BY JEFFREY W. KRAMER

The Risks of Recruiting At-Will Employees

THE CALIFORNIA SUPREME COURT recently provided additional guidance on this question: Is it a tort to hire away a competitor's at-will employees? In *Reeves* v. *Hanlon*,[1] the court ruled that "a plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage."[2] In other words, interfering with an at-will employment relationship is actionable when the interference involves an independently wrongful act. In establishing this law, the court disapproved *GAB Business Services, Inc.* v. *Lindsey & Newsome Claim Services, Inc.*,[3] insofar as that case holds that an employer cannot be liable for interference with at-will employment contracts. In addition, *Reeves* breaks new ground in upholding an at-will employment interference claim that was brought by an employer rather than by an employee.

Reeves offers new guidance to employers, but recruiting a competitor's employees remains a legal risk. To compete successfully, however, businesses must recruit and retain valuable employees. Disagreements about what constitutes fair play in this arena often reach the litigation stage, and courts have struggled to define the limits of permissible conduct. One issue in many decisions is at-will employment, which implies the absence of a full-fledged contractual relationship deserving of protection. Another issue is the distinction, which has not always been clear, between the torts of interference with contract and interference with prospective economic advantage. A third issue is the tension between two important California public policies, one being the protection of businesses from unfair competition and the other being the protection of employee freedom to change employers. California's appellate courts have reached varied conclusions in attempting to address these issues.

On the first issue—at-will employment—California courts have long held that commercial contracts terminable at will are contracts nonetheless and deserve protection from third-party interference.[4] By the same reasoning, some courts have found at-will employment agreements deserving of the same protection. In a 1970 decision, *Kozlowsky* v. *Westminster National Bank*,[5] a discharged bank president sued the bank for breach of contract and a director of the bank for interference with his employment contract. In affirming judgment in favor of the bank but reversing judgment in favor of the director, the court of appeal stated that "the fact that the Bank was privileged to discharge plaintiff at any time does not necessarily privilege a third party unjustifiably to induce the termination."[6] In reaching this conclusion, the court did not distinguish between the torts of interference with contract and interference with advantageous relationships. Indeed, at the time and for many more years it was by no means clear from the case law that there was any meaningful difference in these causes of action.

The substantial confusion between the torts of interference with contract and interference with prospective economic advantage was addressed by the California Supreme Court in 1995 in its landmark ruling, *Della Penna* v. *Toyota Motor Sales USA*.[7] In *Della Penna*, the court explained that courts should "firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant."[8] The court declared that to prevail for wrongful interference with prospective economic advantage, a plaintiff must plead and prove the defendant's conduct was "wrongful by some legal measure other than the fact of interference itself."[9] In *Quelimane Company* v. *Stewart Title Guaranty Company*,[10] the supreme court clarified its ruling in *Della Penna* to make it clear that the requirement of independent wrongfulness does not also apply to the tort of interference with contract.[11] It would still be a number of years before the analyses of these cases would be brought to bear on at-will employment relationships.

Opposing Goals

Judicial decisions involving interference with employment relationships also struggled to reconcile conflicting public policies. One of the earliest cases involving the tension between ensuring fair competition and permitting employee mobility is the California Supreme Court's decision in *Buxbom* v. *Smith*.[12] In *Buxbom*, the plaintiff entered into a contract with the defendant to distribute the defendant's newspaper. After the plaintiff had employed and organized distribution crews to perform the contract, the defendant repudiated the contract and hired the plaintiff's distribution crews directly. The court recognized that "it is not ordinarily a tort to hire the employees of another for use in the hirer's business," but noted that "[t]his immunity against liability is not retained, however, if unfair methods are used in interfering in such advantageous relations."[13] The court then applied this exception because the defendant's breach of contract prevented the "plaintiff from competing effectively for the retention of those employees" and thus constituted "an unfair method of interference with advantageous relations."[14] *Buxbom*, then, can be read as establishing a qualified immunity for interference with employment relationships.

More recently, the concept of immunity for interfering with employment relationships was taken another step. In *GAB*, for reasons based in public policy, the court of appeal rejected an employer's claim against a competitor for tortious interference with its at-will employees. GAB had sued its former employee, Neal, and his new employer, Lindsey, a GAB competitor, after they had caused 17 key GAB employees to resign from GAB to join Lindsey.

