

ROCKY MOUNTAIN LAW JOURNAL

VOLUME 7

FALL 2018

ABOUT THE ROCKY MOUNTAIN LAW JOURNAL

CONTENT & OPINIONS

EDITORIAL BOARD AND STAFF EDITORS

EDITOR'S CORNER

ARTICLES

IN A RAPIDLY CHANGING CULTURE, WHEN DOES APPEARANCE BECOME A PROTECTED TRAIT?

WHITNEY TRAYLOR..... 7-19.

EMPLOYEE RAIDING: A TEACHING CASE ON CLAIMS AND REMEDIES

WADE DAVIS..... 20-51.

SUBMISSION GUIDELINES

ABOUT THE ROCKY MOUNTAIN LAW JOURNAL

Each of the articles in the *Rocky Mountain Law Journal* was recommended for publication by the staff editors and reviewers using a double, blind review process. The journal continues to attract large numbers of submissions from across the country.

The *Rocky Mountain Law Journal* attracts large numbers of submissions from professors and scholars located across the United States and overseas. The Journal is listed in *Cabell's Directory of Publishing Opportunities in Management*. It is also listed in *Washington & Lee University Law Journals: Submissions & Rankings*.

Copyright to the contents of the articles published herein is retained by the respective authors. Copyright to the design, format, logo and other aspects of this publication is claimed by the *Rocky Mountain Academy of Legal Studies in Business*.

The Academy of Legal Studies in Business (International) (ALSB) is an association of teachers and scholars in the fields of business law, legal environment, and law-related courses outside of professional law schools. The *Rocky Mountain Academy of Legal Studies in Business* is one of twelve regional associations associated with ALSB.

For additional information, visit our online presence at <http://www.rockymountainlawjournal.org>.

ROCKY MOUNTAIN LAW JOURNAL

ISSN: 2332-5003

This journal does not charge fees for submission or publication of articles. Users have the right to read, download, copy, distribute, print, search, or link to the full texts of articles in the Journal.

CONTENT & OPINIONS

The opinions expressed in the articles are solely those of their respective authors and do not reflect the opinions of the *Rocky Mountain Academy of Legal Studies in Business*, the *Rocky Mountain Law Journal* itself, the officers, editors and reviewers, or any named college or university. This publication is designed to give accurate and authoritative information with regard to the subject matter. It is distributed with the understanding that neither the publisher nor the editors are engaged in the rendering of legal advice, political opinion, or any other professional service. If legal advice or other expert assistance is required, please seek the services of a competent professional.

EDITORIAL BOARD AND STAFF EDITORS (2018-2019)

EDITOR-IN-CHIEF

PAMELA GERSHUNY, J.D./M.B.A.
SOUTHEAST MISSOURI STATE UNIVERSITY

ASSOCIATE EDITOR

ERIC BLOMFELT, J.D.
METROPOLITAN STATE UNIVERSITY OF DENVER

STAFF EDITORS

PAUL ANDERSON, J.D.
MARQUETTE UNIVERSITY LAW SCHOOL

THOMAS ANTHONY J.D.

CENTRAL MICHIGAN UNIVERSITY

THOMAS A. BAKER, J.D., PH.D.,
UNIVERSITY OF GEORGIA

ROGER W. DORSEY, J.D., C.P.A. L.L.M (TAX)
UNIVERSITY OF ARKANSAS LITTLE ROCK

J. ROYCE FICHTNER, J.D.

DRAKE UNIVERSITY

JOHN HOLCOMB, J.D.

UNIVERSITY OF DENVER

KATHRYN KISSKA-SCHULZE, J.D., L.L.M.

CLEMSON UNIVERSITY

KONRAD LEE, J.D.

UTAH STATE UNIVERSITY

ELIZABETH McVICKER, J.D., PH.D.

METROPOLITAN STATE UNIVERSITY OF DENVER

BARBARA OSBORNE, J.D.

UNIVERSITY OF NORTH CAROLINA

DARREN PRUM, J.D./M.B.A.

FLORIDA STATE UNIVERSITY

DAVID W. READ, J.D.

WEBER STATE UNIVERSITY

GREGORY TAPIS, PH.D.

AUGUSTANA COLLEGE

MATTHEW THUE, J.D.

UTAH STATE UNIVERSITY

WHITNEY C. TRAYLOR, J.D.

METROPOLITAN STATE UNIVERSITY OF DENVER

ADVISORY EDITOR

COREY CIOCHETTI, J.D.

UNIVERSITY OF DENVER

PAST EDITOR-IN-CHIEF

ADAM EPSTEIN, J.D. /M.B.A

EDITOR'S CORNER

The Rocky Mountain Law Journal is listed in both *Cabell's Directory of Publishing Opportunities in Management* and in *Washington & Lee University Law Journals: Submissions & Rankings*. This is a significant achievement. Additionally, our Editorial Board has grown and includes members from the law school community and non-business law community as well. Our website showcases the natural beauty of Vail, Colorado, a conference location that offers hiking, dining, biking, and sunshine at our fall gatherings.

I would like to thank the outstanding editorial staff who reviewed for the *Rocky Mountain Law Journal*. I truly value the time commitment all of you made to the review, acceptance and editorial process. Your input is very important. Many thanks to the Rocky Mountain Academy of Legal Studies in Business conference organizers who support us.

Volume 8 provides intense coverage of employment law: beginning with discrimination and concluding with contractual rights and duties, trade secrets, and tortious interference. It begins with a forward-looking article by Professor Whitney Traylor. Law does not exist in a vacuum. It changes as our knowledge of science, medicine, and technology changes. Frequently, these changes drive cultural acceptance and resistance to laws. Professor Traylor considers the question of appearance in the established realm of discrimination laws. Professor Wade Davis presents an excellent teaching case on employee raiding. I highly recommend Professor Davis' fully developed case for its comprehensive coverage of the complex network of common law and statutory law. His experiential learning case provides all the tools necessary to implement team learning including; discussion questions, teaching notes, and a grading rubric.

Pamela Gershuny
Editor-In-Chief
December 31, 2018

-ARTICLES-

IN A RAPIDLY CHANGING CULTURE, WHEN DOES APPEARANCE BECOME A PROTECTED TRAIT?

BY

WHITNEY TRAYLOR*

INTRODUCTION

In recent years, the relationship between employee and employer has become more complex and nuanced in light of societal changes and behaviors. One result of the changing labor market is the contemporary employee's need for self-expression in the workplace. Often, employee's self-expression will come in the form of tattoos, jewelry, piercings or other "mutable" traits—those a court deems are easily changeable. This can create tension in the traditional employment relationship when employers choose to regulate the appearance of their employees through such things as a grooming policy. This demand for conformity to a work culture has resulted in numerous lawsuits filed by employees claiming some form of appearance discrimination. The case law addressing the legality of employment policies which regulate employee appearance, is inconsistent and fails to provide a uniform legal framework for analyzing these policies.

While the case law is inconsistent, it is clear that courts are reluctant to hold an employer's grooming policy as discriminatory unless it can be tied to a protected trait, such as race, religion or national origin. In deciding these cases, courts have essentially created two different employment standards—one involving immutable characteristics (those that cannot be changed without great difficulty), and one involving mutable characteristics (those that can be changed easily). However, this "mutability" analysis has received significant criticism, including the claim that a grooming policy deemed to be lawful based upon the mutability-immutability dichotomy is contrary to the intended purposes of Title VII and is predicated on an assimilationist theory that limits subordinated groups ability to achieve equality in the workplace.¹

This article provides a survey of the common law related to appearance discrimination from around the country. It will highlight uniformity in the case law while drawing attention to broad inconsistencies that will leave employers without guidance from a court or legislative body. The

* J.D., Assistant Professor of Business Law, Metropolitan State University of Denver.

¹ See Peter Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. Davis L. Rev. 769 (1987) (This article reviews the line of cases which hold that discrimination predicated on a forbidden criteria deemed mutable is not a violation of Title VII. The author argues that the court's reliance on mutable characteristics to justify discriminatory practices contradicts the letter and spirit of the law); Kimberly Yuracko, *Trait Discrimination as Sex Discrimination: An Argument against Neutrality*, 83 Tex. L. Rev. 167 (2004).

remainder of the article discusses the various legal and scholarly critique of the widely accepted “mutability” analysis, highlighting the inadequacies of current legal doctrines.

APPEARANCE DISCRIMINATION

Presently, there is no federal law specifically addressing appearance discrimination. However, courts have long recognized the importance of personal appearance regulations imposed by an employer, even when faced with a Title VII challenge.² Generally, an employer is permitted to develop and enforce appearance guidelines, even if simply distinguishing the appearance of men and women in the workplace.³ However, there are limitations to this doctrine, and courts have found appearance policies to violate federal anti-discrimination laws.⁴ As discussed below, many of the appearance discrimination claims are pled as claims of disparate treatment or disparate impact under Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII expressly prohibits discrimination on the basis of race, national origin, sex, color and religion.⁵ Discrimination may be proven by disparate treatment (intentional discrimination) or disparate impact (unintentional discrimination).

In a Title VII disparate impact case, the plaintiff’s prima facie case requires a showing that a facially neutral employment practice has a disproportionately adverse impact on a protected class. If this is established, the burden of persuasion shifts to the defendant to show the challenged

² See *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35, 43 (E.D.Va. 1976), *aff’d*, 579 F.2d 43 (4th Cir. 1978) (citing *Brown v. D.C. Transit System, Inc.*, 523 F.2d 725 (D.C. Cir. 1975)); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker v. California Land Title Company*, 507 F.2d 895 (9th Cir. 1974); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (1972); *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402 (D.D.C.1972).

³ See, e.g., *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004) (upholding a policy of sex-differentiated grooming standards that allegedly burdened women more than men); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (dismissing a challenge to a policy that prohibited men, but not women, from having long hair); *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1251-52 (8th Cir. 1975) (adopting the view that Title VII “...was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers”); *Fagan*, 481 F.2d at 1125 (“Good grooming regulations reflect a company’s policy in our highly competitive business environment.”).

⁴ See *Carroll v. Talman Fed. Saving & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (holding that an employer’s policy requiring women to wear uniforms but allowing men to wear “normal business attire” was unlawful discrimination).

⁵ “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin....” 42 U.S.C. § 2000e-2.

practice is job-related and justified as a matter of business necessity.⁶ Many claims of appearance discrimination are pled, with limited success, as disparate impact cases.

The case law is clear that an employer has a right to protect its image or brand and can do so by implementing policies that require a certain image from its employees. Courts have allowed employers wide latitude in regulating employee appearance, including policies that mandate employees be clean-shaven or maintain short hair.⁷ This protection has been extended to uphold grooming standards that impose disparate requirements for men and women related to dress, makeup, jewelry, and other factors.⁸

These sex-differentiated appearance standards have been upheld because Title VII's objective is to achieve equality of employment opportunities and remove barriers relating to immutable characteristics.⁹ This was iterated in *Willingham v. Macon Telegraph Publishing Co.*, where the Court reasoned that:

Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.¹⁰

⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁷ See, e.g., *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998) (upholding a policy applying different hair length standards to male and female employees); *Knott v. Missouri Pac. R. Co.*, 527 F.2d 1249 (8th Cir. 1975) (upholding a policy requiring male employees to keep side burns neat and well trimmed and prohibiting side burns and long hair on men, noting that female employees had to conform to other dress standards, and the differences in the policy toward male and female employees were "minor" and "reasonable," reflecting "customary modes of grooming").

