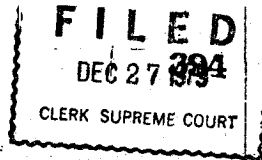


IN THE COURT OF APPEALS OF IOWA



BETTIE MCKENZIE,

)

Plaintiff-Appellant,

)

Filed December 27, 1979

vs.

)

HOUGHTON STATE BANK d/b/a
HAWKEYE INSURANCE & REAL
ESTATE SERVICES OF RED OAK, IOWA,

)

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2-62590

)

Defendant-Appellee.

)

Appeal from Montgomery District Court - Harold L. Martin, Judge.

Plaintiff employee appeals from a declaratory judgment that a covenant not to compete is not unreasonable and can therefore be enforced with minor modification, by the defendant employer. AFFIRMED AS MODIFIED.

Dennis M. Gray of Peters Law Firm, P.C., Council Bluffs, for plaintiff-appellant.

William J. Koehn of Thoma, Schoenthal, Davis, Hockenberry & Wine, Des Moines, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff employee appeals from a declaratory judgment that a covenant not to compete is not unreasonable and can therefore be enforced with minor modification, by the defendant employer. With certain additional modifications, we affirm the trial court's construction of the agreement.

I. Consideration. Plaintiff asserts that the agreement in question, or any subsequent renewal thereof, is without consideration. We disagree. The record is clear that defendant advised plaintiff that as a condition of her continued employment with defendant, under the terms of the written agreement between the parties, paragraph 7 of the agreement (containing the covenant not to compete) would be enforced. Plaintiff's arguments concerning consideration fail to properly characterize the effect of the so-called election of renewal made by defendant. Defendant had no right to place plaintiff in involuntary servitude and force her to continue under the agreement. Such election merely served to alert her that if she did continue to work for defendant, it would be upon the same terms and conditions as were provided in the written agreement including paragraph 7. Plaintiff, by continuing to work after such notice, is deemed to have accepted the opportunity for continued employment as consideration for the entire agreement. Farm Bureau Service Co. v. Kohls, 203 N.W.2d 209, 212 (Iowa 1972). Conversely, should plaintiff decline to accept continued employment, this would simply trigger the running of the time period specified in the agreement not to compete.

II. Bad Faith. We reject plaintiff's claim that paragraph 7 of the agreement is not enforceable because it was negotiated by the defendant in bad faith. There is no support for such claim in the record. Defendant has a legitimate interest to protect by virtue of the covenant not to compete.

III. Reasonableness of the Covenant. Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 373 (Iowa 1971), requires the courts to scrutinize the record in all cases of this type in order to find some "reasonable necessity" for the enforcement of these covenants. We can approve enforcement only to the extent we deem reasonably necessary to prevent pirating of the employer's business or goodwill.

The trial court limited enforcement of the covenant to the city of Red Oak rather than the entire county as provided in the written agreement. We approve this limitation

on enforcement. We also approve the concessions against enforcement made by defendant in this court whereby the restriction should be imposed only as to residential real estate transactions and not as to commercial real estate transactions or the selling of insurance.

In addition to the foregoing limitations on enforcements, we consider plaintiff's claim that under Iowa law an employer can use such a covenant only to protect itself from loss of goodwill in the form of repeat business. It is thus urged by plaintiff that defendant's interests would be adequately protected in the present case by merely restricting plaintiff from soliciting or doing business with defendant's former clients.

We cannot accept this argument completely. We deem it clear that Ehlers permits reasonable restrictions designed to prevent pirating of both business and goodwill. It is equally clear that the good will of a business may be pirated by an employee by means other than doing business with the employer's former clients. Covenant restrictions designed to protect against these other means of stealing goodwill should be enforced if reasonable. Here, this is accomplished by a flat proscription against plaintiff engaging in competition with defendant for a specified period of time (three years).

While we conclude that restrictions against both (a) general competition with defendant and (b) soliciting or doing business with former customers of defendant are, to some extent, reasonable given the facts of the present case, it does not follow that the time periods as to each prohibition should be the same. We accordingly hold that while a proscription against soliciting or doing business with former customers of defendant is valid for the entire three-year period, it is unreasonable to enforce the general proscription against competition for three years. The latter proscription shall cease to be enforceable one year after the termination of plaintiff's employment.

As herein modified, we affirm the trial court's decree. Costs shall be taxed equally between the parties.

AFFIRMED AS MODIFIED.

All judges concur except Donielson, J., who dissents.

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DONIELSON, J. (dissenting)

I dissent from the majority's modification of the duration of the general competition proscription from three years to one. The majority believes the three-year proscription is unreasonable. Weighing the hardship of this ban on plaintiff against the potential harm to defendant's legitimate business interests indicates otherwise. In a small community like Red Oak plaintiff's business reputation is likely to be well-known, even by people who have never dealt with plaintiff. Since plaintiff owes this reputation largely to defendant, some restriction on plaintiff's business activities is justified to protect defendant's interests; the majority recognizes this need by its affirmance of the three-year proscription against doing business with defendant's former customers. This protection is also required to protect defendant's potential profits from individuals who have heard of plaintiff due to defendant's investment in the promotion and support of plaintiff. The burden to plaintiff of two additional years of prohibition from general competition with defendant is slight when considering it is limited to residential sales in Red Oak. On balance, the three-year proscription against general competition by plaintiff against defendant is reasonable and I would affirm the trial court without modification.