

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

DONNA LIVINGSTON,)

Plaintiff-Appellant,)

vs.)

Filed December 18, 1985

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FREMONT COUNTY INSURANCE)

AGENCY a/k/a SOUTHWEST)

COMPANY, an Iowa Corporation,)

5-406

85-34

Defendant-Appellee.)

Appeal from the Iowa District Court for Fremont County - Glen M. McGee,
Judge.

Plaintiff employee appeals from judgment for defendant employer in a
declaratory judgment action seeking to establish the invalidity of a noncompeti-
tion clause of an employment contract. **REVERSED.**

Jon H. Johnson of Leonard & Johnson, P.C., Sidney, for plaintiff-appellant.

Trudy Saunders Bredthauer and Kirk S. Blecha of Baird, Holm, McEachen,
Pedersen, Hamman & Strasheim, Omaha, Nebraska, for defendant-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

Plaintiff employee appeals from judgment for defendant employer in a declaratory judgment action seeking to establish the invalidity of a noncompetition clause of an employment contract, asserting that the restrictions of the clause are unreasonable. We reverse.

Plaintiff was employed in the Sidney, Iowa, office of defendant insurer from 1972 and 1978. From 1978 through 1982 she was employed as a secretary-receptionist at an implement company in Shenandoah, Iowa. In 1982 she accepted an oral offer of employment from the defendant and began work as an internal office manager. Subsequently, she signed a written employment contract after reviewing the document with an attorney which provided that in the event of voluntary or involuntary termination of her employment she would not accept employment in a similar business for a three-year period within a fifty-mile radius of the following Iowa towns: Sidney, Hamburg, or Oakland. Her employment was involuntarily terminated in September 1984 and she commenced a declaratory judgment action seeking to establish that the noncompetition clause was unenforceable. At trial she introduced evidence of the financial hardship to her family resulting from her unemployment and the difficulty of obtaining suitable work. The trial court found the noncompetition clause to be valid and enforceable, but modified the contract in a manner which lifted the restriction on employment in the Omaha, Nebraska, area.

I.

The scope of review in an equity suit to determine the enforceability of a covenant not to compete is de novo. Iowa R. App. P. 4.

As a preliminary matter, Livingston intimates that the events which culminated in signing the employment contract were tainted. Livingston was hired originally under an oral agreement. The employer then wanted her to enter

into a written employment contract. Livingston objected to certain language in the contract and wanted to consult with an attorney of her choice. She alleges the employer suggested another attorney, with whom she ultimately consulted, but who allegedly had an interest in the employer's business. Despite such allegations, we find that the contract was supported by consideration and was executed in good faith by the employer.

II.

The gravamen of this appeal involves a covenant in an employment contract prohibiting competition after involuntary termination of employment. 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.

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); Dain Bosworth Inc. v. Brandhorst, 356 N.W.2d 590, 593 (Iowa Ct. App. 1984).

The employer 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). To meet this requirement, Iowa authority provides:

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 plain-

tiff'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.

The record indicates that Livingston, as an internal office manager for an insurance company, had a comprehensive knowledge of the business and its customers. The employer maintains that 75% of the employer's 2,500 customers dealt with Livingston regularly and some even did so on an exclusive basis. While the advantage a competing insurance company would gain from hiring Livingston is disputed by the parties, covenants not to compete can be reasonably necessary to protect an insurance company's business interest. See Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368 (Iowa 1971); Federated Mutual Implement & Hardware Insurance Co. v. Erickson, 252 Iowa 1208, 110 N.W.2d 264 (1961) (restrictive covenant enforced against an insurance agent).

Livingston, however, urges us to find the entire covenant is invalid and directs us to Ma & Pa Inc. v. Kelly, 342 N.W.2d 500 (Iowa 1984). Generally, the factors in Ma & Pa that determined whether the covenant would be enforced were:

1. whether 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,
2. whether the employee was discharged by the employer or voluntarily resigned, and
3. other factors.

Id. at 502.

As to these "other factors," the court in Ma & Pa stated:

Other factors in the case, although not decisive in themselves, militate against the grant of an injunction. An injunction would work severe hardship on Kelly and his family. Selling is his only skill; he tried to find employment for three weeks before he located the other job; and his employment with Ma & Pa was terminated

during recession. Ma & Pa did not show at trial that it tried to renegotiate Kelly's employment contract. The employment was at will, enabling Ma & Pa to terminate it at any time and assert the clause prohibiting competition. [emphasis added]

Id. at 502-03.

The court in Ma & Pa did not enforce the covenant where it appeared the involuntary discharge was attributable to an economic recession. The facts supporting the discharge in this case weigh more heavily in the employee's favor than in Ma & Pa, where the covenant was not enforced. Thus, no part of the covenant not to compete will be enforced against Livingston.

This decision is arrived at primarily upon our review of the record and the circumstances surrounding the discharge. Livingston began working for the Fremont County Insurance Agency in May of 1982. Apparently she did perform her duties satisfactorily, at least until 1984. On a Monday in July of 1984, Livingston questioned certain company expenditures regarding the agency's purchase of eight automobile tires during a short period of time. When Livingston informed her employer of such expenditures, he instructed her to pay the bills and not to worry about such matters. On Friday of that same week, Livingston received a letter which indicated she was placed on sixty-day probation.

During this period, Livingston noticed her duties were gradually being diminished. Livingston sent a letter to her employer inquiring about her status with the company. Livingston desired an answer to her letter and arranged a meeting to find out the areas in which her performance was deficient. In August, Livingston met with her employer and he informed Livingston that the probationary matter should be dropped. On September 13, 1984, after the sixty-day period expired, Livingston was discharged.

At trial, the employer's counsel had a standing objection on relevancy grounds to any testimony regarding the events surrounding the sixty-day probation

period. For this reason, the record was apparently not developed by the employer's counsel as to the employer's explanation of the events which transpired during the probationary period. The employer did, nonetheless, testify as to his reasons for the discharge. The employer claimed that during 1984 Livingston failed to perform routine bookkeeping functions which were part of her responsibilities and, in general, she had "slowed-up" in performing her duties. Despite such testimony, we find the evidence regarding the events which transpired during the probation period was relevant and it leads us to conclude that the discharge was *primarily retaliatory in nature*.

Although Fremont could terminate Livingston's employment with or without cause in accordance with the contract terms, we do not believe enforcement of the covenant would be equitable. An employer should not be able to fire an employee for mere "slowness" and then be able to deprive that employee of her right to work in her trained profession in the same community. Upon weighing the equities on both sides in our de novo review, we conclude that the covenant should not be enforced. Therefore, it is unnecessary for us to address the other issues raised in the briefs.

REVERSED.