⁸ See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977) (upholding a policy requiring male employees to wear a tie, while female employees did not have to comply with a similar requirement because the requirement was not "overly burdensome" and merely reinforced its image to customers); *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985) (finding no Title VII violation when employer required a female news anchor, to alter her clothes and make-up based on negative responses from audience focus groups because employer treated male news anchors similarly).

⁹ See *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 190 (3d Cir. 2009) (asserting that Title VII "protects all individuals from discrimination motivated by the immutable characteristics specified in the statute"); Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure To Protect Religious Employees in the Workplace*, 17 Va. J. Soc. Pol'y & L. 453, 454 (2010) ("The federal courts explicitly distinguish between mutable and immutable traits or status and conduct when deciding most Title VII cases. In doing so, the courts have routinely held that mutable traits are not entitled to protection under Title VII...").

¹⁰ *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc). See also,

However, there are limitations to employers' discretion in these areas, and employers have been found to violate Title VII, among other laws, when applying standards more stringently against women.¹¹

Hair

Courts have consistently upheld grooming policies regulating employee hairstyles as nondiscriminatory. This was the issue addressed in *Rogers v. American Airlines, Inc.*¹² The plaintiff, Renee Rogers, an African-American woman who wore her hair in a cornrow hairstyle, challenged American Airlines' grooming policy that prohibited employees from wearing an "all-braided hairstyle," claiming that it was discriminatory on the basis of race and sex.¹³ She claimed the company's ban against braided hairstyles, though a race-neutral policy, disproportionately affected Black women because cornrows were "historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."¹⁴ The court disagreed and held that Title VII only protects discrimination on the basis of "immutable" characteristics.¹⁵ It reasoned that since Rogers could have altered her hairstyle by her own volition, her cornrow hairstyle was a mutable or "an easily changed characteristic," and therefore, a policy banning her hairstyle was lawful because the policy did not implicate characteristics "beyond the victim's power to alter" such as skin color.¹⁶

In *Eatman v. United Parcel Service*, the court determined that United Parcel Service's decision to implement a grooming code requiring its drivers to cover their "unconventional" hairstyles, which

Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (following *Willingham* and explaining that "discrimination based on ... immutable sex characteristics ... violate[s] [Title VII] because they present obstacles to employment of one sex that cannot be overcome").

¹¹ See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (striking down an employer's rule requiring female flight attendants to maintain a weight corresponding to women of "medium" build determined by an insurance company table, but allowing men to maintain the weight corresponding to men of a "large" build); *Carroll v. Talman Federal Sav. and Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979) (holding that employer's policy forcing women to wear a uniform, but allowing men to wear "appropriate business attire" violated Title VII); *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (holding that airline's weight requirement constituted discrimination under Title VII on its face because policy only applied to females and airline did not assert a legitimate non-discriminatory justification).

¹² 527 F. Supp. 229, 231 (S.D.N.Y.1981).

¹³ *Id.*

¹⁴ *Id.* at 231-232.

¹⁵ *Id.*

¹⁶ *Id.* at 232 (citing *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980) (holding employer policies barring the display of mutable characteristics that are closely related to cultural or racial identity do not violate Title VII)).

included dreadlocks, braids, corn-rows, and a ponytail, did not violate Title VII.¹⁷ Eatman wore his hair in dreadlocks and was terminated for failing to comply with UPS's grooming code. Among other things, he asserted a claim of disparate treatment, which the court denied. Like in *Rogers*, the court concluded race is an immutable characteristic, while dreadlocks were not.¹⁸

Recently, in *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, the court held that Title VII protects plaintiffs with regard to immutable characteristics, but not cultural practices.¹⁹ It was alleged that the company intentionally discriminated against an African-American applicant because of her race when it refused to hire her because she had dreadlocks, which violated the employer's grooming policy. The complaint, however, did not allege that dreadlocks themselves are an immutable characteristic of black people; instead it stated that hairstyle is historically, physiologically, and culturally associated with their race. Because the action was brought as a disparate treatment case, the court did not address the argument that the company's race-neutral grooming policy had a disparate impact on other black job applicants.²⁰

Despite the clearly established precedent allowing grooming policies that restrict certain hairstyles because they are mutable, a plaintiff may prevail if she can show her hairstyle is "natural," and therefore, immutable. In *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, the Seventh Circuit recognized a race-discrimination claim for a black plaintiff who alleged she was denied promotion for wearing an afro because that hairstyle is natural to African-American women, and therefore, was determined to be immutable and protected.²¹ Courts have consistently decided these cases based upon whether it deems the protected trait in question is deemed "mutable" or "immutable."

This analysis has been extended to characteristics beyond just hairstyles, but are typically associated with race, such as various forms of facial hair, which courts found more commonly worn by African-Americans. Notwithstanding, courts found these characteristics mutable.²² However, courts protect employees who challenge the grooming policy on a religious

¹⁷ *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 259 (S.D.N.Y. 2002).

¹⁸ *Id.*

¹⁹ *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, 876 F.3d 1273 (11th Cir. 2017).

²⁰ *Id.* at 1277

²¹ *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976) (en banc).

²² See *Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (holding that a policy that prohibits dreadlocks, cornrows, and beaded hairstyles was not discriminatory because hairstyle is not an immutable characteristic of race); see also *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373, 374-75 (N.D. Tex. 1975) (holding that a policy dictating the scope of an employee's side burns does not violate Title VII because side burns are a mutable characteristic).

discrimination claim. The primary legal issue in these cases revolves around an employer's duty to reasonably accommodate its employees' sincerely held religious beliefs.²³

Weight/Obesity

At last check, Michigan is the only state that prohibits employment discrimination on the basis of weight.²⁴ A few cities have passed ordinances to add height and weight to their anti-discrimination codes.²⁵ But outside of those few exceptions, weight is not typically a protected characteristic.

In a 2013 case, twenty-two cocktail servers at the Borgata Hotel and Casino in Atlantic City, New Jersey sued alleging weight discrimination. The servers were part of the "Borgata Babe" program which required its participants to meet certain appearance standards, including periodic weigh-ins. The women were not permitted to gain more than 7% of their body weight when hired. Atlantic County Superior Court Judge Nelson Johnson ruled that the casino's policy regarding weight and appearance for the Borgata Babes did not constitute sex discrimination, noting that all of the women had signed agreements agreeing to the terms of the program.²⁶

When it comes to obesity – rather than the generic term "weight" - plaintiffs have argued that obesity is a disability under the Americans with Disabilities Act (ADA). According to the EEOC's interpretive guidance on the ADA, which refers to weight and states:

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not

²³ See, e.g., *Flowers v. Columbia Coll. Chi.*, 397 F.3d 532 (7th Cir. 2005) (holding that allowing a Rastafarian to wear a religious head wrap over dreadlocks did not create undue hardship for college); *Booth v. Maryland*, 327 F.3d 377 (4th Cir. 2003) (finding employer liable for religious discrimination because it refused to provide a reasonable accommodation for correctional officer's Rastafarian dreadlocks despite other religious exemptions for Jewish and Sikh employees); *EEOC v. United Parcel Serv.*, 94 F.3d 314 (7th Cir. 1996) (holding that offering a bearded Muslim employee a similar position without public contact was not reasonable accommodation); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (holding public employer had failed to use least restrictive means when it refused to permit Native American correctional officer to pin up hair rather than cut it).

²⁴ M.C.L. 37.2202.

²⁵ See e.g., San Francisco, CA and Binghamton, NY.

²⁶ *Schiavo v. Marina Dist. Dev. Co.*, No. ATL-L-2833-08, 2013 WL 4105183 (N.J.Super.Ct. Law Div. July 18, 2018)

impairments. The definition of the term 'impairment' *does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, ...that are within 'normal' range and are not the result of a physiological disorder.*"²⁷

In 1997, the Second Circuit Court of Appeals determined that obesity, by itself, does not qualify as a physical impairment under the ADA because "physical characteristics that are "not the result of a physiological disorder" are not considered "impairments" for the purposes of determining either actual or perceived disability."²⁸ The court concluded that "obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the [ADA]."²⁹

In 2016, the Eighth Circuit Court of Appeals came to a similar conclusion. In that case, the plaintiff received a conditional offer of employment for a safety-sensitive position with the railroad. The offer was contingent on passing a medical examination. Through the medical examination, the plaintiff was found to have a body mass index of just over 40, which disqualified him from the job. The employer deemed that the plaintiff's high body mass index and obesity created an unacceptable risk that he would develop certain medical conditions in the future, such as diabetes. The plaintiff sued, alleging a violation of the ADA, arguing both that his obesity was a disability, and that the employer perceived him as having a disability. The Eighth Circuit ruled that obesity would be a disability only if it was outside the normal range *and* caused by a physiological disorder.³⁰ Therefore, although the courts typically have not seen obesity and weight as a disability by itself, it has left the door open for it to be protected if caused by a physiological disorder.

Sex Stereotypes

The United States Supreme Court in *Price Waterhouse v. Hopkins* held that Title VII not only prohibits discrimination based on a person's sex, but also on stereotypes related to the individual's sex.³¹ The court reviewed the sex discrimination claim of a woman who had been denied

²⁷ Appendix to Part 1630—Interpretive Guidance on Title I of the ADA (interpretive guidance), 29 C.F.R. Pt. 1630, App'x § 1630.2(h) (emphasis added).

²⁸ *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) (quoting *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997)).

²⁹ *Id.*

³⁰ *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016).

³¹ 490 U.S. 228 (1989).

partnership in an accounting firm, at least in part on the basis that she was macho, overcompensated for being a woman, and was masculine.³² A partner advised the plaintiff that if she wished to improve her chances of earning partnership, she should walk and talk more femininely, “wear make-up, have her hair styled, and wear jewelry.”³³ The court held that in the specific context of sex stereotyping, “...an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”³⁴ Since this ruling, federal appellate courts have routinely recognized that discrimination based on an employee’s failure to conform to gender norms can be unlawful discrimination “on the basis of sex.”³⁵

Sexual Orientation

Historically, plaintiffs have tried unsuccessfully to assert claims of discrimination based on sexual orientation under Title VII.³⁶ Recently, however, numerous trial court judges have extended Title VII’s protections to include sexual orientation.³⁷ Many of these cases relied upon the Second Circuit’s recent departure from years of precedent that sexual orientation was not a bases for a discrimination claim under Title VII.

In *Christiansen v. Omnicom Group, Inc.*, the court determined that the employee established a factual basis sufficient to sustain a Title VII claim for gender stereotyping, and that gay, lesbian, and bisexual individuals have the same protection against gender stereotyping as heterosexual

³² *Id.* at 235.

³³ *Id.*

³⁴ *Id.* at 250.

³⁵ See e.g. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (*en banc*) (explaining that discrimination because of an employee's failure to conform to gender norms may be “sex discrimination” under Title VII.); *Doe v. City of Belleville*, 11 F.3d 563, 581 (7th Cir. 1997) (holding a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his co-workers' idea of how men are to appear and behave, is harassed ‘because of’ his sex).

