To: Caitlin McNalley

From: F14322

Date: October 27, 2014

RE: Tara Ghobrial; File No. 14-5349
Enforceability of Noncompetition Clause in Employment Contact

Statement of Facts

You have requested assistance in determining whether the terms of Tara Ghobrial's noncompetition clause are enforceable as written in the state of Minnesota.

Ghobrial worked for ReadiCure Medical Supply Corp. as a sales representative before she was promoted to her current role of regional manager. Trained by ReadiCure for sixteen months after hire to be the sole sales representative in Minnesota for ReadiCure's medical equipment, she visited cardiac hospitals every six to seven weeks and taught hospital staff about ReadiCure's latest advances. Customers contacted her directly regarding problems with the equipment or for refresher training on how to use the equipment. While she dined with customers in an attempt to sell ReadiCure's robotic surgical equipment, she never personally befriended the contacts.

In her current role, which began in September 2013, Ghobrial's contact with ReadiCure's customers diminished. In January 2014, ReadiCure hired two full-time employees to replace Ghobrial as sales representatives. Ghobrial signed a noncompetition clause which provided that for eighteen months after leaving ReadiCure's employ, she would refrain from soliciting any of ReadiCure's customers in the State of Minnesota while acting as sale representative for any other company selling health care equipment.

Issue

Under Minnesota law governing noncompetition agreements, may eighteen months of solicitation restriction be enforceable as written, when ReadiCure provides sixteen months of training to

Ghobrial; when Ghobrial's contact with ReadiCure's clients diminishes; when Ghobrial formerly acted as the sole sales representative and main contact for ReadiCure's customers in Minnesota; and when Ghobrial does not have previous social contact or personal friendships with ReadiCure's contacts?

Brief Answer

Probably no. The court will likely conclude that although ReadiCure had a legitimate business interest to use a noncompetition clause, the time limitation of the clause may not be reasonable since it is an unreasonable estimate of the time needed to hire and train a replacement for Ghobrial or the time necessary for the obliteration of relationships between ReadiCure, Ghobrial and cardiac hospitals in Minnesota.

Discussion

Under Minnesota law, a noncompetition clause is enforceable only when the "restraint is necessary for the protection of the business or good will of the employer;" or the employer's "legitimate interest." Bennett v. Storz Broadcasting Co., 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965). In noncompetition clauses, there must be a balance between the rights of the employer to be "free from interference" from people other than those with superior rights and the rights of the employee to "earn a livable wage." Id. at 532, 134 N.W.2d at 897. In the court's view, when wages are acceptable, and one has nothing but labor to sell, one will not raise objections to a noncompetition clause. If there is a legitimate business interest, then the provisions of the restraints must be reasonable. In order for the provisions to be reasonable, limitations as to "the nature and character of the employment, the time for which restriction is imposed and the territorial extent of the locality to which the prohibition extends" must not be overly broad for protecting the employer's legitimate interest. Id. at 534, 134 N.W. 2d at 899. Nature and character is referred to as the "scope" of the employment in later cases. E.g., Webb Pub. Co. v. Fosshage, 426 N.W.2d 445, 450 (Minn. Ct. App.1988). The employer has the burden of proof as to whether their company can enforce a noncompetition clause.

Legitimate Business Interest

An employer's legitimate business interest is protected by law when an employee comes in contact with employer's customers or trade secrets that provide the employee with a "personal hold" allowing a deflection of the employer's customers or trade that impacts the good will of the employer's business**.** Menter Co. v. Brock, 147 Minn. 407, 410, 180 N.W. 553, 555 (1920). Personal hold is established when customers become "attracted" to the employee and "are likely to go" with that employee if the employee "enters the service of a competitor." Id. at 411, 180 N.W. at 555. If an employee's name "carries with it the good will of the employer's business" or the employee has knowledge of trade secrets, there is a possibility that the employee has a "personal hold" that will deflect the employer's customers. Id. at 410, 180 N.W. at 554.

