Indiana Supreme Court Clarifies State Blacklisting Statute

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The Indiana Supreme Court recently provided its first comprehensive discussion of Indiana's Blacklisting Statute, Ind. Code § 22-5-3-2, in more than a century. In response to several certified questions from the U.S. District Court for the Southern District of Indiana, the Supreme Court for the first time offered a definition of "blacklisting" under the statute. It also clarified that employers cannot face liability under the Blacklisting Statute merely for attempting to enforce a noncompetition agreement or protect trade secrets in court.

Factual Background

Stephen Odders and Gerald Kerber worked for the same company. Odders was fired in September 2008, and Kerber resigned in September 2009. Both Odders and Kerber were subject to one-year noncompetition agreements forbidding them from soliciting the employer's customers or working for a competitor within a certain geographical area. After leaving the company, both Odders and Kerber went to work for a competitor – MPI Release Technologies, Inc. (MPI).

The former employer sued MPI, Odders, and Kerber in the U.S. District Court for the Southern District of Indiana, alleging that Odders and Kerber violated the state trade secret statute and breached their noncompetition agreements. Odders and Kerber filed counterclaims under Indiana's Blacklisting Statute, Ind. Code § 22-5-3-2, and sought damages, including attorneys' fees. After Judge Jane Magnus-Stinson granted summary judgment in favor of Odders and Kerber on the company's claims, she certified three questions to the Indiana Supreme Court regarding the Blacklisting Statute.

Legal Analysis

Indiana's Blacklisting Statute prohibits employers from "black-list[ing] any discharged employees, or attempt[ing] by words or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service from obtaining employment with any other person, or company." Ind. Code § 22-5-3-2. Violations of the statute subject employers to liability for damages "in such sum as will fully compensate" the injured employee. Although the statute has been on the books for the more than a century, the Indiana Supreme Court has rarely

interpreted it. In this case, the court provided some much-needed guidance about the scope of the statute.

The Indiana Supreme Court began by answering two technical questions. First, it determined that the statute properly applies both to discharged employees and those who voluntarily resign. In so doing, it recognized that its 1904 opinion in *Wabash Railroad Co. v. Young*, which struck down the portion of the statute applying to employees who voluntarily resign as unconstitutional, was no longer good law in light of subsequent amendments to the Indiana Constitution. Second, it determined that the statute does *not* allow successful litigants to recover attorneys' fees as compensatory damages.

The Supreme Court then turned to the substance of the statute, offering a definition of "blacklisting." Based on a review of the history of the statute and similar laws in other states, the court concluded that Indiana's statute prohibits employers from creating and circulating to other employers an actual "blacklist" of workers who "are to be refused employment or otherwise marked for special avoidance, antagonism, or enmity, because those workers are reputed to hold opinions or engage in actions contrary to the employers' interests." It concluded that the statute also prohibits other activities similar to actual "blacklisting" and applies any time an employer: identifies or categorizes past employees based on conduct, association, or belief; transmits or exchanges the information with other employers in its industry; and does so with the wrongful intent to inhibit or prevent a listed employee from obtaining future employment within the industry.

Applying this definition of "blacklisting," the Indiana Supreme Court concluded that the statute does *not* extend to lawsuits by former employers to enforce noncompetition agreements or protect alleged trade secrets. As the court explained, even if it is not successful, a lawsuit does not fall within the scope of its definition of blacklisting. *Loparex v. MPI Release Technologies, LLC*, *et al.*, No. 94S00-1109-CQ-546, Indiana Supreme Court (March 21, 2012).

Practical Impact

According to Todd Kaiser, a shareholder in Ogletree Deakins' Indianapolis office, "The Indiana Supreme Court's opinion confirms that a former employee has no cause of action for blacklisting based on an employer's attempts to enforce a non-compete agreement. Such a decision by the state's highest court eliminates any uncertainty that may have existed as a result of the differing results reached by the U.S. District Court for the Southern District of Indiana in *Bridgestone/Firestone Inc. v. Lockhart*, 5 F.Supp.2d 667 (S.D. Ind. 1998) and the Indiana Court of Appeals in *Baker v. Tremco Inc.*, 890 N.E.2d 73 (Ind. Ct. App. 2008)."

Steven Pockrass, also a shareholder in Ogletree Deakins' Indianapolis office, commented further, "The Supreme Court struck an appropriate balance between protecting the interests of employers and former employees. Employers can be comforted in knowing that they can attempt to enforce non-competes in Indiana that they believe to be valid without having to defend against a counterclaim for blacklisting." Pockrass noted, however, that the Indiana Supreme Court has not given employers *carte blanche* to pursue litigation against former employees. "If the employer is engaging in frivolous litigation or abusing the legal process, the former employee still could pursue counterclaims based on other legal theories."

Finally, the court's opinion provided employers with some much-needed guidance on the scope of the Blacklisting Statute. Susannah Mroz, an attorney in Ogletree Deakins' Indianapolis office, noted, "This marks the first time that our Supreme Court has provided a definition of blacklisting, which is significant. For example, employers now have some certainty that common internal practices – like designating an employee as ineligible for rehire – will not violate the Blacklisting Statute."

Additional Information

Should you have any questions about this decision, please contact the Ogletree Deakins attorney with whom you normally work, or the Client Services Department at 866-287-2576 or via email at clientservices@ogletreedeakins.com.

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