³⁶ *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir.2000) (“Title VII does not prohibit harassment or discrimination because of sexual orientation.”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir.2007) (It is well-established that the Tenth Circuit “has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation.”); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (“Title VII does not afford a cause of action for discrimination based upon sexual orientation.”).

³⁷ See e.g. *Boutillier v. Hartford Public Schools*, 221 F. Supp. 3d 255 (D. Conn. 2016); *U.S. Equal Employment Opportunity Commission v. Scott Medical Health Center, P.C.*, 217 F. Supp. 3d 834, 2016 (W.D. Pa. 2016) (Title VII’s “because of sex” provision prohibits discrimination on the basis of sexual orientation, which is a subset of sexual stereotyping); *Winstead v. Lafayette County Board of County Commissioners*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016) (discrimination based on perceived sexual orientation is actionable under Title VII as discrimination based on gender or sex stereotypes); *Isaacs v. Felder Services, LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015) (claims of sexual orientation discrimination are cognizable under Title VII); *Complainant v. Anthony Foxx, Secretary, Dept. of Transportation (Federal Aviation Administration), Agency*, 2015 WL 4397641 (E.E.O.C. 2015) (sexual orientation discrimination is discrimination “based on sex”).

individuals.³⁸ As a result, numerous federal trial and appellate courts around the country have applied the rationale in *Christiansen*, and held sexual orientation discrimination is unlawful “sex discrimination” under Title VII.³⁹ Courts adopting this rationale inevitably cause further confusion to this unclear area of law in which courts determine the outcome of a case using a mutability analysis.

Transgender

Whether Title VII prohibits employment discrimination based on an employee’s status as a transgender individual appears to hinge on whether a court finds that transgender discrimination is “because of sex.” The unlawful gender stereotyping recognized in the Supreme Court’s *Price Waterhouse* decision appears to be the basis on which courts have ruled in favor of recognizing protection for transgender persons as a form of sex discrimination. For example, discrimination on the basis of transgender identity is now recognized as discrimination “because of sex” in the Ninth Circuit,⁴⁰ the Sixth Circuit,⁴¹ and in the Eleventh Circuit.⁴² However, the Tenth Circuit declined to recognize discrimination on the basis of transgender identity as constituting discrimination “because of sex.”⁴³

Most recently, however, the Sixth Circuit in *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁴⁴ held that discrimination on the basis of transgender and transitioning status violates Title VII. In that case, the plaintiff, who was born male, was terminated after notifying her employer that she intended to begin transitioning to a female. After admitting that he terminated the plaintiff because she intended to dress as a woman, the owner attempted to

³⁸ 852 F.3d 195 (2nd Cir. 2017).

³⁹ See cases cited *supra* note 37; see also *Philpott v. New York*, 252 F. Supp. 3d 313, 316-317 (2017) (holding “Under the analysis set forth in...*Christiansen*...because plaintiff has stated a claim for sexual orientation discrimination, ‘common sense’ dictates that he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII.”); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2nd Cir. 2018) (recognizing the changing legal landscape taking shape around sexual orientation, and relying in part on *Christiansen*, the court held Title VII prohibits discrimination on the basis of sexual orientation is unlawful discrimination “because of...sex.”); *Hively v. Ivy Tech Comm. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (holding that a plaintiff who alleges employment discrimination on the basis of her sexual orientation has put forth an actionable claim for sex discrimination in violation of Title VII) *overturning Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Hammer v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000).

⁴⁰ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁴¹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

⁴² *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁴³ *Etsitty v. Utah Trans. Auth.*, 502 F.3d 1215 (10th Cir. 2007).

⁴⁴ 884 F.3d 560 (6th Cir. 2018).

rely on his religious beliefs that an individual’s sex is “an immutable God-given gift” as justification for that decision.⁴⁵ In ruling for the plaintiff, the Sixth Circuit focused on gender stereotyping, stating:

Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.⁴⁶

...

Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.⁴⁷

The *Harris* decision is important as the court established that it is analytically impossible to fire an employee based on that employee’s transgender status without being motivated, at least in part, by the employee’s sex.

DEFICIENCIES WITHIN THE CURRENT LEGAL FRAMEWORK

As discussed above, courts have provided protection from appearance discrimination in various limited contexts. While these protections are necessary, there are gaps in the law that many argue have resulted in precedent that conflicts with the remedial purpose of Title VII. The Supreme Court has interpreted congressional intent regarding Title VII as broadly as possible to give full effect to

⁴⁵ *Id.* at 569.

⁴⁶ *Id.* at 571.

⁴⁷ *Id.* at 576-577.

its remedial purposes.⁴⁸ Despite this clear instruction, courts frequently dismiss claims of appearance discrimination by claiming the employment policy in question involves the regulation of mutable traits. But, this simple rationale has not been adopted by all courts.⁴⁹ The fact that a behavior may be altered easily (i.e. hair), ignores the personal importance that behavior, custom or look, may have to the individual employee.

Without a clear framework for determining between mutable and immutable traits, courts will continue to render inconsistent decisions. For example, numerous courts have held sexual orientation is not a protected trait under Title VII.⁵⁰ Notwithstanding this precedent, some argue the Supreme Court's opinion in *Obergefell v. Hodges*, establishes sexual orientation is an immutable characteristic, and therefore should receive protection under the law.⁵¹ It is further argued that because the Supreme Court accepted the findings established by the American Psychological Association in its opinion, and none others, that sexual orientation is a normal expression of human sexuality and immutable.⁵² The question still remains whether the law treats sexual orientation as mutable (suggesting there is a choice in the matter) or immutable. A legal framework cannot be based upon standards which are not clearly defined.

Additionally, courts have been criticized for upholding these types of grooming policies because they are based upon the dominant society's norms and require conformity to a homogeneous work culture.⁵³ Those individuals not fitting this norm are likely to be perceived more negatively in the

⁴⁸ See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (holding "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority.'") (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)) (other citations omitted).

⁴⁹ See *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 666 (C.D. Cal. 1972) (when discussing grooming policies based on mutable characteristics, holding "The issue of long hair on men tends to arouse the passions of many in our society today. In that regard the issue is no different from the issues of race, color, religion, national origin and equal employment rights for women, all of which are raised in Title VII. When this Nation was settled it was hoped that there [would] be established a society where every individual would be judged *according to his ability* rather than who his father was, or what foreign land his family came from, or which part of town he happened to live in, or what the color of his skin was. Since then, millions of individuals have landed on our shores in search of opportunity—opportunity which was denied them in their homelands because of rigid class structures and irrational group stereotypes. The Civil Rights Act of 1964 was born of that hope. *Although the legal technicalities are many, the message of the Act is clear: every person is to be treated as an individual, with respect and dignity.*") (emphasis added).

⁵⁰ See cases cited *supra* note 36.

⁵¹ See Matthew Green, *Same-sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination*, 20 J. Gender Race & Just. 1, 49, fn. 292 (2017) *citing* (*Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (discussing the trajectory of the rights of gays and lesbians in the Twentieth Century until present time and noting that "[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable"))).

⁵² *Id.*

⁵³ See Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2553 (1994).

workplace,⁵⁴and these policies send a message that minorities and their appearance choices do not belong in the workplace.⁵⁵ Thus, courts should be cautious before dismissing a claim if the dismissal is based on nonconformity to a grooming policy as the policy itself may be based upon biased standards. This could result in the scope of Title VII being determined by the dominant group's preferences and reinforce prevailing prejudices.⁵⁶

⁵⁴See Kenji Yoshino, *The Pressure to Cover*, N.Y. Times MAG., Jan. 15, 2006, at 632 (quoting John T. Molloy, *New Dress for Success* (1988)).

⁵⁵See Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 Cardozo Women's L.J. 115, 131 (2001).

⁵⁶ See Karl E. Klare, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 New Eng. L. Rev. 1395, 1418 (1992).

CONCLUSION

Although few jurisdictions have named “personal appearance” or attributes such as height and weight as protected categories under their discrimination laws, physical appearance is increasingly forming the basis for discrimination lawsuits. Whether bringing a disparate impact claim due to characteristics that are arguably immutable for certain races or ethnic groups, or a gender stereotyping or disability claim, plaintiffs continue to be subjected to adverse employment actions due to their hair, tattoos, manner of dress, weight or other appearance basis. Consequently, appearance as a protected trait adds to the complex considerations with which employers must grapple in our growingly diverse population.

If there is a true interest in eradicating discriminatory practices from our workforce, the law must account for discriminatory practices that directly impact marginalized employees in the workforce, regardless of mutability. Commonly-accepted immutable traits (race, national origin, gender) are protected because courts recognize the sense of identity attached to those characteristics.⁵⁷ This same sense of identity is attached to those characteristics a court may deem mutable; thus, warranting the same level of protection from the courts.

⁵⁷ See Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1530 (2011) (“*Scientific research has not proven conclusively whether sexual orientation is a biological trait that is an accident of birth, but it seems always to be fundamental to personal identity.*”).

EMPLOYEE RAIDING: A TEACHING CASE ON CLAIMS AND REMEDIES

By

Wade S. Davis*

I. INTRODUCTION

The conflicts that arise when key employees move between competing businesses provide a rich avenue to teach students about key strategic business interests and the overlapping legal claims of corporate or employee raiding, breaches of non-competition and non-solicitation agreements, and misappropriation of trade secrets.¹ On one hand, employees advocates argue that these legal claims lock employees into jobs, prevent the natural movement of workers between competitors, and suppress wages.² Employers and businesses, on the other hand, argue that they need legal protections to restrict unfair competition, protect their intellectual and proprietary information, and preserve their business investments.³

Employee raiding scenarios provide a unique opportunity for teachers of business law to examine the intersection of competing interests and claims arising from common law, statutes, and contracts. This topic offers an avenue to explore employment “at will” and its many limitations and exceptions. It provides a specific context to discuss the concept “goodwill” and illustrate how personal relationships are the lifeblood of many businesses. Finally, it introduces students to the importance of trade secrets and proprietary information, how those secrets are protected, and the difficulty of maintaining secrecy when key employees leave to competitors – especially when those employees are keen to use the information for their own benefit.⁴ In short, corporate raiding

* J.D., M.A., Assistant Professor of Business Law, Minnesota State University, Mankato.

¹ See, e.g., *Restrain the Restraints: The Case Against Non-compete Clauses*, The Economist, May 19, 2018, at <https://www.economist.com/leaders/2018/05/19/the-case-against-non-compete-clauses>; Daisuke Wakabayshi, *Google’s Claim Against Former Executive Could Help Uber in Driverless-Car Lawsuit*, N.Y. Times, Mar. 29, 2017; Joe Flint & Shalini Ramachandran, *Netflix: The Monster that’s Eating Hollywood*, Wall St. J., Mar. 4, 2017.

² The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, (May 5, 2016) (https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf, (last visited Jul. 21, 2018); Orley Lobel, *Companies Compete but Won’t let Their Workers do the Same*, N.Y. Times, May 4, 2017; Connor Dougherty, *How Noncompete Clauses Keep Workers Locked in*, N.Y. Times, May 13, 2017.

