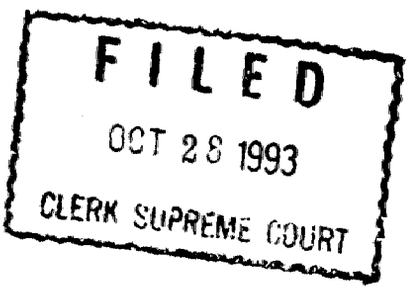
IN THE COURT OF APPEALS OF IOWA

No. 2-629 / 92-745



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CHART SERVICES, LTD.,

Appellee,

vs.

PAUL A. HUGHES,

Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Former employee appeals the district court's enforcement of a covenant not to compete. **AFFIRMED.**

Peter S. Cannon of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for appellant.

Richard K. Updegraff and Jill Thompson Hansen of Brown, Winick, Graves, Donnelly, Baskerville & Schoenebaum, Des Moines, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ. Donielson, J., takes no part.

HABHAB, J. 000064

Former employee, Paul A. Hughes, appeals the district court's granting of injunctive relief partially enforcing a covenant not to compete Hughes had signed with his former employer, Chart Services.

Chart Services, Ltd., is a business that offers asbestos consulting services to school districts. Such services are made necessary by the federal Asbestos Hazards Emergency Response Act (AHERA). The AHERA requires every school in the United States to compile a management plan with respect to its asbestos hazards. Chart Services offers school districts the scientific methods and documentation required under the Act.

Chart Services' sole owner and president is Mary Finn. Finn holds a bachelor's degree in microbiology and chemistry, a Master's degree in biology, and a Ph.D. in industrial hygiene. In 1985, she became a certified industrial hygienist. Currently, fewer than 1000 industrial hygienists engage in the asbestos consulting business.

There are four to six Iowa firms which offer asbestos consulting services. Apparently due to Finn's expertise, Chart Services is able to offer scientific methodology which goes beyond federal requirements and technical and comprehensive services which go beyond mere asbestos removal.

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Paul Hughes graduated in 1978 from the University of Iowa with a bachelor of technology degree. After graduation, Hughes obtained experience in building construction, inspection and loss estimation. In 1985, he worked for Kurtz Construction Company in Denver, Iowa. Thereafter, he worked for Seitz Company as an asbestos removal laborer. In 1986, he worked for ICM as a project manager with duties that included the calculation of asbestos removal cost estimates and timetables.

In April 1987, five months after beginning his employment with ICM, Hughes commenced employment with Chart Services. On May 15, 1987, Hughes signed a post-termination covenant not to compete. The covenant required Hughes not to compete against Chart Services within 250 miles of any of the cities in which they had an office for a period of two years following the termination of his employment. In addition, Chart Services required Hughes to sign a training reimbursement agreement that required him to reimburse Chart Services for a percentage of his training cost if his employment was terminated.

While employed with Chart Services, Hughes was trained in-house by Finn and also attended training courses in Kansas and Washington, D.C. Hughes became Chart Services' number one client contact with school districts throughout Iowa and the Midwest.

In August 1989, Chart Services terminated Hughes' employment. After he left, Chart Services sent him a

letter claiming he owed them $1550.91 as reimbursement for training expenses.

Shortly after leaving Chart Services, Hughes began employment with the American Asbestos Training Center in Monticello, Iowa. His duties included asbestos consultation and inspection. Hughes would try and contact four to five school districts a day. American Asbestos' client base included businesses and school districts within a 150-mile radius of Monticello. American Asbestos is in direct competition with Chart Services.

On December 20, 1990, Chart Services filed a petition seeking an injunction to enforce the covenant not to compete against Hughes. On March 6, 1992, the district court enjoined Hughes from competing with Chart Services within a 150-mile radius of Omaha, Nebraska, and Des Moines, Iowa for a period of one year following the date of the entry of the decree. The district court later amended its decree to end the injunction on January 1, 1993. Hughes appeals. We affirm.

In this equity action, our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

On appeal Hughes asserts the district court erred in partially enforcing the covenant not to compete. Hughes claims that (1) the covenant was not properly pled; (2) the

restrictive covenant was not reasonable and therefore should not have been enforced; (3) an injunction was not an appropriate remedy to enforce the covenant; and (4) the covenant was enforced for an excessive period of time.

I. Pleading of the Covenant Not to Compete.

Hughes argues that Chart did not plead modification and partial enforcement of the restrictive covenant as an alternate remedy and therefore the district court erred in granting Chart partial enforcement.