The *GAB* court acknowledged that courts "have applied tortious interference claims in the specific context of at-will employment relationships,"[15] but concluded that "no case has yet allowed an

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employer to bring such an interference claim."[16] Concerned with the prospect of innumerable lawsuits, California's strong public policy in favor of employee mobility, and "something inherently suspect about a tort that, at bottom, concerns an employee's voluntary departure from employment,"[17] the court found "no compelling reason to expand the tort, and plenty of reason not to."[18] The *GAB* court also concluded that the tort of unfair competition was adequate to address the problem of unfair or unlawful conduct among employers.

The stage was set for supreme court review when the second district decided *Reeves,*[19] and in so doing declined to follow *GAB*. In *Reeves,* the plaintiff law firm sued two former lawyer-employees for tortious interference with the firm's at-will relationships with other employees. Reviewing the supreme court's opinions in *Buxbom* and *Quelimane,* the court of appeal in *Reeves* found that "[n]othing in this authority or any authority cited in *GAB* supports the contrary view, namely, that a person who hires the at-will employee of another employer enjoys a special immunity from liability for tortious interference, notwithstanding the person's use of unjustifiable or unfair methods to lure these employees."[20] The court affirmed the judgment in favor of the employer on the grounds that the defendants engaged in unfair conduct in the course of hiring away the plaintiff's employees by destroying computer records, misusing confidential information, and cultivating employee discontent.

Hiring a Partner

The law regarding tortious interference with employment relations became even more complex when the fourth district decided *Powers* v. *The Rug Barn.*[21] *Powers* involved a written partnership agreement for the operation of a textiles and home furnishings business. The plaintiff alleged that the defendants were liable for interference with contract because they had taken intentional steps to disrupt the partnership agreement by hiring away a key partner.

The *Powers* court acknowledged that the tort of interference with contract does not require a showing of independent wrongfulness but concluded that a "different rule has been applied, however, in cases in which the disruptive conduct consisted of the defendant's hiring of the plaintiff's employees in order to compete with the plaintiff. The law generally recognizes that the defendant in such a case has 'the right to conduct a business in competition with that of plaintiff,' as long as the means of competition 'involve no more than recognized trade practices'.…Hiring a competitor's employees is a recognized trade practice."[22]

The court in *Powers* held that absent independently wrongful conduct, "the hiring of a competitor's employee—including one occupying a partnership position—cannot support liability for interference with contract."[23] The *Powers* court relied, in part, on what it described as the "*Buxbom-GAB* rule of nonliability"[24] and explained that it "is the lack of independently actionable conduct, not the at-will nature of the partnership agreement, that creates the impediment to plaintiff's interference claim."[25] *Powers* may thus be read to immunize interference with any employment contract as long as the interference does not involve other wrongful conduct. The supreme court granted review of *Powers* but later dismissed in light of its decision in *Reeves*.

Factual Background

Against the backdrop of these cases, the supreme court's decision in *Reeves* provides considerable analytical clarity. In *Reeves,* two attorneys resigned from a law firm and, on the evening of their resignations, solicited the plaintiff law firm's key employees, who were at-will. Six of the employees left the plaintiff firm to join the defendants' new firm. Citing *GAB,* the defendants argued that California does not recognize a cause of action by one employer against another for interference with an at-will employment contract.

The court noted established case law holding that the tort of interference with contract may be predicated on interference with an at-will employment relationship, as well as the considerable body of case law recognizing California's competing policies of preventing unfair competition and promoting employee mobility. The key to the court's analysis is its observation that "the economic relationship between parties to contracts that are terminable at will is distinguishable from the relationship between parties to other legally binding contracts."[26] In both cases there is a contractual relationship, but in the case of an at-will contract "'an interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of [a contracting party] there is no breach of it.'"[27]

The holding in *Reeves* is this: Because an interference with an at-will employee "is primarily an interference with the future relation between the plaintiff and the at-will employee, we hold that inducing the termination of an at-will employment relation may be actionable under the standard applicable to claims for intentional interference with prospective economic advantage."[28] This means that to prevail, "a plaintiff must plead and prove that the defendant engaged in an independently wrongful act…that induced the at-will employee to leave the plaintiff."[29]

Adopting this standard, argued the court, reconciles the competing public policies responsible for much of the confusion in the employment case law: "Not only will it guard against unlawful methods of competition in the job market, but it will promote the public policies supporting the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers."[30]

Reeves clarifies the often-litigated interface of employee recruitment and business competition; yet for employers it is a mixed blessing. Employers no longer enjoy blanket immunity on competitive grounds when they hire away a competitor's at-will employees, but employers may now recruit these at-will employees with some assurance that simply interfering in their at-will employment relationships is not actionable. Employers nevertheless must proceed with caution, because there are risks of incurring liability through other independently wrongful conduct.

