IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

PROFESSIONAL BUILDING SERVICES OF THE QUAD CITIES, INC., Plaintiff, vs. JOHN DECLERCK, Defendant.	**Civil No. 3:00-cv-70183** **RULING**

This case came on for trial before the undersigned on April 30, 2002. Plaintiff appeared represented by counsel Catherine Z. Cartee and Garth M. Carlson. Defendant appeared represented by counsel Jody Wilner Moran and Erin D. Foley. Issues remaining for trial in addition to liability included possible modification of the preliminary injunction to a permanent injunction, and determination of any damages or recoverable attorney fees and expenses.[1]

I. FINDINGS OF FACT

Plaintiff, Professional Building Services of the Quad Cities, Inc. ("PBS"), is a company that supplies cleaning and janitorial services to commercial customers in the Quad Cities. The service that Plaintiff provides to its customers includes general cleaning services, such as vacuuming floors, dusting

[1] A review of the pleadings in the case indicates that no specific claim was asserted for damages or attorney fees and expenses either in the initial Petition for Injunction or through amendment or substitution. However, the parties clearly litigated these issues and included these issues in the Final Pretrial Order. "The Pretrial Order supersedes all previous pleadings and 'control[s] the subsequent course of the action unless modified by a subsequent order.'" Anderson v. Genuine Parts Co., Inc., 128 F.3d 1267, 1271 (8th Cir. 1997) (citing Fed. R. Civ. P. 16(e)). The court would also allow amendment to conform to the evidence, Fed. R. Civ. P. 15(b), and therefore considers the claims for damages and attorney fees and expenses.

desks, cleaning restroom facilities, and stripping and waxing floors. In order to procure customers, Plaintiff's sales representatives utilize a variety of sales techniques, including cold-calling to owners and managers of commercial buildings and businesses, delivering sales materials to potential clients, and submitting bid proposals at the request of potential customers.

When a potential customer expresses interest in obtaining a bid for services, Plaintiff schedules a walk-through of the customer's business. The walk-through is conducted by a sales representative, who obtains information about the client's needs that will assist in preparing a bid, such as the square footage of the facility, the number of employees working at the facility, the tasks a customer wishes to have completed, and the frequency of those tasks. The sales representative then produces a sales proposal, which includes such information as equipment costs, supply costs, salaries of employees, benefits for employees where applicable, and profit margins.

Defendant, John DeClerck ("DeClerck"), applied for a part-time building supervisor position with Plaintiff in 1998. Defendant had no prior experience in the janitorial industry and had completed roughly one year of undergraduate course work. Defendant was hired by Plaintiff on December 28, 1998, as a part-time supervisor for the Moline YMCA account. Defendant's starting salary for this position was $8.00 per hour. As part of his employment with PBS, Defendant was required to sign a non-competition agreement. The agreement provided that upon termination of his employment with Plaintiff, Defendant could not work for any competitor of Plaintiff within a 50-mile radius of the Quad Cities. The agreement states, in relevant part:

> "[A]fter a period of twenty-four (24) months and within a radius of fifty (50) miles after the term of employment, irrespective of the reason for termination:

(a) The employee will not, either directly or indirectly, for himself or on behalf of or in conjunction with any other person, firm, partnership, corporation, association or other entity:

(1) contact any customer or customers of the Employer whom the Employee contacted while employed by the Employer, or who the Employee became familiar with or aware of while employed by the Employer, for the purpose of soliciting the business of such customer or customers from the Employer;

(2) engage in any manner in the same or similar business in any city which Professional Building Services of the Quad City, Inc., is doing business within a (50)-mile radius.

(b) The Employee will not, directly or indirectly, communicate to any other person, persons, firm, partnership, corporation, association or other entity any confidential information."

The Defendant read and understood these terms of the contract of employment, as well as what these terms might require upon termination of his employment with PBS.

Most of the Defendant's training with PBS came through on the job experiences. In addition, at the beginning of his employment, Defendant was required to view eight janitorial and management instruction videotapes produced by the Building Services Contractors Association International, and during his employment Plaintiff took Defendant to two industry trade shows where he attended seminars focusing on the industry.

