

# BON TON STORES INC

## **FORM 8-K** (Current report filing)

Filed 11/30/17 for the Period Ending 11/24/17

Address	2801 E MARKET ST YORK, PA, 17402-2406
Telephone	7177577660
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Fiscal Year	01/31

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, DC 20549

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**FORM 8-K**

**CURRENT REPORT  
PURSUANT TO SECTION 13 OR 15(D) OF THE  
SECURITIES EXCHANGE ACT OF 1934**

Date of Report (Date of earliest event reported): **November 24, 2017**

**THE BON-TON STORES, INC.**

(Exact name of registrant as specified in its charter)

**Pennsylvania**  
(State or Other Jurisdiction  
Of Incorporation)

**0-19517**  
(Commission  
File  
Number)

**23-2835229**  
(IRS Employer  
Identification No.)

**2801 E. Market Street, York, Pennsylvania 17402**  
(Address of principal executive offices, zip code)

**(717) 757-7660**  
Registrant's telephone number, including area code

**Not Applicable**  
(Former Name or Former Address, If Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter). Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

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**Item 5.02. Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers**

On or about November 24, 2017, with the authorization of the Company’s Board of Directors (the “Board”), the Company entered into retention award agreements (the “Retention Agreements”) with certain senior officers, including Named Executive Officers, of the Company. The Board determined that each of these employee’s performance of his or her duties has been and continues to be exceptional and highly valuable to the Company and the continuation of the employee’s performance of these duties is critically important to the Company’s ability to manage successfully its business, particularly in light of the challenging business environment facing the Company.

The Retention Agreements provide that the selected employee is paid, contemporaneously upon entering into the Agreements, a cash award (the “Award”) that is subject to repayment by the employee if the employee’s employment is terminated under certain circumstances prior to January 1, 2019. In the event that the employee’s employment is terminated prior to January 1, 2019 due to a termination by the Company for “Cause” (as defined in the Retention Agreement) or any termination by the employee other than for “Good Reason” (as defined in the Retention Agreement), the employee must repay to the Company the entire amount of the Award. In the event that the employee’s employment by the Company is terminated prior to January 1, 2019 due to the employees’ death or disability, a termination by the Company without Cause or a termination by the employee for Good Reason, the employee is not obligated to repay to the Company any amount of the Award.

The cash retention awards paid to the Company’s Named Executive Officers are as follows:

<u>Named Executive Officer</u>	<u>Cash Retention Award</u>
William X. Tracy President & Chief Executive Officer	\$ 900,000
Nancy A. Walsh Executive Vice President – Chief Financial Officer	\$ 600,000
Stephen R. Byers Executive Vice President – Stores, Visual & Loss Prevention	\$ 485,000

The foregoing description of the Retention Agreements is not intended to be complete and is qualified in its entirety by reference to the full text of the form of such agreement that is filed as Exhibit 10.1 to this Current Report on Form 8-K, which is incorporated by reference herein.

**Item 9.01. Financial Statements and Exhibits.**

<u>Exhibit Number</u>	<u>Description</u>
10.1	<a href="#">Form of Retention Award Agreement</a>

**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

THE BON-TON STORES, INC.

By: /s/ Nancy A. Walsh  
Nancy A. Walsh  
Executive Vice President – Chief Financial Officer

Dated: November 30, 2017

**RETENTION AWARD AGREEMENT**

THIS RETENTION AWARD AGREEMENT (this “Agreement”) is entered into and effective as of November [ ], 2017 (the “Effective Date”), by and between The Bon-Ton Department Stores, Inc., a Pennsylvania corporation (the “Company”), and , an employee of the Company (“Employee”).

**RECITALS**

A. The Company has determined that (i) Employee’s performance of his duties has been and continues to be exceptional and highly valuable to the Company and (ii) Employee’s continuation of his duties is critically important to the Company’s ability to manage successfully its business and all activities and endeavors necessary therefor and ancillary thereto, particularly in light of the challenging business environment facing the Company.

