IN THE COURT OF APPEALS OF IOWA

No. 8-620 / 08-0017
Filed November 26, 2008

THE BOARD OF REGENTS, STATE OF IOWA and THE UNIVERSITY OF IOWA,
Plaintiffs-Appellants,

vs.

DR. THOMAS WARREN,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Plaintiffs appeal the district court's denial of their request for injunctive relief based on a covenant not to compete. **AFFIRMED.**

Thomas J. Miller, Attorney General, and George A. Carroll, Assistant Attorney General, for appellants.

David J. Dutton and Erin P. Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

Considered by Vogel, P.J., and Miller, J., and Zimmer, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

MILLER, J.

I. Background Facts & Proceedings

In July 2001, Dr. Thomas Warren became employed as an assistant professor with the College of Medicine at the University of Iowa in the Department of Internal Medicine's Division of Hematology/Oncology, for an initial term of three years. Dr. Warren was interested in conducting cancer research, and he was employed with the expectation that he would spend about eighty percent of his time conducting research. Dr. Warren was given laboratory space and allocated $40,000 each year for the first two years for his research. This allowed him to hire a research assistant and purchase supplies. The University expected that Dr. Warren would secure independent funding for his research after the first two years.

Dr. Warren participated in the Faculty Practice Plan, which meant he was required to provide medical care to patients as directed by the University. In addition to his research time, Dr. Warren worked one day each week at Cancer Care of Iowa City, and he also spent about two months each year covering for other physicians at the University of Iowa Hospitals and Clinics. The University received the revenue from the time Dr. Warren and other faculty members spent treating patients, and then used those funds to pay faculty salaries and other expenses.

Dr. Warren signed a non-compete agreement on July 17, 2001, which provided:

> Upon my voluntary termination of my appointment as a member of the salaried faculty of the College of Medicine, or as an

> appointee as an Associate in the College of Medicine, I will refrain for a two year period from engaging in the practice of (medicine, psychology, etc.) in any community in which I have practiced through any intramural or extramural College of Medicine-Sponsored Program. This restriction will not be enforceable if the College of Medicine does not, directly or indirectly, arrange for (physician, psychologist, etc.) services in the community within 180 days of my termination. For purposes of this paragraph, "community" means any municipality in which I practiced through a College of Medicine-Sponsored Program and the surrounding geographic area defined by a 50 mile radius from the practice site(s).
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> Under extraordinary circumstances, as determined by the Faculty Practice Plan Management Committee, the provisions of this non-compete agreement may be waived, in whole or in part.

Dr. Warren's position as an assistant professor was a tenure track position. Assistant professors are generally given seven years to achieve tenure. The ability to secure funding and to publish are important considerations in achieving tenure. If a person does not achieve tenure they are terminated by the University.

Dr. Warren's performance was reviewed on November 7, 2003, by the Department of Internal Medicine Council on Promotions. The minutes of the meeting show Dr. Warren "experienced a slow start with scholarship and funding applications." Dr. Warren was given a one-year reappointment, which meant he "must make important strides very soon or perhaps consider a change in track."

Dr. Warren's performance was reviewed again on November 4, 2004. The committee had the same concerns as a year earlier--lack of funding and scholarly output. A suggestion was made about moving Dr. Warren to a clinical position, which would not involve research. Dr. Warren was reappointed for a term of two years.

After these reviews Dr. Warren came to realize he was not going to achieve tenure. In March 2005 the University cut off his funding for research. Dr. Warren could no longer hire a research assistant, or continue with his research. Without funding he could not do the research needed to seek additional funding, and he could not publish. Dr. Warren testified that at that point the University had made a decision it would not allow him to continue on the tenure track doing research.

Dr. Warren's supervisor, Dr. Raymond Hohl, suggested that Dr. Warren take a full-time job at Cancer Care, and become a clinical faculty member. A similar suggestion was made by the head of the Department of Internal Medicine. Dr. Warren testified he could "be a much better doctor in the community than I can clinically at the University." He stated the only reason he joined the University faculty was because he wanted to pursue laboratory research. Dr. Warren resigned his position with the University. He made arrangements for his former patients at Cancer Care to see other doctors at that facility. Dr. Warren did not petition the University to waive the provisions of the non-compete agreement.

