



*Passion. Preparation. Persistence.*

*Volume 8, Issue 12*

## THE BASSETT BULLETIN™

### THOU SHALL NOT COMPETE AGAINST THY EMPLOYER

In a recent Dallas Court of Appeals case, *Jon Scott Salon, Inc. v. Garcia*, 2011 WL 1900573 (Tex. App-Dallas), the Court heard Jon Scott Salon, Inc.'s "Jon Scott" appeal concerning the trial court's order denying Jon Scott's request for a temporary injunction. Jon Scott contended that the trial court abused its discretion in denying its request for a temporary injunction hearing which focused on a "non-solicitation" agreement between an employer and its former employees.

### FACTS OF THE CASE

Jacalyn Garcia ("Garcia") and Lindsey Gresham ("Gresham") were employed by Jon Scott to provide hairstyling and related cosmetology services. Both Garcia and Gresham signed employment agreements that included several covenants addressing the disclosure of confidential information, the development of contracts and goodwill, and the solicitation of clients after termination of their employment.

Jon Scott provided confidential information, including training materials, marketing programs, and customer information to Garcia and Gresham. In return, Garcia and Gresham promised not to make any unauthorized disclosures or use of the information either during or after their employment. In addition, Garcia and Gresham acknowledged that the salon would provide them with opportunities and resources to develop contacts and goodwill and they agreed to refrain from using the goodwill for the benefit of any person or entity other than Jon Scott. Lastly, Garcia and Gresham agreed that for a period of one year following the termination of their employment with the salon, they would not, directly or indirectly, solicit any of Jon Scott's customers within a ten mile radius.

Garcia and Gresham resigned on April 30, 2010. Almost immediately thereafter, they opened a new salon less than ten miles away. According to Jon Scott, it began to experience large amounts of cancellations and no shows from established clients with whom Garcia and Gresham had worked. As such, Jon Scott, filed suit seeking damages and injunctive relief.

Jon Scott also claimed misappropriation of trade secrets and confidential information, theft, conversion, breach of contract, and breach of fiduciary duty. Jon Scott then filed a temporary restraining order which the trial court granted. It then scheduled a temporary injunction hearing ten days later.

## THE TRIAL COURT'S RULING

At the temporary injunction hearing, the trial court interrupted examination of witnesses and inquired about the enforceability of the covenants at issue due to the fact that the contracts contained in the non-solicitation clause was for "at-will" employment. At-will employment in Texas means an employer can terminate an employee for good, bad, or no reason at all, with very limited options.

After a brief discussion, the court concluded that the covenants were not enforceable because it was not "ancillary to or part of an otherwise enforceable agreement as required by the Covenants Not to Compete Act." *See Tex. Bus. & Con. Code Ann. § 15.50(a)*. As such, the court then orally denied Jon Scott Salon's request for a temporary injunction. Jon Scott moved for reconsideration and argued that the trial court had misapplied the law. The trial court denied the request and, on July 13, 2010, the trial court signed an order denying Jon Scott's request for a temporary injunction. In the Order, the trial court stated that it was denying the request because the non-solicitation clause in Jon Scott's employment agreements with Garcia and Gresham were unenforceable as a matter of law because the employment agreements with Garcia and Gresham were at-will.

Jon Scott contended that the trial court abused its discretion in denying its request for a temporary injunction. It stated that the trial court misapplied the law when it ruled that the non-solicitation covenant was not enforceable solely because it was a part of an at-will employment agreement.

## THE COURT OF APPEAL'S DECISION

The court of appeals ruled that the trial court did abuse its discretion in that it misapplied the law. The Court of Appeals cited the Texas Supreme Court case *Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 655, where the Supreme Court stated that although the Covenant Not to Compete Act required the covenant to be ancillary to or part of an agreement at the time the agreement was made, the Act did not require the agreement to be enforceable at the time it is made. Instead, the court held that the agreement could later become enforceable based on performance and, at that point, could support a covenant not to compete.

For example, where an employer in an at-will employment agreement agrees to provide confidential information or other consideration to an employee, a reciprocal promise by the employee not use the confidential information in competition with the employer may not be immediately enforceable because the employer's promise is illusory because he could terminate the employee before any confidential information is shared.

However, once the employer fulfills the promise to divulge the confidential information, the contract becomes enforceable and may support a covenant not to compete. Because *Sheshunoff* specifically states a covenant not to compete made part of an employment at-will agreement enforceable, the trial court in this case erred in concluding otherwise. The court stated that the trial court erred in concluding that Jon Scott was not entitled to an injunction solely because the employment agreements at the issue were at-will.

## WHAT DOES THIS MEAN?

Whether you are the employer or the employee, remember, just because there is an at-will relationship, restrictive covenants can be enforceable. Thus, it is very important to think about these covenants when the agreement is entered into. Problems generally arise not when the agreement is entered into, but when the employee leaves.

For employees, have a non-compete agreement looked at carefully before you sign the agreement. A good paying job may cost you more when you leave.

For employers, make sure your restrictive covenants are in line with the Covenants Not To Compete Act and the latest cases addressing such issues. This Court of Appeals decision is another case that sides with the employer in protecting an employer's interest. Years ago, Courts did not favor non-compete arguments. However, ever since the *Sheshunoff* case, Texas courts have been more willing to enforce such restrictive covenants.



## **The Bassett Firm**

**Two Turtle Creek Village  
3838 Oak Lawn Avenue  
Suite 1300  
Dallas, Texas 75219  
(214) 219-9900 Telephone  
(214) 219-9456 Facsimile  
Toll Free: 1-800-310-9769  
[www.thebassettfirm.com](http://www.thebassettfirm.com)**

## **ATTORNEYS**

- **MIKE H. BASSETT**
- **JENNIFER R. ASHMORE**
- **ROBERT L. MCGEE, JR.**
- **WILLIAM A. NEWMAN**
- **MICHAEL J. NOORDSY**
- **J. DANIEL OLIPHANT**
- **JOHN J. ROBERTS**
- **J. ANDREW ROBERTSON**
- **MATHEW SAMUEL**

---

Information regarding *The Bassett Bulletin*<sup>TM</sup> is available from Jennifer G. ([jgraig@thebassettfirm.com](mailto:jgraig@thebassettfirm.com)) at (214) 219-9900. ©2004 The Bassett Firm. All rights reserved.

*The Bassett Bulletin*<sup>TM</sup> is published twenty-six times a year, and is a complimentary publication of The Bassett Firm.