

IN THE COURT OF APPEALS OF IOWA

No. 8-1035 / 08-0424
Filed March 26, 2009

THOMAS J. STIEGEL,
Plaintiff-Appellant,

vs.

**HMA, INC., an Iowa Corporation,
and Subsidiaries, and
HOLMES MURPHY & ASSOCIATES, INC.,
an Iowa Corporation,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

Stiegel appeals from the district court's order denying his request for a
declaratory judgment and a jury verdict denying his claim for age discrimination.

AFFIRMED.

Thomas Hanson of Hanson, Bjork & Russell, L.L.P., Des Moines, for
appellant.

Gene R. LaSuer and Sharon K. Malherio of Davis, Brown, Koehn, Shors &
Roberts, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VOGEL, P.J.

Thomas Stiegel filed suit against his former employer, HMA, Inc. and Holmes Murphy & Associates, Inc. (HMA), seeking (1) a declaratory judgment that a non-compete clause of an employment contract between the parties was void; and (2) damages for wrongful termination based upon age discrimination. HMA counterclaimed for enforcement of the employment agreement. The district court denied Stiegel's request for a declaratory judgment and granted in part and denied in part HMA's counterclaim seeking a declaration as to the enforceability of the non-compete clause. Further, the district court dismissed HMA's counterclaim for money damages "without prejudice." A jury found Stiegel had not proved his age discrimination claim. Stiegel appeals. We affirm.

I. Background Facts and Proceedings

Since 1982, Stiegel has been employed as an account executive in the insurance industry in Des Moines. From February 1998 to May 2006, Stiegel was employed by HMA in a similar capacity. As a condition of employment, Stiegel was required to sign an Employment Agreement, which contained a non-compete clause. That clause prohibited a terminated employee from directly or indirectly competing with HMA for a two-year period. This prohibition applied to current customers and future potential customers of HMA that the former employee became familiar with while employed by HMA. The non-compete clause also stated that "there is no geographical boundary to the restrictions." Finally, the clause provided that a former employee was allowed to solicit a current or future customer of HMA if the former employee notified HMA in advance of any solicitation and paid HMA a sum equal to two times the past

twelve months commission revenue. On May 15, 2006, Stiegel's employment with HMA was terminated "without cause." In August 2006, Stiegel began working for True North Companies, which is a competitor of HMA.

On July 17, 2006, Stiegel filed a petition seeking a declaratory judgment that the employment agreement's non-compete clause was void. On August 1, 2006, HMA filed an answer and counterclaim requesting the district court enforce the non-compete clause. On January 25, 2007, Stiegel filed an amended petition asserting an additional claim for wrongful termination based upon age discrimination.

On August 27, 2007, Stiegel moved to amend his petition for a second time seeking damages caused by HMA since Stiegel's termination. HMA resisted the motion and a hearing was held. On October 12, 2007, the district denied Stiegel's amended claim inferring it was a new theory of recovery, "akin to intentional interference with contract or contractual relationships." The court then noted that as Stiegel's motion was "filed just within the applicable deadline for pleadings, the proposed amendment would substantially change the issues for trial and necessitate considerable discovery." Further, the deadline for experts and dispositive motions had already passed, discovery closed in approximately one week, and the case had previously been continued. The court concluded HMA would be significantly prejudiced if it was forced to defend a new claim added a few weeks before trial, and therefore denied Stiegel's motion to amend.

On January 7, 2008 to January 11, 2008, Stiegel's age discrimination claim was tried to a jury. On January 11, 2008, the jury returned a verdict in favor of HMA.

Stiegel's request for a declaratory judgment was tried to the district court. On February 5, 2008, the district court found that the twenty-four month restriction was reasonable, but the covenant was overbroad as it prohibited nationwide competition and defined a customer base that Stiegel may have had no contact with. Thus, the district court denied Stiegel's petition for a declaratory judgment requesting the non-compete clause be declared void. The district court granted in part and denied in part HMA's counterclaim, enforcing the non-compete clause for a period of twenty-four months, but limiting it to the customers HMA had at the time of Stiegel's termination and imposing a geographical limit to the state of Iowa. The district court dismissed HMA's counterclaim seeking damages without prejudice.¹

