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Fidelity at the Workplace: The Two-Faced Nature of the Duty of Loyalty Under *Dalton v. Camp*

Examining the facts of the case alone, *Dalton v. Camp*¹ appears to be little more than a run-of-the-mill claim brought by an employer against a former employee who left his job to enter into competition with his former boss. The usual claim in such a dispute is that the employee's actions constituted an actionable breach of the fiduciary duty of loyalty owed to the employer. The fact that this case made two passes through the North Carolina Court of Appeals and two trips to the North Carolina Supreme Court before reaching a resolution suggests that the import of the case flows less from its result² than from its rationale.

This Recent Development argues that the *Dalton* decision signals a paradigmatic shift in the North Carolina Supreme Court's treatment of the duty of loyalty in the employment context. First, the court appears to have raised the bar for the plaintiff-employer seeking to establish the existence of a fiduciary relationship with her employee. Though relying on a traditional definition of the fiduciary relationship,³ the court applied that definition narrowly and in derogation to common law agency principles.⁴ Second, the *Dalton* decision heralds the emergence of two distinct brands of employee loyalty—the first a strictly fiduciary brand, the second of a more “generic” quality.⁵ *Dalton* thus ultimately constricts the scope of legal claims available to an employer whose employee acts contrary to the

1. 353 N.C. 647, 548 S.E.2d 704 (2001).

2. *Id.* at 650, 548 S.E.2d at 707 (holding that an employee was not in a fiduciary relationship with his employer and therefore employer's suit against him for breach of his duty of loyalty failed as a matter of law).

3. *Id.* at 651, 548 S.E.2d at 707–08 (citing *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (finding a fiduciary relationship where a special confidence is reposed in a party with “a resulting domination and influence on the other”)).

4. North Carolina case law is replete with references to agency law principles. *See, e.g., Speck v. N.C. Dairy Found., Inc.*, 311 N.C. 679, 685, 319 S.E.2d 139, 143 (1984) (applying agency law definition of fiduciary in an employer-employee dispute over royalties); *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 385, 303 S.E.2d 184, 189 (1983) (citing the *Restatement Second* definition of a fiduciary relationship in a case involving an insurance dispute); *Colony Assocs. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637–38, 300 S.E.2d 37, 39 (1983) (discussing the common law elements of a principal-agent relationship). *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 376–98 (1958) (defining the common law fiduciary duties of the agent).

5. The denomination of this duty as “generic” is the author's term.

employer's interest. This Recent Development concludes that certain classes of employers would be well advised to reexamine their hiring practices and that employees who decide to leave their jobs to compete with their employers must carefully evaluate whether they are subject to the stricter brand of fiduciary loyalty.

In 1993, plaintiff-employer Dalton, a publishing house, contracted to produce the employee newspaper for a furniture company.⁶ Defendant David Camp, an at-will employee, served as the production manager for the account.⁷ Near the end of the three-year agreement, Dalton and the furniture company engaged in renewal negotiations, but the contract expired before the two parties reached an agreement.⁸ Believing the talks would continue, Dalton continued to publish the newspaper without the benefit of a new contract.⁹ Meanwhile, Camp founded his own company and signed a contract with the furniture company to publish the newsletter himself.¹⁰ Camp resigned from Dalton two weeks later.¹¹ Dalton sued Camp¹² in state court alleging, among other things,¹³ that Camp breached his duty of loyalty.

The trial judge granted summary judgment for defendant Camp on the breach of duty of loyalty claim.¹⁴ The North Carolina Court of Appeals reversed, holding that issues of material fact existed.¹⁵ On discretionary review, the Supreme Court of North Carolina remanded the case to the court of appeals¹⁶ on grounds unrelated to the breach of loyalty claim.¹⁷ On remand, the court of appeals again held that

6. Dalton v. Camp, 135 N.C. App. 32, 35, 519 S.E.2d 82, 85 (1999), *rev'd*, 353 N.C. 647, 548 S.E.2d 704 (2001).

7. Dalton, 353 N.C. at 649, 548 S.E.2d at 706.

8. *Id.*

9. *Id.*

10. *Id.* The facts do not indicate that Camp ever agreed to a negative covenant, such as a noncompete or nondisclosure agreement, with his employer. *See id.*

11. *Id.*

12. Dalton also sued Camp's newly formed company and another former employee who served as an assistant to Camp. *Id.* The claims against those defendants are beyond the scope of this Recent Development.