Dr. Warren signed an employment agreement with Iowa Blood and Cancer Care, P.L.C. (IBCC) in Cedar Rapids on June 2, 2005. Cedar Rapids is within fifty miles of Iowa City. Dr. Chirantan Ghosh, who hired Dr. Warren, testified that Dr. Warren brought no patients to IBCC.[1] IBCC suffered a loss hiring Dr. Warren for the first ten months while it paid him a salary and he was

[1] Two of Dr. Warren's patients from Cancer Care of Iowa City later sought him out at IBCC. One patient worked in the same building where IBCC was located, and another was unhappy with her diagnosis at Cancer Care.

building up a patient base in Cedar Rapids. Dr. Warren has referred several of his patients to the University for care they could not receive through IBCC.

On August 26, 2005, the Board of Regents and the University (together University) filed an action against Dr. Warren seeking an injunction to prohibit him from practicing medicine in violation of the non-compete agreement. The University presented evidence that it competed against facilities in Linn County for patients. After Johnson County, the greatest number of patients for the University Hospitals and Clinics come from Linn County. The University spent an average of about $41,000 per year in 2004, 2005, and 2006 in advertising in Linn County the services of its Holden Comprehensive Cancer Care Center.[2]

There is a shortage of oncologists in the State of Iowa. The federal government has determined that the Cedar Rapids area is underserved by physicians. Because of this, the number of visas for physicians from other countries to come to the area had been increased. Dr. Ghosh, who established IBCC, testified he did not believe IBCC was in competition with the University. He stated he believed the two entities were compatible because IBCC referred many patients to the University, and in fact IBCC had increased the number of those referrals in recent years. Dr. Ghosh pointed out that cancer is a chronic disease, and many of IBCC's patients did not want to have a long drive to see

[2] The evidence appears to indicate, but does not make clear, that the services of the Holden Comprehensive Cancer Care Center include some or all of the clinical services of the Department of Internal Medicine's Hematology/Oncology Division. Assuming such to be true, the evidence also does not show what proportion of the Center's services consist of the services of the Division, or what part, if any, of the $41,000 per year in advertising expenses relate to the clinical services of the Division. It is thus impossible to determine from the existing record what part, if any, of the advertising expenses relate to the services of the Division.

their physician. Furthermore, Dr. Ghosh testified Dr. Warren had not brought any patients with him, and he had not taken any patients away from the University.

The district court issued a decision on May 11, 2007, denying the University's request for an injunction. The court found there was not sufficient evidence that the non-compete agreement was reasonably necessary for the protection of the University's business. The court found there was no evidence the University suffered a financial loss when Dr. Warren left. The court determined the agreement was unreasonably restrictive because it prohibited Dr. Warren from practicing medicine within fifty miles, rather than limiting the restriction to the specific type of medicine practiced by Dr. Warren. The court also concluded the public interest weighed heavily on the side of sufficient health care in Linn County and against enforcement of the non-compete agreement. Based on these conclusions, the court determined the University failed to meet its burden to show an injunction was clearly required in this case. The University appeals.

II. Standard of Review

A court has equitable jurisdiction to issue injunctions. *PIC USA v. North Carolina Farm P'ship*, 672 N.W.2d 718, 722 (Iowa 2003). For this reason, our review is de novo. Iowa R. App. P. 6.4; *Max 100, L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 180 (Iowa 2001). In equitable proceedings we give weight to the factual findings of the district court, especially concerning the credibility of witnesses, but are not bound by the court's findings. Iowa R. App. P. 6.14(6)(*g*).

A request for an injunction should be granted with caution and only when clearly required. *Presto-X Co. v. Ewing*, 422 N.W.2d 85, 89 (Iowa 1989).

