

Top Tech Companies Headed To Trial In Talent Poaching Conspiracy Case

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Several top tech companies are headed to trial on claims that they engaged in a talent poaching conspiracy involving agreements not to solicit each other's employees. Trial is set to begin next month in the Northern District of California federal court.

On Friday, March 28, 2014, in the class action case titled *In re: High-Tech Employee Antitrust Litigation*, Judge Lucy Koh decided to send several tech companies to trial when she rejected their summary judgment motions by finding that the plaintiffs, a class of software engineers, had presented sufficient evidence to warrant a jury trial on their claims. 11-CV-02509-LHK, 2014 WL 1283086 (N.D. Cal. Mar. 28, 2014). The plaintiffs claim that by entering non-solicitation agreements, several Silicon Valley companies formed an antitrust conspiracy to suppress employee compensation and stifle true competition. These non-solicitation agreements, according to the plaintiffs, required the tech companies to notify each other whenever one made an offer to hire another's employee, to cap compensation packages in order to prevent bidding wars over talent, and to refrain from recruiting each other's employees.

Examining the evidence before the Court, Judge Koh found that when viewed in the light most favorable to the plaintiffs, as required when considering a summary judgment motion, this evidence tended to exclude the possibility that the tech companies acted independently and therefore satisfied the applicable legal standard under antitrust laws. In so finding, Judge Koh relied on robust evidence—the nearly identical terms in six separate agreements, the companies' recognition of the similarities between the agreements, the efforts to restrict knowledge of the agreements to the small number of recruiters and executives who enforced them, the knowledge that companies had about other companies' non-solicitation agreements, that the same small group of intertwining high-level executives at the companies negotiated and enforced the agreements, the sharing and benchmarking of confidential compensation information between the companies despite regarding each other as competitors for talent and even amongst companies that had not entered non-solicitation agreements, and that many of the same executives attempted to expand the agreements beyond the defendant companies. Based on this evidence, Judge Koh concluded that summary judgment was not appropriate and that the question of whether the companies engaged in some overarching conspiracy requires resolution by a jury.

Unless the parties reach a settlement, the jury's decision will be the next development in this case, which began in 2011 after a Department of Justice investigation revealed that several tech companies had entered agreements not to compete for each other's engineers. This case highlights the difficulty of retaining talent without running afoul of the law. Companies should consult with their labor and employment counsel to determine what types of non-compete agreements are legal under varying state and federal law.

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