In Menter Co.**,** the court held that when an employee does not come in contact with employer's customers, the employee lacks the "personal hold" needed to deflect clients. Id. at 410, 180 N.W. at 555. Brock worked for Menter's clothing store before opening a similar store two blocks from Menter. Brock signed a noncompetition clause that prohibited him from "entering into … the same business" as Menter. Id. at 409, 180 N.W. at 554. Menter's retail store did not have a legitimate interest because Brock's position of retail manager did not allow him to "come in contact" with Menter's customers. Id. at 410, 180 N.W. at 555. Also, Menter "failed utterly" or "pointed to known methods" when asked about Brock's use of trade secrets; signifying that Brock lacked any knowledge of Menter's secret methods that he can transfer to a competitor. Id. at 409, 180 N.W. at 554. Therefore, since Brock did not have a "personal hold" on Menter's business, Menter did not have the legitimate business interest needed to make the noncompetition clause enforceable.

On the other hand, in Webb Pub. the court held that the employer had a legitimate business interest since the employee had a "personal hold" on Webb's business and the employee could deflect employer's customers. Webb Pub. Co. v. Fosshage, 426 N.W.2d 445, 449 (Minn. Ct. App.1988). Fosshage

was an account executive for Webb's custom publishing company before forming his own publishing company. The court concluded that because Fosshage "worked closely with Webb's clients" and became friends with customers, he had a "personal hold" on Webb's clients and could deflect the customers. Id. at 449. Because Webb would suffer a significant loss should Fosshage solicits Webb's customers, the court found the need to protect Webb's business. Thus, when an employee develops a personal relationship and has close contact with an employer's clients, the employee creates a "personal hold" that can be used to deflect customers from the employer.

Ghobrial will argue that she does not have a "personal hold" on the good will of ReadiCure to deflect their customers and ReadiCure's training never provided her with trade secrets. Unlike Fosshage in Webb Pub., who developed a friendship with Webb's clients, Ghobrial never developed a personal relationship from dining with any of ReadiCure's clients that would allow for a "personal hold" to deflect ReadiCure customers should she leave.

ReadiCure on the other hand, will argue that as their sole sales representative, Ghobrial has a "personal hold" that can deflect customers. Like Webb Pub., where a personal relationship developed between Fosshage and Webb's customers, Ghobrial developed relationships with ReadiCure customers by frequent visits. ReadiCure will argue that unlike in Mentor Co., where the employee had no contact with customers, Ghobrial was ReadiCure's only representative and clients have become accustomed to Ghobrial. ReadiCure will argue that Ghobrial's personal relationship with clients combined with the possibility of a leak of trade secrets observed in training gives Ghobrial a "personal hold" on the good will of ReadiCure's business and can deflect customers from ReadiCure.

A court will probably decide that ReadiCure has a legitimate business interest in using a noncompetition clause. ReadiCure customers could have become attracted to Ghobrial and purchase from whatever company Ghobrial markets for. Since Ghobrial has a "personal hold" on the good will of ReadiCure, there is legitimate business interest in using a noncompetition clause.

Reasonableness of Provisions.

If the court finds that there is a legitimate business interest, the reasonableness of the limitations must then be analyzed. Specifically the courts will look at the geographical limitation, scope, and time of the noncompetition clause. A reasonable geographical restriction only prohibits employee's from a "reasonable trade area" that will protect the employer's interest." Klick v. Crosstown State Bank, Inc., 372 N.W.2d 85, 88 (Minn. Ct. App.1985). For a geographical restriction to be reasonable it cannot restrict an employee from an area that the employer does not do any business in. In Klick, the court held that the geographical restriction was unreasonable since it limited the employee from taking employment in an area that was out of the employer's trade area. Id. at 88. In the instant case, Ghobrial works for ReadiCure, which operates in Minnesota; Ghobrial is only restricted from soliciting in Minnesota. There should be no dispute to the reasonability of the geographical provision; Ghobrial is prohibited from working within a state that her employer, ReadiCure, has a "reasonable trade area." The scope of limitation and time limitation will be disputed.