B. The Company desires to recognize Employee’s past services and to assure itself of Employee’s continued services for an extended period of time by paying Employee a cash award in the amount of \$ (the “Award”) that is subject to repayment by Employee if Employee’s employment with the Company is terminated under certain circumstances prior to the expiration of the Retention Period (as defined herein), as provided for in this Agreement.

**AGREEMENT**

**NOW, THEREFORE** , in consideration of the premises and mutual covenants herein contained, the Company and Employee agree as follows:

1. Definitions . For purposes of this Agreement:

(a) “Affiliate” shall mean a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

(b) “Cause” shall mean:

(i) Employee’s willful failure to perform Employee’s duties (other than any such failure resulting from incapacity due to physical or mental illness);

(ii) Employee’s continuous willful failure to comply with any valid and legal directive of the individual to whom Employee reports or the Board of Directors of the Company (the “Board”) or a committee of the Board;

(iii) Employee’s willful engagement in dishonesty, illegal conduct, or gross misconduct that is, in each case, materially injurious to the Company or its affiliates;

(iv) Employee’s embezzlement, misappropriation, or fraud, whether or not related to Employee’s employment with the Company;

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(v) Employee's conviction of or plea of guilty or nolo contendere to a crime that constitutes a felony (or state law equivalent) or a crime that constitutes a misdemeanor involving moral turpitude, if such felony or other crime (A) is work-related, (B) materially impairs Employee's ability to perform services for the Company or (C) in the reasonable judgment of the Company, has resulted or will result in material reputational or financial harm to the Company or its affiliates; or

(vi) Employee's material breach of any obligation under this Agreement, if such breach causes material reputational or financial harm to the Company.

For purposes of this Agreement, no act or failure to act on the part of Employee shall be considered "willful" unless it is done, or omitted to be done, by Employee in bad faith or without reasonable belief that Employee's action or omission was in the best interests of the Company. Any act, or failure to act, based upon authority given pursuant to a resolution duly adopted by the Board or upon the advice of counsel for the Company shall be conclusively presumed to be done, or omitted to be done, by Employee in good faith and in the best interests of the Company.

Furthermore, a termination of Employee's employment shall not be deemed for Cause unless and until the Company delivers to Employee a copy of a resolution duly adopted by the affirmative vote of not less than a majority of the Board (after reasonable written notice is provided to Employee and Employee is given an opportunity, together with counsel, to be heard before the Board), finding that Employee has engaged in the conduct described in any of clauses (i)-(vi) above. Except for an action or breach described in clause (iv) or (v) above, or any other failure, breach, or refusal that, by its nature, cannot reasonably be expected to be cured, Employee shall have ten (10) business days from the delivery of written notice by the Company within which to cure any acts or omissions constituting Cause, and the determination of whether such attempted cure is sufficient shall be in the Company's sole discretion; *provided however*, that if the Company reasonably expects irreparable injury or material reputational or financial harm from a delay of ten (10) business days, the Company may give Employee notice of such shorter period within which to cure as is deemed reasonable by the Board under the circumstances, which may include the termination of Employee's employment without notice and with immediate effect. The Company may place Employee on paid leave for up to thirty (30) days while it is determining whether there is a basis to terminate Employee's employment for Cause. The placement of Employee on paid leave for up to thirty (30) days in such circumstances shall not constitute Good Reason.

(c) "Code" shall mean the Internal Revenue Code of 1986, as amended.

(d) "Disability" shall mean Employee is entitled to receive long-term disability benefits under the Company's long-term disability plan, or if there is no such plan, Employee's inability, due to physical or mental incapacity, to substantially perform Employee's duties and responsibilities for one hundred eighty (180) days out of any three hundred sixty-five (365) day period or one hundred twenty (120) consecutive days; *provided however*, in the event that the Company temporarily replaces Employee, or transfers Employee's duties or responsibilities to another individual on account of Employee's inability to perform such duties due to a mental or physical incapacity that is, or is reasonably expected to become, a Disability, then Employee's employment shall not be deemed terminated by the Company, and Employee shall not be able to resign for Good Reason as a result thereof. Any question as to the existence

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of Employee's Disability as to which Employee and the Company cannot agree shall be determined in writing by a qualified independent physician mutually reasonably acceptable to Employee and the Company. If Employee and the Company cannot agree as to a qualified independent physician within fifteen (15) days, each shall appoint such a physician and those two physicians, within fifteen (15) days, shall select a third, who, within thirty (30) days, shall make such determination in writing. The determination of Disability made in writing to the Company and Employee shall be final and conclusive for all purposes of this Agreement.

