The Daily Washington
LAW
Reporter

Established in 1874

1898 Photo of Washington Law Reporter Co.'s composing room managed by Frank B. Crown.

Volume 137 — Number 248— Page 2673
Wednesday, December 23, 2009

D.C. Superior Court

REMEDIES

PRELIMINARY INJUNCTION / OVERREACHING CONFIDENTIALITY AGREEMENT

Précis: A confidentiality agreement which precludes a person from pursuing valid administrative or judicial remedies for illegal discrimination or cooperating with governmental or law enforcement authorities is in violation of public policy and cannot serve as a basis for seeking equitable relief to enforce same. In order to obtain a preliminary injunction a movant must not only show likelihood of success on the merits, *inter alia*, but also demonstrate how the action complained of will have not simply a harmful connotation but an irreparable result.

Abstract: An association of professional of football players attempted to turn their defensive position into an aggressive offense by seeking a Preliminary Injunction against the Plaintiff that would have effectively removed the ball from play in this case. In response to the Plaintiff's suit for gender discrimination and retaliation, the players filed a Motion for a Preliminary Injunction in an attempted interference with the Plaintiff's effort to pass information via her complaint. This play gained them no ground when the Trial Judge flagged them based on the analogous penalty of "encroachment" (crossing the line of scrimmage, though without touching an opposing player, before the ball is snapped). **Facts**: This case originated when the Plaintiff filed suit against her employer, a professional football players' association, in which she claimed not only that she had been terminated from her job as Human Resources Director due to sex-based discrimination in violation of the D.C. Human Rights Act but also that she had been the victim of retaliation for pursuing legal remedies because the employer believed that she had cooperated with the U.S. Department of Labor during an investigation of the Association. The defense was a hard-hitting rushback in which, astonishingly, the Association filed a counterclaim contending that by simply filing her suit in the first place the Plaintiff had violated an employment Confidentiality Agreement which forbade her from disclosing "anything" she learned while in the Association's employ. The cleverly-drafted Agreement was a kind of contractual "draw play" by which the Plaintiff had been misdirected into agreeing that she would neither copy, transmit, nor "otherwise convey any information that I obtain as a result of my relationship with ... [the Association] to any person or entity to ... which I have not been authorized to provide such information." By including information describing her employment circumstances in her formal court complaint filed on the public record, the Defendant asserted, the Plaintiff had facially violated this broad proscription and it sought a Preliminary Injunction requiring her to "immediately cease and desist from" and further such disclosures in the course of the case or afterwards. This, of course, would not simply have been a "delay of the game," it would have resulted in a "forfeiture" of the game (in which the recorded score under the pertinent rule would have been 1-0 in the Defendant's favor). The Trial Judge in the case, however, acting in the role of the Head Referee, whose duty in game is to control all action and determine and announce penalties, signaled that in attempting to secure a Preliminary Injunction the Defendant had prematurely crossed the line of scrimmage without the necessary justification. **Rulings**. The following flags were thrown: **(A)** The so-called Confidentiality Agreement was deemed to be not only impermissibly overbroad but also an affirmative violation of "public policy." First of all, the "agreement" was one in which the untutored employee had been decoyed into promising never to disclose "any information" whatsoever emanating from her employment with the Defendant. Aside from its being impractical and overreaching, the Court ruled, the fact was that the dispute had already found its way into the public arena, as evidenced by the Court's citation of two Internet sites reporting the dispute. This made the issue of "preserving confidentiality" moot. Beyond that, the Court ruled that there is no precedent for contracting away a court's jurisdiction to hear disputes on the basis of "confidentiality." Finally, such an agreement would actually penalize an employee from cooperating with official government investigations or acting as a "whistleblower" upon discovery of illegal activity by an employer. Any such agreement that "materi-

Agreement — cont'd on page 2674

The DWLR will be closed on December 23rd, 24th and 25th, 2009 and will not publish papers on December 24th or 25th in observance of Christmas. The next published issue will be December 28th, 2009.