Scope of Limitation

For the scope of limitation to be reasonable, it should only restrict the "soliciting of customers" provided to the employee by the employer. Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131 (Minn.1980). If a restriction is "broader than necessary" to prevent soliciting, such restriction is usually found to be invalid. Bennett v. Storz Broadcasting Co., 270 Minn. 525, 534, 134 N.W.2d 892, 899 (1965). Therefore, the scope of limitation is reasonable only when it protects an employer from solicitation of the employer's clients by a former employee.

In Davies & Davies Agency, Inc., the court held that a restriction that goes beyond protecting employers from the solicitation of customers is unreasonable when the restriction does not benefit the employer. Id. at 131. The noncompetition clause in Davies & Davies Agency, Inc., "precluded [employee], …, from engaging in the insurance business." Id. at 129. The court ruled that the scope of

limitation "was overly broad" and "more restrictive than necessary" to protect the employer since customers not served by employee would not "necessarily choose" the employer. Id. at 131. Hence, since the restriction was broader than needed to protect the agency from solicitation of customers by Davies, the scope of limitation was unreasonable.

Additionally, in Bennett, the court held that the scope of limitation is unreasonable when the economic interest of the employer would not be affected by prohibiting an employee from soliciting a competitor for hire. Id. at 536, 134 N.W.2d at 900. Bennett, a radio personality, signed a noncompetition clause that restricted him from "accept[ing] employment from, ..., any radio or television station" where Storz broadcasted. Id. at 527, 134 N.W.2d at 894. When the court held that the scope of limitation was broader than needed, they were convinced that Storz was using the limitation to "prevent [employee] from improving his earnings." Id. at 537, 134 N.W.2d at 900. Therefore, the court found the scope of the noncompetition clause to be unreasonable, determining that prohibiting Bennett from the solicitation of customers only hurts Bennett and does not benefit Storz.

Ghobrial will argue that the scope of limitation is too broad since she does not have access to information on ReadiCure customers that would assist her in the "solicitation of former customers." Ghobrial will argue that the noncompetitive clause she signed is unreasonable because the character of her current employment with ReadiCure diminishes her contact with customers. Ghobrial will also argue that similar to Davies & Davies Agency, Inc., where a solicitation prohibition would not directly result in more customers for the employer, prohibiting Ghobrial from soliciting ReadiCure customers does not mean customers will automatically choose ReadiCure. Similar to Bennett, where interaction with competing radio and television stations would not negatively affect his employer, Ghobrial will argue that the prohibition of "solicitation of former customers" will not negatively affect ReadiCure in anyway and is not needed to protect their legitimate business interest.

ReadiCure on the other hand will argue that they provided Ghobrial with access to solicit former customers. ReadiCure will point to the fact that they had previous relationships with customers, and after they employed and trained Ghobrial they gave her access to their customers. Unlike Bennett, where the employer did not have an economic interest in prohibiting the employee from working with a competitor, ReadiCure will argue that it will be an economic detriment to their business if Ghobrial is allowed to solicit ReadiCure's customers. Unlike Davies & Davies Agency, Inc., where customers were unlikely to use the insurance agency if the employee was no longer employed, ReadiCure will argue that if Ghobrial is not prevented from the solicitation of their customers, the customers may purchase from Ghobrial and whatever competitor she may be marketing for. ReadiCure will argue that since they provided Ghobrial with access to their customers and "solicitation of former customers" will impact ReadiCure negatively, the scope of limitation is reasonable.

The court will probably rule that the scope of limitation is reasonable. The character of Ghobrial's employment provided her access to ReadiCure's customers. Even though ReadiCure is training replacement sales representatives, Ghobrial has been the only sales representative ReadiCure customers have become accustomed to, at least since mid 2008. Therefore prohibiting Ghobrial from the "solicitation of former customers" is reasonable.

