

WORKSHOP ON CRITIQUING STUDENT WORK
Led by Daniel L. Barnett, Boston College Law School
Washington, D.C.
June 29, 2003

MATERIALS

1. Introduction and Directions
2. Memorandum from Partner
3. Summary of Analysis
4. Billings v. Paris Fashions
5. Daniels v. Daniels
6. Klinger v. Hamilton
7. Wilson v. Foster

SCHEDULE

Morning

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| 2:15-3:00 | Panel Discussion, Daniel L. Barnett and
Joan Blum, Boston College Law School |
| 3:00-3:15 | Break |
| 3:15-5:00 | Critique of Student Draft and Small Group Discussion |

INTRODUCTION AND DIRECTIONS

Goal of Workshop

The goal of the Workshop on Critiquing Student Work is to introduce basic critiquing strategies to new writing teachers. The workshop aims to mirror the actual process by which an LRW teacher analyzes a legal problem and then helps students, through effective written critique, communicate that analysis in a well-structured and well-written objective memorandum to a supervisor. We have designed a short common-law problem with student sample memos to help demonstrate some basic critique.

Method of Workshop

The workshop will begin with a panel discussion of critiquing strategies to give effective written feedback on student-written work. After the panel, participants will critique a sample student draft of an objective memo based on the materials included in this packet and then break into small discussion groups to discuss the critique.

Objective Memorandum for Workshop Critique

The student sample will be a portion of an objective memo dealing with the issue of enforceability of a non-competition clause in an employment agreement. The problem is a common law problem in a mythical jurisdiction with four relevant cases.

Directions for Workshop Preparation

Please read the memorandum from the partner assigning the problem to the student and analyze the four cases. The court's analysis includes two major issues: 1) whether the employer has a "legitimate interest" in restricting an employee; and 2) whether the covenant "reasonably protects" that legitimate interest. To ensure that participants have sufficient time to critique and discuss their critique in the small groups, the student sample will only address the issue of whether the employer has a legitimate interest. Please fully analyze that issue in preparation for the critique. A quick summary of the analysis is included with the cases to assist you.

TO: Associate
FROM: Partner
RE: American Tools, Inc: Non-competition Agreement
DATE: June 2003

American Tools, Inc. ("ATI") distributes a line of farm equipment manufactured in Russia. ATI would like to hire Andy Jones as a sales representative in the State of Hamilton. Andy currently works in Hamilton as a sales representative for Midwestern Farm Equipment, Inc. ("Midwestern"). Midwestern distributes domestically manufactured farm equipment that is the same type of equipment ATI markets. When discussing the new position with Andy, ATI learned that Andy's original employment contract with Midwestern included a non-competition clause that restricts Andy from "working as a sales representative for another farm equipment distributor in the State of Hamilton for two (2) years after termination of employment" with Midwestern.

To help me advise ATI about hiring Andy, please write a memo explaining if the non-competition agreement is enforceable against Andy. Although I have not researched this issue in Hamilton, I have dealt with this question in other states. I think I remembered all the questions to ask the client to give you the information you need to write the memo. I've included the information below. To help save you time, I have already checked and Hamilton does not have a statute dealing with non-competition clauses in employment agreements, so you can get started with a print digest search of Hamilton cases since our client is concerned about paying the expense for on-line research at this time. Here's the information I obtained from the client:

- Andy started with Midwestern in 1991 and has been servicing most of his customers for at least 6 years.
- Andy had no experience selling farm equipment before he took the job with Midwestern.
- After Andy took the job, Midwestern provided on-the-job training for about two years.
- In Andy's capacity as a Midwestern sales representative, he makes all contacts with his customers. If a dealer needs technical assistance when servicing the equipment, Andy arranges the necessary support.
- Andy meets with his customers at least once every month.
- Andy is not a personal friend of any of his customers.

SUMMARY OF ANALYSIS

This analysis requires a simple synthesis of four cases. Each of the four cases provides a good, consistent explanation of the structure of the overall analysis—see below. To understand the analysis of the specific requirements of the two-step test (legitimate interest and the reasonableness of the restrictions—see below), the four cases must be synthesized together as a group, since no one case lays out the complete analysis.

