The Ostrich Approach to Recruiting Employees? It Might Fly in New Jersey.

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In a recent decision, the Supreme Court of New Jersey considered whether an employer has an independent duty to inquire into the source or ownership of a newly hired employee's customer list. Surprisingly, the answer is "no."

The case, Thomas Fox v. Millman, involves a sales representative, Jean Millman, who previously worked for Target Industries, an industrial plastic bag company. Millman signed a confidentiality agreement when she began working for Target. She was subsequently fired because Target's CEO believed that she was disparaging the company and selling products on behalf of Target's competitors. Four days later, Millman began working for Polymer Packing Inc., which was also engaged in the industrial plastic bag industry.

When Polymer hired Millman, it asked her whether she was subject to any confidentiality agreements or non-compete clauses. Millman assured Polymer that she was not. Millman also provided Polymer with a customer list and implied that she had generated the list on her own over the years. The list did not identify Target, nor did it bear any indication that it was not Millman's own list. Polymer knew, however, that Millman had previously worked for Target and that Target was the only other plastics company for which Millman had ever worked. Polymer required all of its employees, including Millman, to sign a confidentiality agreement and admitted that it generally considered customer information to be proprietary. But Polymer did not do anything to verify

Millman's representation that she was not subject to any confidentiality agreement or non-compete clause. After joining Polymer, Millman generated substantial sales on behalf of Polymer to former Target customers.

Three and a half years later, Target sued Polymer, asserting claims for misappropriation of proprietary and confidential information, tortious interference with business relations and prospective economic advantage, unfair competition, and conversion. The trial court dismissed Target's claims, concluding that Polymer had no way of knowing that Millman's customer list did not belong to her. The Appellate Division affirmed. On appeal, the Supreme Court of New Jersey refused to impose an affirmative duty on Polymer to undertake an independent inquiry into the source of the customer list in Millman's possession.

The opinion, devoted primarily to a discussion of whether the doctrine of laches was properly applied to the case (the court found that it was not and reversed and remanded on that basis), rather tersely stated the Court's conclusion that there was "no ground on which to impose a duty of independent inquiry upon an employer, like Polymer, faced with an otherwise unremarkable representation by a prospective employee, like Millman, that a list of contacts is her own."

Whether you are the employer whose former employee has recently joined a competitor company or the hiring employer who is bringing a new employee on board, the Fox v. Millman case does not clearly specify what is required. (See fellow blogger John Marsh's thoughts on the case.)

Employers should take steps to protect their trade secrets and protect them vigorously. (See Top Ten Things To Do When an Employee Resigns to Join a Competitor). Notably, it took Target three and a half years to initiate legal action against Polymer. Target apparently had been involved in litigation involving its former CEO and needed Millman to assist with that litigation. As part of its defense that Target had unfairly delayed in pursuing its claims, Polymer argued that Target made a conscious and strategic decision not to pursue litigation against Polymer because it wanted to ensure it had Millman's assistance, to the unfair prejudice of Polymer. Although the Supreme Court ultimately did not affirm the application of laches, Target made a risky and expensive decision when it decided to wait to bring suit against Polymer.

Furthermore, employers should exercise reasonable diligence when hiring any individual – but particularly an individual who has previously been employed in the same industry, by a known competitor, and who is in possession of information that the employer itself would consider to be proprietary. (See Top Ten Mistakes Made by Departing Employees). The New Jersey trial and appellate courts uniformly agreed that Polymer did not have an independent duty to inquire into the source of Millman's customer list. Still, hiring employers should not think that this gives them free license to ignore "unremarkable" clues that an employee may be, in fact, be subject to post-employment restrictions by their former employers. In fact, Polymer is still not in the clear – after more than eight years of litigation, it is now heading back to trial.