Time Limitation

A reasonable time limitation is the time necessary for the obliteration and replacement of the relationship between the employer and the employee in the eyes of the employer's customers. See Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131 (Minn.1980). A reasonable time restriction is determined by the "length of time necessary to obliterate the identification between the employer" in the eyes of customers and the "length of time necessary for an employee's replacement to obtain licenses and learn the fundamentals of the business employee." Id. at 131.

For instance, in Klick, the court held that because Crosstown Bank did not train the employee, three years was not a reasonable time limitation. Klick v. Crosstown State Bank, Inc., 372 N.W.2d 85, 88 (Minn. Ct. App.1985). To determine a reasonable time limitation circumstances such as special relationships with customers are analyzed. Klick agreed not to work with "any financial institution … for three years following termination." Id. at 86. The court concluded that since during Klick's employment at Crosstown he never developed any "special relationship with bank customers," Crosstown did not need three years to obliterate Klick as Crosstown's employee. Id. at 88. Therefore, the time restriction was unreasonable because the time needed for protection was more than necessary for obliteration and replacement.

Analogously, in Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 131 (Minn.1980), the court held that five years was an unreasonable time for the obliteration and replacement of Richard Davies even after significant training. Everett Davies hired and extensively trained his son in the "sale of probate and court bonds." Id. at 129. The son, Richard Davies, signed a noncompetition clause that precluded him from "engaging in the insurance business for ... five years." Id. at 129. The court held that although Richard Davies had significant training and customers identified him with the agency, one year, rather than five years, is a reasonable time to obliterate and replace Richard Davies. Id. at 131.

Ghobrial will argue that the eighteen months of restriction is unreasonable because it is beyond the time needed to protect ReadiCure while they obliterate and replace her in the eyes of customers. Ghobrial will argue that unlike Davies & Davies Agency, Inc., where the employee was strongly identified with the employer by customers, Ghobrial's identity as a sales representative began to be obliterated after her promotion. Ghobrial will also add that similar to Klick, who did not develop any special relationship with bank customers, she also never developed any personal relationship with ReadiCure customers; therefore ReadiCure does not need eighteen months to obliterate her identification with ReadiCure. Thus, the time needed for customers to obliterate identification of Ghobrial with ReadiCure

and for ReadiCure to replace Ghobrial is less than eighteen months rendering the time limitation unreasonable.

ReadiCure will argue that eighteen months is a reasonable time needed for their protection to obliterate and replace any relationship with Ghobrial that customers may have. Unlike Klick, where the employee had not developed any relationships with the customers, Ghobrial visited hospitals, or clients every six to seven weeks. ReadiCure will argue that since Ghobrial has dined with customers and Ghobrial is the only person customers would contact when they had problems with ReadiCure's equipment, eighteen months is a reasonable time to obliterate any identification of Ghobrial as still working for ReadiCure and finding a replacement.

A court would probably find that the time restriction is unreasonable for the need for protection of ReadiCure's interest. The time period is unreasonably necessary to obliterate Ghobrial's relationship from the company in the mind of customers considering the hired replacements. Although, Ghobrial was trained for fourteen months, the hired representatives should be ready to replace Ghobrial. Therefore there is not reasonable "need for protection" by ReadiCure to obliterate and replace Ghobrial in the eyes of ReadiCure's customers.

Conclusion

The noncompetition agreement Ghobrial signed probably will not be enforceable as written. It appears that ReadiCure has a legitimate business interest in using a noncompetition agreement since the nature of Ghobrial's relationship with ReadiCure's clients can lead to Ghobrial deflecting customers. The scope and geographical limitations also seem reasonable because Ghobrial can deflect customers provided by ReadiCure if she worked for ReadiCure's competitors and ReadiCure's trade area includes Minnesota. However, the time limitation seems unreasonable, since Ghobrial's contact with ReadiCure's clients have diminished and replacements have been hired to obliterate and replace the relationship between Ghobrial and ReadiCure in the eyes of customers.