vantage point

Letting Go

It's an inevitable cycle of the business world: people are hired; people leave (voluntarily or involuntarily). Only the terms of engagement and disengagement vary from one firm to another.

Recently more companies are requiring new employees to sign what amounts to an oath of allegiance. Thou shalt not share trade secrets. Thou shalt not work for a competitor in the same line of business or in the same region for so many years. Thou shalt not lure clients away from your present employer either to your own new company or to your future employer.

Conditions in an employment agreement are sometimes reasonable and sometimes not. Sometimes they should not be applied uniformly to every employee. And perhaps there should be some two-way responsibility between employer and employee so that both parties are responsible to each other. The case of *Fenner Precision, Inc. v. Mearthane Products Corp.* (US District Court for the Western District of NY, February 2013) illustrates how an employment agreement can work - or not, depending upon your hoped-for outcome.

Phillip Garrod had worked exclusively as a salesman for elastomeric precision products (EPP, products made of elastomers that stretch and return to their original shape) since 1983. Winfield Industries, a manufacturer of EPP, hired him in 2000 primarily because of his established sales relationship with a particular purchaser, and Garrod built a good relationship with that client and his new employer. His employment with Winfield subjected Garrod to a non-compete agreement with several restrictive clauses.

Fenner Precision, Inc. bought out Winfield and hired its entire staff in 2008, requiring everyone to sign various documents regarding their transfer of employment. Garrod was told he had to sign the new non-compete agreement but wasn't told specifically that it was a condition of his employment to do so. This document contained three restrictive covenants: a confidentiality provision (primarily regarding trade secrets of product manufacture); a non-compete provision (prohibiting Garrod from providing his services to a competitor within a year of leaving Fenner); and a non-solicitation provision (prohibiting solicitation of "current, past or prospective customers".)

After three years, Fenner changed Garrod's title (a demotion), hired a new sales employee, and then required Garrod to teach this new employee his former job. Five months later, Fenner terminated Garrod without saying why, offering him a severance package in exchange for signing another agreement extending the restrictive covenants of his employment agreement for a period of one year. At age 58, Garrod refused to sign the form that would prohibit him from working in any business relating to the manufacture or sale of competing production, contacting or soliciting any current past or present customers, and disclosing any proprietary company information. Essentially this severance agreement would have prevented him from working in the EPP industry as he had for his entire career and make it nearly impossible to find a job outside of this business.

After being terminated, Garrod sent out about sixty resumes for "general sales positions" (outside his EPP field), the only responses being four rejections. Then he sent out eight resumes to EPP companies, had three interviews, and accepted a position with Mearthane Products Corp., one of Fenner's competitors.

Fenner sued because Garrod was now selling to Fenner's shared clientele. But the customer base for EPP is very limited, and Garrod counterclaimed that he knew most of these companies even before he worked for Winfield, much less Fenner. Furthermore, at the time of Fenner's suit, he hadn't closed a single sale to any of Fenner's customers since starting work with Mearthane. The products that clients purchase, as well as the products that Fenner sells, are not secret. Pricing is not confidential, since clients often share with sales people what they currently pay in hopes of a better deal.

Was the non-solicitation clause violated? Did Garrod violate the non-compete clause? The court in this case did find that Garrod did cause "irreparable harm" to Fenner by applying the goodwill he had built up with his former employers to his new position. However, "Generally, our determination of reasonableness . . . has involved a weighing of competing interests-that of the employer's need for protection-against the hardship of the restriction to be imposed upon the employee." While the burden of proof is on the employee, "a restrictive covenant found to be reasonable in one case may be unreasonable in others." Factors affecting this determination of reasonableness "may include the reasons why the employee's employment ended, the employee's personal circumstances, the number of times the employee has previously agreed to such provisions, the potential harm to the employer, the size of the potential pool of customers and the business climate." Considering that Garrod had been fired (reason undisclosed), the court inferred that Fenner considered him worthless and this should be factored into determining enforceability of the restrictive covenants. ■

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