³ I. P. L. Png, *Law and Innovation: Evidence form State Trade Secrets Laws*, 99 The Rev. of Econ. and Statistics 167-79 (2017); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L. J. 727, 765 (2010) (“The often-litigated covenant not to compete in the employment setting serves two strategic purposes: proprietary protection and strategic coercion.”).

⁴ See M. Evans, *Trade Secrets in the Legal Studies Curriculum – A Case Study*, 29 J. OF LEGAL STUD. EDUC. 1-25 (2012).

scenarios provide an excellent narrative and set of facts to capture our students' attention and teach them about key employment and business legal concepts.

College students are particularly interested in employee mobility and post-employment restrictions because these restrictions may fundamentally limit their personal future job opportunities and professional development.⁵ As non-competition agreements are used with more frequency entry-level positions, recent graduates may rightfully worry that their professional development will be hobbled.⁶

This article sets forth a teaching module and assignment that places students in the role of decision makers for an employer facing the unforeseen and abrupt departure of three key employees to a competitor. As with the business world, the students are forced to work with a limited set of information that strongly implies the employees are trying to use their working relationships and confidential information gained from their former employer to help a competitor jump-start a competing business line. Students are placed in groups and tasked with researching particular claims and returning to the class to present and discuss their findings.⁷

This article provides instructors all the materials they need to teach a dynamic, practical and relevant group project to examine the legal and business issues involved when key employees move between competitors. Section II identifies the learning objectives. Section III describes the classroom dynamics and teaching process. Section IV discusses the legal principles and their application to the facts of the case, and provides guidance for teaching the module. Everything needed to teach the module is included in the appendices including the case materials, student guides, teaching notes, and a grading rubric.

II. LEARNING OBJECTIVES

This case study encourages students to recognize the central role of interpersonal relationships between employees and key customers and the value of proprietary and confidential information. It is designed for classes studying the legal environment of business, business ethics, contracts, and employment law by placing students in rapidly evolving crisis where they are forced to engage incomplete and difficult facts, learn basic legal principles, and implement an effective business and legal response.

The specific learning outcomes of the case study are to:

- Recognize the centrality of key business relationships as well as confidential and trade secret information

⁵ Tonia Hap Murphy, *Covenants Not to Compete in Employment Contracts: Worth a Closer Look in the Classroom*, 32 J. OF LEGAL STUD. EDUC. 131-71 (2015);

⁶ Aruna Viswanatha, *Noncompete Agreements Hobble Junior Employees*. Wall St. J., Feb. 2, 2016.

⁷ Patricia Sánchez Abril, *Reimagining the Group Project for the Business Law Classroom*, 33 J. OF LEGAL STUD. EDUC. 235-62 (2016) (assessing the critical role of group projects in business law course).

- Identify, analyze and apply typical common law, contractual and statutory claims in a typical corporate raiding scenario including:

Common Law Claims – at will employment, breach of contract, breach of duties of loyalty and confidentiality, and tortious interference with business relations

Contract Claims – restrictive covenants, non-compete and non-solicitation agreements

Statutory Claims – Uniform and Federal Trade Secrets Acts claims

- Consider and evaluate the practical business effects of the departure of key employees and potential disclosure and misuse of confidential and trade secret information
- Identify and evaluate potential solutions to a rapidly-evolving crisis scenario
- Identify and implement proactive and measures to protect key employee-client relationships and to preserve confidential trade secret information

III. TEACHING PROCESS

A. *Pre-class Reading*

Depending on the specific course, the instructor should assign readings that involve appropriate background information including, for instance, at-will employment, trade secret information and non-compete agreements.

B. *Day One Activities*

1. *Review and Analyze Background Information and Documents (10-15 minutes)*

This project thrusts students into a crisis narrative, placing them in the role as a member of the leadership team acting to save their company. The first class starts with the instructor handing out the background memorandum and four key fact documents - App. A. Docs 1-5. Each student should be allowed 10 to 15 minutes to absorb the information alone.

Document 1 is a memorandum is from the Chief Operating Officer of Midwest Copy Supply Co. (“MCS”) that establishes the foundation for the case study and activity. The memorandum describes the company - a photocopy sales and maintenance company transitioning from a company focused on copying paper documents to a company that manages electronic-data - and the crisis created by the departure of the following three key employees to a competitor. The three departing employees are:

1. Phil Collins, a senior software engineer who designed the MCS's proprietary data management software and purportedly "retired" two months earlier.
2. Sara Tompkins, a third-year data management employee who helped guide customers to transition from a paper to a digital data management system.
3. Prakash Habeek, a second-year sales employee.

The handouts also include the following four additional documents:

1. Linked-In announcement of Prakash Habeek.
2. Facebook post of Sara Tompkins.
3. E-mail from a concerned customer.
4. Excerpts from MCS's non-compete agreement signed by two of the departing employees.

This scenario is based on a series of lawsuits litigated by the author and other lawsuits with similar sets of facts.⁸ As with a typical corporate raiding or unfair competition fact pattern, students are operating with an incomplete set of information that is open to multiple interpretations. On one extreme, the information can be viewed as a calculated effort to by the departing employees and their new employer to exploit MCS's confidential information to gain an unfair advantage in the marketplace. On the other extreme, the information suggests that three employees simply moved to a competitor and are engaging in typical, fair, and legal competition.

2. *Group Work - Basic Legal Research and Preparation for Presentation (45 – 60 minutes)*

After the students read the background information, they should be assigned to one of four different groups to analyze a distinct legal issue. Each group will be provided a document to guide them through their analysis and instruct them to prepare a five to seven-minute presentation the following class – App. B, Docs 1-4. The rest of the class should be dedicated to allowing the students to brainstorm, conduct their research and prepare their presentation.

⁸ See, e.g., *Coface Collections N. Amer. V. Newton*, 430 Fed. Appx. 162, 164-65 (3rd Cir 2011) (affirming preliminary injunction for violation of non-competition and non-solicitation agreements where defendant posted an job opening for a CEO position on Facebook and Linked-In stated and encouraged experienced professionals from his previous employer to contact him); *Amway Global v. Woodward*, 744 F.Supp.2d 657, 673 (E.D.M.I. 2010) (affirming arbitration award, issuing an injunction, and awarding attorney fees to a former employer because a departing employee violated his non-solicitation agreement through a series of coordinated announcements of the employee's new company including a blog post stating, "If you knew what I knew, you would do what I do."); *Enhanced Network Soln. Group, Inc. v. Hypersonic Tech. Corp.*, 951 N.E.2d 265 (Ind. Ct. App. 2011) (holding that Linked-in Post regarding job openings was not unlawful solicitation).

a. *Specific Legal and Business Issues for Each Group*

Each of the groups are also directed consider a series of general practical business issues presented by the case study including:

- What additional information does MCS need to make a fully-informed decision?
How do we gather that information?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?
- What actions do you suggest MCS takes with respect to the affected business group?
- What other actions do you suggest MCS takes?

The first class period should be a high-impact, high-energy day. Students groups should be given wide-discretion to respond to the challenge and prepare for their presentation. The instructor should provide limited guidance and tell the students that they “need to create a high-quality work product because the future of the company depends on them.” It may be appropriate for the instructor to leave the room.

b. *General Business Questions for the Entire Class to Consider*

All of the groups are also directed consider a series of practical business issues presented by the case study including:

- What additional information does MCS need to make a fully-informed decision?
How do we gather that information?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?
- What actions do you suggest MCS takes with respect to the affected business group?
- What other actions do you suggest MCS takes?

The first class period should be a high-impact, high-energy day. Students groups should be given wide-discretion to respond to the challenge and prepare for their presentation. The instructor should provide limited guidance and tell the students that they “need to create a high-quality work product because the future of the company depends on them.” It may be appropriate for the instructor to leave the room.

C. *Day Two – Presentations and Class Discussion*

The second day is devoted to presentations, class discussion and debriefing. The groups should be allowed five minutes to finalize their presentation plans. Each group will then deliver their five to seven-minute presentation. The remainder of the class is dedicated to follow-up questions, discussion, analysis and debriefing. Teaching notes are included as App. C. Instructors who do not want to devote two full class periods to this assignment can simply assign the facts and background reading (App. A, Docs. 1-5) and use the teaching notes (App. C) to lead a typical case study discussion.

D. *Evaluation of Students*

Appendix D is a grading rubric for the presentation that evaluates the students' delivery; compliance with time requirements; organization; professionalism; explanation, analysis and merits of the legal claim; and responses to questions.

IV. THE SUBSTANTIVE BUSINESS AND LEGAL ISSUES IN CASE STUDY

A. *Recognize the Importance of Key Business Relationships and Proprietary Information*

This case study illustrates that the intellectual property and goodwill are the lifeblood of successful businesses. Many students do not yet recognize that key business relationships are intensely personal; they are created, nurtured and strengthened through sustained interactions between specific employees and customer representatives. Over time, employees develop an understanding of the customer's needs and establish a rapport with the customer representatives. The company's ultimate goal is often to develop a longstanding personal connection between the company and its customer.

The departure of a relationship-employee often creates a period of risk and uncertainty for a business because customers often have strong bonds with the departing employee. This risk is heightened when the departing employee can provide similar products or services through a competitor. Employers therefore need to implement a transition plan when key relationship-employees leave. This case study pushes students to think about how businesses can proactively protect their goodwill by preparing ahead of time and strategically responding to these transitions (i.e. by establishing at multiple contact points for every customer, a centralized repository of

information about the customer relationship, and possibly putting non-compete or non-solicitation agreements in place).

The scenario also forces students to recognize the importance of proprietary business information, processes and products. Businesses spend tremendous amount of time, energy and resources developing unique business models, processes and products that differentiate themselves in the marketplace. By placing students in a fact pattern where a company is at risk of losing its key competitive advantage by the possible disclosure or use of confidential and trade secret information, students will start strategically thinking through these important legal and business issues.

B. *Identify and Apply Substantive Legal Claims in a Corporate Raiding Scenarios*

1. *Common Law Claims - At-will Employment and Breach of Contract*

The “employment relationship is fundamental contractual” in which the employee provides services to the employer in exchange for wages.⁹ It is also an agency relationship between a master and servant.¹⁰

The “at will” doctrine is at the heart of American common law governing employer/employee relationships. It stands for the proposition that, absent any other contractual or legal constraint, an employer or employee may terminate an employment relationship at any time and for any reason so long as the reason is not unlawful or against public policy.¹¹ This means that employees are free to move between employers, many of which are direct competitors. Over time, this doctrine has become riddled with statutory and common law exceptions and limitations, many of which are explored in this teaching module.

2. *Common Law Claims – Employee’s Duties of Confidentiality and Loyalty*

a. *Duty of Loyalty*

⁹ *Guz v. Bechtel Natl., Inc.*, 8 P.3d 1089, 1100 (Cal. 2000).

¹⁰ *Kelley v. So. Pac. Co.*, 419 U.S. 318, 323-24 (1974).

¹¹ *Id.* at 1095; *Engquist v. Or. Dept. of Ag.*, 553 U.S. 591, 597 (2008).