TABLE OF CASES

D.C. Superior Court

Also in this issue

The Daily Washington Law Reporter

ISSN 10666095 The Daily Washington Law Reporter is a newspaper of general circulation, published daily, Monday through Friday, except legal holidays by:

The Daily Washington Law Reporter Co.
100 E. Pratt Street,
Suite 2520
Baltimore, MD 21202

Phone: 202.331.1700
Fax: 202.785.8476
www.DWLR.com

Copyright ©2009 Daily Washington Law Reporter Company. Material published in the Daily Washington Law Reporter is compiled at substantial expense and is for the sole and exclusive use of the subscriber. It may not be published, resold, recorded or reused in any manner, in whole or part, without the publisher's consent. Any infringement will be subject to legal redress.

SUBSCRIPTION RATES:
(Includes index)
1 Year: $255 • 2 Years: $490
3 Years: $735 • Single copy: $2
(Add sales tax in MD)

Attorneys placing legal advertisements are responsible for payment. Legal advertisements will not be accepted on a contingent basis. Publisher is not responsible for errors in advertisements if publication orders have not been submitted according to the rules of the Court.

Elizabeth Lewis Enney, President
Donald J. Nichols, Publisher
Ronald A. Goodbread, Magistrate Judge (Ret.), Legal Editor
legaleditordwlr@gmail.com
Michael Schuchat, Esq., Legal Editor Emeritus
To contact the office email us at lawreporter@mindspring.com

POSTMASTER:
Send change of address to:
The Daily Washington Law Reporter Co.,
100 E. Pratt Street
Suite 2520
Baltimore, MD 21202
Periodicals Postage Paid at Baltimore, MD
(USPS 146-840)
Member—American Court and Commercial Newspapers, Inc.; National Newspaper Association; American Bar Association; Historical Society of the D.C. Circuit.

Agreement *Continued from page 2673*

ally interferes with communication between an employee [and government agencies such as law enforcement officials, the Department of Labor, the IRS, or the EEOC] sows the seeds of harm to the public interest," the Court held. **(B)** More basically, it found that the Defendants simply could not erect the four pinions on which a Preliminary Injunction must stand: substantial likelihood of success on the merits, irreparable harm, the need for immediate relief, and the absence of disservice to the public interest. As discussed in Section (A), above, the Court found that the Defendants had little prospect of success on the merits, largely because it disserved the public interest. As to irreparable harm, the Court did not need to "view the tape" because it found that the Defendants had not come close to the goal line of establishing even a valid proffer of any harm, much less irreparable harm itself. Wisely distinguishing "irreparable disclosure" as a concept from "irreparable harm" as a result, the Court found that the Defendant simply "did not explain how they would suffer irreparable harm should a Preliminary Injunction not result." Indeed, the Court concluded, the harm, if any, to the Defendant "seems relatively insignificant." **(C)** Finding that the Defendant had not met the required four elements for a Preliminary Injunction, particularly was to the prospects of success on the merits and the consequence of irreparable harm, the Court denied the motion (although leaving open the opportunity for the filing of any Motion for a Protective Order). **(D)** Based on these calls, on fourth and 40 the Movant was left with no realistic alternative except to punt.

MORAN v. NATIONAL FOOTBALL LEAGUE PLAYERS INC., ET AL

D.C. Super. Ct. No. 2009-CA-6225 B. Decided Nov. 13, 2009. Before the Hon. Joan Zeldon. *Lynne Bernabei, Esq.* and *Alan Kabat, Esq.* for the Plaintiff. *John M. Simpson, Esq., Michelle, Pardo, Esq., Kara Petteway, Esq.* and *Richard C. Smith, Esq.* for the Defendants.