III. Merits

Restrictive covenants regarding physicians have been recognized as valid and enforceable in Iowa. *Cogley Clinic v. Martini*, 253 Iowa 541, 546, 112 N.W.2d 678, 681 (1962). Non-compete agreements, otherwise known as covenants not to compete, are not generally favored, however, because they "are viewed as restraints of trade which limit an employee's freedom of movement among employment opportunities . . . ." *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999). A restrictive covenant is strictly construed against the party seeking injunctive relief. *Cogley Clinic*, 253 Iowa at 546, 112 N.W.2d at 681 (noting restrictive covenants are in partial restraint of trade and are approved with some reluctance).

To determine whether a restrictive covenant is enforceable, we consider: (1) whether the restriction is reasonably necessary for the protection of the employer's business; (2) whether it is unreasonably restrictive of the employee's rights; and (3) whether it is prejudicial to the public interest. *Revere Transducers*, 595 N.W.2d at 761. The restriction must be no greater than that necessary to protect the employer. *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 1055, 65 N.W.2d 405, 407 (1954).

"Essentially, these rules require us to apply a reasonableness standard in maintaining a proper balance between the interests of the employer and the employee." *Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa

1983). The facts and circumstances of each individual case must be carefully considered to determine whether a restrictive covenant is reasonable. *Id*. at 382. "The validity of the contract in each case must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and employee." *Baker v. Starkey*, 259 Iowa 480, 495, 144 N.W.2d 889, 897-98 (1966).[3]

A. "The employer has the initial burden to show that enforcement of the covenant is reasonably necessary to protect its business." *Dental East, P.C. v. Westercamp*, 423 N.W.2d 553, 555 (Iowa Ct. App. 1988); *see also Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502 (Iowa 1984) ("The burden of proving reasonableness is upon the employer who seeks to enforce such a covenant." (citation omitted)).

In considering whether a restrictive covenant is reasonably necessary for the protection of the employer's business, we consider whether the employee had close proximity to customers. *Revere Transducers*, 595 N.W.2d at 761. An important consideration is whether the employee has personal contact with the employer's customers. *Orkin Exterminating Co. v. Burnett*, 259 Iowa 1218, 1222, 146 N.W.2d 320, 324 (1966). "Where there is little customer contact, we have refused to enforce the covenant on the basis that the restriction was unreasonable." *Iowa Glass*, 338 N.W.2d at 382. A restrictive covenant is more likely to be upheld "when the employee is placed in a position of close customer

[3] Although *Iowa Glass Deport* and *Baker* speak of balancing the interests of the employer and employee, the later *Revere Transducers* makes clear that the public interest also must be considered. *See Revere Transducers*, 595 N.W.2d at 761.

relationship and has an opportunity to pirate customers from the employer at the termination of his employment." *Id.* at 381.

As noted above, Dr. Warren spent eighty percent of his time conducting research, and during this time he had no contact with patients. Dr. Warren spent some time covering for other physicians at the University Hospitals and Clinics, and all parties agreed the patients he saw there were not his patients. There was no evidence he developed a close customer relationship with these patients.

Dr. Warren additionally spent one day each week at Cancer Care. While he had a physician-patient relationship with these patients, the record is also clear that he arranged for all of these patients to remain in the care of other physicians at Cancer Care. Dr. Warren later saw two of these patients at IBCC. One patient worked in the same building as IBCC, and Dr. Warren testified he saw this patient in conjunction with a physician at the University. Another patient called Dr. Warren after she became unhappy with the recommendation of a physician at Cancer Care. Dr. Warren referred this patient for radiation therapy at the University. We conclude Dr. Warren did not attempt to solicit or "pirate" the patients of Cancer Care after he left his employment there.

In considering whether a restriction is reasonably necessary for an employer's business, we also look to whether the employee has obtained confidential knowledge and the nature of the business and the occupation. *Revere Transducers*, 595 N.W.2d at 761; *Orkin Exterminating*, 259 Iowa at 1223, 146 N.W.2d at 324. Dr. Warren received his training as a physician prior to his employment as a faculty member of the University. There was no evidence that

while employed as a faculty member he received "special training or peculiar knowledge that would allow him to unjustly enrich himself at the expense of his former employer." *See Iowa Glass*, 338 N.W.2d at 382. Dr. Warren testified that in treating patients he used information generally known to those practicing hematology and oncology.