Independent from any express contractual agreement, employees have a duty of to act in good faith and for the advancement of their employers' interests and not for their own individual benefit or for the benefit of a third party.¹² Therefore, during the term of the employment relationship, employees may not directly compete with their employers concerning the matter of their employment.¹³

Courts generally distinguish between an employee's preparation to compete and actual competition. Employees can generally seek employment with a competitor so long as they do not: (1) violate express non-compete agreements, (2) use or misappropriate their employer's confidential or trade secret information, (3) seek employment on their employer's time, or (4) use their employer's resources or property for their job search.¹⁴ Employees may also generally discuss and plan their departure with other employees.¹⁵ After an employee resigns, he or she may generally solicit and accept customers of his former employer. Employees may, however, not start to work for a competitor or solicit customers during the term of their employment.¹⁶ Significantly, it is not a breach of the duty of loyalty for an employee to use the experience, general knowledge and skill gained during employment at a subsequent employer, unless that information rises to the level of a confidential trade secret or is prohibited by contract.¹⁷

b. *Duty of Confidentiality*

Independent from of any contractual or statutory obligations, employees also have a duty to maintain the confidential information of their employer. Employees may not use their employers' confidential information for their personal purpose or for the benefit of a competitor during or after the conclusion of their employment.¹⁸ This common law claim is akin to the protections offered by the Uniform Trade Secret Act adopted by the states and the Federal Defense of Trade Secrets Act in that both claims recognize the employers' right to protect their valuable confidential and proprietary information. This duty of confidentiality is often codified in in handbooks, employment contracts and restrictive covenants.

¹² RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.06; *see also* *Lawlor v. N. Am. Corp. of Ill.*, 983 N.E.2d 414, 433 (Ill. 2012) (“[E]mployees as well as officers and directors owe a duty of loyalty to their employer.”).

¹³ RESTATEMENT (THIRD) OF AGENCY §§ 8.04 (2006); *Orkin Exterminating Co., Inc. v. Rathje*, 72 F.3d 206, 207 (1st Cir. 1995); *Porth v. Ia. Dept. of Job Serv.*, 372 N.W.2d 269, 273 (Iowa 1985).

¹⁴ *See* RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (1958).

¹⁵ Officers and employees with significant responsibility face more restrictions on discussing and coordinating their departure plans with current employees while still employed.

¹⁶ *Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. Ct. App. 1987).

¹⁷ *AMP Inc. v. Fleischhacker*, 823 F.2d 1199, 1203 (7th Cir. 1987); *Midland-Ross Corp. v. Yokana*, 293 F.2d 411, 412 (3rd Cir. 1961); *Schulenburg v. Signatrol, Inc.*, 212 N.E.2d 865, 869 (Ill. 1965).

¹⁸ RESTATEMENT (THIRD) OF AGENCY §§ 8.05-.06, 8.12 (2006); *Union Pac. R.R. Co. v. Mower*, 219 F.3d 1069, 1073 (9th Cir. 2000) (applying Oregon law); *Eaton Corp. v. Giere et al.*, 971 F.2d 136, 141 (8th Cir. 1992) (applying Minnesota law).

By definition, confidential information cannot be readily discoverable by third parties through proper means.¹⁹ As highlighted in this module, there are often fact disputes as to whether information is truly confidential and valuable, whether the employer has taken sufficient measures to preserve its confidentiality, and whether the employee improperly used or disclosed the information.²⁰

3. Contractual Claim - Non-compete and Non-solicitation Agreements

Whether post-employment restrictive covenants such as non-compete and non-solicitation agreements are enforceable varies widely by jurisdiction.²¹ The majority of states will enforce a non-compete agreement so long as (1) the agreement is supported by adequate consideration, (2) the restrictions are tailored to protect a reasonable business interest, and (3) the restrictions are reasonable in scope.²² Recognizing the significant restrictions that non-compete agreements have on reducing job mobility and employee bargaining power, there is growing momentum in favor of restricting the application of non-compete agreements or to abolish them all together.²³ For example, California, North Dakota and Montana statutorily prohibit most non-compete agreements.²⁴

Another common restriction included in post-employment restrictive covenants is the prohibition of the departing employee to solicit customers or co-employees to leave their employment.²⁵ These non-solicitation or anti-raiding provisions are also generally evaluated on sufficiency of consideration and their reasonableness in light of all the circumstances of each case.²⁶ With this in mind, courts may be more likely to enforce non-solicitation agreements because they do not prevent the employees from working in their profession; rather, they limit which customers departing employees can solicit in their new business ventures.²⁷

¹⁹ “An employee's duty of honesty and faithfulness to his employer is an implied condition of every contract for personal services.” *Marsh v. Minneapolis Herald, Inc.*, 134 N.W.2d 18, 22 (Minn. 1965). This duty encompasses maintaining an employer's confidential information regardless if it is protected by contract or statute. *Jostens v. Nat'l Computer Sys., Inc.*, 318 N.W.2d 691, 702 (Minn. 1982).

²⁰ *Cenveo Corp. v. S. Graphic Sys.*, 784 F. Supp.2d 1130, 1136 (D. Minn. 2011).

²¹ See Brian M. Malsberger, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (10th ed. 2015) for a comprehensive analysis of the state-by-state approaches to restrictive covenants. Compare Fl. Stat. § 542.335 (2016) (recognizing that restrictive covenants protect legitimate business interest) with Cal. Bus. Prof. Code § 16600 (banning most non-compete agreements).

²² See, e.g., *Reliable Fire Equip. Co. v. Arredondo*, 965 N.E.2d 393, 396-97 (Ill. 2011); *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899 (Minn. 1965).

²³ White House *supra* note 2 (surveying state positions); *Ecolab v. Garland*, 537 N.W.2d 291, 294 (Minn. Ct. App. 1995) (“The court dislikes and closely scrutinizes non-compete agreements, because they partially restrict trade.”).

²⁴ Cal. Bus. Prof. Code § 16600; MCA §28-2-704 and 705; N.D.C.C. § 9-08-06.

²⁵ See, e.g., *Steuben Foods Inc. v. Morris*, 01-CV-0521E(Sc), 2002 U.S. Dist. LEXIS 13827, at *4 (W.D.N.Y. May 29, 2002); *WebMD Health Corp. v. Martin*, 824 N.Y.S.2d 767 (Sup. Ct., N.Y. Cty. 2006).

²⁶ Craig A. Courville, *Validity of Nonsolicitation Clauses in Employment Contracts*, 48 LA. L. R. 700-709 (1998)

²⁷ See Susan P. Serota, *Restrictive Covenants in Executive Employment Contracts*, 503 Practicing L. Inst., *Tax Law and Estate Planning Course Handbook Series* 413, 427 (2001).

a. *Legitimate Business Interests*

Whether an employer has a legitimate business interest to enforce a non-compete agreement is generally based on three factors: (1) the relationship between the employee and the employer's customers, (2) the confidential information known or possessed by the employee, and (3) whether the employee has any specialized training.²⁸ Employers have a legitimate interest in preventing employees with strong customer relationships from taking those customers with them when they change jobs.²⁹ Likewise, employers have a legitimate interest to put in place reasonable restrictions to prevent their confidential and proprietary information or specialized training to be used by a competitor in the marketplace.

This module forces students to wrestle with the relationships between the employee and the customer, the use of confidential information, and specialized training of each employee. When considering non-compete and non-solicit restrictions, most students will personally bristle at the thought of having their job mobility restricted, especially early in their careers.

b. *Reasonable Restrictions (Temporal, Geographic, Scope)*

Whether a non-compete agreement is reasonable is generally determined by examining the geographic scope of the limitation, the duration of the competition restrictions, and the scope of services restricted. The geographic region must generally be, at minimum, restricted to the area that the employer does business, and may be more properly limited to the region that the employee actually worked.³⁰ Many courts find specific customer restrictions (i.e. the customers that the employee worked directly with) as reasonable in lieu of a geographic restriction.³¹ In considering the length of a non-compete restriction, courts often inquire into (1) the nature of the business and the employee's occupation, (2) the amount of time it takes for the employer to find and train a replacement, and (3) the amount of time it takes customers to no longer associate the departed employee with the employer.³²

²⁸ William C. Penwell, *Litigating Covenants Not to Compete*, Bench and Bar, Apr. 2002.

²⁹ *Cert. Restoration Dry Cleaning Network, LLC v. Tenke Corp. et al.*, 511 F.3d 535, 547-48 (7th Cir. 2007) (applying Michigan law); *Millard v. Elec. Cable Specialists*, 790 F.Supp. 857, 865 (D. Minn. 1992).

³⁰ *Rollins Burdick Hunter of Wi., Inc. v. Hamilton et al.*, 304 N.W.2d 752, 755 (Wis. 1981) quoting *Chuck Wagon Catering, Inc. v. Raduege*, 277 N.W.2d 787 (Wi. 1979) ("In Wisconsin a covenant is considered reasonable as to territory if, like this covenant, it is limited to the route or customers defendant actually services."). Geographic limitations may become less applicable as businesses that engage in web-based commerce.

³¹ *Gave v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 128 (Ne. 2014); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796 (Minn. Ct. App. 1993).

³² *Overholt Crop Ins. Serv. v. Bredeson*, 437 N.W.2d 698 (Minn. Ct. App. 1989); *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88 (Minn. Ct. App. 1985).

c. *Adequate Consideration*

As with all contracts, a valid non-compete agreement must be supported by consideration. In other words, the employee must be given something of value by the employer in exchange for agreeing to the post-employment restrictions.³³ An offer of new employment is generally sufficient consideration so long as the employee was provided a copy of the non-compete agreement before the time of hiring.

One key question raised in this scenario is whether an employee (Phil Collins), who is required to execute a non-compete agreement during the term of their employment, has received adequate consideration.³⁴ The courts of at least thirteen states including Iowa and Wisconsin hold that continued employment of an at-will employee is sufficient consideration.³⁵ According to this view, the promise of continued employment in an at-will contract is not illusory – neither the employer nor the employee is bound in any way to continue the relationship.³⁶ In sharp contrast, other states such as Minnesota hold that mid-stream non-compete agreements lack consideration unless the employee receives independent consideration such as a promotion or a bonus in conjunction with entering the agreement.³⁷ In other words, the employer provides insufficient consideration by simply maintaining the employee’s employment. This split highlights that the resolution of a non-compete agreement disputes will often depend on which state law is applied.

d. *Scope and Overbreadth*

The impact of an overbroad non-compete or non-solicitation agreements will depend on the jurisdiction of the controlling law. In many states, courts will “blue pencil” a non-compete by enforcing a more restrictive restraint or reform the contract to make it enforceable.³⁸ Even in these states, courts may choose to disregard the entire agreement in instances that the court would effectively have to rewrite the entire agreement to make it enforceable.³⁹ In some states, the courts

³³ *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993).

³⁴ *See, e.g.*, Oregon Rev. Stat. § 653.295 (requiring employers to provide notice of non-compete before employment); R.I. Gen. Laws §5-37-33 (restricting non-compete laws with physicians).

³⁵ *See, e.g.*, *Runzheimer Int’l, Ltd. v. Friedlen*, 862 N.W.2d 879 (Wis. 2015); *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376 (Iowa 1983); *Lake Land Employment Group of Akron, LLC v. Columer*, 804 N.E.2d 27 (Ohio 2004).