ORDER DENYING MOTION FOR A PRELIMINARY INJUNCTION

ZELDON, *Judge*: The Court has before it a Motion for a Preliminary Injunction filed by Defendants National Football League Players Association and National Football League Players Incorporated ("Defendants" or "NFLPA"), Plaintiff's Opposition, and Defendants' Reply.

Plaintiff sued her former employers for wrongful discharge, unlawful sex-based discrimination, and retaliation in violation of the District of Columbia Human Rights Act, D.C. Code § 2-1402.11 *et seq.* She alleges the NFLPA terminated her employment because she assisted the Department of Labor in its investigation of the NFLPA or, alternatively, that the reason for her termination was sex discrimination and retaliation. The NFLPA filed an Answer and a Counter-claim asserting that Plaintiff was contractually prohibited, pursuant to an employee Confidentiality Agreement, from making any unauthorized disclosure of information obtained as a result of her employment. Specifically, Defendants allege that Plaintiff has breached this Confidentiality Agreement by discussing her employment and circumstances involved in her termination with her attorneys and by filing the instant Complaint.

The Confidentiality Agreement to which Defendants refer provides, *inter alia*:

> During my employment, internship or work as an independent contractor by or for NFLPA, Players Inc or any other subsidiary of NFLPA, I may obtain access to information and data that is not available to the public and which may be highly confidential and proprietary.... *I recognize and agree that I cannot and will not copy, transmit, download or otherwise convey any information that I obtain as a result of my relationship with NFLPA to any person or entity to whom or to which I have not been authorized to provide such information.*

(Defs. Mot. for Prelim. Inj. Ex 1, ¶ 2. (emphasis added).)

NFLPA argues that by reason of this Agreement Plaintiff is precluded from revealing much of the information contained within Plaintiff's Complaint. Defendants consequently request this Court to enter a Preliminary Injunction ordering Plaintiff to cease and desist the disclosure of any information subject to the Confidentiality Agreement. Defendants further seek an Order directing the parties to confer and submit to the Court an agreed upon Protective Order within thirty days of the Court's injunction order. For the reasons that follow, the Defendants' Motion for a Preliminary Injunction is **DENIED**; however, the parties are directed to confer and submit to the Court a Protective Order by no later than December 17, 2009.

To be entitled to a preliminary injunction, the moving party must "clearly" demonstrate:

> (1) that there is a substantial likelihood [the moving party] will prevail on the merits; (2) that [the moving party] is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to [the moving party] from the denial of the injunction than will result to the

[the opposing party] from its grant; and, in appropriate cases (4) that the public interest will not be disserved by the issuance of the requested order.

Wieck v. Sterenbuch, 350 A.2d 384, 387 (D.C. 1976), *quoted in District of Columbia v. Sierra Club*, 670 A.2d 354, 361 (D.C. 1996). The Court shall consider each element in turn all the while cognizant of the principal that: "[a] preliminary injunction is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief." *Id.*

1. Substantial Likelihood that Defendants will Prevail on the Merits of its Counterclaim

At the outset, the Court notes the unusually broad scope of Defendants' request; they seek an Order of this Court providing that "[P]laintiff immediately cease and desist disclosure of any information subject to the Confidentiality Agreement." (Defs. Mot. at 8.) As previously described, that Agreement covers "any information" obtained "as a result of my relationship with NFLPA . . . ." Such an order would appear to preclude Plaintiff from exercising her right to pursue an action for unlawful discrimination and retaliation as well as her ability to assist the Department of Labor in an investigation of the NFLPA for alleged racketeering violations. Enforcing the parties' Confidentiality Agreement in this way would appear to be a violation of public policy. *See EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744-45 (1st Cir. 1996) (holding a settlement agreement that precluded settling employees from assisting in an EEOC investigation of harassment charges unenforceable). Thus there is not a substantial likelihood of success that Defendants will prevail on the merits. *See Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

