

## Employer Failed to Establish Tortious Interference by Current Employees Who Were Secretly Operating a Competing Business

Todd M. Torres | April 7, 2014

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An employer failed to show that its former employees tortiously interfered with its current and prospective customers, even though they had been secretly operating a competing business while working for the employer. In deciding *Aid Maintenance Co., Inc. v. Realty Maintenance Service, Inc.* (C.A. No. PC-2009-0194), the Rhode Island Superior Court noted that the employer did not have an agreement with the employees prohibiting their competitive efforts, the employee's conduct was typical of competitors in the industry, and the employer could not quantify the value of lost business. Said the trial court, "[t]here are many descriptive, albeit non-legal, terms that may be appropriate in describing defendants' actions: dishonest, disloyal and unappreciative are a few. These terms, however, do not carry any particular legal significance in this Court's dispassionate analysis."

After approximately 23 years as a sales representative for Aid Maintenance Co., Inc., Robert Bizier, while still an Aid Maintenance employee, founded Realty Maintenance Service, Inc.—a direct competitor with Aid Maintenance in the provision of cleaning services. Unlike Aid Maintenance, Realty Maintenance performed maintenance and repair services in addition to cleaning services.

Manuel Teixeira, a cleaning supervisor for Aid Maintenance, worked contemporaneously for Realty Maintenance as a consultant. Until approximately 2008, Aid Maintenance did not know that these employees were operating a competing business. Notably, Bizier and Teixeira did not sign agreements not to compete with Aid Maintenance when they were hired or during their employment. Once Aid Maintenance learned of their activities, however, its vice president confronted Bizier, who subsequently left Aid Maintenance (with Teixeira) to work exclusively for Realty Maintenance.

Shortly thereafter, Aid Maintenance alleged that Bizier and Teixeira, while employees, had purposely diverted customers to Realty Maintenance, either directly or by sabotaging Aid Maintenance's contract bids to the benefit of Realty Maintenance. Aid Maintenance claimed that Bizier, for example, encouraged two repeat Aid Maintenance customers, whom he had originally solicited for Aid Maintenance, to contact Realty Maintenance for subsequent contracts. Bizier testified, however—and Aid Maintenance was unable to refute—that in one instance the customer was looking for maintenance services that Aid Maintenance did not provide, and in the other the customer had told Bizier that it no longer wished to do business with Aid Maintenance.

Aid Maintenance also claimed that it lost bids for contracts as a result of Bizier's and Teixeira's tortious conduct. For example, it claimed that it lost one bid to Realty Maintenance because Teixeira, who was involved in developing Aid Maintenance's bid, likely gave the details of its bid to Realty Maintenance. Teixeira denied the allegation, however, and Aid Maintenance was unable to substantiate its claim that he had in fact shared its information with Realty Maintenance. In another instance, Aid Maintenance alleged that Bizier or Teixeira caused it to retract its bid on a contract for which Realty Maintenance was also a bidder. In addition to denying their involvement, however, Bizier and Teixeira also noted that Realty Maintenance lost its bid for the contract.

After a two-day non-jury trial, the trial court ruled as a matter of law that Aid Maintenance lacked sufficient evidence to prove tortious interference. The court held that despite the evidence of Bizier's and Teixeira's "less than honorable" conduct, Aid Maintenance had "failed to prove its claim of intentional interference with present and prospective contractual relations against [Bizier and Teixeira] by a preponderance of the evidence."

In reaching that conclusion, the trial court noted that in Rhode Island, a claim for tortious interference exists where (i) there is a

business relationship or expectancy, (ii) the interferer knows of the relationship or expectancy, (iii) one party performs an intentional act of interference that causes harm, and (iv) there is proof that the interferer's actions caused damages. For the interference to be considered intentional, the actor must have intended to cause harm without justification. As the court recognized, ordinary economic competition, without more, does not constitute tortious interference.

Applying those legal principles to the facts, the trial court noted that Bizier and Teixeira had not signed a noncompetition agreement with Aid Maintenance and thus were not required to refrain from competing with their employer. The court further observed that there was insufficient evidence to show that Bizier's and Teixeira's actions amounted to more than ordinary competitive behavior in the cleaning services industry. That industry, the court commented, is characterized by often informal agreements that extend generally for one month at a time, and are usually terminable at will.

Given that the same customers use multiple competitors, Bizier's and Teixeira's promotion of Realty Maintenance, in the court's opinion, did not constitute unjustified competition. Most damaging to Aid Maintenance's case, however, was its failure to prove that Bizier's and Teixeira's actions actually resulted in lost business. The court noted that the two customers Bizier purportedly referred to Realty Maintenance could not be considered lost business because Aid Maintenance did not offer the services that one customer was looking for and because the evidence showed that the other customer had already decided not to contract with Aid Maintenance.

Moreover, Aid Maintenance failed to prove that, but for Bizier's and Teixeira's alleged interference, it would have been the successful bidder on the contracts it claimed to have lost due to Bizier's and Teixeira's actions. The court thus found that there was not a preponderance of evidence demonstrating that the defendants' actions had resulted in a quantifiable loss of business for Aid Maintenance.

### Key Takeaways

The *Aid Maintenance* decision underscores the importance of requiring employees to agree at the start of their employment not to engage in any activity that competes—directly or indirectly—with their employer. That is especially true in highly competitive industries where proving actual damages due to lost business can be very difficult and the start-up costs for employees to create a competing business are low. The court in *Aid Maintenance* noted the lack of an agreement not to compete between the parties and observed that if the employer was concerned about unfair competition from its employees, it should have insisted on one.

Todd M. Torres is an associate in the Boston office of Ogletree Deakins and is admitted to practice in Rhode Island.

**April 7, 2014 | TAGS: agreement prohibiting competition, Aid Maintenance Co., bids for contracts, business relationship or expectancy, competing business, competitors in the industry, current and prospective customers, diverted customers, Inc., Inc. v. Realty Maintenance Service, lost business, noncompetition agreement, Rhode Island Superior Court, tortious interference, tortiously interfered.**

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