In March of 1999, Plaintiff promoted Defendant to District Manager. At this time, Defendant began to work full-time and received an annual salary of $23,000. Upon being promoted, Defendant's job duties expanded to include hiring janitorial staff, ensuring that customer cleaning requirements were being met, and resolving any customer complaints or concerns with respect to the quality of cleaning performed. In October of 1999, Defendant's duties were again expanded to include additional

accounts serviced by Plaintiff. Defendant received a salary increase of $2,000 in January 2000, bringing his annual salary to $25,000.

Chad Johnson ("Johnson") is the President of PBS, and at all relevant times was responsible for developing the bids for services presented to all new or potential clients of Plaintiff. Defendant was never responsible for sales, bidding, or soliciting new accounts, and his communication with a customer did not begin until after the cleaning services contract was signed. Once the contract was signed, Defendant was provided with the name of the client's contact person with whom Defendant would maintain communication to ensure that the client's needs were being met and that Plaintiff was performing its job satisfactorily. This ultimate position with PBS placed the Defendant in frequent contact with the customer representatives and allowed the development of a business relationship between the Defendant and those customer contacts.

In the Fall of 2000, Defendant was contacted by Chris Nowack ("Nowack"), the Business Development Manager for Millard Maintenance ("Millard"). Millard is a competitor of the Plaintiff, providing janitorial services to customers in the Quad Cities area. Nowack had learned about Defendant through business interactions in the industry. Nowack informed Defendant that an upper management position was available with Millard, and they were interested in meeting with Defendant to discuss the position. Defendant subsequently met with Nowack and Richard Curry ("Curry"), the Executive Vice President of Millard Maintenance, to discuss the management position. The position entailed monitoring profit and loss for regional expenses, invoicing each account, administrative duties, handling payroll, human resources, and the financial success and general day-to-day aspects of the business in the Quad Cities region. The position did not involve sales or soliciting customers; those tasks being

handled by Nowack. The position also differed from the position with Plaintiff in that Defendant was no longer seeing customers on a daily basis.

During their initial meetings to discuss the employment opportunity available at Millard, Curry asked Defendant if he was subject to a non-compete agreement with Plaintiff. Non-compete provisions of some nature are common in the janitorial services business, and Curry had reviewed a number of such provisions. Millard utilizes non-compete provisions in some of its employment contracts, though with less restrictive terms than the provision now before the court. Defendant informed Curry that he was in fact under a non-compete agreement. Curry requested a copy of the agreement for review by Millard's legal department, and Defendant subsequently faxed a copy of the agreement to Curry.

Following review of the agreement by counsel for Millard, Curry reported to the Defendant that they believed some, but not all, of the terms in the non-compete section of the agreement were enforceable. Specifically, Curry reported they believed the provisions regarding non-solicitation of customers and protection of confidential information would be enforced, but the time and geographic restrictions on competing employment would not be enforced.[2] Despite this communication from Curry, Defendant conveyed to Curry that he had concerns regarding the non-compete agreement and expressed that in the event he accepted employment with Millard, he would need some protection from any legal action Plaintiff may pursue in seeking enforcement of the agreement. Curry provided Defendant with an indemnification agreement that stated Millard would indemnify Defendant and provide him legal representation as a result of any effort on the part of Plaintiff to enforce the non-compete agreement. Once

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[2] This review by counsel, as reported by Curry, failed to address the significant potential that a court might modify the agreement with more appropriate terms and enforce the time and geographic requirements with such a modification. See Presto-X-Co. v. Ewing, 442 N.W.2d 85, 90 (Iowa 1989); Farm Bureau Serv.Co. of Maynard v. Kohls, 203 N.W.2d 209, 211 (Iowa 1972).

Defendant received this letter of indemnification, the subject was not further discussed between Curry and Defendant.

On Friday, September 15, 2000, Millard offered Defendant the position of Regional Operations Manager. The offer included an annual salary of $37,500, a $3,000 signing bonus, either single or family health insurance coverage under Millard's salaried employee plan, the potential for an 8% incentive bonus, the ability to participate in Millard's 401(k) program, and the indemnity agreement. Defendant accepted Millard's offer and on Tuesday, September 19, 2000, resigned his position with PBS.

