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COURT DECLINES TO ENFORCE NON-COMPETE AGREEMENT

By: Christopher P. Mazzoli, Member, Workplace Law

The recent Michigan Court of Appeals decision in *Goldfish Swim School v Aqua Tots* highlights the challenges employers face when enforcing non-compete agreements.

Steven Ogg worked part-time for Goldfish Swim School as a swim instructor and later as a deck supervisor. When hired, he signed an Employee Confidentiality, Non-Disclosure and Non-Compete Agreement. The agreement precluded him from working for a competitor within a 20-mile radius of any Goldfish location for one year after ending his employment and from soliciting any Goldfish employees or customers for an 18-month period after separation. After Goldfish terminated his employment, Ogg began working for Aqua Tots, a direct competitor of Goldfish, in breach of his non-compete agreement.

Upon learning of his employment with Aqua Tots, Goldfish sued Ogg for breach of contract. After some initial discovery and a hearing, the circuit court denied Goldfish's motion for a preliminary injunction and dismissed the lawsuit. The Court of Appeals affirmed the circuit court's decision.

With respect to the denial of the injunction, the Court of Appeals agreed that Goldfish had failed to prove it would suffer irreparable harm if a preliminary injunction did not enter. The court relied on the fact that Goldfish had no evidence that Ogg had shared its curriculum with Aqua Tots, taken any client contact information, solicited any Goldfish clients, or caused Goldfish any financial harm.

With respect to dismissal of the lawsuit, the Court of Appeals determined that the "current covenant executed with an entry-level employee did not protect a 'reasonable competitive business interest.'" Under Michigan law (MCL §455.774a), in order to be enforceable, a restrictive covenant must protect an employer's "reasonable competitive business interests" and it must be reasonable as to its duration, geographical area, and type of employment or line of business. The court rejected Goldfish's

argument that the non-compete agreement was necessary to maintain the confidentiality of its swim instruction method, which it characterized as a trade secret. As the court noted, a trade secret is subject to efforts to maintain its secrecy, yet in this case, Goldfish taught its instructional method in front of hundreds of people daily.

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Unlike its conclusion that the non-compete provision was unreasonable, the Court of Appeals concluded that the provision barring solicitation of Goldfish clients was reasonable. The court nevertheless affirmed the dismissal of Goldfish's breach of contract claim because Goldfish had no evidence that Ogg had solicited any Goldfish clients in breach of the non-solicitation provision.

This case is a timely reminder that employers should give careful consideration as to which categories of employees they will require to sign a non-compete agreement. In making this determination, it is crucial that employers be able to articulate and prove the "reasonable competitive business interest" that they seek to protect with the non-compete. Employers should also consider whether a non-solicitation of customers provision, which is more likely to be enforced, is sufficient to protect their interests. Finally, to prevent employees from using or disclosing their trade secrets, employers should require all employees to sign a confidentiality and assignment of inventions agreement. *BHB Investment Holdings, LLC v Ogg* (unpublished, Michigan Court of Appeals No. 330045, Feb. 21, 2017).

***About the Author. Christopher P. Mazzoli** counsels employers on employment law. In the area of traditional labor law, he helps non-union employers avoid unions and unionized employers manage their relationship with their unions. Chris has presented at seminars on various employment law topics and has provided on-site training in areas such as sexual and other forms of illegal harassment, hiring and firing, and FMLA compliance.*

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