In *Cogley Clinic*, 253 Iowa at 548, 112 N.W.2d at 682, a case involving a restrictive covenant signed by a physician employed by a clinic, the court noted the clinic had invested in the promotion of the physician in the community. The physician had been introduced, sponsored, and recommended in the community by the clinic for several years. *Cogley Clinic*, 253 Iowa at 549, 112 N.W.2d at 682. In the present case, however, there was no evidence the University had promoted Dr. Warren within the community as a physician. The University did not expend any money to obtain patients for Dr. Warren or to establish a clinical practice for him.

Looking at all of the facts and circumstances of this case, we determine the University has not met its burden to show the restriction was reasonably necessary for the protection of the University's business. The University has not shown that it suffered or will suffer a loss of business due to the practice of medicine in Cedar Rapids by Dr. Warren.

B. The second element to consider is whether the restrictive covenant is unreasonably restrictive of the employee's rights. *Revere Transducers*, 595 N.W.2d at 761. A covenant will not be upheld if it is oppressive or creates hardships for the employee that are out of proportion to the benefit to the

employer. *Dental East*, 423 N.W.2d at 555. Restrictive covenants must be tightly limited as to both time and area. *Lemmon v. Hendrickson*, 559 N.W.2d 278, 282 (Iowa 1997). A restrictive covenant "must be no greater than necessary to protect the interests of the employer." *Mutual Loan Co.*, 245 Iowa at 1055, 65 N.W.2d at 407.

The non-compete agreement signed by Dr. Warren does not appear to be unduly restrictive as to time (two years) or area (fifty miles). However, because we find, as the district court did, that the first and third elements identified in *Revere Transducers* must be resolved against the University, we conclude we need not decide whether this second element also militates against enforcement of the non-compete agreement.

C. The third element is whether the restrictive covenant is prejudicial to the public interest. *Revere Transducers*, 595 N.W.2d at 761. "Where the basic contract is fair and equitable, such covenants do not violate public policy." *Orkin Exterminating*, 259 Iowa at 1223, 146 N.W.2d at 324. The party asserting a restrictive covenant is contrary to public policy has the burden of proof on the issue. *Cogley Clinic*, 253 Iowa at 550, 112 N.W.2d at 682.

In *Cogley Clinic*, a physician was restricted from practicing within twenty-five miles of Council Bluffs for three years. *Id.* The court considered the great number of doctors practicing in Council Bluffs and Omaha, and concluded, "[t]he public welfare is not seriously involved in this case." *Id.* In the present case, however, Dr. Warren presented testimony that the federal government had designated Cedar Rapids as underserved by physicians, and the visa quota for

the area had been increased. Based on this shortage of physicians, the Cedar Rapids community would be negatively impacted if Dr. Warren were not permitted to treat cancer patients there.

We concur in the district court's conclusion:

> The evidence establishing the current atmosphere in Linn County with regard to the treatment of cancer patients weighs heavily on the side of that public interest for appropriate and sufficient health care and in favor of non-enforcement of the non-compete clause. On balance, the Court finds the public interest in health care must prevail.

After carefully considering and weighing the interests of the parties, we conclude that enforcement of the non-compete agreement would not be reasonable under the facts of this case. *See Iowa Glass*, 338 N.W.2d at 381 (noting we must "apply a reasonableness standard in maintaining a proper balance between the interests of the employer and the employee"). There was a lack of evidence to show enforcement of the agreement was reasonably necessary to protect the employer. Balancing against this, there was evidence to show the non-compete agreement was unreasonably restrictive to Dr. Warren and was prejudicial to the public interest.

We affirm the decision of the district court denying the University's request for an injunction against Dr. Warren.

AFFIRMED.