Structure of Overall Analysis. In every case, the court explains that non-competition agreements are disfavored because they restrict a person’s right to earn a living. However, the court also recognizes that an employer has a right to protect itself from a former employee if the employee could use an advantage gained during employment to compete against the employer. Therefore, the court attempts to balance the rights of the parties by requiring the employer to show that it has a “legitimate interest” in restricting the employee from working. If the employer can show it has a legitimate interest, then the court requires that the restrictions of the covenant reasonably protect that legitimate interest.

Legitimate Interest. To understand how the court decides if an employer has a legitimate interest, all four cases must be synthesized together as a group. This synthesis makes clear that the employer must convince the court that the employee has acquired enough of a “personal hold” on the employer’s customers that the customers would likely follow the employee to a competitor. The court determines if customers would likely follow the employee by examining the “totality” of the employee’s relationship with the customers, including whether the employee was the exclusive or primary contact with the customers; the regularity and frequency of the employee’s contact with the customers; and the duration of the employee’s relationship with customers.

Reasonableness of Restrictions. The analysis of how the court determines if a covenant reasonably protects the employer’s legitimate interest is not included here because the student sample does not address this issue.

316 N.E.4th 100

(Cite as: 316 N.E.4th 100)

William BILLINGS
v.
PARIS FASHIONS, Inc.

Supreme Court of Hamilton.

April 2, 1965.

MURPHY, Justice.

Factual background

Plaintiff operates a chain of clothing stores in several large cities around the country. The defendant became the manager of the plaintiff's store in Mercy Springs on April 4, 1960. At the time the defendant was hired, he signed an employment agreement that included a noncompetition clause. The clause provided that the defendant would not directly or indirectly enter into or engage in the same business as plaintiff in the city of Mercy Springs for a period of four years after his employment with plaintiff ceased. The defendant's main responsibilities were to assist customers who came into the store to buy clothing. He was also responsible for managing the other store employees. At most times, the store was staffed with a minimum of 10 salespeople. In March, 1963, the employee quit his job with plaintiff and opened a competing clothing store in Mercy Springs. The employer filed this action to enjoin defendant from carrying on that business in the city of Mercy Springs. The trial court dismissed the action. The plaintiff appeals.

Discussion

The question is whether the noncompetition clause in the employment agreement is enforceable. In this connection it should be immediately recognized that the agreement is one in partial restraint of trade since it limits the right of a party to work and to earn a livelihood. Such contracts are looked upon with disfavor, cautiously considered, and carefully scrutinized. *Arthur Murray Dance Studios v. Witter*, Ohio Com.Pl. 62 Ohio L.Abst. 17, 105 N.E.2d 685. This approach has been influenced by a concern for the average individual employee who, as a result of his unequal bargaining power, may be found in oppressive circumstances. It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable. On the other hand, it is important to allow businesses to protect themselves from unfair competition. Accordingly, the enforceability of each such clause must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee. *101

316 N.E.4th 100

(Cite as: 316 N.E.4th 100, *101)

Therefore, the test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer's legitimate interest, in terms of the time, territory and subject matter. 35 Am.Jur., Master and Servant, s 99; 36 Am.Jur., Monopolies, Combinations, and Restraint of Trade, ss 78 and 79. See, Combined Ins. Co. v. Bode, 247 Minn. 458, 77 N.W.2d 533.

This case fails the first part of this test. A restraint is necessary for the protection of the employer when the employee obtains a personal hold on the employer's customers. In this case, the plaintiff is unable to show that defendant had such a relationship with its customers. Plaintiff's business is selling men's and women's clothing to walk-in customers. The employee did

not meet with the same customers regularly. Any salesperson could assist the customers when they walked into the store. If an employee's job requires him to work with the same customers regularly, those customers may be attracted to him personally, and therefore are likely to go with him should he enter the service of a competitor. The employee in this case did not have that type of relationship with the employer's customers.

Because the employer did not have a legitimate interest in restricting the employee, there was no need for a noncompetition clause. Therefore, we do not need to analyze the reasonableness of the restrictions.

Affirmed.

515 N.E.4th 310
(Cite as 515 N.E. 4th 310)

DANIELS
v.
DANIELS, Inc.

Supreme Court of Hamilton

Oct. 17, 1980.

WAHL, Justice.