13. In addition to breach of the fiduciary duty of loyalty, Dalton sued Camp for conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage, and unfair and deceptive acts or practices pursuant to chapter 75 of the North Carolina General Statutes. *Id.*

14. *Id.*

15. Dalton v. Camp, 135 N.C. App. 32, 38, 519 S.E.2d 82, 87 (1999) *rev'd*, 353 N.C. 647, 548 S.E.2d 704 (2001).

16. Dalton v. Camp, 351 N.C. 353, 353, 525 S.E.2d 470, 470 (2000). The order gave no indication of the court's view, if any, on the merits of the breach of fiduciary duty claim.

17. *Id.* The court remanded the case for reconsideration of the plaintiff's unfair and deceptive act or practices claim in light of the court's holding in Sara Lee Corp. v. Carter,

summary judgment was improperly granted for the defendant on the breach of duty of loyalty claim.¹⁸ The supreme court reversed, holding that the trial court properly granted summary judgment in favor of the defendant-employee as to the breach of duty of loyalty.¹⁹ Specifically, the court concluded that because no fiduciary relationship existed between the plaintiff-employer and the defendant-employee, the plaintiff's claim of a breach of fiduciary duty necessarily failed.²⁰ The court, however, did *not* rule that Camp owed no duty of loyalty whatsoever to his employer. The court recognized that a more general duty of employee loyalty exists outside of the fiduciary context,²¹ but held that North Carolina law does not recognize the breach of this generic duty of loyalty as an independent tort.²²

Examining *Dalton* through the lens of agency law sheds light on the significance of the holding. Although the employer-employee relationship is essentially of a contractual nature, and is therefore governed by the law of contracts,²³ the employer-employee relationship further constitutes a principal-agent relationship.²⁴ An

351 N.C. 27, 34, 519 S.E.2d 308, 312 (1999) (holding that a defendant's status as an employee does not serve as a shield from liability under the North Carolina Unfair and Deceptive Practices Acts or Practices Statute, N.C. GEN. STAT. § 75-1.1 (2001)). The *Sara Lee* decision had no direct bearing on the breach of duty of loyalty claim.

18. *Dalton v. Camp*, 138 N.C. App. 201, 206-08, 531 S.E.2d 258, 262-63 (2000), *rev'd*, 353 N.C. 647, 548 S.E.2d 421 (2001).

19. *Dalton v. Camp*, 353 N.C. 647, 652-54, 548 S.E.2d 704, 708-09 (2001). The supreme court also reversed the court of appeals on the claim of tortious interference with prospective advantage and the claim under the Unfair and Deceptive Practices Act. *Id.* at 655-58, 548 S.E.2d at 710-12.

20. *Id.* at 652, 548 S.E.2d at 708.

21. *See id.* at 653, 548 S.E.2d at 709 (holding that although an employee has a duty of loyalty, the courts will not recognize its breach as an independent claim); *see also In re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965) (*per curiam*) (holding that an employer's discharge of a "disloyal" employee is justified when the employee deliberately has acquired an interest adverse to his employer); *McKnight v. Simpson's Beauty Supply*, 86 N.C. App. 451, 453, 358 S.E.2d 107, 109 (1987) (stating that the law implies a duty on every employee to serve his employer faithfully).

22. *Dalton*, 353 N.C. at 653, 548 S.E.2d at 709.

23. *Alliance Co. v. State Hosp. at Butner*, 241 N.C. 329, 333, 85 S.E.2d 386, 389 (1955); *Archer v. Rockingham County*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 792 (2001).

24. *Holleman v. Taylor*, 200 N.C. 618, 619-20, 158 S.E. 88, 89 (1931) (describing the law of principal and agent as an extension of the law of master and servant); RESTATEMENT (THIRD) OF AGENCY, *Introduction* (Tentative Draft No. 2, 2001) (describing the reach of the common law of agency as encompassing the employment relationship); *see, e.g., Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 227, 139 S.E.2d 199, 201 (1964) (finding that a security guard was acting as an agent of the store-employer and within the scope of employment when he detained the plaintiff in a parking lot); *Fletcher, Barnhardt & White, Inc. v. Matthews*, 100 N.C. App. 436, 441, 397 S.E.2d 81, 84 (1990) (citing *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W.2d 749 (Minn. Ct. App. 1984))

agent owes a fiduciary duty to his principal regarding matters within the scope of his agency.²⁵ Thus, *unless an explicit agreement to the contrary is in place*, the law will imply common law rules of agency, including certain fiduciary duties.²⁶

Some of the duties generally associated with the fiduciary duty of loyalty include the duty to account for profits arising from the agency relationship,²⁷ the duty not to act as an adverse party in dealings with

("A salesman may be found liable to repay advances from a draw account against commissions, if he has breached his contract or his fiduciary duty to his employer."). Modern courts and scholars have renamed the law of master and servant as the law of employment relationships. 27 AM. JUR. 2D *Employment Relationship* § 3 (1996); *see also* Vaughn v. N.C. Dep't of Human Res., 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978) (defining the essential components of the principal-agent relationship as the agent's authority to act for the principal and the principal's charge over the agent). *See generally* Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 549 (1949) (discussing the fiduciary duty not to compete with the principal and citing as an example *Beatty v. Guggenheim Exploration Company*, 122 N.E. 378 (N.Y. 1919), a case involving a dispute between an employer and an employee).