Our supreme court held in Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa), modified on other grounds, 190 N.W.2d 413 (Iowa 1971), that we will enforce covenants not to compete to the extent they are reasonably necessary to protect the employer's legitimate interests without imposing undue hardship on the employee when the public interest is not adversely affected.

In its petition Chart asked for specific relief and such "relief that may be just and equitable in the premises." Generally under the modern rules of pleading, plaintiff's failure to use specific words in its prayer for relief will not make pleading defective as long as it gives defendant notice of the issues to be litigated. Engstrom v. State, 461 N.W.2d 309, 313 (Iowa 1990).

Hughes relies on Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 911 (Iowa 1986), to reach a contrary conclusion. In Lamp, our supreme court ruled that the

failure of the plaintiff to file a rule 179b motion after the district court did not rule on whether the covenant should be partially enforced prohibited the plaintiff from raising the issue on appeal. Id. It stated "while Ehlers allows for modification of such agreements, it does not require a court to do so sua sponte." Id. (emphasis added). We find nothing in Lamp that prohibits the district court from partially enforcing this covenant not to compete. We affirm the district court on this issue.

II. Reasonableness of the Restrictive Covenant.

Hughes next argues that Chart failed to show the restrictive covenant was reasonable.

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 unreasonably restrictive of the employee's rights nor prejudicial to the public interest. Iowa Glass Depot, Inc. v. Jindrich, 338 N.W.2d 376, 381 (Iowa 1983); see also Ehlers, 188 N.W.2d at 369, Lamp, 379 N.W.2d at 910.

Assessment of reasonableness of noncompetitive covenants generally requires us to examine both the time and area restrictions contained in the covenant. Id. In justifying restraints enforced against an employee, our supreme court has identified the employee's close proximity to customers along with peculiar knowledge gained through

employment as one aspect to consider. Id. Other aspects, including the nature of the business itself, accessibility to information peculiar to the employer's business, and the nature of the occupation which is restrained, must also be considered along with matters of basic fairness. Id.

Hughes position at Chart placed him in a position to build a relationship of trust and confidences with clients whom he provided asbestos counseling services. When an employee had close contact with employer's customers it is only fair on termination of his employment there be an interval when a new employee will be able to get acquainted with the customers. Mutual Loan Co. v. Pierce, 245 Iowa 1051, 1058, 65 N.W.2d 405, 409 (1954). Hughes admits that he is currently soliciting and servicing some of Chart's clients and that he has been since he left Chart.

Hughes received formal training from Chart by attending a number of courses which lead to EPA certifications. In addition, he received considerable on-the-job training in the areas of asbestos survey, techniques of scientifically valid sampling, interpretation and application of laboratory results, and the drafting and preparation of asbestos management plans. Hughes also obtained AHERA training while at Chart.

In summary, we conclude Hughes received from Chart special training and peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer. See Orkin Exterminating Co. v. Burnett, 259 Iowa

1218, 1222, 146 N.W.2d 320, 323 (1966) [Orkin I].(employee given eight weeks' training in exterminating insects and methods of operation); Federated Mutual Implement and Hardware Insurance Co. v. Erickson, 252 Iowa 1208, 1215-16, 110 N.W.2d 264, 267 (1961) (insurance company's agent had intimate knowledge of customer list, policyholders' insurance needs and policy expiration dates); Cogley Clinic v. Martini, 253 Iowa 541, 544, 112 N.W.2d 678, 679-80 (1962) (cost clinic $10,000 to train a new doctor and doctor's acquaintance with patients, referral doctors, hospital personnel and local procedures was through his association with the clinic); Sioux City Night Patrol v. Mathwig, 224 Iowa 748, 752-53, 277 N.W. 457, 460 (1938) (employee's position made him privy to confidential information about his employer's business and the property of its customers).

We now must assess the employee's situation and the surrounding circumstances in order to fairly weigh the interests of the parties. Hughes has previous work experience in various areas including positions as a building and zoning officer, a draftsman, an estimator for a construction company, a bookkeeper, a municipal employee involved in administration of federal grants and work in the asbestos removal field. Evidence at trial showed Hughes had in the past worked in various cities and that he had current job offers in Knoxville, Tennessee, and in South Dakota.

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The injunction was narrowly tailored. It does not prohibit Hughes from working in the asbestos-related field so long as he is not involved, directly or indirectly in school district work. The injunction was for a limited period of time and for a limited area. We find the covenant as enforced by the district court was reasonable as applied to the individual interests of both parties.