2. Defendants' Danger of Suffering Irreparable Harm During the Pendency of the Action

Defendants first argue Plaintiff concedes the irreparable harm caused by her disclosure of confidential information because the parties' Confidential Agreement provides that, "any disclosure or threatened disclosure of information I acquire as a result of my employment shall constitute in itself irreparable harm and grounds for entry of an injunction . . . ." (Defs.' Mot. Ex. 1 ¶ 4.) This Court, however, is aware of no authority

NEW DATE!!!
D.C. Bar Continuing Legal Education Program
Presents "HOW TO LITIGATE A MEDICAL MALPRACTICE CASE"
Cosponsored by the D.C. Bar Litigation and Tort Law Sections

DATE: TUESDAY, January 19, 2010

TIME: 6:00 P.M. - 9:15 P.M. (3.0 CREDITS)

PLACE: D.C. BAR CONFERENCE CENTER,
1101 K Street NW
WASHINGTON, D.C. 20005

PRICE: $89.00 Cosponsoring Section Members;
$99.00 D.C. Bar Members;
$129.00 Others

This popular course, taught by leading practitioners and a sitting judge, addresses medical malpractice litigation topics including:

- **Screening the case**
- **Venue and Jurisdiction**
- **Pre-suit requirements**
- **Discovery**
- **Experts**
- **Damages**
- **Mediation**
- **Pre-trial**
- **Trial**

NEW
Effective Use of Courtroom Technology
Qualifying the Expert at Trial in Ten Easy Minutes
Appellate Updates

This course includes a valuable handout which is useful to both newcomers and those with more experience.

FACULTY:
Honorable Melvin R. Wright, Deputy Presiding Judge of the Civil Division, Superior Court of the District of Columbia
Steven A. Hamilton, Esquire, Hamilton, Altman, Canale & Dillon, LLC
Bruce J. Klores, Esquire, Bruce J. Klores & Associates, P.C. (Faculty Chair)

REGISTER ONLINE at:
http://www.dcbar.org/for_lawyers/events/search_results cfm?filters=cle
Or
CALL THE D.C. Bar at 202-626-3488

providing that the parties may contractually waive the requirement that the Court itself make a finding as to the danger of irreparable harm. *See Smith, Bucklin & Assocs., Inc. v. Sonntag*, 317 U.S. App. D.C. 364, 369, 83 F.3d 476, 481 (D.C. Cir. 1996) ("Although there is a contractual provision that states that the company has suffered irreparable harm if the employee breaches the covenant [not to compete] and that the employee agrees to be preliminarily enjoined, this by itself is an insufficient prop.").

Alternatively, Defendants do not explain exactly how they would suffer irreparable harm should a Preliminary Injunction not result. Concededly, the disclosure of confidential information is by definition irreparable because it cannot thereafter be rendered confidential again. *See Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 933 (D.C. 2004). However, Plaintiff has demonstrated that some of the information already has been disclosed through the media. (Pl.'s Opp. Exs. 1 + 2 (Don Banks, *Sources: Upshaw Had Proof Vincent Released Agents' Confidential Info*, SI.COM, Feb. 25, 2009, http://sportsillustrated.cnn.com/2009/writers/don_banks/02/25/vincent/index.html; Don Banks, *Upshaw's Widow: Vincent is not 'Right Candidate' to Fill NFLPA Job*, SI.COM, March 5, 2009, http://sportsillustrated.cnn.com/2009/football/nfl/03/05/terriupshaw/ index.html).) Thus, Defendants cannot now claim that disclosure of such confidential information contained within the Complaint will further cause Defendants harm. Furthermore, Defendants do not explain how the disclosure of such information might actually *harm* Defendants. *See Barry v. Wash. Post. Co.*, 529 A.2d 319, 322 (D.C. 1987) (noting that in seeking a preliminary injunction occurrence of an "irreparable *result*" is not sufficient, a movant must demonstrate actual "irreparable harm" (second emphasis added)). [1]

3. That More Harm will Result to Defendants from the Denial of a Preliminary Injunction than will Result to Plaintiff from its Grant

Defendants argue the Court's grant of a Preliminary Injunction will not burden Plaintiff because this "will not prevent plaintiff from pursuing her claim." (Defs.' Mot. at 7.) However, the scope of Defendants' request for Preliminary Injunction is wide. It is difficult to imagine how Plaintiff could continue to pursue her claim if the Court were to grant the requested injunction. It seems obvious that Plaintiff will be more harmed by the Court's issuance of a Preliminary Injunction than Defendants, especially where the harm to Defendants, as discussed above, seems relatively insignificant.