(e) "Good Reason" shall mean the occurrence of any of the following during the Retention Period, in each case without Employee's written consent:

(i) a reduction in Employee's base salary;

(ii) a relocation of Employee's principal place of employment by more than 50 miles;

(iii) any material breach by the Company of any material provision of this Agreement or any material provision of any other agreement between Employee and the Company;

(iv) the Company's failure to obtain an agreement from any successor to the Company to assume and agree to perform this Agreement in the same manner and to the same extent that the Company would be required to perform if no succession had taken place, except where such assumption occurs by operation of law; or

(v) a material, adverse change in Employee's title, authority, duties, or responsibilities (other than temporarily while Employee is physically or mentally incapacitated) as of the date of this Agreement.

For purposes of this Agreement, Employee's termination of his employment shall not be deemed for Good Reason unless Employee has provided written notice to the Company (a "Notice") of the existence of the circumstances providing grounds for termination for Good Reason within ninety (90) days of the later of (i) the initial existence of such circumstances and (ii) Employee's actual knowledge of the existence of such circumstances, and the Company has had at least thirty (30) days from the date on which such notice is provided to cure such circumstances. If Employee does not (i) provide a Notice of the existence of the circumstances providing grounds for termination for Good Reason within ninety (90) days of the later of (A) the initial existence of such circumstances or (B) Employee's actual knowledge of the existence of such circumstances, or (ii) terminate employment for Good Reason within sixty (60) days following Employee's delivery of a Notice to the Company (where the Company has not cured the circumstances providing such grounds for termination for Good Reason within thirty (30) days of the date of Employee's delivery of such Notice), then Employee will be deemed to have waived Employee's right to terminate for Good Reason with respect to such grounds.

(f) "Retention Period" shall commence on the Effective Date and terminate on January 1, 2019.

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(g) “ Termination Date ” shall mean the date on which Employee’s employment by the Company is terminated.

2. Duties. Except as specifically provided in Section 3(b) below, in order to retain the Award, Employee agrees that, during the Retention Period, Employee shall perform fully the terms of this Agreement and Employee’s duties for the Company.

3. Award; Termination of Employment.

(a) Award. On the Effective Date, the Company shall pay Employee, in cash in a single lump sum, an amount equal to the Award, less all applicable withholdings and deductions required by law.

(b) Repayment of Award upon Termination. In the event that Employee’s employment is terminated prior to the end of the Retention Period due to (x) a termination by the Company for Cause or (y) any termination by Employee other than for Good Reason, Employee must repay to the Company within sixty (60) days of the Termination Date the entire, gross amount of the Award. In the event that Employee’s employment by the Company is terminated prior to the end of the Retention Period due to (i) Employee’s death, (ii) Employee’s Disability, (iii) a termination by the Company without Cause, or (iv) a termination by Employee for Good Reason, Employee shall not be obligated to repay to the Company any amount of the Award. For the avoidance of doubt, Employee’s retirement from the Company without Good Reason shall constitute a termination by Employee other than for Good Reason for purposes of this Agreement and require the repayment of the Award pursuant to this Section 3(b). Except as may be limited by Section 409A of the Code, the parties acknowledge and agree that the Company may, subject to a judicial determination as to Employee’s obligation to repay the Award, offset any amounts owed to the Company by Employee pursuant to Employee’s repayment obligations under this Section 3(b) against any amounts owed to Employee by the Company as of or following the Termination Date.

