

Seventh Circuit Revives McDonald's Employee No-Poach Litigation

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In June of 2022, McDonald's obtained a judgment on the pleadings, ending antitrust litigation challenging the legality of the no-hire restraints it previously included in its franchise agreements.^[1] More than a year later, the Seventh Circuit reversed and remanded the case. The appellate court rejected the district court's ruling that the no-poach clauses at issue were ancillary restraints to the McDonald's franchise agreements and therefore were subject to rule of reason analysis. In doing so, the Seventh Circuit suggested that a more rigorous review of the facts was necessary before rejection of the *per se* standard and acceptance of the ancillary restraint defense in the no-poach or no-hire context.

Deslandes v. McDonald's USA LLC

On June 28, 2017, Leinani Deslandes, a McDonald's employee, filed a class action complaint against McDonald's in Illinois federal court, alleging that the company violated Section 1 of the Sherman Act by including a no-hire provision in its franchise agreements. In 2019, a nearly identical class action complaint was filed by Stephanie Turner and the cases were combined for litigation.^[2] Both plaintiffs sought to represent former and current employees of McDonald's who allegedly suffered from wage suppression and limited competition due to the no-hire clauses.

Until 2017, McDonald's franchise agreements contained no-hire clauses, which prohibited franchisees from employing or seeking to employ individuals who worked for other McDonald's restaurants. These restraints applied to all other McDonald's restaurants including restaurants owned and operated by McDonald's corporation or its subsidiaries. The plaintiffs alleged that the restrictions limited the employment opportunities available to McDonald's employees, which resulted in suppressed wages.

The Court Grants McDonald's Motion for Judgment on the Pleadings

On June 28, 2022, the district court granted McDonald's motion for judgment on the pleadings.^[3] Having previously partly granted McDonald's motion to dismiss and denied plaintiffs' motion for class certification, the only claims before the court were plaintiff Deslandes' and plaintiff Tuner's individual Section 1 claims alleging that McDonald's no-poach provisions unreasonably restrained trade.^[4]

In granting McDonald's motion, the court made two distinct rulings. First, the court found that the plaintiffs' claims "presumptively" call for rule of reason analysis" based on the Supreme Court's recent decision in *NCAA v. Alston*, U.S., 141 S. Ct. 2141 (2021) and because the plaintiffs specifically alleged that the no-poach was part of a

franchise agreement. Therefore, it was ancillary to an agreement that was output enhancing and not subject to *per se* illegal treatment.^[5]

Second, the court rejected the plaintiffs' argument that they were not required to plead a relevant market.^[6] The court acknowledged that the plaintiffs did not need to plead legal theories but ruled they did need to plead sufficient facts to support a judgment in their favor, and that by failing to plead the relevant market, the plaintiffs could not show that the noncompete clauses were unlawful.^[7] Relatedly, the court also ruled that the relevant market was the local market for quick-service food employees and that the plaintiffs could not show McDonald's had market power.

Seventh Circuit Reverses and Remands

The Seventh Circuit reversed the trial court's ruling and revived the litigation.^[8] Although the appellate court did not foreclose the applicability of the ancillary restraint defense, it held the trial court "jettisoned the *per se* rule too early."^[9]

The court first noted that the plaintiffs alleged that because McDonald's operates many of its restaurants directly or through a subsidiary, the no-hire provisions are horizontal restraint subject to *per se* treatment.^[10] The court then explained that the trial court erred in ruling that the no-hire provisions were ancillary restraints solely because they were contained in franchise agreements, each of which necessarily increased output in the form of the newly opened franchised restaurant.^[11] The court further held that benefits to customers cannot justify detriments to workers and that the trial court should not have assumed that the no-hire provisions increased the franchise output.^[12]

The Seventh Circuit did not go so far as to hold that the no-hire provisions were not ancillary restraints. Instead, it remanded and ordered that a "careful economic analysis" be performed to determine if the provisions qualified as ancillary restraints.^[13] The court also provided a list of potential "complex questions," which might fall within the economic analysis, including: was the restraint protecting the franchise's investments in training, or was it allowing them to "appropriate the value of the workers' own investment"; why did the no-hire provisions have a national scope; why did the restrictions last for the entire length of a worker's employment, plus six months, instead of a time period linked to the time it would take a franchise to recoup any investments in training; and, how do the terms of the provision reflect McDonald's proposed rationale of preventing free riding by other franchises?^[14] The appellate court concluded its opinion by inviting the trial court to also reconsider its denial of plaintiffs' motion for class certification in light of its holding.^[15]

The Seventh Circuit upheld the trial court's ruling that the plaintiffs' failure to allege that McDonald's had market power in the relevant market would be fatal to their rule of reason and quick-look analysis arguments.^[16] Likewise, the court upheld the trial court's ruling that the relevant market was the local quick-service restaurant market as opposed to the national market of McDonald's restaurants.^[17] Should McDonald's ultimately prevail in establishing that no-hire provisions are ancillary restraints, the affirmations of these judgments will severely limit the plaintiffs' case.

Conclusion

The reversal of the trial court's ruling in *McDonald's* is discouraging for franchisors and, more generally, firms that use ancillary restraints such as no-hire or no-poach provisions. The Seventh Circuit's decision makes more difficult successful dispositive motions on the pleadings based on the ancillary restraint defense. However, the concurring opinion also carefully explains that, as the case develops, the trial court might determine that it need not answer all the questions posed in the opinion. For example, the concurrence noted that the scope and duration of the restriction in question could reduce the need for extended economic analysis of other "potentially complex questions" substantially.

[1] Recent No-Poach Developments: Federal Enforcement Agencies Ally to Promote Labor and McDonald's Latest Judicial Win, Troutman Pepper (July 29, 2023), available at <https://www.troutman.com/insights/recent-no-poach-developments-federal-enforcement-agencies-ally-to-promote-labor-and-mcdonalds-latest-judicial-win.html>.

[2] *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857 (N.D. Ill. June 28, 2017); *Turner v. McDonald's USA, LLC*, 19-cv-5524 (N.D. Ill. August 15, 2019).

[3] The parties cross-moved for summary judgment and McDonald's also moved for judgment on the pleadings. *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857, at 1-2 (N.D. Ill. June 28, 2022).

[4] *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857, at 18 (N.D. Ill. June 25, 2019); *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857, at 27 (N.D. Ill. July 18, 2021).

[5] *Id.* at 8.

[6] *Id.* at 10.

[7] *Id.*

[8] *Deslandes v. McDonald's United States, LLC*, Nos. 22-2333, 22-2334, 2023 WL 5496957, 2023 U.S. App. LEXIS 22509 (7th Cir. Aug. 25, 2023).

[9] *Deslandes*, 2023 U.S. App. LEXIS 22509 at *7.

[10] *Id.*

[11] *Id.* at *7-8.

[12] *Id.* at *9-10.

[13] *Id.* at *12.

[14] *Id.* at *11-12.

[15] *Id.* at *12-13.

[16] *Id.* at *5-7.

[17] *Id.*

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