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Torts--Liability for Solicitation of Former Employer's Customers (Duane Jones Co. v. Burke, 306 N.Y. 172 (1954))

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As a policy consideration, courts may be reluctant to extend the protection of the Tort Claims Act to a malefactor such as the plaintiff, though not a prisoner in the narrow sense. If given the right to sue while incarcerated, the prisoner may disrupt prison routine and discipline by seizing upon every opportunity to leave the prison confines for trips to the courthouse.[12] Moreover, servicemen [13] and many federal prison inmates [14] are protected by some form of injury compensation benefits. Hence, cases denying tort relief to servicemen and prisoners have rested, at least in part, upon the premise that Congress did not intend to afford them more than one remedy.[15]

Therefore, where servicemen and prisoners are concerned, the decision in the instant case achieved a commendable result. However, the case highlights a possible inequity in the provision of the Tort Claims Act which excludes suits arising out of assault and battery. The plaintiff's complaint was based on an alleged negligent omission of Government employees, and not on an assault and battery of an inmate. Nevertheless, the Court, in construing the provision, stated that it does not refer to claims *of* assault and battery, since Congress could have, but did not, so word it. Consequently, in cases where an assault or battery results in injury to a person *other than a serviceman or prisoner,* due to the negligence of Government employees, there could be no relief under the Act. An enlightened republic ought not to suffer its citizens to receive such injuries without recourse. "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." [16]

TORTS—LIABILITY FOR SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS.—Plaintiff advertising agency sought damages from its former account executives alleged to have been sustained as the result of a conspiracy by the latter to deprive plaintiff of its principal cus-

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his suit against the Federal Government for injuries incurred during his confinement are barred. See Van Zuch v. United States, *supra* note 8.

[12] See Duffy v. State, *supra* note 11.

[13] See Feres v. United States, *supra* note 10 at 144 (statutes collected therein).

[14] 48 STAT. 1211-1212 (1934), 18 U.S.C. § 4126 (Supp. 1952).

[15] See Feres v. United States, 340 U.S. 135, 144 (1950) (serviceman); Sigmon v. United States, 110 F. Supp. 906, 911 (W.D. Va. 1953) (prisoner).

[16] Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) [quoted with approval in reference to the Tort Claims Act in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949)].

tomers and key employees.[1] The Court *held* that their active solicitation of plaintiff's customers and key employees, while still in plaintiff's employ, amounted to such acts of bad faith and unfair dealing as to constitute a breach of their fiduciary duties.[2] *Duane Jones Co. v. Burke,* 306 N.Y. 172, 117 N.E.2d 237 (1954).

A fiduciary relationship between parties is implicit in business employment,[3] even where, as in the present case, there is no expressed contract of employment.[4] The employee's acts must not conflict with the business interests of his employer.[5] Even after termination of employment, he is not permitted to use knowledge of a confidential nature acquired during, and incidental to, his employment if it will injure his former employer.[6] A breach of this duty will result in the employee being held accountable in damages,[7] or he may be enjoined from the continuance of such acts.[8]

In the instant case, the acts of the defendants in conspiring to defeat their employer's interests were clearly a breach of the duty owed to the plaintiff. The decision, however, indicates the difficulty in determining, where there is no contract to the contrary, *when,* and *in what manner,* an employee may act with respect to establishing himself in competition with his former employer, without subjecting himself to liability for the breach of his fiduciary duty. Specifically, the problem may be considered in the light of the following situations:

(1) The solicitation of customers *before* termination of the employment. Because of the fiduciary nature of the employment relationship, solicitation under this circumstance constitutes an act of "bad

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[1] Plaintiff also joined as defendants, the Manhattan Soap Co., a former customer, Frank Burke, an officer of that company, alleged to have participated in the conspiracy against the plaintiff, and Scheideler, Beck & Werner, Inc., an advertising agency established by the former account executives of plaintiff to compete with it. The complaint was subsequently amended, so as to provide a separate action for an accounting against the latter defendant, which is still pending.

[2] The Court affirmed the dismissal of the complaint as against the defendants, Manhattan Soap Co. and Burke, for failure to state a cause of action.

[3] *See* Robert Reis & Co. v. Volck, 151 App. Div. 613, 616, 136 N.Y. Supp. 367, 370 (1st Dep't 1912); Fairchild Engine & Airplane Corp. v. Cox, 50 N.Y.S.2d 643, 655 (Sup. Ct. 1944); see McClain, *Injunctive Relief Against Employees Using Confidential Information,* 23 Ky. L.J. 248, 253 (1934).

[4] *See, e.g.,* Little v. Gallus, 4 App. Div. 569, 574, 38 N.Y. Supp. 487, 489 (4th Dep't 1896).

[5] *See* Lamdin v. Broadway Surface Advertising Corp., 272 N.Y. 133, 138, 5 N.E.2d 66, 67 (1936); Murray v. Beard, 102 N.Y. 505, 508, 7 N.E. 553, 554 (1886).

[6] *See* Byrne v. Barrett, 268 N.Y. 199, 206, 197 N.E. 217, 218 (1935); Towne & Country House & Home Service, Inc. v. Newberry, 119 N.Y.S.2d 324, 325 (Sup. Ct. 1952); see Note, 165 A.L.R. 1453, 1454 (1946).

[7] Shevers Ice Cream Co. v. Polar Products Co., 194 N.Y. Supp. 44 (Sup. Ct. 1921); see Note, 165 A.L.R. 1453, 1461 (1946).