25. SNML Corp. v. Bank of N.C., 41 N.C. App. 28, 37, 254 S.E.2d 274, 280 (1979) (concluding that the bank as agent owed a fiduciary duty to plaintiff in the context of an escrow agreement).

26. *See, e.g., McKnight*, 86 N.C. App. at 453, 358 S.E.2d at 109 (citing *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964)) ("[T]he law implies a promise on the part of every employee to serve his employer faithfully and discharge his duties with reasonable diligence, care and attention."); *see also* RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (1958) (describing fiduciary duties as derived of inferences "drawn from the conduct of the parties in light of common experience and what reasonable men regard as fair"). In light of the contractual nature of the employment agreement, note that the employment agreement typically can be devised such that duties of a fiduciary nature necessarily (do or do not) attach to the employer-employee relationship. *See, e.g.,* Pat K. Chew, *Competing Interests in the Corporate Opportunity Doctrine*, 67 N.C. L. REV. 435, 448-49 (1989) (discussing the use of explicit agreements between corporations and fiduciaries and the attendant expectations); J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 445-46 (1997) (discussing the law of agency and fiduciary duties); Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 699, 708 (1993) (arguing that employers can protect themselves against employee infidelity). Nevertheless, employers should exercise caution in assigning those duties. Noncompete covenants, for example, may be unenforceable if contrary to public policy. *See Asheville Assocs., Inc. v. Miller*, 255 N.C. 400, 402, 121 S.E.2d 593, 594 (1961) (indicating that courts do not usually enforce restrictive covenants in the employment context unless they are in writing, entered into as part of the employment contract, based on valuable consideration, reasonable in time and territory, fair, and consistent with public policy); *see also* *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 690, 228 S.E.2d 478, 482 (1976) (acknowledging the existence of the employee's duty not to disclose the employer's confidential information). Merely labeling a relationship as fiduciary, without more, is probably insufficient to create a fiduciary relationship if none existed without that description. *See* RESTATEMENT (SECOND) OF AGENCY § 13 cmt. c (1958).

27. *See* *Clyde Rudd & Assocs., Inc. v. Taylor*, 29 N.C. App. 679, 682, 225 S.E.2d 602, 604 (1976) (holding that an employer may recover unaccounted profits of an agent).

the principal,²⁸ the duty not to compete with the principal in matters within the scope of the agency relationship,²⁹ and the duty to deal fairly with the principal in all transactions.³⁰ The breadth and scope of these duties may vary depending on the centrality of the agent's activities to the agency relationship.³¹ The concept flows directly from the notion that an agent owes a fiduciary duty to her principal regarding matters *within the scope of her agency*.³² As the responsibilities or confidences of the employee decrease, so do the attendant duties.³³ Thus, the employment-agency relationship gives rise to *some* fiduciary duty of loyalty, the breadth and scope of which depends on the nature of the employment relationship.

Applying the facts in *Dalton* to these principles, the threshold issue of whether Camp owed a fiduciary duty to his employer would disappear, for agency law provides an affirmative answer. Rather, the issue would be whether Camp breached that fiduciary duty by negotiating and signing a contract with his employer's client. The *Dalton* court, however, never reached the breach inquiry because it held that no fiduciary relationship existed between the plaintiff-employer and the defendant-employee.³⁴

Indeed, the challenge for courts and legal scholars alike has been less to define fiduciary duties than to identify the full gamut of relationships that give rise to such duties.³⁵ Courts traditionally

28. See *In re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965) (per curiam) (“[W]hen a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master . . . he has an interest against his duty.”).

29. See *Matthews*, 100 N.C. App. at 441–42, 397 S.E.2d at 84 (holding that a salesman merely making plans to compete with his agent did not breach his fiduciary duty).

30. For a more complete catalog of these duties, see RESTATEMENT (SECOND) OF AGENCY §§ 376–98 (1958).

31. Scott, *supra* note 24, at 549 (“The question here is one of degree. It is a question of the closeness of the connection between what he does for himself and what he has undertaken to do for his principal.”).

32. *SNML Corp. v. Bank of N.C.*, 41 N.C. App. 28, 37, 254 S.E.2d 274, 280 (1979) (“An agent is a fiduciary concerning the matters within the scope of his agency.”).