4. Legal Fees and Expenses. If (i) either party commences any proceeding, action, or litigation against the other party concerning the terms of this Agreement or the rights and duties of the parties hereto or for the breach of this Agreement by the other party of any of the terms hereof and (ii) Employee shall prevail in such proceeding, action, or litigation, in addition to any other relief granted, Employee shall be entitled to recover all costs and expenses incurred by Employee in connection with responding to and prosecuting or defending such action and the enforcement and collection of any judgment rendered therein, including without limitation all out-of-pocket expenses, court costs, administrative fees, attorneys’ fees, consultant fees, expert witness fees, personnel expenses, duplicating expenses, and other related expenses that are associated with Employee’s enforcement of his legal rights under this Agreement (including all such costs, fees, and expenses incurred in all appeals) and a right to such costs and expenses shall be deemed to have accrued upon the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

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5. Covenants.

(a) Non-Solicit. While Employee is employed by the Company and following the termination of Employee's employment for any reason and continuing for a period of twelve (12) months from the Termination Date, Employee shall not, directly or indirectly, for Employee or on behalf of, or in conjunction with, any other person, persons, company, partnership, corporation, business entity, or otherwise, hire away any employees or independent contractors of the Company or any Affiliate or entice any such persons to leave the employ of the Company or any affiliate without the prior written consent of the Company. Employee is a party to a restrictive covenant agreement dated January 15, 2016 and titled, "CONFIDENTIALITY, NON-COMPETITION AND NON-SOLICITATION AGREEMENT" and hereinafter referred to as the "Restrictive Covenant Agreement." Employee continues to be bound by the Restrictive Covenant Agreement and the covenants therein which shall survive the executive of this Agreement.

(b) Non-Disparagement. While Employee is employed by the Company and at all times following the termination of Employee's employment for any reason, Employee shall not, directly or indirectly, for Employee or on behalf of, or in conjunction with, any other person, persons, company, partnership, corporation, business entity, or otherwise, make any statements that are inflammatory, detrimental, slanderous, or negative in any way to the interests of the Company or any affiliate. Nothing in this paragraph infringes on Employee's right to participation or cooperation in any charge or investigation by the Federal Equal Employment Opportunity Commission or any comparable state agency, or any other self-regulatory organization or any other state or federal regulatory authority or making other disclosures that are produced under the whistleblower provisions of federal or state law or regulation.

(c) Confidentiality. Employee acknowledges that, during the course of his employment by the Company, he has and will continue to have access to the Company's Confidential Information. Employee agrees not to use or disclose to any person or entity, at any time, any Confidential Information of Employee without first obtaining the Company's written consent. The term "Confidential Information" means any information not generally known to the public that concerns the Company's business or proposed future business and that gives or is intended to give the Company an advantage over its competitors who do not have the information. Notwithstanding the foregoing non-disclosure obligations, those set forth in the provisions of any agreement or policy, and any restrictive covenants entered into between Employer and Employee pursuant to 18 U.S.C. Section 1833(b), Employee shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made: (i) in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, and solely for the purpose of reporting or investigating a suspected violation of law; or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding if such filing is made under seal.

6. Successors.

(a) Assignment by Employee. This Agreement is personal to Employee and, without the prior written consent of the Company, shall not be assignable by Employee

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otherwise than by will or the laws of descent and distribution. This Agreement shall inure to the benefit of and be enforceable by Employee's legal representatives.

(b) Assignment by the Company. This Agreement shall inure to the benefit of and be binding upon the Company and its successors. The Company shall require any successor to all or substantially all of the business or assets of the Company, whether direct or indirect, by purchase, merger, consolidation, acquisition of stock, or otherwise, expressly to assume and agree to perform this Agreement in the same manner and to the same extent as the Company would be required to perform if no such succession had taken place.

7. Miscellaneous.

(a) Impact of Award on Other Benefit Plans. The parties hereto agree that the Award to be paid by the Company pursuant to this Agreement (i) shall be considered a bonus, and hence not compensation, for purposes of the Company's benefit plans and programs (ii) shall not be construed as compensation or otherwise taken into account, for purposes of determining any benefits provided under any other compensation arrangement or benefit plan, practice or policy maintained by the Company or any of its subsidiaries for any of its or their respective employees.

(b) Applicable Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania, applied without reference to its principles of conflict of laws.

(c) Jurisdiction and Venue. Each party irrevocably submits to the exclusive jurisdiction of the Court of Common Pleas of York County, Pennsylvania, or to the Federal District for the Middle District of Pennsylvania, for the purposes of any suit, action, or other proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the suit, action, or other proceeding shall be heard and determined in any such court. Each party agrees to commence any such suit, action, or other proceeding in the Court of Common Pleas of York County, Pennsylvania or the Federal District Court for the Middle District of Pennsylvania. Each party waives any defense of improper venue or inconvenient forum to the maintenance of any suit, action, or other proceeding so brought. Each party waives its right to a jury trial with respect to any action, or claim arising out of any dispute in connection with this Agreement, any rights or obligations hereunder, or the performance of such rights and obligations.

(d) Amendments. This Agreement may not be amended or modified other than by a written agreement executed by the parties hereto or their respective successors and legal representatives.

(e) Entire Agreement. This Agreement and the Restrictive Covenant Agreement shall constitute the entire agreement between the parties hereto with respect to the matters referred to herein and shall supersede all prior or existing agreements between the parties hereto with respect to such matters. There are no promises, representations, inducements, or statements between the parties other than those that are expressly contained herein. Notwithstanding any rule of law to the contrary, this Agreement may not be modified, changed, amended or waived in any way (either in whole or in part) orally, by conduct, by informal

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writings or by any combination thereof. In the event that any provision of this Agreement is invalid or unenforceable, the validity and enforceability of the remaining provisions hereof shall not be affected. Employee is entering into this Agreement of his own free will and accord and has read this Agreement and understands it and its legal consequences.

(f) Notices. All notices and other communications hereunder shall be in writing and shall be given by hand delivery to the other party or by registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

If to Employee: To the most recent address on file at the Company

If to the Company: The Bon-Ton Department Stores, Inc.  
2801 East Market Street  
York, Pennsylvania 17402  
Attention: Chief Executive Officer

or to such other address as either party shall have furnished to the other in writing in accordance herewith. Notices and communications shall be effective when actually received by the addressee.

(g) Counterparts. This Agreement may be executed in separate counterparts, including by facsimile and electronic delivery, each of which is deemed to be an original and all of which taken together constitute one and the same agreement.

(h) Section 409A Compliance. The parties intend that all amounts payable under this Agreement comply with Section 409A of the Code or an exemption therefrom, including regulations and guidance thereunder, so as not to subject Employee to the payment of any additional taxes, penalties, or interest imposed under Section 409A with respect to amounts paid under this Agreement or any other agreement or arrangement between the parties. The parties agree to amend this Agreement to the extent necessary to bring this Agreement into compliance with Code Section 409A (or to meet an exemption therefrom) as it may be interpreted by any regulations, guidance, or amendments to Section 409A issued or adopted after the date of this Agreement. Nothing in this Agreement shall be interpreted to permit (i) accelerated payment of nonqualified deferred compensation, as defined in Section 409A, (ii) any other payment in violation of the requirements of Section 409A, or (iii) Employee to designate the taxable year of any payment. No provision of this Agreement shall be interpreted or construed to transfer any liability for failure to comply with the requirements of Section 409A from Employee or any other individual to the Company or any Affiliate, employee, or agent. All taxes imposed on or associated with payments made to Employee pursuant to this Agreement, including any liability imposed under Section 409A (but excluding the employer portion of any payroll taxes), shall be borne solely by Employee.

(i) Confidentiality. Notwithstanding any disclosure by the Company of the fact or content of this Agreement, whether in whole or in part, Employee hereby covenants and agrees that Employee shall keep confidential this Agreement and the terms hereof, including the eligibility for the Award and the amount thereof, except as required by applicable law. Further, Employee may disclose to his/her attorney, his/her spouse, and his/her tax and financial advisors

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the fact or content of this Agreement, provided the Employee obtains the recipient's agreement to keep this Agreement and its contents confidential.

**IN WITNESS WHEREOF**, Employee and the Company have each executed or caused the execution of this Agreement, as applicable, as of the Effective Date.

COMPANY:

THE BON-TON DEPARTMENT STORES, INC.

By:

Name: Denise M. Domian

Title: SVP, Human Resources

EMPLOYEE:

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