

FEBRUARY 23, 2010

Recently, New York courts have continued to uphold the longstanding “faithless servant doctrine,” which provides protection for employers who are subjected to improper actions by disloyal employees. Under the faithless servant doctrine, a faithless employee generally forfeits the right to all compensation for services performed after his or her first disloyal act. Disloyal acts that have resulted in an employee’s forfeiture under this rule include:

- using or divulging to third parties the employer’s confidential documents and information which were acquired during employment (*Schanfield v. Sojitz Corp., et al.*, 07 Civ. 9716 – S.D.N.Y. September 2009);
- committing acts of sexual harassment in the workplace (*Astra USA, Inc. v. Lars P.E. Bildman, et al.*, 455 Mass. 116 – October 2009, applying New York law); and
- failing to comply with a policy mandating disclosure of director’s fees and compensation earned by an employee by serving on the boards of third parties (*Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184 – 2d Cir. 2003).

Last month, in *Markbreiter v. Feinberg, et al.* (09 Civ. 5573 – S.D.N.Y. January 2010), the United States District Court for the Southern District of New York again emphasized New York’s rigorous application of the faithless servant doctrine. In *Markbreiter*, the plaintiff, who formerly worked in an administrative/secretarial capacity for the defendant physicians, brought an action for allegedly unpaid overtime under the Fair Labor Standards Act and the New York Labor Law. The defendants filed an affirmative defense and counterclaims based on the faithless servant doctrine, alleging that the plaintiff had engaged in disloyal acts. Specifically, the defendants alleged that the plaintiff, during her working hours, had wrongfully diverted patients from the defendants to other physicians in exchange for kickbacks. Among other things, the defendants sought the remedy of equitable forfeiture by the plaintiff of any allegedly unpaid overtime. Thereafter, the plaintiff moved to dismiss the defendants’ counter-claims for lack of subject matter jurisdiction and to strike the affirmative defense as legally insufficient.

Denying the plaintiff’s motion in all respects, the Court held, *inter alia*, that:

“Under the faithless servant doctrine, a faithless servant forfeits the right to compensation, at least for the services that are tainted by the dishonesty and perhaps more broadly. Defendants therefore have a cause of action against plaintiff for damages for her alleged dereliction of duty. So, even if such a claim is not an ‘affirmative defense’ in the sense that it is an independent bar to plaintiff’s recovery ... it does give rise to a partial defense on a theory of recoupment or setoff.”

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*Reminder regarding applicants for employment:*

Under Section 380-c of New York’s General Business Law, employers who conduct background checks (“investigative consumer reports”) involving criminal history on applicants for employment are required to provide each such applicant with a copy of Article 23-A of the New York Correction Law. Article 23-A governs the employment of persons previously convicted of criminal offenses. If the background check reveals a criminal record, the employer must provide the applicant with a second copy of Article 23-A.

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If you have any questions regarding the foregoing or would like to receive copies of the cases or statutes referenced herein, please contact:

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