33. This syllogism, carried to its logical extreme, suggests that even an employee with de minimus responsibilities would be bound by some degree of fiduciary duty. At least one author argues that this duty should be attenuated among low-level employees if only because such employees are unlikely to be aware of their fiduciary duty. See Scott W. Fielding, Note, *Free Competition or Corporate Theft?: The Need for Courts To Consider the Employment Relationship in Preliminary Steps Disputes*, 52 VAND. L. REV. 201, 207 (1999) (arguing that courts should define the extent of the fiduciary duty according to the expectations of employee and employer).

34. *Dalton v. Camp*, 353 N.C. 647, 651–52, 548 S.E.2d 704, 707–08 (2001) (citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984)).

35. See Fielding, *supra* note 33, at 202–04 (stating that courts and attorneys have difficulty defining relationships and applying legal principles to them).

hesitate to provide a definitive list of the relationships that result in fiduciary duties for fear of being *underinclusive*.³⁶ As a result, the typical definition of fiduciary relations enumerates the types of relationships that de jure give rise to a fiduciary relationship, along with a more general description of the types of relationships that de facto result in a fiduciary relationship.³⁷ The seminal North Carolina case defining the fiduciary relationship is *Abbitt v. Gregory*.³⁸ The *Abbitt* court defined the fiduciary relationship broadly as any relationship in which one party places a special confidence in another party with “a resulting domination and influence” on the first party.³⁹ The *Abbitt* court also included the principal-agent in its enumeration of legal relationships that give rise to a fiduciary relationship.⁴⁰

Although citing the classic *Abbitt* definition, the *Dalton* court omitted the part of the definition that enumerates de jure examples of fiduciary relationships, and instead focused on the de facto description of a fiduciary relationship. This omission represented the first indication that the court intended to distance itself from strict application of agency law principles.⁴¹ Indeed, the court in its ensuing

36. See, e.g., *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931); 37 AM. JUR. 2D *Fraud and Deceit* § 32 (2001); see also RESTATEMENT (THIRD) OF AGENCY, *Introduction* (Tentative Draft No. 2, 2001) (discussing the inclusions and exclusions of the common law definition of an agency relationship); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (“Fiduciary obligation is one of the most elusive concepts in Anglo-American law.”); Hynes, *supra* note 26, at 442–43 (describing the law of fiduciary duties as “open-textured and uncertain” resulting in “considerable vagueness and ambiguity”).

37. See, e.g., *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951) (“Suffice it to say, without more, that as between principal and agent, the [fiduciary] relationship applies with all of its rigor in all of its implications.”); *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616–17 (1943) (listing several “known and definite” examples of relationships giving rise to the fiduciary duty). *Black’s Law Dictionary* defines the fiduciary relationship as one “in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship” and includes the agent-principal relationship in its enumeration of usual fiduciary relationships. BLACK’S LAW DICTIONARY 640 (7th ed. 1999). Professor Scott, in his classic article addressing the fiduciary principle, broadly defines a fiduciary as “a person who undertakes to act in the interest of another person.” Scott, *supra* note 24, at 540. Professor Scott lists “trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of kin of the decedent” as some of the “usual fiduciary relations.” *Id.* at 541 (emphasis added).

38. 201 N.C. 577, 160 S.E. 896 (1931).

39. *Id.* at 598, 160 S.E. at 906.

40. *Id.*

41. Admittedly, even prior to *Dalton*, North Carolina case law contained hints that the courts would not automatically apply the fiduciary label to employer-employee relationships. See *King v. Atl. Coast Line R.R. Co.*, 157 N.C. 35, 49, 72 S.E. 801, 808 (1911) (stating that the employer-employee relationship “is not one of those regarded as confidential, from which a presumption of fraud or undue influence will arise”); *Hlatt v.*

analysis implicitly established a rule that requires courts to presume that a fiduciary relationship does *not* exist between employer and employee.⁴² The court's analysis further suggests that the bar has been placed fairly high for employers seeking to prove a fiduciary relationship in the workplace. This conclusion gains support when one compares the supreme court's decision with the decision of court of appeals on the same facts.

The court of appeals first considered Camp's title as General Manager and the fact that responsibility for Dalton's publications had been delegated solely to him.⁴³ The court also viewed Camp's handling of the plaintiff's financial matters and his personal contact with clients as additional evidence of a fiduciary duty.⁴⁴ Focusing on the first prong of the *Abbitt* definition—the instillation of confidence—the court concluded that Camp owed Dalton a fiduciary duty and that a genuine issue of material fact existed as to whether Camp breached that duty.⁴⁵

The supreme court emphasized different aspects of Camp's employment relationship. The court stressed Camp's status as an at-will employee, describing his responsibilities as "not unlike those of employees in other businesses."⁴⁶ The sweeping nature of this statement alone suggests the court's stringent approach toward

Burlington Indus., Inc., 55 N.C. App. 523, 529, 286 S.E.2d 566, 569 (1982) (citing *King* in dicta). Many courts use the terms "confidential" and "fiduciary" interchangeably, as appears to be the case here. See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 906. Some scholars prefer to distinguish between the two terms, *id.*, but the distinction is not relevant for purposes of this Recent Development.