Plaintiff filed a Petition for Temporary and Permanent Injunction on September 27, 2002. On the same date that Plaintiff filed its Petition, the Iowa District Court for Scott County issued an *ex parte* Temporary Restraining Order. Defendant filed a notice of removal on October 6, 2002, requesting that the action be removed to this court. Defendant also filed an Emergency Motion to Vacate the Temporary Injunction and Request for an Expedited Hearing. Defendant's Motion to Vacate was referred to the Hon. Judge Thomas J. Shields, United States Magistrate Judge for the Southern District of Iowa. The Hon. Harold D. Vietor accepted Magistrate Judge Shields' Report and Recommendation and issued a preliminary injunction on December 15, 2000. The preliminary injunction enjoined Defendant from:

> (1) Contacting any customer of plaintiff Professional Building Services of the Quad Cities, Inc., for the purpose of soliciting the business of such customer from plaintiff [PBS]; and
>
> (2) Communicating to any person, firm, partnership, corporation, association or other entity any confidential or propriety information regarding the customers of plaintiff [PBS] or the service of those customers by plaintiff.

II. NON-COMPETE AGREEMENT

In deciding whether to enforce a restrictive covenant, Iowa courts apply a three-pronged test:

(1) Is the restriction reasonably necessary for the protection of the employer's business;

(2) Is it unreasonably restrictive of the employee's rights; and

(3) Is it prejudicial to the public interest?

See Moore Business Forms, Inc. v. Wilson, 953 F. Supp. 1056, 1062 (N. D. Iowa 1996); Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224, 1260 (N. D. Iowa 1995); Lamp v. American Prosthetics, Inc., 379 N.W.2d 909, 910 (Iowa 1986); 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); Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 369 (Iowa 1971); Baker v. Starkey, 144 N.W.2d 889, 897 (Iowa 1966). This general rule requires the application of a reasonableness standard in maintaining a proper balance between the interests of the employer and employee. Iowa Glass, 338 N.W.2d at 381. Although fair protection must be afforded to the business interests of the employer, "the restriction on the employee must be no greater than necessary to protect the employer." Id. "[T]he covenant must not be oppressive or create hardships on the employee out of proportion to the benefits the employer may be expected to gain." Id.

A. Is the restriction reasonably necessary for the protection of the employer's business?

"The employer bears the initial burden on the first prong of this test of showing that enforcement of the covenant is 'reasonably necessary to protect his business'." Curtis 1000, 878 F. Supp. at 1260 (citing Dain Bosworth v. Brandhorst, 356 N.W.2d at 593 (Iowa Ct. App. 1984)). 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 plaintiff'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." Ehlers, 188 N.W.2d at 373 (citing Mutual Loan Co. v. Pierce, 65 N.W.2d 405, 408 (Iowa 1954)).

Despite much speculation, no evidence was entered to demonstrate that Defendant disclosed to Millard's any confidential information gained from Plaintiff regarding customer accounts. Further, no evidence was produced to show that Defendant had pirated any information from Plaintiff. Both parties agree that confidential customer information was kept in a locked file cabinet and that Defendant was not authorized to access the information contained in that file cabinet without permission from one of Plaintiff's owners. No evidence produced by Plaintiff showed that Defendant had at any time accessed the confidential information in this file cabinet. Other than the records that would have been maintained in this cabinet, there was no evidence the Defendant had at any time obtained information that is not readily available from other sources.

Another way for the employer to meet this burden is to show that the employee received special training or peculiar knowledge from the employer that would "allow him to unjustly enrich himself at the expense of his former employer." Curtis 1000, 878 F. Supp. at 1261 (citing Dain Bosworth, 356 N.W.2d at 593 (initial burden met by showing the non-competition agreement sought to protect the company's $20,000 investment in training defendant to be a broker)). See also Orkin Exterminating Co., Inc. v. Burnett, 146 N.W.2d at 320 (Iowa 1967) (non-competition agreement enforced where employee had been given eight weeks of training in exterminating insects and methods

of operation); Cogley Clinic v. Martini, 112 N.W.2d at 678 (Iowa 1962) (enforcing non-competition agreement where it cost clinic $10,000 to establish new doctor).

