[Cite as *Swagelok Co. v. Young*, 2002-Ohio-3416.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78976

SWAGELOK COMPANY	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellant	:	OPINION
	:	
-vs-	:	
	:	
MICHAEL YOUNG	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT OF DECISION: JULY 3, 2002

CHARACTER OF PROCEEDING: Civil appeal from the Court of Common Pleas Case No. CV-416589

JUDGMENT: Reversed and Remanded.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:

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(continued)

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ANN DYKE, J.:

{¶1} This is an appeal from the order of the trial court denying Appellant Swagelok Company's ("Swagelok") Motion for Preliminary Injunction in an action against its former employee, Michael Young ("Young"). Swagelok alleges that the trial court erred in refusing to enforce a covenant not to compete against Young. Swagelok contends that the court erred in determining that the promise of continued employment in exchange for Young's acceptance of the restrictive covenant constitutes sufficient consideration to enforce the agreement. We agree. For the reasons set forth below, we reverse the finding of the trial court and remand for further proceedings consistent with this opinion.

{¶2} The facts of this case are undisputed. Swagelok manufactures and markets industrial tube fittings, valves and related products. Swagelok hired Young and he began work as a sales training manager on December 19, 1994. On August 6, 1998, Swagelok presented Young with an Employee Agreement that contained a non-compete clause. Swagelok promised Young continued at-will

employment with the company in exchange for his assent to the Employee Agreement. The agreement states, in relevant part:

> {¶3} In consideration of my employment by Swagelok or by any of its existing or future related companies, subsidiaries or any other company within the Swagelok organization (hereafter collectively called the "Company") and for the salary and wages to be paid to me by the company during my employment, I hereby agree as follows ***.
>
> {¶4} ***
>
> {¶5} 9. I hereby acknowledge my awareness that during the term of my employment I may have access to certain procedures, business philosophies and marketing strategies that are proprietary to the Company and are a valuable asset to the Company. Therefore, during my employment hereunder and during the one-year period after termination of employment for any cause whatsoever, I will not, either on my own behalf or as an employee, agent or representative of any person or corporation, engage, directly or indirectly, in any segment of any business if that segment is competitive with the segments of the business of the Company with which I have been associated. The term "business of the company" as used in this paragraph means and includes the business in which the Company is engaged on this date and any other or additional business in which it engages hereafter during the term of my employment.
>
> {¶6} For purposes of the Agreement, the Company shall be deemed to be in the above business only in those

> geographic areas where it is conducting said business.

{¶7}

> It is agreed that the restriction contained in this Paragraph 9 shall not act to prohibit the engagement of the undersigned in any capacity by any party, including present customers of the Company, providing the business of the Company is merely as an incident to said party's primary business.

{¶8}

> 10. That my employment with the Company is for no specific term or length of time and that I am an "employee at-will," meaning that either I or the Company may terminate my employment at any time with or without notice and with or without any reason or cause. Neither I nor the Company is required to provide any reason for termination in the event of the termination of my employment. I also understand and agree that any statements, or promises, or representations made to me concerning the length or term of employment or my status as an employee other than as an employee-at-will which conflict or otherwise modify the terms of this paragraph are considered null and void and that the terms of this paragraph supersede any promises, representations or agreements made prior to the execution of this agreement. [Emphasis added.]

{¶9} The parties agree that the sole underlying consideration for this clause was Young's continued at-will employment.

{¶10} On January 31, 2000 Swagelok terminated Young. Thereafter, Young began working for one of Swagelok's direct

competitors. Swagelok asserts that Young's new employment violated the non-compete clause contained in the Employment Agreement.

{¶11} Swagelok filed a Motion for Injunctive Relief seeking to enforce the restrictive covenant. In its Motion, Swagelok argued that the promise of continued employment was sufficient consideration to enforce the non-compete clause against Young. The trial court denied Swagelok's motion. It is from this ruling that Swagelok now appeals. Swagelok's sole assignment of error states:

I.

{¶12} THE TRIAL COURT ERRED IN DENYING APPELLANT SWAGELOK COMPANY'S REQUEST FOR INJUNCTIVE RELIEF TO PRECLUDE THE DEFENDANT MICHAEL YOUNG FROM VIOLATING A NONCOMPETITION AGREEMENT, BASED ON ITS DETERMINATION THAT CONTINUED EMPLOYMENT DOES NOT CONSTITUTE SUFFICIENT CONSIDERATION TO UPHOLD SUCH AN AGREEMENT.

{¶13} The issue of whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court should not disturb the judgment of the trial court in the absence of an abuse of discretion. *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496, 498. When applying this standard of review, an appellate court must not substitute its judgment for that of the trial court. *State v. Reiner* (2001), 93 Ohio St.3d 601, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. Rather, reversal on appeal is warranted only when the trial court has exercised its discretion unreasonably,

arbitrarily, or unconscionably. *Id.*, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶14} In determining whether to grant a preliminary injunction, a trial court must consider whether (1) there is a substantial likelihood that the movant will prevail on the merits, (2) the movant will suffer irreparable injury if the injunction is not granted, (3) third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by granting the injunction. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.* (1996), 109 Ohio App.3d 786, 673 N.E.2d 182. However, no one factor is dispositive. *Willis v. Maynard* (Jan. 18, 2000), Clermont App. No. 99-05-047, citing *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 14, 684 N.E.2d 343.

{¶15} In the case at hand, the trial court abused its discretion when it failed to expressly consider all of the above factors in denying injunctive relief, particularly whether Swagelok would suffer irreparable injury if the injunction were not granted. The trial court addressed at great length the issue of whether continued employment alone constitutes sufficient consideration to uphold a noncompetition agreement. From this analysis, we presume that the trial court determined that Swagelok did not have a substantial likelihood of prevailing on the merits. However, the trial court was also required to consider whether Swagelok would

suffer irreparable injury if the injunction were not granted. Additionally, the trial court was required to consider whether third parties would be unjustifiably harmed and/or the public interest would be served if the injunction were granted.[1]

{¶16} Both parties agree that the thrust of the underlying dispute is whether continued at-will employment alone is sufficient consideration to uphold a non-compete clause of an employment agreement.

{¶17} Young contends that the covenant not to compete is unenforceable because he was given no consideration other than the promise of continued employment in exchange for his assent to the agreement which contained the restrictive clause.

{¶18} It is axiomatic that mutual consideration is necessary to support a contract. *Chrysalis Health Care, Inc. v. Brooks* (1994), 65 Ohio Misc.2d 32, 640 N.E.2d 915. Generally, courts will not inquire into the adequacy of consideration. *Rogers v. Runfola Associates, Inc.* (1991), 57 Ohio St.3d 5, 565 N.E.2d 540. Therefore, the issue here is whether the post-hire promise of continued employment alone constitutes sufficient consideration to enforce a non-compete clause in an employment agreement.

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[1] While the trial court engaged in an analysis balancing the competing interests of employers, employees and the general public, it did not do so in the context of considering whether to grant the injunction. Rather, the court engaged in the analysis to determine whether or not continued employment should constitute sufficient consideration to uphold a non-compete clause in an employment

{¶19} The Ohio Supreme Court has specifically declined to address whether continued employment constitutes sufficient consideration to support a post-hire covenant not to compete, despite an apparent conflict among Ohio districts. The Fifth Appellate District, in *Copeco, Inc. v. Caley* (1992), 91 Ohio App.3d 474, 632 N.E.2d 1299 held that an employment agreement containing a covenant not to compete was supported by sufficient consideration where the employees risked being fired if they did not sign the agreement. Acknowledging a conflict between its decision and the Ninth Appellate District's ruling in *Prinz Office Equip. Co. v. Pesko* (Jan. 31, 1990), Summit App. No. CA-14155, the Fifth District certified the conflict to the Supreme Court in *Copeco, Inc. v. Caley* (1994), 69 Ohio St.3d 79; 630 N.E.2d 662. The Supreme Court dismissed the appeal stating that the judgments were not in conflict. *Id.* As a result of the Supreme Court's refusal to rule on the issue, two lines of authority regarding this issue have emerged in Ohio's appellate districts.

{¶20} This court has held that the promise of continued employment is sufficient consideration to uphold a non-compete agreement. *Cole Nat. Corp. v. Koos* (Dec. 22, 1994), Cuyahoga App. No. 66760, and *H.R. Graphics v. Lake-Perry* (Jan. 30, 1997), Cuyahoga App. No. 70696. However, because both *Cole* and *H.R.*

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agreement.

Graphics involved consideration in addition to continued employment, this court did not address at length the issue of continued at-will employment as the sole consideration for the agreement. We choose to consider the issue in greater detail and analyze it in the context of the case *sub judice*.

{¶21} Some districts have held that the promise of continued employment is insufficient consideration to uphold a covenant not to compete in an employment agreement entered into after the commencement of the employment relationship. *Prinz, supra.* (Ninth District);[2] *Apronstrings, Inc. v. Tomaric* (Aug. 7, 1987), Lake App. No. 11-272 (Eleventh District); and *Toledo Clutch & Brake Serv. v. Childers* (Feb. 28, 1986), Lucas App. No. L-85-069, (Sixth District). Courts rendering decisions holding that continued at-will employment is insufficient consideration reason that restrictive covenants are the result of unequal bargaining positions between employers and employees, and as such require something more than the promise of continued at-will employment (e.g. a salary increase, bonus or promotion). *Prinz, supra*., citing

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[2]The Ninth District appears to have a conflict within its district. In its most recent case, it held that continued at-will employment **was** sufficient consideration to support a covenant not to compete. *Bruner-Cox v. Dimengo* (Feb. 12, 1997), Summit App. No. 17732, citing *Nichols v. Waterfield Financial Corp.* (1989), 62 Ohio App.3d 717, 577 N.E.2d 422 and making no reference to the *Prinz* decision.

Morgan Lumber Sales Co. v. Toth (1974), 41 Ohio Misc. 17, 321 N.E.2d 907 (Tenth District).[3]

{¶22} However, the majority of districts have found that continued employment does constitute sufficient consideration to enforce a covenant not to compete which was entered into after the employment relationship commenced. *Willis v. Maynard* (Jan. 18, 2000), Clermont App. No. 99-05-047, (Twelfth District)[4]; *Financial Dimensions, Inc. v. Zifer* (Dec. 10, 1999), Hamilton App. Nos. C-980960 and C-980993, (First District); *Sash v. Thompson* (June 17, 1998), Allen App. No. 1-98-06, (Third District); *Bruner-Cox v.* Dimengo (Feb. 12, 1997), Summit App. No. 17732, (Ninth District); *Canter v. Tucker* (1996), 110 Ohio App.3d 421, 674 N.E.2d 727 (Tenth District); *Trugreen LP v. Richwine* (June 29, 1994), Clark App. No. 3098, (Second District); *Copeco, supra.*[5] (Fifth District); *Nichols v. Waterfield* (1989) 62 Ohio App.3d 717; 577 N.E.2d 422 (Ninth District); *O'Brien v. Production Engineering Sales Co.* (Jan. 8,

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[3]Twenty-two years after its decision in *Morgan Lumber*, the Tenth District held that continued at-will employment **does** constitute sufficient consideration to enforce a covenant not to compete in *Canter v. Tucker* (1996), 110 Ohio App.3d 421, 674 N.E.2d 727.

[4]The *Willis* decision was rendered five years *after* the Twelfth District's opinion in *Tri-County Tree and Turf v. Busse* (Dec. 11, 1995), Warren App. No. CA95-02-013, in which that court had held that continued employment did not constitute sufficient consideration.

[5]The *Copeco* court impliedly overruled its decision in *Burnham v. Digman* (July 21, 1986), Licking App. No. CA-3185.