42. *Dalton v. Camp*, 353 N.C. 647, 651–52, 548 S.E.2d 704, 708 (2001). Indeed, at least one lower court has already read *Dalton* to convey such a rule. See *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 155, 555 S.E.2d 281, 292 (2001) ("[O]ur Supreme Court has recently indicated that a fiduciary relationship will generally not be found in the workplace."); see also Ertel Berry, *Low-Level Employee Not Subject to Fiduciary Lawsuit*, N.C. LAW WEEKLY, July 30, 2001, at A1 ("The black letter law from this case is that, absent exceptional circumstances, there is no fiduciary relationship between employers and employees.") (quoting William E. Wheeler, plaintiff's attorney).

43. *Dalton v. Camp*, 138 N.C. App. 201, 207, 531 S.E.2d 258, 262 (2000), *rev'd*, 353 N.C. 647, 548 S.E.2d 704 (2001) (enumerating defendant's day-to-day responsibilities).

44. *Id.* (explaining that Camp had responsibility for the payroll, checkbook, and accounts associated with the plaintiff's business); cf. *State v. Rupe*, 109 N.C. App. 601, 609, 428 S.E.2d 480, 485 (1993) (stating that the defendant's position in a group of related companies, and the monetary compensation and career advancement he received, placed him in a fiduciary position with respect to the investors and prospective purchasers).

45. *Dalton*, 138 N.C. App. at 207, 531 S.E.2d at 262–63.

46. *Dalton*, 353 N.C. at 652, 548 S.E.2d at 708 (describing those duties as "overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines").

finding a fiduciary relationship. Focusing on the second prong of the *Abbit* definition—the agent’s resulting domination of and influence on the principal—the court concluded that a fiduciary relationship could not exist *as a matter of law* “absent a finding that the employer in the instant case was somehow subjugated to the improper influences⁴⁷ or domination of his employee—an unlikely scenario as a general proposition and one not evidenced by these facts in particular.”⁴⁸

Two courts, applying the same legal definition to the same forecast of evidence, reached opposite conclusions. Granted, high courts overturn lower courts on a regular basis; but the legal posture of the issue in *Dalton* renders the divergent outcomes more striking. First, the determination that a fiduciary relationship exists is a question of fact for the judge or jury.⁴⁹ Yet neither court opined that it needed to submit this question to the jury in this case. Second, the legal posture of the case required the court to view the evidence in the light most favorable to the plaintiff.⁵⁰ If reasonable judges clearly differed on this factual inquiry, the supreme court’s holding that no fiduciary relationship existed *as a matter of law* demands further examination. The court’s subsequent analysis sheds some light on the puzzle: The two courts apparently were talking about different duties.

The supreme court distinguished the fiduciary duty of loyalty from another, *nonfiduciary* duty of loyalty.⁵¹ The second, more general duty requires every employee to “serve his employer faithfully and discharge his duties with reasonable diligence, care and

47. Although the court qualified as “improper” the type of influence to which the employer must be subjugated to find a fiduciary relationship, the *Abbit* definition does not call for such qualification. *Id.* at 652, 548 S.E.2d at 708. The court did not clarify what might make an influence “improper.” Apparently, the “propriety” of such influence hinges on the existence of the fiduciary relationship in the first place. *Id.*

48. *Id.*

49. *Crew v. Crew*, 236 N.C. 528, 530, 73 S.E.2d 309, 311 (1952) (stating that the jury makes findings of fact to determine whether the plaintiff and defendant had a fiduciary relationship); *see also* *Kapp v. Kapp*, 336 N.C. 295, 301, 442 S.E.2d 499, 503 (1994) (finding that the existence of a fiduciary relationship properly was submitted to the jury when evidence pointed in both directions); *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (explaining that the existence of a fiduciary relationship often depends on case-specific circumstances); *Patterson v. Strickland*, 133 N.C. App. 510, 516–17, 515 S.E.2d 915, 919 (1999) (adhering to a jury determination that the two parties were fiduciaries).

50. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707.