Both parties agree that at the beginning of his employment, Defendant was required to view eight janitorial and management instruction videotapes. In addition, Defendant was taken to two industry trade shows at which he attended informational seminars. Defendant received no further formal training from Plaintiff. Plaintiff introduced Defendant to the customer contact, gave him the specifications for the tasks to be completed at the customer's facility, and then left him to make sure that the job was completed. Defendant gained much of his knowledge regarding the performance of his position with Plaintiff through experience he obtained on each job, not from specific training provided by Plaintiff. Defendant's new employer, Millard, is a well-established company with its own substantial experience in the business. Under these circumstances, the court cannot find that Defendant received special training or peculiar knowledge from the Plaintiff that would unjustly enrich the Defendant at Plaintiff's expense.

B. Is it unreasonably restrictive of the employee's rights?

The inquiry into whether or not a non-compete agreement is unreasonably restrictive focuses primarily on whether the covenant is properly limited as to both time and area. See Pathology Consultants v. Gratton, 343 N.W.2d 428, 434 (Iowa 1984) ("Covenants not to compete are unreasonably restrictive unless they are tightly limited as to both time and area"), citing Ehlers, 188 N.W.2d 368, 373-74); Iowa Glass, 338 N.W.2d at 381 ("Assessment of the reasonableness of non-competitive covenants generally requires us to examine both the time and area restrictions contained in the covenant"). Generally, restrictive covenants range from two to three years in duration. See Cogley,

12 N.W.2d at 678 (three years and 25 miles); Orkin, 146 N.W.2d at 320 (3 years and 10 miles). Covenants extending beyond five years have not been enforced in Iowa. See Rasmussen Heating, 463 N.W.2d at 705 (refusing to enforce 10-year covenant not to compete). The time limitation in this case is two years, well within the standards that Iowa courts have been willing to accept.

However, the 50-mile geographic limitation is far more restrictive than necessary to protect Plaintiff. While Defendant's showing of hardship is not particularly compelling because he could have pursued other employment in the Quad Cities area or worked with Millard's at another location, the record evidence reveals no basis upon which the court can conclude Defendant had confidential information, imparted confidential information, solicited Plaintiff's customers, or was used as an enticement to Plaintiff's customers. To the extent that the non-compete restricts Defendant's employment in the Quad Cities area, the court finds it is unreasonably restrictive.

Iowa courts have adopted the position that the court may modify the covenant to make it no more restrictive than necessary. See Presto-X-Co. v. Ewing, 442 N.W.2d 85, 90 (Iowa 1989) (citing Ehlers); Farm Bureau Serv.Co. of Maynard v. Kohls, 203 N.W.2d at 211 (recognizing that Brecher v. Brown, 17 N.W.2d 377 (Iowa 1945), had been overruled on this ground by Ehlers); Ehlers, 188 N.W.2d at 374 (specifically overruling Brecher on this issue); Phone Connection Inc. v. Harbst, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992). As the court has found that the 50-mile geographic limitation is overly restrictive, it will therefore modify the covenant to omit this provision.

C. Is it prejudicial to the public interest?

This covenant is not prejudicial to the public interest. Regardless of whether Defendant is able to work in this field or not, consumers will have various professional cleaning services to choose from, as there are over three dozen such janitorial services in the Quad Cities area.

III. BREACH OF AGREEMENT

Defendant admits he violated the terms of the agreement that he knowingly and intelligently entered into at the time of his employment with Plaintiff, and that he understood its terms. Defendant was adequately concerned about the enforceability of the agreement that he sought and obtained the indemnification agreement from Millard's. In fact, Curry testified that he told Defendant that the lawyers thought the non-solicitation and confidentiality provisions of the non-compete would be enforceable. Upon questioning by Defendant's counsel, Curry testified as follows:

> Q. What were the items in the non-compete that you believed would be enforceable and that you abide by and have Mr. DeClerck abide by?
>
> R. Well, the items in the non-compete that I was told by legal counsel that was enforceable would be the non-solicitation of customers, the non-transferring of confidential information.