1988), Montgomery App. No. 10417, (Second District). The Fourth District Court of Appeals did not specifically address the issue of whether continued at-will employment alone constitutes sufficient consideration in *Thompson v. Clough* (Mar. 28, 2001), Washington App. No. 00CA8, noting that the corporation offered the employee continued employment regardless of whether he signed the agreement. Lastly, the Seventh District Court of Appeals has not yet addressed the issue. Interestingly, but not surprisingly, support for this proposition exists in Ohio's federal courts. *Pertz v. DeBartolo Corp.*, 188 F.3d 508, (6th Circ. 1999) (on appeal from N.D. Ohio), Avery Dennison Corp. v. Kitsonas, (S.D. Ohio 2000), 118 F. Supp.2d 848.

{¶23} In *Copeco*, *supra*, the employee was presented with an employment agreement containing a non-compete clause a few days after he was hired. The employee understood that the failure to sign the agreement would result in his termination. After weighing conflicting case law, the *Copeco* court held that continued employment was sufficient consideration to enforce the agreement, noting:

> **{¶24}** *** As a practical matter every day is a new day for both employer and employee in an at-will relationship. As stated supra, we see no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to 'day one.'
>
> *Id.* at 425.

{¶25} In *Canter, supra*, an employee was presented with a non-compete agreement two years after she was hired. When that employee began her own competing business, she was terminated from her company. She alleged that there was insufficient consideration to uphold the non-compete clause contained in her employment agreement. The *Canter* court disagreed. It, too, reviewed the conflicting case law and followed the reasoning set forth in *Copeco.* In response to the argument that insufficient consideration existed because the employer was not required to do anything "which it was not already bound to do," the court stated, "This court would note that an employer is *not* legally bound to continue an at-will employee's term of employment." Id. at 426.

{¶26} We agree with the majority of Ohio districts that have held that continued employment constitutes sufficient consideration to uphold a non-compete agreement that was entered into after the commencement of the employment relationship.

{¶27} Moreover, while we are not bound by it, we find particularly persuasive the reasoning outlined in *Trugreen, supra*:

{¶28} *** The distinction between an indefinite promise of employment made when an employee is initially hired and indefinite promise of employment to an existing employee seems artificial to us. It would either permit the employer who finds itself in legitimate need of covenants not to compete from certain of its employees to fire them all and then require them, as a condition of being re-hired, to execute covenants not to compete, or, worse yet, it would require the employee to fire those employees and inform them that as much as it would like to re-hire them, it is forced to hire new employees to replace them, so that it may obtain covenants not to compete that are reasonably related to its legitimate business needs. We doubt that an employee would be fired so that he could be replaced with an employee who could properly be required to execute a legitimate covenant not to compete as a condition of his initial hire would appreciate the benevolent paternalism implicit in preventing the employer from simply requiring the existing employee to execute a covenant not to compete as a condition of his employment. [Emphasis added.]

Id. at 7.

{¶29} In his brief, Young relies on this court's holding in *Cohen Co., CPA's v. Messina* (1985), 24 Ohio App.3d 22, 492 N.E.2d 867. However, *Cohen* is distinguishable from this case, and as such, his reliance is misplaced. In *Cohen*, a personnel manual contained, *inter alia*, a "client ownership" provision which prohibited employees from soliciting the firm's clients after termination. The manual was merely distributed to the employee two years after he began working for the firm. However, this personnel manual was unilateral in nature; the employee did not assent to the new terms of his employment in exchange for his continued at-will employment with the company. In the instant case, Young was

required to expressly assent to the non-compete clause of his employment agreement by signing the document in order to remain employed by Swagelok. Young was not merely notified of the altered terms of employment as in *Cohen*.

{¶30} We find that continued at-will employment constitutes sufficient consideration to uphold a post-employment non-compete clause contained within an employment agreement. Whether an employee assents to a restrictive covenant prior to or after the commencement of employment does not change the nature of an at-will employment relationship. In either case, both the employer and employee are free to terminate the relationship.

{¶31} Our holding does not change the fact that in order to be enforceable, a noncompetition clause must be reasonable. *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 325 N.E.2d 544. A non-competition clause is reasonable if the restraint is no greater than necessary for the protection of the employer, does not place undue hardship on the employee, and is not public. Id.