II. Non-Compete Clause

As the petition for declaratory judgment was tried in equity, our review is de novo. Iowa R. App. P. 6.4; see *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000) ("We review declaratory judgment actions according to the manner [in which] the case was tried in the district court. If tried in equity, as in this case, our review is de novo."). We give weight to the factual findings of the district

¹ HMA's counterclaim requested that the non-compete clause be enforced, including but not limited to ordering Stiegel to: (1) notify HMA of customers he intends to solicit; (2) pay HMA a sum equal to two times the past twelve month commission revenue for such solicitations (3) refrain from disclosing HMA's confidential information; and (4) refrain from attempting to or actually inducing employees of HMA to leave their employment at HMA. Although a single counterclaim requesting enforcement of the non-compete clause, the district court treated the request that Stiegel pay HMA for the customers he intends to solicit as a separate counterclaim for money damages, which included dismissing this claim without prejudice. On appeal, both parties also treat this portion of the counterclaim as a separate counterclaim for money damages and neither party asserts that the district court erred in doing so.

court, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *Owens*, 610 N.W.2d at 865.

Stiegel asserts, regarding his declaratory judgment claim, that the district court erred by (1) enforcing the non-compete clause because he was fired without cause and in bad faith; (2) misapplying the balancing test; and (3) dismissing HMA's counterclaim for damages without prejudice. HMA responds that Stiegel did not preserve the first claim and all three claims are moot. We agree with HMA that Stiegel did not preserve the first claim as it was not raised nor ruled on below. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Further, Stiegel did not preserve this issue in his post-trial motion pursuant to Iowa Rule of Civil Procedure 1.904(2). See *id.* ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."). Thus, we conclude that error was not preserved on this argument.

Regardless, we agree with HMA that all three claims are moot. Stiegel's employment with HMA was terminated on May 15, 2006, and the non-compete clause was enforceable for a period of two years, which has expired.² Stiegel asserts that HMA's counterclaim seeking damages is a compulsory counterclaim. At oral argument, HMA conceded that all claims regarding the non-compete clause are moot because HMA's counterclaim is a compulsory counterclaim. We

² Stiegel asserts we should decide the issue regardless of its mootness, as it is a practical impossibility for a plaintiff to bring a similar action and have it reach the appellate courts before the expiration of the restricted time. We decline his invitation.

agree with the parties that HMA's counterclaim is a compulsory counterclaim and as such HMA is precluded from attempting to litigate this issue. See Iowa R. Civ. P. 1.241 (defining a compulsory counterclaim). The non-compete clause is no longer enforceable and no damages may be sought for breach of the non-compete clause; thus, the issues raised by Stiegel as well as HMA's claim for damages are moot. See *Knauss v. Kemin Indus., Inc.*, 267 N.W.2d 56, 57 (Iowa 1978) (holding that where an employer appealed the district court's denial of its suit to enforce a non-compete clause and the duration of the non-compete clause had expired, the issue was moot).

III. Age Discrimination Claim

Stiegel next asserts, regarding his age discrimination claim, that the district court erred by (1) denying Stiegel's August 2007 request to amend his petition or allow certain witnesses to testify; (2) allowing a juror to continue to serve despite Stiegel's objection for cause; and (3) denying Stiegel's request to give a jury instruction regarding future lost earnings.

The district court's ruling on pretrial motions regarding amendments to pleadings, testimony of witnesses, and jury selection and management are reviewed for an abuse of discretion. See *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002) (stating a district court's ruling on a motion for leave to amend is reviewed for an abuse of discretion); *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 249 (Iowa 2000) (stating a district court's ruling on the admission of evidence is reviewed for an abuse of discretion); *State v. Mitchell*, 573 N.W.2d 239, 239-40 (Iowa 1994) (stating that a district court's ruling on challenges to prospective jurors for cause is reviewed for an abuse of discretion). We review a

challenge to a jury instruction for errors at law. Iowa R. App. P. 6.4; *Anderson v. Webster City*, 620 N.W.2d 263, 265 (Iowa 2000). “Although our review is on error, we will not reverse unless ‘prejudicial error by the trial court has occurred.’” *Anderson*, 620 N.W.2d at 265 (quoting *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999)).