51. *Id.* at 652, 548 S.E.2d at 708.

attention.”⁵² The court of appeals likely based its analysis on this nonfiduciary duty. According to the supreme court, however, only a breach of the *fiduciary* duty of loyalty gives rise to an actionable claim.⁵³ A breach of the nonfiduciary duty of loyalty may serve as an affirmative defense to an employer in a wrongful termination suit,⁵⁴ but does not constitute a cognizable claim as an independent tort.⁵⁵ In sum, because the supreme court did not attempt to restrict its holding,⁵⁶ it announced a distinct paradigmatic shift characterized by a rather narrow application of fiduciary principles in the workplace.⁵⁷ A more general duty of loyalty survives the decision, but its legal effect rests only as an affirmative defense for an employer’s wrongful termination claim.⁵⁸

The shift also signals that the court has tipped the scales of equity in favor of the employee vis-à-vis the employer in employment loyalty disputes. Although the *Dalton* court omitted discussion of the policy considerations that may have influenced its decision, judges and legal scholars have identified two predominant, sometimes conflicting,

52. *McKnight v. Simpson’s Beauty Supply, Inc.*, 86 N.C. App. 451, 453, 358 S.E.2d 107, 109 (1987).

53. See *Dalton*, 353 N.C. at 652–54, 548 S.E.2d at 708–09.

54. See, e.g., *In re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965) (per curiam) (“Where an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified.”); *Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 604, 439 S.E.2d 797, 802 (1994) (citing *Burris*, 263 N.C. at 795, 140 S.E.2d at 410)).

55. *Dalton*, 353 N.C. at 653, 548 S.E.2d at 709. Plaintiff’s confusion is understandable—a federal district judge in North Carolina held that a claim for breach of the duty of loyalty was cognizable. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1217, 1229 (M.D.N.C. 1996). The court in *Dalton* overruled *Food Lion* to the extent that it held that such a breach was an independent and actionable tort. *Dalton*, 353 N.C. at 653, 548 S.E.2d at 709.

56. The decision appears intended for general applicability. For example, the language in the court’s analysis of Camp’s nonfiduciary status itself suggests broad application: “[E]mployees in other businesses” are “unlikely . . . as a general proposition” to subjugate their employer to the influence or domination required by the court to constitute a fiduciary relationship. *Dalton*, 353 N.C. at 652, 548 S.E.2d at 708 (emphasis added). Moreover, the holding that no basis exists for recognizing an independent tort claim for breach of the general duty of loyalty is clearly intended to serve as a general rule of law. *Id.* at 652–54, 548 S.E.2d at 708–09.

57. Such a shift, although apparently inconsistent with strict agency principles, is consistent with the observation that “[a] fiduciary duty will not be lightly created, as it imposes extraordinary duties and requires the fiduciary to put the interests of the beneficiary ahead of its own if the need arises.” 37 AM. JUR. 2D *Fraud and Deceit* § 32 (2001). The conflict, however, can be largely resolved by maintaining the distinction between defining a fiduciary and assigning the duties owed by that fiduciary.

58. *Dalton*, 353 N.C. at 653, 548 S.E.2d at 709 (“[A]lthough our state courts recognize the existence of an employee’s duty of loyalty, we do not recognize its breach as an independent claim. Evidence of such a breach serves only as a justification for a defendant-employer in a wrongful termination action by an employee.”).

policies that influence the duties inherent in the employment relationship. The first policy concerns promoting increased competition in the marketplace and the attendant benefits in a free-market system.⁵⁹ The second policy is rooted in morality principles and promotes standards of loyalty and fair dealing in the workplace to protect the employer from actions of self-interested employees.⁶⁰

To the extent that the two policies conflict, the *Dalton* decision decidedly weighs in favor of encouraging competition. This result may seem surprising in light of the limited protections traditionally afforded at-will employees in North Carolina.⁶¹ On the other hand, the result may seem less surprising in light of the established policy in North Carolina of prohibiting restraints in trade⁶² and promoting employee mobility.⁶³ For example, in a case involving a dispute over the validity of a noncompete agreement, the North Carolina Court of Appeals referred to North Carolina's "particular commitment" to a person's freedom in choosing his employment.⁶⁴

Of course, any efficiencies gained from the free flow of labor may be offset by attendant costs related to the demise or devaluation of employee loyalty. Benefits of employee loyalty may include reduced recruitment and training costs, increased productivity of experienced workers, and other benefits from improved company morale.⁶⁵ Though impossible to quantify, such benefits arguably are

59. See, e.g., *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 567-69 (Md. 1978) (expounding on the influences of these sometimes conflicting policies); Chew, *supra* note 26, at 452 (discussing the restraint on an individual's freedom to compete as "contrary to society's long-standing goal of promoting competition"); see also Fielding, *supra* note 33, at 203-05 (describing court attempts at resolving the tension under the "preliminary steps doctrine").