[8] People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N.Y. Supp. 15 (2d Dep't 1916), *aff'd mem.,* 224 N.Y. 727, 121 N.E. 886 (1918); see Note, 165 A.L.R. 1453, 1457 (1946).

faith" on the part of the employee, thus rendering him accountable to his employer.[9] The underlying reason upon which liability is based is that a person should not use his position of trust and confidence to the detriment of his employer.[10] On the other hand, if notice of intention to terminate the employment is given, there are dicta to the effect that subsequent solicitation, not involving the use of confidential information, is permissible.[11] It is here that the present case creates uncertainty. Since conspiracy, which was the basis of the action, had occurred prior to giving notice, it was not necessary to determine whether specific acts of solicitation after notice had been given, but before the actual termination of employment, were violations of a fiduciary duty. However, had there been no conspiracy, the Court failed to consider the possibility of whether or not liability would attach for the mere solicitation itself, since the list of customers used was not of a confidential nature. Nevertheless, in a recent comment on this case,[12] it was felt that in this important area of employee activity, potential liability for acts of solicitation could be inferred from the opinion, even though the employee had given notice of termination prior to his soliciting customers. Nonetheless, the Court has left to speculation and future litigation the question of liability under these circumstances, when a clarification of the law to be applied would have been greatly appreciated.

(2) The solicitation of customers *after* termination of the employment. When, in the absence of a negative covenant, the former employee solicits customers of his former employer, knowledge of whom was gained during the period of employment, liability is predicated on whether or not such information was of a confidential nature.[13] If no unfair tactics are involved, and if the information might have been readily acquired by any industrious competitor, such

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[9] Robert Reis & Co. v. Volck, 151 App. Div. 613, 136 N.Y. Supp. 367 (1st Dep't 1912); Shevers Ice Cream Co. v. Polar Products Co., *supra* note 7; see 35 AM. JUR. 516.

[10] *See* Robert Reis & Co. v. Volck, *supra* note 9 at 616, 136 N.Y. Supp. at 370.

[11] *See* Garst v. Scott, 114 Kan. 676, 220 Pac. 277, 279 (1923); see Nichol v. Martyn, 2 Esp. 732, 170 Eng. Rep. 513 (K.B. 1799) (employee permitted to solicit his employer's customers on a prospective basis for the establishment of his own competitive business). It is to be noted that there appears to be an absence of litigation or opinion on the effect of giving notice in the State of New York.

[12] See 9 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 126 (1954).

[13] Boosing v. Dorman, 148 App. Div. 824, 133 N.Y. Supp. 910 (4th Dep't 1912), *aff'd mem.*, 210 N.Y. 529, 103 N.E. 1121 (1913) (court decided that the customers were known to the general trade and not restricted to the knowledge of the former employer); People's Coat, Apron & Towel Supply Co. v. Light, 171 App. Div. 671, 157 N.Y. Supp. 15 (2d Dep't 1916), *aff'd mem.*, 224 N.Y. 727, 121 N.E. 886 (1918) (court decided that the list of customers requiring laundry service, unadvertised and reached only by personal contact, was of a confidential nature).

knowledge is not deemed confidential.[14] Yet, if such information were dependent on the employer's compiled list of customers, restricted as to general access, adverse use of a written copy of such information would constitute a breach of confidence.[15] The use of the copy, in these instances, is a violation of the property right attached to the duplication of any written material possessed by the employer.[16] But if, under the same circumstances, the list is memorized, no liability for use attaches,[17] since equity is not able "to wipe such a slate clean." [18]

It is regrettable that the Court did not more clearly indicate what effect, if any, the giving of notice *prior* to the termination of employment would have on the employee's potential liability. In this respect, notice of intention to terminate the employment should release the employee from any fiduciary duty to the extent that he may solicit customers for his future business if he does not use any confidential information. In addition, where solicitation is *subsequent* to termination of the employment, it is to be noted that the former employee is undoubtedly more familiar with the restrictions imposed upon him by the required standards of fair competition than he is with those imposed on him because of a fiduciary duty carried over from his previous employment.

Consequently, in determining whether or not there has been a breach of a duty because of the utilization of alleged confidential customer lists, the courts should be primarily concerned with the danger of granting or recognizing a monopolistic control in the particular business field to the former employer by declaring such customer lists to be confidential *per se*. To avoid such a result, the courts should consider the degree of competition in the particular business if the employer's customers list used by a former employee is alleged to be of a confidential nature. The liability, then, for the use of such lists would vary in direct proportion with the degree of competition in that business. In this way, the former employee will be more capable of determining the extent to, and direction in, which his business activities may be pursued without incurring liability.

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[14] *See* Richard M. Krause, Inc. v. Gardner, 99 N.Y.S.2d 592, 596 (Sup. Ct. 1950).

[15] Witkop & Holmes Co. v. Boyce, 61 Misc. 126, 112 N.Y. Supp. 874 (Sup. Ct. 1908), *aff'd mem.*, 131 App. Div. 922, 115 N.Y. Supp. 1150 (4th Dep't 1909); Witkop & Holmes Co. v. Boyce, 64 Misc. 374, 118 N.Y. Supp. 461 (Sup. Ct. 1909); *see* Boosing v. Dorman, *supra* note 13 at 826, 133 N.Y. Supp. at 911; S. W. Scott & Co. v. Scott, 186 App. Div. 518, 524-525, 174 N.Y. Supp. 583, 587 (1st Dep't 1919).

[16] *See* Witkop & Holmes Co. v. Boyce, *supra* note 15 at 378, 118 N.Y. Supp. at 464.

[17] *See* American Binder Co. v. Regal & Wade Mfg. Co., 106 N.Y.S.2d 543, 547 (Sup. Ct. 1951); see Note, 126 A.L.R. 758, 768 (1940).

[18] *See* Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 717, 132 N.Y. Supp. 37, 39 (1st Dep't 1911).