{¶32} As such, the decision of the trial court is reversed and this matter is remanded to determine whether the non-compete clause of the employment agreement is reasonable pursuant to *Raimonde*.

Judgment reversed and remanded for further proceedings consistent with this opinion.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TERRENCE O’DONNELL, J., CONCURS.

DIANE KARPINSKI, P.J., DISSENTS

(SEE ATTACHED DISSENTING OPINION)

ANN DYKE
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

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KARPINSKI, J., DISSENTING:

{¶33} What characterizes the at-will employment relationship, whether implied or express, is that it can be terminated by the employer or employee at any time and, with or without cause. The converse is also true: at-will employees can leave their employment whenever they so desire.

{¶34} The law is firmly established that the initial "consideration" between the parties in the at-will setting is the fact that the employee accepts an offer to perform services in exchange for the payment of wages. Restricting future choices of employment, however, adds an entirely new dimension to this situation. There is an enormous inequity between an employer's second promise of continued future employment, which can last as little as one day after the covenant has been signed, and, in return, the employee's promise not to compete years into the future. Once employees agree to the covenant-not-to-compete, they are obliged to conform to that covenant and all of its possible restrictions, often for years after the employment ends. In light of what the veteran employee promises in a restrictive covenant, an employer's tenuous promise of continued employment is not a fair or balanced exchange. *Cohen & Company v. Messina* (1985), 24 Ohio App.3d 22.

{¶35} In a published opinion, this court, faced with a restrictive covenant presented to an employee, also after employment had begun, decided that a promise of continuing employment is insufficient consideration. This court held that absent the exchange of "new" consideration by the employer the restrictive covenant is not enforceable. *Cohen & Co. v. Messina* (1985), 24 Ohio App.3d 22. Other courts have issued decisions consistent with this court's holding in *Cohen*: *Prinz Office Equip. Co. v. Pesko* (Jan. 31, 1990), Summit App. No. 14155, 1990 Ohio App. LEXIS 367; *Apronstrings, Inc. v. Tomaric* (Aug. 7, 1987), Lake App.

No. 11-272, 1987 Ohio App. LEXIS 8206; *Toledo Clutch & Brake Service, Inc. v. Childers* (Feb. 28, 1986), Lucas App. No. L-85-069, 1986 Ohio App. LEXIS 5763; *Morgan Lumber Sales Co. v. Toth* (C.P. 1974), 41 Ohio Misc. 17. In *Cohen*, supra, it was after the employee began working that the employer issued a personnel manual containing a client-ownership provision. The provision required employees to compensate the employer for any clients they took after they left its employment. This court held that the employer's promise of continuing employment did not constitute sufficient consideration to support the restrictive covenant provision. I find the facts and holding in *Cohen* applicable to the case at bar. Cohen's client-ownership provision, presented after the employee had been hired, is analogous to the restrictive covenant here. Both the *Cohen* provision and the covenant here were presented after employment had begun and both reached into the future to restrict the employee's prospective employment.

{¶36} I believe the majority too easily dismisses the precedential value of *Cohen*, supra, as well as its analysis of the issue. The majority attempts to factually distinguish *Cohen* on the basis that it involved a personnel manual that the employee did not affirmatively agree to and, therefore, could not be held to have accepted. This analysis ignores the essence of the inquiry *Cohen* followed, namely, whether there is an exchange of consideration between parties before the employment relationship is altered. The analysis in *Cohen* focused on consideration:

> **{¶37}** In this case, as in *Morgan Lumber*, the disputed provision was not in the original

> contract, and, in fact, was not announced until after Messina had been employed with the company for sixteen months. Furthermore, Messina's position, duties, and the nature of the business remained exactly the same as before the manual was distributed; the employment relationship was "at will," and the company assumed no obligation it did not already have. See *Morgan Lumber Sales Co. v. Toth,* supra. The trial court found that continuation of Messina's employment was the only consideration the company gave him. " *** [N]either the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party. * * *" *Rhoades v. Rhoades* (1974), 40 Ohio App. 2d 559, 562 [69 O.O.2d 488]. Thus, as *Morgan Lumber* indicates, the trial court was correct in ruling that mere continuation of employment, without additional consideration is insufficient to support the client-ownership provision as a contract. (Emphasis added).