60. See, e.g., *Md. Metals, Inc.*, 382 A.2d at 567-69.

61. See, e.g., *Woods v. City of Wilmington*, 125 N.C. App. 226, 229, 480 S.E.2d 429, 432 (1997) (noting that at-will employees can "generally be discharged for arbitrary, irrational, indifferent, or illogical reasons without any legal recourse").

62. See, e.g., N.C. GEN. STAT. § 75-1 (2001) (declaring any contract in restraint of trade or commerce in North Carolina a felony).

63. See N.C. GEN. STAT. § 95-78 (2001) ("The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion."). North Carolina courts treat noncompete covenants as partial restraints of trade that are enforceable only if: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *Asheville Assocs., Inc. v. Miller*, 255 N.C. 400, 402, 121 S.E.2d 593, 594 (1961).

64. *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 691-92, 228 S.E.2d 478, 483 (1976).

65. *An Alternative to Cocker Spaniels: The Idea That Loyalty Pays Is Being Severely Tested by the Economic Downturn*, *ECONOMIST*, Aug. 25, 2001, at 49, 50-51 (discussing

sacrificed at the expense of increased competition. Former Chief Justice Harlan F. Stone stated in 1934 that “[n]o thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to [the fiduciary] principle.”⁶⁶ Not surprisingly, the *Dalton* decision has prompted responses from the legal community airing similar concerns.⁶⁷

Nevertheless, legal scholarship provides additional support for *Dalton*'s result. One scholar encourages courts to make the very distinction found in *Dalton* with respect to two separate strands of loyalty.⁶⁸ The first—a strictly “fiduciary” duty—would apply only to high-ranking employees, while the second—a less stringent duty of loyalty—would apply to lower-level or at-will employees.⁶⁹ Indeed, such a standard might be more consistent with employee expectations and the realities of the modern workplace.⁷⁰

Another line of scholarship suggests a model of fiduciary duty that operates as a function of the employee's bargaining power⁷¹ in

various companies' strategies to maintain employee loyalty in the face of widespread layoffs).

66. Harlan F. Stone, *The Public Influence of the Bar*, Address at the Dedication of the Law Quadrangle, University of Michigan (June 15, 1934), in 48 HARV. L. REV. 1, 9 (1934). In a similar vein, Professor Scott described the foundation of the noncompete rule as “rest[ing] on the unfairness in the particular circumstances of the taking advantage of an opportunity for personal profit when the interests of the corporation call for protection.” Scott, *supra* note 24, at 551.

67. See Berry, *supra* note 42; *Employee Loyalty: Whatever Happened to Loyalty?*, N.C. EMP. L. LETTER, (M. Lee Smith Publishers LLC; Womble Carlyle Sandridge & Rice, PLLC, 2001) Aug. 2001, at 1, 2 [hereinafter *Employee Loyalty*].

68. See Fielding, *supra* note 33, at 232–33.

69. *Id.* at 205; see also *Headquarters Buick-Nissan, Inc. v. Michael Oldsmobile*, 539 N.Y.S.2d 355, 356 (N.Y. App. Div. 1989) (stating that an at-will employee may, under certain circumstances, establish a company in competition with his employer while still an employee).

70. Fielding, *supra* note 33, at 205. Fielding also raises the issue of whether courts should treat the duty of loyalty as an implied contractual term. *Id.* at 223–32. This issue is part of a larger, ongoing scholarly debate about the nature of the fiduciary duty. See, e.g., Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 767–70 (2000) (discussing different views on the nature of fiduciary duty and proposing a new hypothesis); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1045–48 (1991) (discussing the analogy between the fiduciary relationship and an economics-based principal-agent model); DeMott, *supra* note 36, at 879–80 (arguing that applying only contract principles to fiduciary law is “surely mistaken”).

71. O'Neill, *supra* note 26, at 694–95, 706–13 (exploring the argument that a reciprocal duty of loyalty should run from employer to employee); see also *Wexler v. Greenberg*, 160 A.2d 430, 435 (Pa. 1960) (discussing the irony surrounding the weakened bargaining position of the individual with increased expertise who leaves her employ in search of a better position).

contrast to agency law, which has tended to favor employers.⁷² The power dynamics in employment relationships naturally vary with the ebb and flow of given industries and with the fluctuations of the economy at large.⁷³ Under this view, as the employee's bargaining power increased, so would her fiduciary duty.⁷⁴ Such a model might redress what some perceive as the logical imbalance in fiduciary rules that tend to protect the employer through an implicit operation of law even though employers can protect themselves explicitly through employment agreements.⁷⁵ Whether the *Dalton* court had this model of the fiduciary in mind when rendering its decision, the two models converge to the extent that employers increasingly will be forced to safeguard themselves from employee disloyalty in express contractual agreements.

