

SILGUERO v. CRETEGUARD, INC: California Employer's Agreement to Enforce Prior Employer's Unenforceable Non-Compete Agreement Creates Potential Wrongful Termination Claims

A decade ago, in the case *D'Sa v. Playbut*, a California Court of Appeal held that the termination of an employee for his failure to sign a non-competition agreement constituted wrongful termination in violation of public policy. In July 2010, a California Court of Appeal increased the scope of the state's public policy regarding unenforceable non-competition agreements. In *Silguero v. Creteguard, Inc.*, the court held that an employer may be found liable for terminating an employee by ratifying the employee's unlawful non-competition agreement with a previous employer. The subsequent employer may be held liable for wrongful termination in violation of public policy merely by recognizing the non-competition agreement with the former employer - despite the fact that the subsequent employer did not generate the agreement, nor was a party to the agreement.

In *Silguero*, the issue presented was whether a terminated sales employee, Rosemary Silguero, had a rightful claim for wrongful termination (in violation of public policy) against her new employer when it terminated her after receiving notice that Silguero had signed an agreement barring her "from all sales activities for 18 months following either departure or termination." The subsequent employer terminated Silguero's employment out of "respect and understanding with colleagues in the same industry," in spite of its belief that "non-compete clauses are not legally enforceable here in California."

More specifically, Silguero's Complaint alleged that she had been forced into signing a Confidentiality Agreement with Floor Seal Technology, Inc. ("FST") in 2007. This agreement prohibited her from all sales activities for 18 months after her termination or departure from FST. Silguero was later terminated and soon found employment with Creteguard, Inc. FST contacted Creteguard and "requested the cooperation and participation of [Creteguard] in enforcing the

confidentiality agreement, including those provisions prohibiting Silguero from all sales activities for 18 months following Silguero's departure or termination from FST.”

Therefore, Creteguard’s CEO told Silguero that it was terminating her employment, by stating: “it has been brought to my attention...that you have signed a confidentiality/noncompete agreement with your past employer[.] [W]e regret to inform you that [Creteguard] is unable to continue your employment effective today 11/14/07[.] [A]lthough we believe that noncompete clauses are not legally enforceable here in California, [Creteguard] would like to keep the same respect and understanding with colleagues in the same industry.”

Silguero alleged that the noncompetition agreement enforced by Creteguard was void pursuant to section 16600 of the California Business and Professions Code, that no statutory exception to section 16600 applied, and that Creteguard's “enforcement and ratification of an illegal and void non-compete agreement ... violated ... the public policy of the State of California.”

After opposition and a hearing on the motion, the trial court awarded Creteguard \$23,532.50 in attorney fees and costs. But Silguero appealed and had the result reversed in her favor. The Court of Appeal instead found that Creteguard’s ratification of the agreement, despite believing that “noncompete clauses [were] not legally enforceable ... in California,” was “tantamount to a no-hire agreement” by which Creteguard agreed not to hire FST’s employees. The court further reasoned that such an agreement unfairly limit[s] the mobility of an employee” because FST “should not be ‘allowed to accomplish by indirection that which it cannot accomplish directly.’”

Based on law stemming from cases like *D’Sa v. Playbut* in 2000, California employers should already understand that they face potential liability for not hiring or terminating an employee who refuses to sign an illegal non-competition agreement. The *Silguero* decision expands this notion by prohibiting an employer from terminating an employee (and also, by extension, refusing to hire an

applicant) because the employee has signed a non-compete or non-solicitation agreement that is unenforceable under California law.

The *Silguero* holding requires employers to more carefully analyze an applicant's contractual relationship with a former employer. The determination to hire an applicant or restrain an employee should not be based on an unenforceable covenant not to compete. As such, employers need to obtain sound legal advice when contemplating hiring someone who has signed a non-competition agreement.