{¶38} Under the majority's approach, the employer, after employment has begun, may impose a new obligation that operates after employment ceases, but gives up nothing and has no new obligation. This result fails to comport with the concept of consideration. In *Cohen*, the issue was payment of money; in the case at bar, it is denial of free access to future employment elsewhere. Here, the requirement of consideration is crucial if the court is being asked to deny an employee access to certain employers after he leaves employment. For the courts to enforce such a serious future restriction of an American's fundamental right requires more than an employer's illusory promise to do what

it was "already bound to do," as this court in *Cohen* explained quite well.

{¶39} I disagree with the majority's reading of *Thompson v. Clough* (Mar. 28, 2001), Washington App. No. 00CA8, 2001 Ohio App. LEXIS 1592, when it says that the court did not address the issue of whether a promise of continued employment is sufficient consideration. To the contrary, the court in *Thompson,* supra, clearly stated that such a promise was not sufficient consideration for the employee's signing an agreement not to compete. The court expressly said: "[w]e find that, even when construing the facts in the light most favorable to The Computer Store, no reasonable person could conclude that The Computer Store gave Clough consideration for the agreement."

{¶40} In support of its position that new consideration is not necessary, the majority also erroneously cites to *Cole Nat. Corp. V. Koos* (Dec. 22, 1994), Cuyahoga App. No. 66760, 1994 Ohio App. LEXIS 5781, and *H.R. Graphics v. Lake-Perry* (Jan. 30, 1997), Cuyahoga App. No. 70696, 1997 Ohio App. LEXIS 324. In these two cases, as the majority correctly observed, this court found consideration in addition to continued employment. Because of the additional consideration, the majority cannot cite to these cases as authority for the principle that continued employment alone is sufficient for a restrictive covenant. The fact is that the only case from this court dealing with the specific issue of whether a promise of continued employment is, without more, sufficient consideration to modify the at-will status of an employee after

employment has begun is *Cohen*, supra. *Cohen*, therefore, is the only correct precedent for the majority to follow.

{¶41} I also do not find persuasive the analysis in *Trugreen LP v. Richwine* (June 29, 1994), Clark App. No. 3098, 1994 Ohio App. LEXIS 2806, which the majority cites with approval. *Trugreen* overlooks the material requirement and definition of consideration in the formation of an enforceable contract. *Trugreen* prefers unsubstantiated practical considerations over the historical and legal importance of a bargained-for exchange in forming binding contractual obligations between parties. The *Trugreen* court, moreover, never decided the consideration question other than to send the case back to the trial court for a determination of that very issue.[6] Such dicta is less persuasive than the precedent of our own court in *Cohen*, which is factually on point.

{¶42} The majority opinion and *Trugreen* are both grounded in the unfounded presumption that requiring an employer to provide some additional consideration for a post-hire restrictive covenant is simply an impractical gesture which works an unnecessary hardship on the employer. To the contrary, without a requirement of additional consideration in exchange for what I believe to be substantial post-hire promises by the employee, the mutuality and freedom of at-will employment is turned on its head.

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[6]The court held there was "a genuine issue of fact concerning when the [plaintiff] received a meaningful promise of continuing employment," because plaintiff averred that the defendant "had already made the decision to fire him when it extracted his covenant." The court further found a question of fact on whether the covenant reasonably related "to a legitimate business end."

{¶43} As a result of the majority opinion in the case at bar, the employer is not only relieved of having to inform the prospective employee in the initial interview of what will be required of him or her after they begin employment, it also, quite unevenly, provides the employer with the benefit of post-employment restrictions on the employee for which the employer did not have to bargain or give anything in return.

