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# OUR INSIGHTS

## Federal Court in Missouri Holds At-Will Employment Is Not Consideration for Noncompete

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The end of the year is an opportune time for employers to make sure their noncompete and arbitration agreements are still valid. A recent Missouri federal court decision underscores how difficult it can be to enforce those agreements against at-will employees in Missouri. *Durrell v. Tech Electronics, Inc.*, No. 4:16-cv-1367-cdp (November 15, 2016).

### Case Overview

Robert Durrell worked for Tech Electronics as an at-will employee until 2016, when Tech terminated his employment. In his employment agreement, Durrell had entered into a one-year post-employment noncompete agreement with Tech. Six months after Durrell's employment ended, Tech informed Durrell that he was violating the noncompete.

Durrell filed a lawsuit in the U.S. District Court for the Eastern District of Missouri, asking the court to issue a ruling that his noncompete was invalid. Durrell argued that Tech had only given him at-will employment in exchange for his noncompete, and that at-will employment is not valid consideration under Missouri law.

Tech moved to dismiss Durrell's declaratory judgment action, arguing Durrell's at-will employment with Tech provided valid consideration for his noncompete.

The court rejected Tech's argument and denied its motion to dismiss. "An offer of at-will employment, or the continuation of at-will employment, is simply not a source of consideration under Missouri law," the court explained. "This is so because with at-will employment, 'the employer makes no legally enforceable promise to do or refrain from doing anything that it is not already entitled to do. The employer can still terminate the employee immediately for any reason.'" Therefore, the court held, "there must be another source of consideration" to satisfy the consideration requirement of contract formation.

### Analysis

In reaching its decision, the Court in *Durrell* relied on the recent string of Missouri cases holding that at-will employment is not valid consideration in the context of arbitration agreements. In *Baker v. Bristol Care, Inc.*, the Missouri Supreme Court held that continued at-will employment and the "attendant

benefits" of that employment do not constitute consideration to form a binding arbitration agreement. The Missouri Court of Appeals followed suit a few months later when it decided *Jimenez v. Cintas Corporation*, in which the court held that an initial offer of at-will employment cannot constitute valid consideration for an employee's arbitration agreement.

Following these decisions, the federal court held that Durrell's at-will employment with Tech could not serve as the consideration for his noncompete.

However, the employer in *Durrell* may not be out of luck yet. The court has not ruled that the noncompete is invalid. Since the court was ruling on the employer's motion to dismiss, the court simply examined the employee's pleadings. The employee alleged that the *only* purported consideration for the noncompete was his at-will employment. As the case moves forward, if the employer can point to some other source of consideration, the court may ultimately rule that the noncompete agreement is valid and enforceable.

**Practical Impact**

Here are the questions that should be on every Missouri employer's mind: What constitutes valid consideration for a contract with an at-will employee? And how do businesses enforce arbitration agreements and noncompetes with at-will employees?

In the context of noncompete agreements, Missouri courts have held that giving an at-will employee access to an employer's protective information and relationships constitutes adequate consideration for a noncompete agreement.

In *Morrow v. Hallmark Cards, Inc.*, for example, the Missouri Court of Appeals held that a purported arbitration agreement with an at-will employee was invalid under Missouri law for lack of consideration. However, in dicta, the court distinguished noncompetes from arbitration agreements, acknowledging that the consideration for noncompetition agreements was "the employer's allowing the employee (by virtue of the employment) to have continued access to the protectable assets and relationships."

In 2013, the Missouri Court of Appeals applied the guidance from *Morrow* in *JumboSack Corp. v. Buyck*. In that case, the court held that the noncompete in question was supported by valid consideration because the employer provided the employee continued access to customer relationships in exchange for the agreement.

In *Durrell*, the federal court did not address whether the employee was given access to protectable assets or relationships in the employer's motion to dismiss. As the case moves forward, the employer may argue that this was the consideration for the agreement. But in light of Missouri courts' recent scrutiny of agreements between employers and at-will employees, it remains to be seen whether decisions like *Morrow* and *JumboSack* will remain good law. An employee could argue, under the more recent *Baker* decision, that giving access to protectable assets and relationships is nothing more than an "attendant benefit" of at-will employment that cannot serve as consideration.

One thing is certain: Missouri employers will want to craft their arbitration agreements and noncompetes with the utmost care. Otherwise, they run the risk of signing a contract that is made to be broken. The end of the year is a great time to revisit those agreements and take necessary steps to keep them

compliant and up-to-date with the law.

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As an associate attorney in the St. Louis office of Ogletree Deakins, Andrew advises and represents employers in a broad range of matters arising under federal and state law. His experience includes representing employers in lawsuits alleging employment discrimination, retaliation, wage and hour violations, FMLA claims, First Amendment claims, workers' compensation retaliation claims, and violations of federal and state computer tampering laws. He also provides advice and counseling to...

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