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Antitrust Practice
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Duke Hit with Antitrust Suit for Non-Poaching Agreement with UNC

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Universities and medical institutions in close geographic proximity may have faced the same issues as Duke and UNC when their faculties started departing for richer positions at the other's campuses. With ever-increasing salary burdens, the universities likely saw no harm in gentlemen's agreement not to hire each other's faculty. It was a decision with significant negative consequences.

Dr. Danielle Seaman, an assistant professor of radiology at Duke University School of Medicine, filed an antitrust class action on June 9, 2015 against Duke University and Duke University Health System, citing an alleged agreement with the University of North Carolina and the North Carolina Health System to forego hiring certain of each other's medical facility faculty and staff. See *Danielle Seaman v. Duke University; Duke University Health System, et al.*, Case No. 1:15-cv-462 (M.D.N.C. filed June 9, 2015). Although Dr. Seaman was considered to be a highly qualified radiologist who specialized in cardiothoracic imaging, with strong references and teaching awards, she was told by UNC's Chief of Cardiothoracic Imaging that there was an agreement between the "deans of UNC and Duke [reached] a few years back" that "lateral moves of faculty between Duke and UNC were not permitted."

Due to this agreement, the proximity of the schools and the parsity of alternative facilities, Dr. Seaman was foreclosed from a better and higher paying job. When she inquired about the reason for the agreement, Dr. Seaman was told that several years prior Duke had tried to recruit the entire UNC bone marrow transplant team and UNC had been forced to generate a substantial retention package to keep the team. Dr. Seaman alleges that the "conspiracy was an ideal tool to suppress their employees' compensation."

This case does not stand alone. The Antitrust Division of the U.S. Department of Justice filed a civil complaint in 2010 against Adobe System, Inc., Apple Inc., Google, Inc., and other California high-tech companies for entering into bilateral agreements barring the "soliciting, cold calling, recruiting or otherwise competing for employees of the other person." *United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc. and Pixar*, Case: 1:10-cv-01629 (D.D.C. filed September 24, 2010). The agreements between the parties were "substantially similar," prohibited the companies from making cold call solicitations of each other's employees and were enforced by senior management. These agreements began as early as 2006 and continued until the Government's complaint.

The *Adobe* case demonstrates not only the seriousness with which the Government views anti-poaching agreements, but also a potential way of lawfully achieving some of their benefits. A little-known aspect of the *Adobe* Final Judgment is that the Government did *not* prohibit the defendants from maintaining or enforcing no-direct-solicitation provisions in "existing and future employment or severance agreements," in certain third party consulting agreements, and a limited number of other circumstances.

Apparently the Government in *Adobe* was primarily concerned with the clandestine nature of the defendants' no poaching agreements. But when such a provision is part of a bargained-for employment agreement, then the restraint of trade tendencies of such provisions may be ameliorated.

It is entirely foreseeable that educational institutions in other geographic areas may experience the same pressures that Duke and UNC did. While solutions to such pressures are not without risk, the Government's exceptions in *Adobe* suggest there are some steps that universities can take to address these pressures lawfully.

For more information on the matters discussed in this *Locke Lord Quick Study*, please contact the authors:

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