³⁶ *Freeman v. Duluth Clinic, Ltd.*, 344 N.W.2d 626 (Minn. 1983); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982).

³⁷ *See* Malsberger *supra* note 20.

³⁸ *See, e.g.*, *Bess v. Bothman*, 257 N.W.2d 791, 795 (Minn. 1977); *Head v. Morris Veterinary Center, Inc.*, 2005 WL 1620328 (Minn. App. 07/12/2005) (unpublished) (blue penciling non-compete restriction for veterinarians from three years to one year).

³⁹ *Gavaras v. Greenspring Media, LLC*, 994 F.Supp.2d 1006 (D. Minn. 2014) (refusing to blue pencil agreement where doing so would require court to rewrite entire agreement).

or legislatures prohibit blue-penciling, leaving the court to find overbroad agreements unenforceable as a matter of law.⁴⁰ Finally, in the jurisdictions that refuse to enforce non-competition and non-solicitation agreements, even narrowly tailored agreements will be deemed invalid and unenforceable.⁴¹

4. *Common Law Claim - Tortious Interference with Business Relations*

The claim of tortious interference with current or prospective business relations is often asserted in situations where an employee with a non-compete agreement moves to a competitor.⁴² To recover for a claim of tortious interference, the plaintiff must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages.⁴³ This claim is unique from the other claims addressed in this scenario because it is asserted against the new employer and not the departing employee. A former employer may arguably assert a claim against the new employer if it can prove the new employer knew of a valid non-compete agreement and still recruited the employee to change jobs in violation of the agreement.⁴⁴

It is important to note that Courts favor the free market and competition; competitors are generally given significant leeway to compete so long as their conduct is not fraudulent or independently unlawful.⁴⁵ As such, a party will not be liable under a tortious interference claim unless the underlying conduct is independently tortious. Furthermore, courts may place higher burdens on plaintiffs seeking relief for interference with prospective business relationships than damages existing contractual relationships.⁴⁶

5. *Statutory Claim – Federal and Uniform Trade Secrets Acts*

⁴⁰ See *Wis. Stat. §103.465*. States that will not reform an non-compete include Arkansas, Georgia, Nebraska, Virginia, and Wisconsin.

⁴¹ California, Montana, and North Dakota legislatures have passes statutes that effectively bar non-compete agreements unless the agreements are part of the sale of a business. See *Cal. Bus. Prof. Code § 16600*; *MCA §28-2-704 and 705*; *N.D.C.C. § 9-08-06*; see also *Dobbins v. Rutherford*, 218 Mont. 392, 396 (1985) (limited non-compete agreements are valid as part of the sale of a business)

⁴² This category of claims is labeled by a variety of names such as tortious interference with contract or prospective contract, tortious interference with business relations or prospective business relations; tortious interference with prospective economic advantage. *Gieseke ex. rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 216 (Minn. 2014).

⁴³ *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363–64 (Minn. 1998).

⁴⁴ *Id.* at 361-62.

⁴⁵ *Gieseke*, *supra* note 41 at 218.

⁴⁶ *Id.* at 218-19.

A trade secret is confidential information that is valuable because it is secrecy and its owner took reasonable measures to preserve its secrecy.⁴⁷ The clear majority of states have enacted the Uniform Trade Secrets Act⁴⁸ and the United States Congress has enacted the federal Defend Trade Secrets Act in 2016.⁴⁹

In general, trade secret disputes involving departing employees who begin to compete in the marketplace revolve around three issues: (1) whether the disputed information is a trade secret, (2) whether the employer took reasonable measures to protect the confidentiality of the information, and (3) whether the information was or will likely be misappropriated. In this class module, the most obvious candidates for trade secrets are software and computer databases,⁵⁰ customer and vendor identities,⁵¹ and marketing and business plans.⁵²

Because a trade secret is, at its core, a secret, the employer must take reasonable steps to preserve the confidentiality of the information.⁵³ These steps include, for instance, maintaining the information in security-protected databases, restricting access of the information only to those who need to know it; using non-disclosure agreements with vendors, customers and employees; and having clear policies in place informing employees of the confidential nature of the information. This is ultimately a fact question that the students should examine in their analysis.

A trade secret is misappropriated if it is wrongfully acquired, used without consent, or disclosed to a third party without consent.⁵⁴ In this module, the primary issues are whether the employees (1) took any confidential and trade secret information, (2) will use the information to compete, or (3) will improperly disclose the information. The evidence suggests that the former employees might have improper motives, but this conclusion is far from certain.

6. Remedies and Damages

⁴⁷ 18 U.S.C. §1839.

⁴⁸ See, e.g. Illinois (Ill. Stat. Ch. 140 § 351-59); Indiana (Ind. Code. Ann. § 24-3-1); Iowa Code § 550.1 *et seq.*; Minnesota (Minn. Stat. § 325C.01 *et seq.*); Ohio (Ohio Rev. Code § 1333.61 *et seq.*); Wisconsin (Wis. Stat. § 134.90 *et seq.*).

⁴⁹ 18 U.S.C. § 1890 *et seq.* (2016), Defend Trade Secrets Act.

⁵⁰ See *Aries Info. Sys., Inc. v. Pac. Mgmt. Sys. Corp.*, 366 N.W.2d 366 (Minn. Ct. App. 1985), *rev. denied* (Jun. 27, 1985) (affirming that computer software was a trade secret).

⁵¹ See *Sys. Dev. Servs., Inc. v. Haarmann*, 907 N.E.2d 63 (Ill. Ct. App. 2009) *rev. denied* (Sept. 30, 2009) (holding that customer lists were not trade secrets because they the information could easily be obtained from the internet, telephone and chamber of commerce directories, and other legitimate sources); *Internet Inc. v. Tensar Polytechnologies, Inc.*, No. 05-317, 2005 WL 2453170 at *8 (D. Minn. 2005) (holding that plaintiffs have a “high burden to overcome” to show customer lists constitute trade secrets under Minnesota law).

⁵² *Eaton Corp. v. Giere*, 971 F.2d 136 (8th Cir. 1992) (affirming permanent injunction); *Children’s Broad. Corp. v. Walt Disney*, 357 F.3d 860 (8th Cir. 2004) (affirming injunction).

⁵³ 18 U.S.C. § 1839(3)(A).

⁵⁴ 18. U.S.C. §1839(5).

In cases where an employer faces the potentially illegal competition by former employees, the employer will often initiate a lawsuit to seek equitable and legal relief. The initial primary goal is usually to prevent the former employee from competing and working for the new employer as quickly as possible. To accomplish this result, the former employer will need to initiate a lawsuit and bring an accompanying motion for a temporary restraining order or a motion for a preliminary injunction.⁵⁵

The goal of both motions is to restrain the former employee from competing during the pendency of the litigation. Parties will often quickly move the court for a temporary restraining order or preliminary injunction.⁵⁶ A temporary restraining order is an expedited motion designed to maintain the status quo (before the employee started competing) of the matter in controversy and prevent irreparable harm until a preliminary injunction hearing can be held. A preliminary injunction is designed to maintain the status quo until the matter can be resolved on its merits. The party seeking a preliminary injunction must generally prove that: (1) there is a substantial likelihood of success on the merits of the case, (2) the asserting party will suffer irreparable harm if the injunction is not granted, (3) the threat is immediate, (4) the balance of harms weighs in favor of the party seeking the preliminary injunction, (5) there is no adequate available legal remedy, the (6) grant of an injunction would serve the public interest.⁵⁷

Courts will often consider the breach of a noncompetition agreement as risking an irreparable injury even where monetary damages may be available because it risks injury to an ongoing relationship between the employer and its customers.⁵⁸ Furthermore, trade secret statutes specifically authorize courts to grant injunctions to prevent actual or threatened misappropriation of trade secrets.⁵⁹

Notably, employers who bring these types of motions need to have sufficient evidence to convince a judge that the employers will prevail on the merits. In the facts of the module, the employer may not have sufficient information to show that the former employees are actually using trade secrets or violating confidences of their former employer, but the employer does have evidence that the employees are inclined to do so.⁶⁰ The employer in this module has a strong argument that the

⁵⁵ 18 U.S.C. § 1836(3)(A). Plaintiffs may also seek civil forfeiture and other equitable and legal relief. *See* 18 U.S.C. § 1836(2).

⁵⁶ Fed R. Civ. P. 65.

⁵⁷ *Winter v. NRDC, Inc.*, 555 U.S. 7, 20-21 (2008).

⁵⁸ *Cherne Indus., Inc. v. Grounds Assocs., Inc.*, 278 N.W.2d 81 (Minn. 1979); *Adv. Bionics Corp.*, 630 N.W.2d 438, 451 (Minn. Ct. App. 2001); *Overholt Crop Ins. Service Co. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (availability of damages does not preclude equitable relief).

⁵⁹ 18 U.S.C. § 1836(b)(3). Notably, the Federal Defend Trade Secrets Act specifically prohibits injunctions from “preventing a person from entering into an employment relationship.” 18 U.S.C. § 1836(b)(3)(A)(i).

⁶⁰ *See Canteen Vending Servs. v. Mfrs. & Traders Trust Co.*, No. 98-CV-0314E, 1998 WL 268858, at *2 (W.D.N.Y. May 18, 1998) (“[W]here ...the former employee is not bound by a restrictive covenant and has not been shown to

employees are violating their non-competition agreements, assuming the agreement restrictions are reasonable and enforceable under the relevant state law. Finally, a party seeking interim injunctive relief may be required to post a bond to cover the costs and damages sustained by any party found to have been wrongfully enjoined or restrained (i.e. the former employees and new employer).⁶¹

Although the injunctive orders are limited in nature, they are often dispositive on the outcome of the lawsuit because they drive the parties to a settlement. This is, in part, because the court makes a preliminary ruling on the apparent merits of the case - that there is or is not a likelihood that the former employees and/or new employer are violating their legal obligations. Furthermore, the issuance of an injunction places the employee and new employer in a bind. The employee effectively becomes unemployed and the new employer loses its new hire.⁶² If the employee should win the initial injunction, the former employer may be less willing to invest in a lawsuit that may be a losing cause. It will also be forced to compete with the former employee in the marketplace during the lawsuit. Finally, the court can split the difference by allowing the departing employee to work for the new employer in a limited scope or explicitly without access certain confidential and proprietary information.

Should the lawsuit be resolved on its merits, the former employer may be entitled to monetary damages and equitable relief. Such damages might include actual damages for lost business, unjust enrichment to the defendants, or a reasonable royalty for the misappropriation of a trade secret.⁶³ If the employer proves the defendants willfully and maliciously misappropriated the trade secrets, it may be entitled to double its actual damages under trade secrets statutes.⁶⁴

Likewise, all parties may be entitled to attorney fees under trade secrets statutes, contracts and, in some instances, common law.⁶⁵ Notably, these contracts and employers may also authorize the former employee to recover his or her attorney fees if the employee prevails or shows that the claim of misappropriation was brought in bad faith.⁶⁶ Likewise, former employers who thrust new

possess trade secrets, an allegation that the former employee breached his duty of loyalty while employed by his former employer does not, in and of itself, provide a basis for granting injunctive relief following termination of the employment relationship").

⁶¹ Fed. R. Civ. P. 65(c).

