

SJC Finds that Employee's Unauthorized Copying of Proprietary Information Did Not Give Employer Grounds to Discontinue Severance

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On February 4, 2016, the Massachusetts Supreme Judicial Court (SJC) held in *Eventmonitor, Inc. v. Leness* that an employer breached its agreement with a former employee when it reclassified the employee's termination from "without cause" to "for cause" and stopped making severance payments to the employee after it discovered that the employee had copied the employer's proprietary data to an online storage system without the employer's knowledge. The Court explained that the employee's conduct was not a material breach of the agreement. It thus avoided having to decide whether the "after-acquired evidence" doctrine – a legal doctrine followed in other jurisdictions that allows employers to recharacterize an employee's termination based on information learned after the termination – exists in Massachusetts.

Eventmonitor involved a dispute between a Massachusetts-based software company and its former vice president of business affairs. The employee's contract allowed the employer to terminate the employee with or without cause. If the termination was "without cause," the employer agreed, among other things, to make severance payments to the employee for 12 months, unless he began full-time employment during the severance period. If the termination was "for cause," however, the employer was not obligated to pay severance. Among the limited reasons the employer could terminate the employee "for cause" was if the employee "engaged in willful fraud or defalcation, either of which involved funds or other assets of [the employer]." The agreement also contained a non-disclosure provision requiring the employee to hold in confidence and not knowingly disclose or use for non-business purposes the employer's proprietary information. The provision also required the employee to promptly return "all items containing or embodying Proprietary Information (including all copies)" to the employer upon the termination of his employment.

After the employee had a falling out with the employer's president/executive director, the employer terminated the employee without cause. Before departing, the employee provided the employer with information regarding client accounts and agreements and a written explanation of the locations on the employer's computers where he had stored proprietary information. After the departure, however, the employer learned through a forensic examination of the employee's work-issued laptop that, a few months before his termination, the employee had copied all of the files that had been on his laptop, which included proprietary information, to an online storage system.

Upon learning of this conduct, the employer retroactively changed the employee's termination to one "for cause," and stopped making severance payments to the employee. After the employee threatened a lawsuit, the employer brought an action asserting a claim for breach of contract and other claims against the employee. The employee counterclaimed, alleging among other things that the employer breached his employment contract by discontinuing his severance payments. A judge in the Superior Court found for the employee, concluding that the employee had not committed a material breach of the employment agreement and that the termination could not have been "for cause" because the employee had not engaged in defalcation of the employer's assets.

The SJC upheld the Superior Court's ruling. The Court held that, although the employee had breached the non-disclosure provision of his employment agreement by copying proprietary information to the online storage system and not disclosing the upload or returning the documents to the company upon his termination, it was not a material breach. A material breach, the Court held, must affect "an essential or inducing feature of the contract." The essential purpose of the non-disclosure provision was to protect the confidentiality of the employer's proprietary information. Because there was no evidence that the employee had disclosed or used the information, his breach was not material and, in turn, the employer could not stop making severance payments to the employee.

The Court also rejected the employer's attempt to reclassify the termination as one "for cause" under the after-acquired evidence

doctrine. The SJC declined the employer's invitation to adopt the doctrine, because the information that the employer learned about the employee post-termination would not have supported a decision to terminate him for cause. The Court concluded that "defalcation" requires "at least a temporary misuse or deprivation of the use or value of an asset." Again, because there was no evidence that the employee had misused or deprived the employer of its proprietary information, the Court believed that the employee's actions did not undermine the employer's exclusive use of its information.

The *Eventmonitor* case serves as a cautionary tale for Massachusetts employers. Employers often discover after an employee's departure that he or she engaged in some type of misconduct that causes the employer to question its obligations to the former employee, including whether it needs to continue making severance payments. Frequently, the misconduct involves an employee failing or refusing to return company property, misappropriating the company's confidential information, or going to work for a competitor in violation of a non-competition agreement. In light of the *Eventmonitor* decision, employers engage in self-help at their peril. Employers should be certain that the employee's conduct constitutes a material breach of the contract or falls within the applicable contract's cause provision before abandoning its own obligations under the agreement. Employers should review and, if necessary, revise their employment agreements to make sure that the contracts specifically identify material obligations and to ensure that the breaches of post-employment covenants constitute "cause."

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