A final policy note: The *Dalton* court might have been motivated to shift the focus of breach of duty of loyalty disputes from a question of breach to a question of duty, in an effort to give trial judges more discretion over whether to hear loyalty disputes in the employment context. Indeed, one would expect the *Dalton* decision to have the effect of decreasing the number of those claims that make it to the trial stage.⁷⁶

In sum, the paradigmatic shift announced in *Dalton* effectively restricts the scope of legal action available to an employer whose employee acts in his own interest and against the employer's interest. The decision's practical implications are likely to be most germane among small- to medium-sized companies which rely on simple, if any, employment agreements without noncompete or nondisclosure provisions.⁷⁷ Firms that heavily rely on the development of a client base or that deal in intellectual capital or other transferable proprietary interests may also be particularly affected by *Dalton* because of the nature of their businesses. Such companies may wish

72. O'Neill, *supra* note 26, at 694–95.

73. *Id.* at 694.

74. Notwithstanding the apparent tendency of agency law to protect the employer, such a model is arguably in harmony with agency principles. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) (providing that “[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act”) (emphasis added). That is, the scope of the fiduciary relation (including attendant duties) expands or contracts as a function of the agent's control over the principal.

75. O'Neill, *supra* note 26, at 699.

76. See *Dalton v. Camp*, 353 N.C. 647, 653, 548 S.E.2d 704, 709 (2001) (restricting the breach of an employee's duty of loyalty—as distinguished from a breach of a fiduciary duty—to a justification in a wrongful termination action only).

77. See Berry, *supra* note 42; *Employee Loyalty*, *supra* note 67, at 1, 2.

to negotiate more detailed employment agreements, including noncompete or nondisclosure provisions if necessary. Additionally, these companies may want to avoid the use of at-will employees in positions that pose significant loyalty threats.⁷⁸

Finally, employees who are considering leaving their jobs to go into competition with their former employers should consider whether their current job descriptions might fit into the imprecise definition of a fiduciary. Although the subtext of *Dalton* appears to allow the “ordinary” employee considerable freedom to move from worker to competitor, the textual analysis in *Dalton* is too sparse, and the issues are too fact-specific⁷⁹ to yield definitive conclusions. Thus, the employee should proceed with caution through this ever-gray area of the law.⁸⁰ Nonetheless, common law agency principles *do* allow the employee to *prepare* to compete with her employer while still an employee.⁸¹ Indeed, if Camp had exercised some patience and simply waited to sign with the furniture company until *after* he quit his job, this dispute probably would not have reached the highest

78. Although the court was not explicit as to the relevance of at-will employment in this particular case, courts may have less sympathy for the employer when the alleged breach of loyalty involves an at-will employee. See Fielding, *supra* note 33, at 207 n.24.

79. See RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (1958) (explaining that because the existence of an agency relationship is based upon the parties’ manifestations of consent, the inquiry is fact-specific).

80. David J. Gass, *Departing Directors, Officers and Employees and the Limits of Their Fiduciary Duties*, 72 MICH. BAR J. 650, 654 (1993). Gass also reminds the employee that “in the event of a legal challenge, co-workers and customers will likely be deposed and everything they do after forming the intention to leave could well be subjected to close scrutiny.” *Id.*

81. See Fletcher, *Barnhardt & White, Inc. v. Matthews*, 100 N.C. App. 436, 441–42, 397 S.E.2d 81, 84 (1990) (finding that defendant-salesman owed a fiduciary duty to plaintiff-employer but he did not breach that duty by merely making preparations to compete with the plaintiff). Of course the distinction between preparations to compete and actual competition evokes another potentially gray area in the law. See, e.g., *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 494 (Colo. 1989) (en banc) (remanding the case to determine whether pre-termination customer meetings constituted a breach of duty of loyalty or merely preparations to compete); *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 569 n.3 (Md. 1978) (acknowledging that “the line separating mere preparation from active competition may be difficult to discern in some cases”).

court of the state, let alone twice.⁸² Disgruntled agency law advocates take comfort in the realization that at least one old-fashioned virtue survives *Dalton*.⁸³

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82. See, e.g., *Matthews*, 100 N.C. App. at 441-42, 397 S.E.2d at 84 (holding that an employee's actions in preparing to leave the company to form a competing business while still employed by the company did not breach the fiduciary duty) (citing *Md. Metals, Inc.*, 382 A.2d at 564).

83. "Patience is a virtue." The English version of this popular proverb has "been traced back to *Piers Plowman* (1377) by William Langland." See GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 273 (Random House, 1996).