Clearly Defendant appreciated he was intentionally violating his contract and had very real fears that some or all of the contract would be found enforceable by a court. Nonetheless, Defendant did proceed to violate the contract and place the Plaintiff in the position of having to seek whatever protection a court would allow.

The essential problem with the Plaintiff's claim is the record simply does not support a finding that Plaintiff has been damaged by the violation of any provision of the non-compete, other than having

to seek legal action to protect their position. Because of failure of proof, the court cannot find that the breach of the non-compete agreement resulted in any damages other than the legal expenses and costs of litigation.

"Attorney's fees are generally not recoverable as damages in the absence of a statute or a provision in a written contract." Suss v. Schammel, 375 N.W.2d 252, 256 (Iowa 1985). See also Lickteig v. Iowa Dept. of Transportation, 356 N.W.2d 205, 212 (Iowa 1984); McNabb v. Osmundson, 315 N.W.2d 9, 15 (Iowa 1982); Wilson v. Fenton, 312 N.W.2d 524, 529 (Iowa 1981); Dole v. Harstad, 278 N.W.2d 907, 909 (Iowa 1979). In the present case, there was a provision in the non-compete agreement that provided Defendant was responsible for any legal expenses Plaintiff incurred in the enforcement of the non-compete agreement. That provision reads as follows:

> "The Employee further agrees that the remedy at law for any breach of the above referenced provisions will entitle the Employer, its successors or assignees, to injunctive relief against any such breach without bond. In addition, the Employee will be subject to all of the following:
>
> A. All costs, expenses and attorney's fees incurred by the Employer in seeking injunctive relief, damages or any other remedy.
>
> B. All of the costs of litigation incurred by the Employer in seeking damages from the Employee through legal process.

Under the circumstances of this case, the court does not find this contract provision to be unfair or unduly burdensome on the Defendant. The Defendant was so cognizant of the potential consequences of this provision that he sought and obtained an indemnity agreement with his new employer.

Plaintiff has been unable to establish that the preliminary injunction was insufficient to protect their interests; and further, Plaintiff has failed to demonstrate they were in any way damaged by Defendant's breach, other than incurring legal fees to pursue enforcement of the non-compete agreement.

The preliminary injunction has caused no hardship to Defendant and would cause no hardship if continued until the end of the contract term later this year. Based on the knowing and intentional breach of the agreement by the Defendant which forced the Plaintiff to seek a judicial remedy, the court awards Plaintiff the attorney's fees accrued in obtaining the preliminary injunction and in maintaining the litigation until the Defendant evidenced his willingness to stipulate to a permanent injunction on December 19, 2001.[3] From that point through the remainder of the case, the court finds the fees and expenses were not reasonably necessary, and not related to any actual damage to the Plaintiff. The fees incurred after Defendant resigned his position and prior to December 19, 2001, amount to $18,815.00.

IV. MOTIONS FOR JUDGMENT AS A MATTER OF LAW

At the conclusion of Defendant's case, both parties moved for judgment as a matter of law. Both of these motions are denied.

V. RULING AND ORDER

The preliminary injunction that was issued in this case on December 15, 2000, is hereby modified to become a permanent injunction, to remain in effect until September 19, 2002, expiring by its own terms on September 20, 2002. During this period, Defendant John DeClerck is hereby enjoined from:

A. Contacting any customer of the Plaintiff, Professional Building Services of the Quad Cities, Inc., for the purpose of soliciting the business of such customer from Plaintiff, Professional Building Services of the Quad Cities, Inc.; and

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[3] Pursuant to Fed. R. Evid. 201, the court takes judicial notice of pleadings filed in this case, specifically the Defendant's Motion for Permanent Injunction filed on December 19, 2001.

B. Communicating to any person, firm, partnership, corporation, association, or other legal entity any confidential or proprietary information regarding the customers of Plaintiff, Professional Building Services of the Quad Cities, Inc., or the service of those customers by Plaintiff.

The court enters judgment against the Defendant and in favor of the Plaintiff in the amount of $18,815.00, plus interest and costs of this action.

IT IS SO ORDERED.

Dated this 23rd day of May, 2002.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT