IN THE COURT OF APPEALS OF IOWA

No. 4-517 / 93-1993

FILED
JAN 23 1995
CLERK SUPREME COURT

MIDWEST OFFICE TECHNOLOGY, INC.,
Plaintiff-Appellee,

vs.

MARY YOUNGWIRTH,
Defendant-Appellant,

and

REDDEN-MILLER OFFICE MACHINES, INC.,
Defendant.

Appeal from the Iowa District Court for Polk County, Michael J. Streit, Judge.

The defendant, a former salesperson for the plaintiff, appeals from the district court's rulings granting a temporary and permanent injunction which enforced the plaintiff's covenant not to compete against the defendant. **AFFIRMED.**

David Shinkle of Reavely, Shinkle, Bauer, Scism & Reavely, Des Moines, and W. Michael Shinkle, Davenport, for appellant.

Jill T. Hansen and James H. Gilliam of Brown, Winick, Graves, Donnelly, Baskerville & Schoenebaum, P.C., Des Moines, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

The plaintiff, Midwest Office Technology, Inc., sells and services office equipment. Midwest's sales territory is roughly the one hundred mile radius surrounding Des Moines. From 1979 until January 1993, the defendant, Mary Youngwirth, was employed with Midwest. Youngwirth worked as a salesperson in all but the initial three months of her employment with Midwest. Youngwirth is a high school graduate with previous work experience as a secretary and a bank teller. Youngwirth received some sales training at Midwest's expense.

In 1984, Youngwirth signed, at Midwest's request, an employment contract which included a covenant not to compete. In the covenant, she promised not to compete with Midwest's business for 180 days after she left employment with Midwest.[1] Midwest asserts the covenant was necessary

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1. The covenant states in part:
> Employee covenants and agrees that he will not, directly or indirectly, enter the employment of, or render any services, advice or counselling to, any other person, partnership, association or corporation engaged in a business substantially similar to that of the Company (i.e. the business of selling and servicing copier equipment, typewriters, calculators and other office equipment) . . . subject to the following terms and limitations:
>
> (a) Duration: Employee's obligation to refrain from competing with the Company shall commence as of the effective date of this agreement and shall continue for 180 days subsequent to the termination of this agreement . . . .
>
> (b) Geographical Scope: Employee shall refrain from competing with the Company in the following Iowa counties: Adair, Appanoose, Boone, Clarke, Dallas, Davis,

to protect its business. Youngwirth claims she was told the covenant not to compete would not be effective if she was fired.

In January 1993, Youngwirth was fired for poor job performance.[2] Within two weeks of her termination from Midwest, Youngwirth accepted a job at Redden-Miller Office Machines, Inc., a competitor of Midwest. Midwest claims Youngwirth solicited business from Midwest clients for

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Greene, Guthrie, Hardin, Jasper, Keokuk, Lucas, Madison, Marion, Marshall, Monroe, Polk, Poweshiek, Ringgold, Story, Tama, Union, Wappello, Warren, Wayne.

2. Youngwirth's immediate superior, Jeffrey Mann, stated she was terminated for insufficient sales production and negative attitude toward her work. Mann gave the following testimony on why Youngwirth was fired:

> Q. And what would you say the reasons, to the best of your knowledge, were that she was terminated? A. The major reason was the fact that earlier on she had stated to me that she was unhappy with her position at Midwest, did not like or care for Ken Illig or Randy Forgurger, also had indicated that her boyfriend was an attorney, didn't need the job, didn't need the stress of the job and that she was looking for employment elsewhere.
> Q. Was her decision to be fired, so far as you know, in any way related to her sales production? A. It's all similarly related.

In cross-examination, Mann further testified:

> Q. On direct examination you said that you were asked if Mary's sales production had something to do with her being terminated, and you said it was all similarly related. What does that mean, sir? A. That means that Mary was released based on her sales, so that they are similarly related.
> Q. Her sales were down? A. Down for what we expected of that territory with the tenure of the rep, yes.

Redden-Miller in violation of the noncompetition agreement. The record shows such attempts were made, although they were largely unsuccessful. Youngwirth argues Midwest was not able to quantify any financial loss it suffered because of her employment with Redden-Miller.