Stiegel asserts that the district court abused its discretion when it denied his motion to amend his petition arguing the amendment would not have substantially changed the issues. On July 17, 2006, Stiegel filed his initial petition requesting the district court declare the non-compete clause void. On January 25, 2007, Stiegel filed an amended petition seeking damages for wrongful termination based upon age discrimination. On August 27, 2007, Stiegel sought to amend his petition for a second time to seek damages for HMA’s conduct after Stiegel was terminated. We agree with the district court that Stiegel’s proposed amendment would have substantially changed the issues to be tried and necessitated substantial discovery, which would have required another continuance. See *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996) (holding that the district court did not abuse its discretion by denying the plaintiff’s motion to amend the petition where “the proposed amendment would have substantially changed the issues to be tried, potentially deprived defendants of adequate representation if they were not granted a continuance, and would also have completely altered the course of trial preparation by reopening the entire discovery process”). Therefore, we conclude that the district court did not abuse its discretion by not allowing the amendment.

Stiegel next asserts that the district court abused its discretion when it excluded four witnesses that Stiegel planned on calling at trial. On Friday January 4, 2008, Stiegel informed HMA of four witnesses it planned on calling at trial, which was to begin the following Monday, January 7. HMA moved to strike these four witnesses, which the district court granted. The district court found that Stiegel had a continuing obligation to supplement interrogatory answers and its witness list. As that was not done in regards to these witnesses, the court concluded HMA would be prejudiced should they be allowed to testify without HMA having the benefit of pretrial discovery. We agree with the district court and find no abuse of its discretion in striking these witnesses.

Stiegel next claims that the district court abused its discretion by allowing a juror to continue to serve following his objection. During voir dire, a juror indicated that she knew Steve Flood, one of the witnesses HMA planned on calling. Stiegel did not move to strike this juror. On the second day of trial, the juror gave a note to the court, which stated:

In light of information disclosed in the trial yesterday afternoon about Steve Flood's role in the plaintiff's employment termination, I believe it may be important to the parties to have more information about our family's relationship with the Flood family.

Our 8 year old daughters attend the same parish school – St. Augustin, a rather small community of families. Our daughters play together at each others' homes on occasion and I have served at several parish and school events alongside Steve's wife, Ann, over the course of the last ten years that I have known them. I consider Ann a friend. She and her family brought a meal to our home this summer following the birth of our baby and our families exchange Christmas cards during the holidays.

Knowing now that Steve may be a major player in this trial, I am questioning my ability to be fair. The plaintiff deserves a fair trial.

However, I don't want to be in a position of having to pass judgment on Steve Flood.

While I am not personally close to Steve, he is part of our St. Augustin family and it would be next to impossible for me to set that aside.

The court then met privately with the juror. Stiegel declined to question the juror further, but moved to strike the juror for cause. The district court stated:

I am convinced from that discussion that she remains able to discharge her obligations as a juror, in that she would be able to continue to keep an open mind throughout all of the evidence and make the decisions that she will be asked to make based solely upon that evidence and the law contained in the Court's instructions. And that while the association with Mr. Flood and his family while present is not such as to impede those responsibilities in a manner I believe would rise to the level of a challenge for cause.

The district court denied Stiegel's request to strike the juror for cause. The jurors began their deliberations on Friday and the district court noted that in the event the jurors did not reach a verdict that day, they would continue deliberations on Monday in spite of the fact that two of the jurors were college students who were unable to return on Monday. However, the jurors returned a verdict on Friday. Stiegel asserts that the college students "emphasized the importance" of the juror he challenged for cause and had she been dismissed, the deliberations and hence the verdict may have been different. After interviewing the witness in light of her forthright disclosure, the court made a reasoned decision. We find no abuse of discretion.

Finally, Stiegel asserts that the district court erred in refusing to give a jury instruction regarding future lost earnings. HMA asserts that the district court did not err in refusing to instruct the jury on this issue and even if it did, reversal

would not be warranted because there was no prejudice to Stiegel. “[E]rror in giving a challenged instruction will not result in a reversal unless the challenging party has been prejudiced by it.” *Conner v. Menard*, 705 N.W.2d 318, 322 (Iowa 2005). Because the jury found Stiegel did not prove his age discrimination claim, he cannot establish prejudice for an error in a jury instruction regarding damages. *See id.*; accord *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). Therefore, there is no basis for awarding a new trial based upon this challenged jury instruction.

We have considered all the arguments on appeal and affirm the district court.

AFFIRMED.