



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of Prudential Security

File No. 211-0026

January 4, 2023

Today, the Commission announced that it has accepted, subject to final approval, a consent agreement with Prudential Security, Inc. The consent resolves allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. This case, which alleges a stand-alone violation of Section 5, is one of the first to employ the approach that the recently issued Section 5 Policy Statement¹ describes. For the reasons explained below, I dissent.

One point is worth emphasizing: my vote to oppose issuance of the complaint does *not* mean that I endorse or condone the conduct of Prudential Security. The company required its security guards to sign non-compete agreements that prohibited employees from accepting employment with a competing business for two years following conclusion of their employment with Prudential. Moreover, a liquidated damages provision required employees to pay Prudential \$100,000 for violations of the non-compete agreement. Based on these facts, it seems appropriate that a Michigan state court found that the non-compete agreements were unreasonable and unenforceable under state law.²

Instead, my vote reflects my continuing disagreement with the new Section 5 Policy Statement and its application to these facts. When it was issued, I expressed concern that the Policy Statement would be used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives.³ Unfortunately, that is the approach taken in this case.

The Complaint offers no evidence of anticompetitive effect in any relevant market. According to the Complaint, Prudential's use of non-compete agreements "has harmed employees" by limiting

¹ Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

² Complaint ¶ 22.

³ See Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf.

their ability to work for other firms in the security guard industry.⁴ It asserts that Prudential's use of non-compete agreements is "coercive and exploitative" and "tends to negatively affect competition conditions"⁵ – but it appears that those "competition conditions" pertain only to individual employees. Similarly, the Complaint offers only a conclusory assertion that "[a]ny possible legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibited disclosure of any confidential information."⁶ This assertion is unsubstantiated.

Another aspect of the case also concerns me. This enforcement action is designed not to provide effective relief but instead to signal activity with respect to non-compete agreements in the employment arena. As the Complaint describes, Prudential sold the bulk of its security guard business to another security guard company, Titan Security Group. The former Prudential security guards who now work for Titan are not subject to non-compete agreements.⁷ Moreover, now that Prudential no longer provides security guard services, there is no reason for the company to seek to enforce non-compete agreements against former Prudential security guards who did not move to Titan.

I wish it were accurate to say that this case (with apologies to Shakespeare) is a tale of sound and fury, signifying nothing. Unfortunately, it has great significance: it foreshadows how the Commission will apply the new Section 5 Policy Statement. Practices that three unelected bureaucrats find distasteful will be labeled with nefarious adjectives and summarily condemned, with little to no evidence of harm to competition. I fear the consequences for our economy, and for the FTC as an institution.

⁴ Complaint ¶¶ 23, 25.

⁵ Complaint ¶ 29.

⁶ Complaint ¶ 26.

⁷ Complaint ¶ 16.