⁶² See Matt McKinney, *Ridder Resigns from Start Tribune; Pioneer Press Lawsuit Settled*, Star Tribune, Dec. 8, 2007; Richard Perez-Pena, *Judge Orders Publisher to Leave Job for a Year*. New York Times, Sept. 19, 2007.

⁶³ See, e.g., 18 U.S.C. § 1836(3)(B).

⁶⁴ See, e.g., 18 U.S.C. § 1836(3)(C-D); Minn. Stat. § 325C.03(b).

⁶⁵ 18 U.S.C. § 1836(3)(C-D); *Medtronic v. Hughes*, 2011 WL 134973 (Minn. Ct. App. Jan. 1, 2011) (awarding over \$600,000 in attorney fees to plaintiff enforcing non-compete agreement, even where the court "blue penciled" the agreement).

⁶⁶ 18 U.S.C. § 1836(3)(D).

employers into litigation regarding the enforceability of non-competition agreements might open themselves to counterclaims for damages and recovery of attorney fees.⁶⁷

The following chart identifies some of the primary differences and similarities between the various claims identified in this article, and may be useful in guiding classroom discussion.

⁶⁷ *Kallok*, *supra* note 42 at 363-64 (affirming award to defendant employer for judgment of \$111,221.30 in attorney fees and expenses)

Claim	Legal Basis	Defendant	Remedies	Attorney Fees	Punitive/ Exemplary Damages
Duty of Loyalty	Common Law	Employee	Injunction & Damages	No	Punitive if standard is met
Non-Compete and Non-solicitation Agreement	Contract – Varies by jurisdiction	Employee	Injunction & Damages	If provided for in contract	No
Tortious Interference With Contract	Tort & Contract	New Employer	Injunction & Damages	No	Punitive if standard is met
Trade Secrets	Statutory	Employee & New Employer	Injunction, Damages, Royalties	Yes if willful misappropriation or plaintiff sues in bad faith	Double damages are possible

C. *Business Options and Strategy*

Finally, the module requires students to consider the practical business effect of the departure of key employees to a competitor. They are asked to:

1. assess and manage the risk to the employer,
2. conduct a liability and damage analysis,
3. consider the impact on customer service and client relationships,
4. identify specific actions to shore up the customer relationships and continue to provide essential services to the customers,
5. evaluate the impact on the company’s ability to provide services,
6. consider how to compete in the marketplace against an aggressive competitor with new capacities, and
7. determine proactive actions to ensure that confidential, proprietary information and maintain and protect as business relationships in the future.

The discussion of business options provides the instructor a good opening to discuss the expense and energy that is consumed by litigation. If an employer is suing a former employee, that employee might not have the financial ability to hire an attorney and defend him or herself. Beyond the attorney fees, litigation has other costs. In these types of cases, the plaintiff’s customers and vendors are pulled into the litigation through the discovery process, which may disrupt the employer’s relationships. Finally, the employer needs to determine what is actually at stake. Often times the best solution is to simply outcompete the former employee in the marketplace.

V. CONCLUSION

The departure of critical employees are challenging moments for any company because those employees have established strong relationships with their employers' business partners and customers, know the employers' trade secrets and confidential information, and their absence creates a vacuum that needs to be filled. Whether the former employer can prohibit the employee from competing or restrict the information that that employee can use depends on the specific facts of the case. Hopefully this module helps instructors of business law create a dynamic, real-world learning environment where students can grapple with these intersecting and competing interests with an incomplete and ambiguous set of facts.

APPENDIX A: FACTUAL BACKGROUND AND ASSIGNMENT HANDOUTS

Document 1 – Confidential Memorandum and Group Assignment Requirements

TO: The Leadership Team of Midwest Copy Supply Co.
FROM: Bob Hipkins, CFO
RE: Departure of Key Employees and Risk to Key Business Unit – Emergency Meeting

I wish I could welcome everyone back from a wonderful extended July 4th holiday, but unfortunately, I have bad news. Over the weekend, one of our key business units, the Digital Data Management Group (“DDMG”), has fallen under attack. We need to act immediately to save our business.

Company Background

Midwest Copy Supply Co. (“MCS”) has a long history as a leading photocopier supplier and service provider across the Upper Midwest. MCS has 124 employees in 12 offices across Minnesota, Iowa and Wisconsin, and will be opening two offices in Illinois this year. Recognizing that the digital revolution is radically changing how businesses use, store and manage documents, MCS has invested heavily in DDMG over the past three years. We are quickly transitioning from a company that sells and services photocopiers to a digital management company.

DDMG is designed to provide our clients a seamless system to scan, organize, store and manage digital documents. It is composed of three units: software and database design (which develops proprietary software that can be tailored to our clients’ needs), document management (which helps companies shift from a paper business model to a business model built on electronic data, and sales (which acquires new customers). DDMG has quickly become the fastest growing revenue source for MCS and, according to our internal studies, will drive 75% of the company profits in five years. If we can position MCS as the leader of electronic data management, we firmly believe that MCS can grow sales from a \$72 million to a \$250 million a year in five years. If MCS fails to make the transition, we will all be in deep trouble.

The next two years will determine who the winners and losers of this new digital environment. New start-ups have struggled to enter the market because they do not have the expertise to sell, service and maintain copiers and are finding it difficult to create business relationships with our

long-term customers. Because of our strategic efforts, we are far ahead of our key competitors including Business Access Documents, Inc. (“BAD”), which have stuck with the paper photocopy model. MCS recently won two significant contracts with regional hospitals because of our digital document expertise. We have also made inroads with two of BAD’s best legal customers.

The Problem

Over the past 72 hours we learned of a major risk to our company - three of our key DDMG employees quit their employment with MCS and began working with BAD. Most of you are aware that one of our long-term senior software engineers, Phil Collins, retired two months ago. Likewise, Sara Tompkins, a third-year data management employee in the Southern Minnesota and Wisconsin territory, and Prokesh Habeek, a second-year Milwaukee-based DDMG sales employee, resigned last Friday. All three are now working for DDMG. Combined, these three employees hold the keys to our castle. They know all of MCS’s secrets, its software code, its technical and business plans, and its pricing and profit models. They have strong relationships with many key clients and prospects. If they bring all of their knowledge to bear, they will be able to turn BAD into real competitor in months instead of years.

It appears that the three have been planning their move for quite some time. On Saturday, BAD released a ¼ page add on all of our major market newspapers announcing the roll out of BAD’s new “Digital Data Group”. Tompkins and Habeek have aggressively advertised their move on social media. We have also received inquiries from confused and upset customers who have been contacted by the three departing employees.

MCS rolled out a standard non-compete agreement with all of its employees three years ago. Collins signed the agreement six years into his employment. Tompkins signed the agreement when she started with the company. We are searching desperately but have been unable to locate Habeek’s noncompetition agreement. Habeek asked to review his personnel file six weeks ago and we suspect that he may have stolen the paper copy of the agreement. Tompkins and Habeek wiped their company phones before turning them in. A flash drive was plugged into Tompkins’ computer three times last month; we don’t know if any data was transferred. Habeek has also not turned in his “Sales Management Guide” that contains the names of MCS’s customers, the profit margin guidelines, customer discounts, and bid guidelines. This information could be lethal in the hands of BAD.

Discovered Documents

I have attached the following four key documents: (1) a Linked-In announcement of Prokesh Habeek, (2) a Facebook post of Sara Tompkins; (3) an e-mail from the managing partner of a key law firm customer; and (4) Excerpts from MCS's non-compete agreement.

Your Assignment – Presentations and Strategy Meeting

The leadership team must promptly assess MCS's potential legal and business responses to these solutions. You are being broken into four groups. Each group has been assigned the task to research and report back on one of the following legal claims: (1) duty of loyalty and confidentiality¹ (2) breach of a non-competition and non-solicitation contract, (3) tortious interference with business relations, and (4) misappropriation of trade secrets.

Please focus your analysis solely on the specific claim assigned to your group. The other groups will address the other claims.

When we next meet (next class period), each group will need to deliver a professional 5-7 minute presentation that (1) explains the nature of the legal issue and identifies the essential elements of the claim, (2) discusses the merits (strengths and weaknesses) of the claim as it relates to our situation, and (3) makes a recommendation for the company's next steps. I want at least two group members must speak. Finally, everyone needs to be prepared to thoughtfully discuss this legal terrible situation and what MCS should do next. We need to work together to determine how we are going to respond.

I cannot understate the importance of this project. The future of our business is at stake! Get to work!

Document 2 – Linked-In Post by Sales Employee (Prokesh Habeek)

I am pleased to announce that I have recently joined the newly formed Digital Data Group for Business Access Documents as a Senior Salesperson. BAD is the upper-Midwest's leading provider of digital document management services for businesses and government entities. BAD has proprietary software systems that we can be tailored to any businesses' needs. We can digitize your paper filing system.

Business Access Documents is business savvy. We have a unique competitive advantage of our competitors. We make the following promises to you. We know our competitors' technology and their weaknesses! Our products and services are far superior. We know how our competitors overcharge their customers! We will never include hidden costs and mark-ups that our competitors hide in their technology and service agreements.

Business Access Documents is the best digital management company in the Midwest. Trust me, I know because I used to work for the competitors! I know their pricing, their technology, their capacities and their shortcomings! I know what you need! Business Access Documents will provide better service for less. We will not be undersold.

Please e-mail or call me if you have any questions about BAD or our competitors.

Document 3 – Facebook Post by Data Management Employee (Sara Tompkins)

Guess what? I left my stupid dead-end job at a second-rate copy photocopy company (Midwest Sucky Supply Co.) for a cutting-edge data management company – Business Access Documents. Yeah! It was liberating to tell my idiot boss that I quit. He almost started to cry. Boo hoo. Business Access Documents is awesome. My work is more challenging, and my pay almost doubled!!!

The best part is that my two best co-workers from MCS also jumped ship to Business Access Documents! We know everything (I mean absolutely everything) about MCS and are going to crush it. Why would anyone want to work with a company when its three best employees left work for a competitor? No one, that's who. BAD is going to kick MCS's butt from Minneapolis, to Milwaukee to Chicago!!!! I can't wait to see my old boss cry for real when we do.

Document 4 – Client E-Mail

TO: Bob Hipkins (bhipkins@MCS.com)
FROM: Louise Delgado (LDelgado@dsk.com)
DATE: Saturday, July 4, 10:00 am
RE: What's Going On?

Bob,

I'm writing because I'm seriously confused about what's going on with your company. On Friday afternoon, I received a phone call from Sara Tompkins. She said that all of MCS's key data management employees left MCS and moved to Business Access Documents. She then asked me to move all of our business to BAD. She promised that BAD would be cheaper and better than MCS. At the end of our conversation, she said, "MCS is going to be out of digital management business in six months."

Although I couldn't believe her moxie, I have come to trust Sara over the past two years that she guided our firm's digital data management transition. Did you really just lose your best employees to BAD? Is MCS going to be able to continue to meet our digital data management needs? Who will replace Sara now that she has left MCS? Will MCS change its pricing structure if BAD offers a more competitive bid? We need answers immediately.

Just know that I have also heard from two other law firms who receive similar sales pitches from Sara. You had better get this under control or you are going to be in trouble.