4. The Effect of a Preliminary Injunction on the Public Interest

Just as would Plaintiff be harmed should this Court order a Preliminary Injunction, so too would such an injunction be adverse to the public interest. Principally, a Preliminary Injunction would preclude Plaintiff from cooperating with the Department of Labor in any investigation it conducts of the NFLPA. Confronted with a similar issue, the First Circuit Court of Appeals has said, "any agreement that materially interferes with communication between an employee and the [EEOC] sows the seeds of harm to the public interest." *Astra USA*, 94 F.3d at 744.

Conclusion

In conclusion, Defendants have not met the required elements for a court to issue a Preliminary Injunction. Notably, the most important inquiry is that concerning irreparable harm, *see In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980), and Defendants have not demonstrated how the disclosure of Plaintiff's knowledge of "confidential information" concerning the NFLPA (some of which already has been disclosed through the media) will irreparably harm them other than to state the obvious – that such a disclosure renders the information no longer confidential. Furthermore, Defendants have not established that there is a substantial likelihood that they will prevail on the merits of their claim, that Defendants suffer greater harm by the Court's denial of their motion than the Plaintiff will suffer in the granting of the motion, and that a Preliminary Injunction will not have an adverse affect on the public interest.

Wherefore, it is this 13th day of November 2009 hereby

ORDERED that Defendants' Motions for Leave to File a Reply are **GRANTED** and it is noted that this Court has considered Defendants' Replies in consideration of their Motions for a Preliminary Injunction and for a Temporary Restraining Order; and it is

FURTHER ORDERED that Defendants' Motion for a Preliminary Injunction is **DENIED**; and it is

FURTHER ORDERED that Defendant's Motion for a Temporary Restraining Order is **DENIED AS MOOT**; and it is

FURTHER ORDERED that as stated on the record in open court on November 9, 2009, the parties shall negotiate and agree on a Protective Order and submit it to this Court no later than 3 p.m. on December 17, 2009.

FOOTNOTES:

1. That Defendants risk the disclosure of additional confidential information is a danger for which they have provided no factual support. Both parties reference a "demand letter" sent by Plaintiff to Defendants which, Defendants assert, "discloses a myriad of internal, and highly sensitive, NFLPA information – far exceeding the disclosures contained in the publicly-filed Complaint." (Defs.' Reply at 3.) This letter, however, is not a part of the record and this Court will not speculate as to its potentially harmful contents.

Cite as *Moran v. NFL Players Inc., et al* 137 DWLR 2673 (Nov. 13, 2009) (Zeldon, J.)(Sup. Ct. D.C.)

Stock up now on DWLR Legal Forms and Supplies!
LARGE SELECTION OF DC, MD AND VA FORMS INCLUDING

GOES #73
COMMON STOCK CERTIFICATES
$2.00 EACH

Stock Border Paper
$30 PER 100

Will Covers and Envelopes
$2.00 EACH

Exhibit Labels
YELLOW EXHIBIT / BLUE EXHIBIT
BLUE DEFENDANT EXHIBIT
YELLOW PLAINTIFF EXHIBIT
$13.95 PER PACK
(EACH PACK CONTAINS 492 STICKERS)

DWLR Binders
DURABLE IMPRINTED BLACK BINDERS
TO STORE 6 MONTHS OF ISSUES
$25 EACH

Order by phone: 202-331-1700