Finally, we find nothing in the record showing it would be prejudicial to the public interest to enforce the covenant not to compete. We affirm the trial court on this issue.

III. Injunction as a Remedy.

Hughes also argues that an injunction was not an appropriate remedy to enforce the covenant in this case.

The granting of injunctive relief is governed by well established principles. Such relief is designed primarily to avoid irreparable damage. Presto-X-Co. v. Ewing, 442 N.W.2d 85, 89 (Iowa 1989) (citing Incorporated City of Denison v. Clabaugh, 306 N.W.2d 748, 755 (Iowa 1981)). As an extraordinary remedy, it should issue only when the party seeking it has no adequate remedy at law. Id. (citing Green v. Advance Homes, Inc., 293 N.W.2d 204, 208 (Iowa 1980)). An injunction should be "granted with caution and only when clearly required." Id. (quoting Clabaugh, 306 N.W.2d at 755).

We find Chart is entitled to injunctive relief. Chart's right to an injunction is founded on the restrictive covenant contained in Hughes' contract of employment even though the contract contained no explicit provision for injunction. Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 429 (Iowa 1968) [Orkin II]. "[I]t is clear that where there is a violation of a plain right of the [plaintiff] and [the] injury is regarded as irreparable, [the plaintiff] is ordinarily entitled to an injunction." Orkin I, 259 Iowa at 1228, 146 N.W.2d at 327.

In the present case, Chart's contractual right to freedom from Hughes' competition was clearly violated. The injury to Chart would be irreparable in the absence of an injunction because the customers Hughes pirated from Chart would be permanently lost. The issuance of an injunction is the only way that Chart can be returned to the position it would have been in had Hughes not violated the restrictive covenant.

We therefore affirm the district court's issuance of an injunction against Hughes.

IV. Time Period for the Injunction to Run.

Hughes next argues the injunction to enforce the noncompetition covenant should not have been extended until January 1, 1993 because Chart waited sixteen months before it filed suit against Hughes.

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The covenant not to compete was for a term of two years from the date of separation of employment. Hughes left his employment at Chart in August of 1989. Therefore, absent any other variables the covenant would have expired in August of 1991. Chart filed suit against Hughes on December 20, 1990 and the case was tried January 6 and 7, 1992. The district court extended the time period for the injunction to run until January 1, 1993.

Courts have equitable powers to extend the restraint period, so as to accomplish full and complete justice between the parties. Presto-X-Co., 442 N.W.2d at 90. We are not constrained by the strict legal rights of the parties. Id.

Applying these principles, we affirm the trial court's extension of injunction until January 1, 1993. We believe this judicial extension kept Hughes from benefiting from the normal delays of the judicial process. Id. We find no merit in Hughes' claim that Chart intentionally delayed these proceedings. We also believe a time extension is necessary to protect the usefulness of such restrictive covenants and that the extra restraint time is necessary to give Chart an opportunity to regain customer contacts it lost due to Hughes violation of the covenant. Id.

V. Employer's Client List and Tax Returns.

Hughes also contends the district court erred in partially overruling his motion to compel discovery.

During discovery, Hughes sought a listing of Chart's clients, along with a detail of services provided to those clients. Hughes also requested Chart's tax returns for the previous four years. Chart objected to the discovery request claiming the information would be used by Hughes to compete even more effectively against Chart. The district court required Chart, to provide to Hughes, a list of Chart clients which are public schools. The district court also required Chart to provide a breakdown of training expenses and a general profitability statement.

Ordinarily the district court has wide discretion in ruling upon discoverable nature of requested information and will not be reversed in the absence of abuse of discretion. State ex rel. Shanahan v. Iowa District Court, 356 N.W.2d 523, 526 (Iowa 1984). The power of the trial court to control those discovery matters should be utilized fairly and impartially by application of relevant, legal and equitable principles to all known or readily available facts of a given issue or cause, to the end justice may more nearly be effectuated. Jones v. Iowa State Highway Commission, 261 Iowa 1064, 1067, 157 N.W.2d 86, 87-88, (Iowa 1968).

The trial court attempted to strike a balance between allowing Hughes access to information to prepare for trial and the legitimate concerns of Chart that the information disclosed in discovery would be used by Hughes to compete even more effectively against Chart. We find the district

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court did not abuse its discretion when it partially overruled Hughes' motion to compel. We affirm the district court on this issue.

We determine any other issues raised in this appeal are either covered by this opinion or are without merit.

Costs of this appeal are taxed to appellant.

AFFIRMED.