I hate to write this note but, given our long history, I wanted you to know the rumors and make sure that you will be able to meet my firm's needs. Get back to me soon!

Best regards,

Louise Delgado

Managing Partner

Delgado, Smith and Krause, LLC

Document 5 – Excerpts from Non-Compete and Non-Solicitation Agreement

Employment Restrictions

- A. *Full Time Commitment.* During the period of the employment relationship, Employee will devote his full-time and energy to furthering Employer's business and will not pursue any competitive business activity without Employer's prior written consent.

B. *Post-Employment Restrictions.* For a period of one (1) year after the employment relationship ends, whether voluntarily or involuntarily, Employee shall not:

1. directly or indirectly communicate with, contact, solicit, offer to provide, transact business with, provide, or sell any service or product similar to those which employer sells.
2. directly or indirectly work for a Competitor, which is defined as any person or entity that (a) is involved in competitive activities with the Employer, and (b) is located within a 30-mile radius of any place of business operated by Employer.
3. directly or indirectly solicit a customer that Employee worked with or serviced while employed by Employer.
4. directly or indirectly solicit any of Employer's employees for the purpose of hiring them or inducing them to leave their employment.

APPENDIX B – GROUP WORK GUIDES

Group One Handout: Duty of Loyalty

For Presentation

- Identify an employee's common law duty of confidentiality.
- Identify an employee's common law duty of loyalty.
- What is an employee prohibited from doing during employment?
- Based on what you know, do you think MCS will be able to prevail either of these claims?

For Further Classroom Discussion

- What additional information does MCS need to make a fully-informed decision? How do we gather that information?
- What remedies does the company have?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?
- What actions do you suggest MCS takes with respect to its Digital Data Management Group?
- What other actions do you suggest MCS takes?

Group Two Handout: Non-Competition and Non-Solicitation Contract

For Presentation

- What is the standard used to determine if a non-compete agreement is enforceable?
- What specific activities does the contract prohibit during and after employment?
- Based on what you know, do you think MCS will be able to prevail on a breach of the non-compete agreement claim?

For Further Classroom Discussion

- Does the contract apply to Phil Collins (even though he signed the agreement after being employed for years), Sara Tompkins, and Prokesh Habeek differently?
- What will happen if a court determines that the agreement is overbroad?
- What additional information does MCS need to make a fully-informed decision? How do we gather that information?
- What remedies does the company have?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?

- What actions do you suggest MCS takes with respect to its Digital Data Management Group?
- What other actions do you suggest MCS takes?

Group Three Handout: Tortious Interference with Contractual Relations

For Presentation

- What are the elements of the claim?
- Where is the line between lawful competition and illegal tortious interference?
- Who would be the defendant?
- Based on what you know, do you think MCS will be able to prevail on this claim?

For Further Classroom Discussion

- What additional information does MCS need to make a fully-informed decision? How do we gather that information?
- What remedies does the company have?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?
- What actions do you suggest MCS takes with respect to its Digital Data Management Group?
- What other actions do you suggest MCS takes?

Group Four Handout: Trade Secrets

For Presentation

- What is a trade secret?
- Identify potential trade secrets at issue.
- What is misappropriation?
- Identify potential misappropriation at issue.
- Based on what you know, do you think MCS will be able to prevail on this claim?

For Further Classroom Discussion:

- What remedies are available?
- What additional information does MCS need to make a fully-informed decision? How do we gather that information?
- What remedies does the company have?
- What actions do you suggest MCS takes with respect to the departed employees?
- What actions do you suggest MCS takes with respect to its customers?
- What actions do you suggest MCS takes with respect to its Digital Data Management Group?
- What other actions do you suggest MCS takes?

APPENDIX C – SUMMARY TEACHING NOTES FOR CLASSROOM DISCUSSION

Group 1: Duty of Loyalty

Based in common law

Former employee is the defendant

Competition v. preparation to compete

Current employees cannot

- use employer resources to compete or prepare to compete
- prepare to compete during working hours
- actively solicit employer's customers while employed
- actively advertise competitive services while employed

Current employees can, outside of work time:

- prepare to compete (set up new business, prepare advertisements). Key dichotomy between competition and preparation to compete
- develop own competitive materials

Confidential and Trade Secret Information

- Employees cannot use employers confidential or proprietary information for own benefit or benefit of another after employment ends.
- Potential confidential information includes: software design, customer information and demographics, and marketing and financial information
- Employees can use general information and skills gained during work for own benefit
- Whether information is confidential is often a fact question

Remedies

- Equitable – injunction-based
- Damages
- Possible punitive damages

Group 2 – Noncompetition and Nonsolicitation Agreement

Based in common law – contract

Former employee is the defendant

Enforceability depends on jurisdiction and terms of agreement

- Some states generally prohibit non-compete and non-solicitation agreements (CA, MT, WI)
- Difference between non-competition (cannot engage in competitive conduct) and non-solicitation (cannot solicit employees or customers to leave)
- Most states will enforce if agreement is reasonable and tailored to employer's legitimate business needs and will consider (1) geographically reasonableness and (2) temporal reasonableness
- A customer non-solicitation instead of geographic limitation may be reasonable
- If the agreement is overbroad, some courts will reform or "blue pencil" the agreement to make the overbroad provisions more limited and enforceable. Courts in some jurisdictions will find the entire agreement unenforceable
- Are any of the provisions overbroad? If so, how?

Consideration issues

- Some jurisdictions will not enforce a non-compete agreement implemented mid-stream employment without separate consideration (MN, IL)
- Some jurisdictions will enforce a non-compete agreement implemented mid-stream employment without separate consideration (IA, IL)
- This law will may be dispositive for this lawsuit because software engineer (Collins) did not sign agreement until 6 years into employment. Company will need to determine if additional consideration was provided.

Documentation issues

- The non-compete for the sales employee (Habeek) is missing
- Can we enforce the agreement if we don't have a copy? What if Habeek stole it? This might be evidence of bad faith.

Remedies

- Equitable – prohibiting departing employee from working at new employer
- Damages
- Possible attorney fees if the agreement allows for it
- No punitive damages because contract-based claim

Group 3 – Tortious Interference with Contract

Based in common law

New employer is the defendant

Courts generally encourage competition and efficient breaches of contracts.

Elements of a claim

- Existence of an enforceable contract
- New employer must know of non-compete agreement

- New employer must cause employee to breach agreement
- Independent wrongdoing

Remedies

- Equitable – prohibiting departing employee from working at new employer
- Damages
- Possible punitive damages

Group 4 – Trade Secrets Act

What do we still need to learn / know?

- Company policies / handbook (may define confidential or trade secret information and address duty of loyalty)
- Search employee emails and computers
- Facebook and Linked-In review?
- Determine what was downloaded to Sara Tompkins' flash drive
- Talk with other employees.
- Talk with customers.

What confidential information is at issue?

- Sales policies
- Financial information, profit margins, pricing structures, etc.
- Software and hardware (more likely protected)
- Customer names and information (less likely protected)
- What measures did MCS take to preserve confidential information? Did MCS protect it sufficiently?

How should MCS shore up its current client relationships?

- Contact each one customer personally
- Establish new employee contact
- Hire new employees? Reassign remaining employees?

How does MCS proceed with departed employees?

- Preserve data
- Threaten or initiate lawsuit. Possible motion for temporary restraining or preliminary injunction. Consider cost of lawsuit and significant amount of energy and attention it will take.
- Demand return of all property
- Cease and desist letter
- Identify confidential information and demand that BAD does not use it
- Demand all employees cease work at BAD based on non-compete agreement (best argument with Tompkins, possible consideration problem with Collins, where is Habeek's signed agreement)?

How should MCS protect confidential and trade secret information going forward?

- Passwords, limit access to information
- Better control measures
- Review of non-compete agreements and get back-up copies
- Establish policies for confidential information
- Establish and monitor social media policies

From a young professional's prospective

- How would you feel if you were required to sign a non-compete agreement?
- Should non-compete agreements be used with lower level employees?
- Do non-compete agreements unfairly lock employees into their jobs?
- Should the enforcement of a non-compete differ if an employee quits or is fired?

APPENDIX F – GRADING RUBRIC FOR GROUP PRESENTATION

Group: _____

Overall Grade: _____

	Excellent	Very Good	Satisfactory	Needs Improvement	Does Not Meet Requirement
Delivery					
Time Requirement					
Organization					
Professionalism					
Accurate Explanation of Legal Claim					
Analysis of Merits of Claim					
Quality Responses to Questions					

Additional Comments:

SUBMISSION GUIDELINES

As a peer-reviewed law journal whose primary influence and outreach is related to those who teach business law, the *Rocky Mountain Law Journal* requires that all submissions comply with *The Bluebook: A Uniform System of Citation* (20th Edition). The *Journal* welcomes submissions from other disciplines as well, but compliance with the Bluebook is mandatory.

I. MANUSCRIPT SUBMISSION PROCESS

Submissions should be single-spaced and in compliance with the directions found at www.rockymountainlawjournal.org

II. COPY

As a peer-reviewed law journal whose primary influence and outreach is related to those who teach business law, the Rocky Mountain Law Journal requires that all submissions **substantially** comply with *The Bluebook: A Uniform System of Citation*. The Journal welcomes submissions from other disciplines as well, but compliance with the Bluebook is mandatory. **If you are not familiar with Bluebook, please consult with someone who does before submitting to our journal, otherwise the article will likely not be considered for review and publication and could be desk rejected without review.**

There is no minimum or maximum number of words. We are quite flexible otherwise, but look at previous editions of the journal for guidance on format, etc. We recommend reviewing previous editions of the Rocky Mountain Law Journal for compliance with style and format, in addition to the checklist below. **While we recognize that utilizing the Bluebook can be challenging, the author is primarily responsible for compliance with the latest version of *The Bluebook*.** In addition, here is a checklist of items before submission:

- A. Papers should not normally be longer than 20 single-spaced 8.5 x 11 sized pages, including footnotes, which are also single-spaced.
- B. Use 12 point Times New Roman Font.
- C. Use 10 point Times New Roman Font for footnotes (use single line spacing for all and between all footnotes).
- D. Skip lines between section titles.
- E. Skip lines between paragraphs.
- F. In general, major sections, especially an Introduction and Conclusion, are underlined and are left justified.
- G. In general, subsections are italicized and are also left justified.
- H. Use full justification for the rest of the article, but not for footnotes.
- I. Do not indent paragraphs.
- J. Do not number pages. They will be inserted in the editing process.
- K. Margins: 1 inch on all sides.
- L. Title should be **bolded** and **SMALL CAPITAL LETTERS** (i.e. “small caps”).
- M. There should be one whole space () after each footnote number and before the first letter of the reference itself, including when using *Id.*

III. ACTION

Consideration for publication of manuscripts is normally made beginning in August following the national meeting of the Academy of Legal Studies in Business (ALSB) until around the annual meeting of the Rocky Mountain Academy of Legal Studies in Business each fall. Manuscripts are encouraged to be submitted via our website beginning in early August to allow sufficient time for distribution to the reviewers. Check our website as deadlines may be set accordingly and posted there. Submissions not selected for publication are not required to provide feedback. Accepted manuscripts are published electronically via our website at www.rockymountainjournal.org

-END-