punitive damages to the employer.

P&A provides business counseling to employers as well as departing employees, and can help you prepare for such misconduct by having proper agreements in place with employees. B&H is proof positive that a determined employer can obtain relief on an

appropriate record, and a warning to other employees to part ways with an employer in the proper manner.

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