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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROGER A. LAMP,)

Plaintiff-Appellee,) Filed August 29, 1985

vs.)

AMERICAN PROSTHETICS, INC.,) 5-300
84-1428

Defendant-Appellant.)

Appeal from the Iowa District Court for Cerro Gordo County - B. C. Sullivan, Judge.

Defendant employer appeals from order entered in favor of plaintiff in a declaratory judgment action brought to determine the validity of a covenant not to compete contained in an employment contract. AFFIRMED.

Russell J. Hansen and Peter S. Cannon of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for defendant-appellant.

John S. Scoles of DeVries & Scoles, Mason City, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J.

Roger Lamp worked for American Prosthetics, Inc. for more than twelve years. American Prosthetics was in the business of manufacturing, distributing, and selling orthonic and prosthetic devices. Lamp began managing American's Mason City office in August of 1982. Sometime in August of 1982, Lamp signed a one-year employment agreement with American Prosthetics. The agreement contained a provision which barred the employee from engaging in a similar business within a radius of 100 miles of any of the employer's offices, or from contacting customers of the employer, for three years following the employee's termination with cause. On July 28, 1983, Lamp signed an identical employment agreement with American Prosthetics for another year.

On March 3, 1984, Lamp was terminated without written notice from his employment with American Prosthetics. Afterwards, Lamp opened his own business in Mason City, fitting and selling orthonic and prosthetic devices. Lamp's office is in the same medical center where American Prosthetics' office is located. Lamp filed a petition for declaratory judgment requesting that the court determine the enforceability of the covenant not to compete. American filed a counterclaim seeking to enjoin Lamp from competing according to the terms of the agreement.

The trial court found that the agreement was unreasonably restrictive to Lamp and prejudicial to the public interest. The court ruled that the provision was void and dismissed American's counterclaim.

Review of a suit in equity to determine the enforcibility of a covenant not to compete is de novo. Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 323 (Iowa 1967); Iowa R. App. P. 4. The scope of review is the entire action. Orkin, 146 N.W.2d at 323.

This appeal involves a covenant in an employment contract prohibiting competition after termination of employment with just cause. In Iowa a balancing test is employed to determine the reasonableness of a covenant not to compete.

> The general rule in Iowa is that we will enforce a noncompetitive provision in an employment contract if the covenant is reasonably necessary for the protection of the employer's business and is not reasonably restrictive of the employee's rights nor prejudicial to the public interest .... Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. Moreover, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain. The burden of proving reasonableness is upon the employer who seeks to enforce such a covenant.

Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 502 (Iowa 1984); Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983).

American Prosthetics has the initial burden to show that enforcement of the covenant is reasonably necessary to protect its business. Iowa Glass, 338 N.W.2d at 381; Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971).

> There must be "some showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; took or had the opportunity of taking some part of the good will of plaintiff's business, or it can reasonably be expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment." (Authorities)

Id.

Lamp had worked in the Mason City office for over a year when he was discharged. During that time he had worked for a variety of the orthopedic doctors in the North Iowa Medical Center and in the Mason City area. Those physicians referred their patients to Lamp for the fitting of orthotic and prosthetic devices. Lamp had personal contact with the physicians to discuss what would be the best for the patient. After Lamp's discharge, he received patient

referrals from the same physicians that had employed American Prosthetics in the past. Because Lamp relocated his business in the same medical center, it could be reasonably expected that some of the physicians Lamp served while in American Prosthetics' employment would follow him to his new office. Lamp clearly had the chance in his location to "pirate" part of American Prosthetics' business.

Another way to meet the "business necessity" element is to show that the employee received from his employer "special training or peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer." Iowa Glass, 338 N.W.2d at 382.

American Prosthetics met this initial burden by showing that the noncompetition agreement seeks to protect its investment in training Lamp to be a "fitter" over a twelve-year period. See Dain Bosworth, Inc. v. Brandhorst, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984) (enforcing noncompetition agreement where employee received $20,000 training); Cogley Clinic v. Martini, 112 N.W.2d 678, 682 (Iowa 1962) (upholding noncompetition agreement where clinic spent $10,000 to establish new doctor). Another factor weighing in American's favor is the time restriction in this noncompetitive covenant of three years. A three-year time restriction has been upheld in several Iowa cases. See Cogley, 112 N.W.2d at 682; Orkin Exterminating Co. v. Burnett, 146 N.W.2d 320, 324 (Iowa 1967). We conclude that the time restriction in the present situation is also reasonable.

We are now required to consider the employee's situation and surrounding circumstances in order to fairly weigh the interests of the parties. While the area restriction of 100 miles on its face may appear reasonable, its effect is clearly detrimental to the public interest. The noncompetitive covenant provides that the employee will not, within a radius of 100 miles from any office of the employer, engage in a similar business.

According to the testimony of its president, American Prosthetics has offices in Sioux City, Mason City, Davenport, Iowa City, and West Branch. With the possible exception of the Council Bluffs area, this restrictive covenant effectively prevents Lamp from being employed in his profession in any place in Iowa.

It is well established that an employee cannot be precluded from exercising the skill and general knowledge he has acquired or increased through experience or even instruction while in the employment. Iowa Glass, 338 N.W.2d at 383. There are no cases upholding area restrictions which operate to prohibit employment statewide. Therefore, we conclude the area restriction at issue is oppressive and creates disproportionate hardship for Lamp.

Another factor to be placed on the scales in reaching a decision is whether the employee voluntarily left employment or was terminated by the employer. Ma & Pa, 342 N.W.2d at 502. Discharge by the employer is a factor opposing the grant of an injunction against the employee. Id. Lamp did not quit his employment with the intention of opening a competing business, but rather he was terminated by American Prosthetics without any advance notice. In fact, Lamp had just recently moved his family to Mason City with the intention of remaining under American's employ, incurring substantial mortgage debt.

Other factors in this case, although not decisive in themselves, militate against the enforcement of the restrictive covenant.

American Prosthetics claimed a 50% reduction in revenues since Lamp was terminated, yet did not examine any of the great variety of factors which can cause a business to suffer losses, such as new management or the general economy. We are aware that Lamp has done business with some of American Prosthetics' customers. However, there is no evidence that the doctors referring patients to Lamp are not also referring patients to American Prosthetics. There

is simply no evidence that any number of American Prosthetics' customers have become exclusive customers of Lamp. While harm from subsequent competition by a former employee is not a prerequisite to obtaining enforcement of a noncompetitive covenant, we think these circumstances require a greater showing of harm to American's business before it is entitled to enforce the restrictive covenant. See Iowa Glass, 338 N.W.2d at 384.

Enforcement of the covenant would work severe hardship on Lamp and his family. Lamp moved his family to Mason City, incurred a substantial mortgage debt, heard no major complaints about his work that were not a result of shorthandedness in the office, and was abruptly terminated after 17 months.

American Prosthetics had no complaints about Lamp's professional skill or attitude which was evidenced by the fact that it offered Lamp a position in Des Moines, requiring another move and almost a $7,000 salary decrease.

Upon weighing the equities on both sides in our de novo review, we conclude American Prosthetics did not meet its burden to prove that the covenant is not unreasonably restrictive of Lamp's rights. We affirm the trial court's determination that the restrictive covenant at issue is unenforcible.

AFFIRMED.