Midwest filed a petition seeking a temporary and permanent injunction to enforce the covenant not to compete agreed to by Youngwirth. After a hearing, the district court on June 24, 1993, issued an order for temporary injunction enforcing the terms of the noncompetition covenant. The court determined the covenant was supported by sufficient consideration and should be enforceable. Midwest was required to post a $20,000 bond. Youngwirth quit the job with Redden-Miller after the entry of this order.[3]

On October 28, 1993, the court entered its ruling continuing the temporary injunction until the conclusion of the 180-day period provided by the agreement. The court also determined the covenant to compete was not unreasonable and should be enforceable. The court determined the injunction commenced on June 28, 1993, and exonerated Midwest from the bond. The district court denied Youngwirth's motion to enlarge under Iowa Rule of Civil Procedure 179(b).

Youngwirth appeals the district court's issuance of the

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3. Youngwirth was unable to gain employment in the two months between the termination of her employment with Redden-Miller and the final injunction hearing.

injunction, so it may establish possible damages suffered due to the injunction.

I. Scope of review. This action was brought in equity. Review by this court will be de novo. Iowa R. App. P. 4.

II. Mootness. Midwest contends Youngwirth's appeal is moot since the injunction has expired. A case is moot when "the issues have become academic so that judgment, if rendered, will have no practical legal effect upon the existing controversy." City of Dubuque v. PERB, 339 N.W.2d 827, 831 (Iowa 1983). Youngwirth fails to address this argument in a reply brief. In any event, we find this appeal is not moot.

Under the employment agreement between Midwest and Youngwirth, the parties agreed take any controversy arising out of or relating to the employment agreement to arbitration. The result reached on appeal, particularly if we were to find merit in appellant's position, may have a legal effect on any damages arising out of this controversy; thus, this appeal is not moot even though we feel obliged to affirm. See Dain Bosworth Inc. v. Brandhorst, 356 N.W.2d 590, 592-93 (Iowa App. 1984).

III. Covenant not to compete. Youngwirth contends the district court erred in granting the temporary and permanent injunction enforcing the covenant not to

compete. The three factors to consider when determining whether a restrictive covenant should be enforced are: (1) whether the restriction is reasonably necessary for the protection of the employer's business; (2) whether the covenant is unreasonably restrictive of the employee's rights; and (3) whether the covenant is prejudicial to the public interest. Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986).

Youngwirth argues Midwest was not harmed and she failed to take any of Midwest's customers after she left their employment. This, however, is not the test. Rather, in determining whether the restriction is necessary to protect Midwest's business, we look to whether Youngwirth had the opportunity to take some of Midwest's business. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971). We find Youngwirth did have the opportunity. She gained employment from a direct competitor in the Des Moines area. In fact, Youngwirth admits in her brief to contacting some Midwest customers in an attempt to gain their business. In addition, while at Midwest, Youngwirth was expected to and did cultivate close contacts with customers. As a result, we view the covenant as reasonably necessary to protect Midwest's business.

Next, it must be shown the covenant did not unreasonably restrict Youngwirth's rights. Youngwirth had approximately twelve years of sales experience from her work with Midwest. Youngwirth was allowed under the

covenant to seek employment in any company not specializing in the sale of office equipment. We do not view the covenant as being unreasonably restrictive in light of Youngwirth's substantial sales experience and the limited scope of the covenant.

The public interest does not suffer prejudice due to the covenant since there are many companies in the Des Moines area which sell office equipment.

One final consideration is the fact that Youngwirth was fired from her job with Midwest. Our supreme court has found this factor is not decisive in itself, but rather is only one of the many factors to consider in determining whether a covenant not to compete should be enforced. Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984). While it is true Youngwirth's employment was terminated by Midwest, this factor alone does not make the covenant invalid. This factor is outweighed by the reasonableness of the covenant itself.

IV. Sufficiency of consideration. Youngwirth contends the covenant not to compete was supported by insufficient consideration. Continued employment for an indefinite period of time is sufficient consideration to support a covenant not to compete. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983). Youngwirth received continued employment, as an employee at will, in return for signing employment contract which included the

covenant not to compete. We find such consideration to be sufficient.

Youngwirth also attempts to make the argument the consideration given was grossly disproportionate to the injury she incurred. As this is the first time Youngwirth has raised this issue, we refuse to consider it. State ex rel. Iowa Dep't of Human Serv., 465 N.W.2d 871, 873 (Iowa 1991).

We find the district court properly concluded the covenant not to compete was enforceable.

AFFIRMED.