{¶44} The practical effect of the majority decision in this case robs the at-will employee of future freedom. The majority ignores the fact that the employee, having just begun a new job and presented with a restrictive covenant, is hardly in a position to "take it or leave it." The reality is that if employees reject the post-hire covenant, only they have suffered a detriment, which is wholly inconsistent with the concepts of a bargained-for exchange and "consideration."

{¶45} Having to look for a different type of employment works an unfair and distinct disadvantage on the employee who now is saddled with a resume that appears to indicate employment instability. The employees are also in the unenviable position of having to explain that they are seeking a new job because they refused to sign a prior employer's agreement not to compete. Otherwise, employees would have to advise a new employer that they are limited in what customers they could seek. I sincerely doubt that a prospective employer would find the employee's prior refusal or a current limitation an appealing reason upon which to make an

offer of employment. Such a handicap should be compensated with more than a nebulous promise.

{¶46} As a matter of law, I conclude that Young did not receive any consideration for his execution of the covenant. Therefore, the restrictive covenant is not enforceable.

{¶47} Finally, because the judgment rendered by the majority in this case is in obvious conflict with other districts, as noted by the majority, upon the same question and rule of law, I would urge the Ohio Supreme Court to consider the issue of whether an employer's promise of continued employment, presented to an at-will employee after employment has begun, constitutes sufficient consideration in exchange for the employee's written covenant not to compete after employment has ended.

{¶48} I do not believe the Ohio Supreme Court has closed the book on this issue. The majority oversimplifies the Ohio Supreme Court's explanation of its ruling denying the motion to certify a conflict by the Fifth District between *Prinz,* supra, and *Copeco, Inc. v. Caley* (1992), 91 Ohio App.3d 474, 632 N.E.2d 1299. The majority explains that the Supreme Court "dismissed the appeal stating that the judgments were not in conflict." The Supreme Court, however, gave two reasons for refusing to certify a conflict, one of which is that the appellate court "did not clearly set forth the rule of law upon which the alleged conflict exists." *Copeco, Inc. v. Caley* (1994), 69 Ohio St.3d 79, 630 N.E.2d 662.

In fact, the Fifth Appellate District did not articulate any rule of law when the court certified the conflict.[7]

{¶49} Moreover, I do not agree with the majority in its assertion that most of the districts agree that continued employment is sufficient consideration for a covenant not to compete after employment has begun. In support of its claim, the majority opinion cites seven districts. Three districts have conflicting opinions on this issue: the Fifth, Ninth, and Twelfth.[8] Only four districts clearly support the majority's interpretation: the First, Second, Third, and Tenth. On the other hand, four districts clearly support the opposite interpretation: the Fourth, (*Thompson, supra*), the Sixth, (*Toledo Clutch & Brake Service V. Childers* (Feb. 28, 1986), Lucas App. No. L-85-069, the Eighth, (*Cohen*, supra, *Cole*, supra, and *H.R. Graphics,* supra.) and the Eleventh, (*Apronstrings,* supra, and *Etna Products, Inc. v. Stofey* (Sept. 28, 1981), Geauga App. No. 953. There is no clear majority in support of either interpretation.

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[7] **{¶a}** The appellate court entry reads in total as follows:

> **{¶b}** Upon application of the defendants-appellees, the record in the above captioned case is hereby certified to the Supreme Court of Ohio for review and final determination due to a conflict between the underlying judgment in the case at hand and the judgment in *Prinz Office Equipment Co. v. Pesko* (January 31, 1990) Summit App. No. CA-14155, unreported.

[8] In the Fifth, *Copeco*, supra, conflicts with *Burnham v. Digman* (July 21, 1986), Licking App. No. CA-3185, in the Ninth, *Prinz*, supra, conflicts with *Bruner-Cox v. Dimengo* (Feb. 12, 1997), Summit App. No. 17732; and in the Twelfth, *Willis Refrigeration*, *Air Conditioning & Heating v. Maynard* (Jan. 18, 2000), Clermont App. No. CA99-05-047 conflicts with *Tri-County Tree & Turf v. Busse* (Dec. 11, 1995), Warren App. No. CA95-02-013.

{¶50} And that is a good reason to ask the Supreme Court to consider the issue.