Other Employees

If the recruited employee is under a contract for a specified term, the recruiting employer may still be liable for inducing breach of contract.[31] If the recruited employee is an officer, director, or senior manager of his or her current employer, the employee may owe that employer a fiduciary duty. The recruiting employer may be liable for conspiracy to breach a fiduciary duty and unfair competition if the recruited employee assists the recruiting employer in any way, for example by providing competitively sensitive information or recruiting other employees before terminating the employment relationship.[32] If the recruited employee has access to trade secrets or other confidential information of his or her current employer, the recruiting employer may be liable for misappropriation of trade secrets and unfair competition if the employee brings any of this information to the new employer.[33] If the recruiting employer makes defamatory statements regarding the employee's current employer or uses false information to recruit the employee, the recruiting employer may be liable for defamation and unfair competition.[34] In all of these cases, the recruiting employer may also be liable for interference with economic relations based on this other, independently wrongful conduct.

According to the supreme court reasoning in *Reeves,* a recruiting employer is not liable merely for interfering with a recruited employee's former at-will employment relationship, but the employer may be liable if the inter-

ference involves any independently wrongful conduct. This rule resolves uncertainty regarding the tort of interference with contract in the context of at-will employment and resolves the competing public policies of preventing businesses from competing unfairly and promoting employee mobility.

Employers must still exercise care in recruiting the at-will employees of their competitors. Employers may still be liable for interference with economic relations when recruiting at-will employees if the recruiting involves breaches of fiduciary duty, misappropriation of trade secrets, defamation, or any conduct constituting unfair competition. As reported cases demonstrate, this independently wrongful conduct is often present when employees leave their employer to work for a competitor. ■

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[1] Reeves v. Hanlon, 33 Cal. 4th 1140, 95 P. 3d 513 (Aug. 12, 2004).
[2] *Id.* at 1152.
[3] GAB Bus. Servs., Inc. v. Lindsey & Newsome Claim Servs., Inc., 83 Cal. App. 4th 409 (2000).
[4] *See* Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 39 (1946); Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126-27 (1990).
[5] Kozlowsky v. Westminster Nat'l Bank, 6 Cal. App. 3d 593, 598 (1970).
[6] *Id. See also* Savage v. Pacific Gas & Elec. Co., 21 Cal. App. 4th 434, 448 (1993).
[7] Della Penna v. Toyota Motor Sales USA, 11 Cal. 4th 376 (1995).
[8] *Id.* at 392.
[9] *Id.* at 393.
[10] Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26 (1998).
[11] *Id.* at 55-57.
[12] Buxbom v. Smith, 23 Cal. 2d 535 (1944).
[13] *Id.* at 547.
[14] *Id.* at 548.
[15] GAB Bus. Servs., Inc. v. Lindsey & Newsome Claim Servs., Inc., 83 Cal. App. 4th 409, 427 (2000).
[16] *Id.* at 427 (emphasis in original).
[17] *Id.* at 428.
[18] *Id.* at 427.
[19] Reeves v. Hanlon, 106 Cal. App. 4th 433 (2003).
[20] *Id.*
[21] Powers v. The Rug Barn, 117 Cal. App. 4th 1011 (2004).
[22] *Id.* at 1020.
[23] *Id.* at 1024.
[24] *Id.*
[25] *Id.* at 1025 n.3.
[26] Reeves v. Hanlon, 33 Cal. 4th 1140, 1151 (Aug. 12, 2004).
[27] *Id.* at 1151-52 (quoting RESTATEMENT (SECOND) OF TORTS §768, cmt. i).
[28] *Id.* at 1144.
[29] *Id.* at 1145.
[30] *Id.*
[31] *Powers* may be read to create an exception for such liability in the employment context. Such a rule would be a fairly significant departure from existing case law.
[32] *See* Bancroft Whitney Co. v. Glen, 64 Cal. 2d 327 (1966); GAB Business Servs, Inc. v. Lindsey & Newsome Claim Servs., Inc., 83 Cal. App. 4th 409 (2000).
[33] *See* Reeves, 33 Cal. 4th at 1151.
[34] *See* Savage v. Pacific Gas & Elec. Co., 21 Cal. App. 4th 434, 448-50 (1993).