Richard Daniels (the “employee”) brought suit against Daniels, Inc. (the “agency”) seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. After a trial, the district court held that the clause was enforceable. The employee appeals.

Factual Background

The agency is a family-run insurance company. The employee is the eldest son of the owner, Everett Daniels. The employee began working for the agency in June 1967. At the beginning of his employment, the employee signed an employment agreement that included a non-competition clause. The non-competition clause precluded the employee, upon termination of his employment with the agency for any reason, from engaging in the insurance business for a period of five years within a 50-mile radius of Minneapolis, St. Paul, or Duluth.

Over a period of years, the employee was trained and acquired expertise in the sale of probate and court bonds. As the employee was entrusted

with greater responsibility, the father phased himself out of that part of the business. By 1972, the employee was in charge of the agency's bond business and was often the exclusive contact between the agency and its bond customers. He met most of his clients a few times each month. Most of the bond clients had been clients for several years

Due to a conflict between the employee and his father about the business, the employee left the agency on January 13, 1978. At the time of trial, the employee had not accepted employment with any other insurance agency.

Discussion

The only question in this appeal is whether the non-competition clause was enforceable. The test of enforceability of a non-competition clause in an employment agreement was well stated in *Billings v. Paris Fashions*, 316 N.E.4th 100, 101 (1965):

[T]he test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer's legitimate interest, in terms of the time, territory and subject matter. *311

In this case, the trial court found that the agency had a protectable interest in its client relationships and the non-competition clause reasonably protected

515 N.E.4th 310
(Cite as 515 N.E. 4th 310, *311)

that interest. We agree and affirm the trial court's decision.

In Billings, the court found that the employer did not have a protectable interest in restricting the employee from working because the employee did not have a personal hold on the employer's clients. This case is very different. Here, the employee was the exclusive contact with his customers for a long

period of time, meeting with them often. See Billings, 316 N.E.4th at 101.

[Analysis of the reasonableness of the agreement deleted.]

Affirmed.

545 N.E.4th 619
(Cite as 545 N.E.4th 619)

Thomas W. KLINGER
v.
HAMILTON STATE BANK

Supreme Court of Hamilton

Aug. 6, 1985.

LESLIE, Justice.

Plaintiff brought suit seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. After a trial on the matter, the district court held that the clause was unreasonable and therefore invalid. The defendant appeals.

Factual Background

In October of 1983, Hamilton State Bank (defendant) and Thomas W. Klinger (plaintiff), entered into an employment contract. Under the terms of the written contract the plaintiff would become a vice president responsible for servicing commercial accounts. The employee was the only employee of the bank who called on the commercial clients. He met with his clients several times a month. The employment contract contained a non-competition clause. Under the provisions of this clause, the plaintiff could not accept employment with any financial institution within a defined trade area for a period of three years following termination of his employment.

Approximately four months after the plaintiff began working for the

defendant he received what he considered a better offer from another bank and asked to be released from his contract with the defendant. The defendant refused. The plaintiff immediately brought this suit to declare the non-competition clause invalid. Following a trial, the court entered judgment declaring that the non-competition clause was unenforceable. The defendant appeals, claiming that the clause was reasonable and enforceable. Because we find the defendant's arguments unpersuasive, we affirm.

Discussion

Non-competition clauses like the one involved here have long been carefully scrutinized by courts and have been traditionally disfavored as restraints on an individual's ability to make a living. See *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100 (1965). As we said in *Billings*: "[o]ne who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." However, a court may enforce a non-competition clause if it is necessary to protect reasonable interests of an employer, and does not impose unreasonable restraints on the rights of the employee. *Billings*, 316 N.E.4th at 100, 101.

Defendant argues that the restriction imposed was necessary to protect the interests of the bank. We disagree. The defendant did not have a legitimate *620 interest in restricting the plaintiff. The relevant inquiry is whether the employee

545 N.E.4th 619

(Cite as 545 N.E.4th 619, *620)

had a personal hold on the defendant's customers like the employee in Daniels, 515 N.E.4th 310 (1980). Although the regularity and quality of contacts the plaintiff had with the defendant's customers is similar to the type of relationship we found sufficient in Daniels, in that case the employee worked with the employer's customers for several years. Here, the plaintiff did not have a personal hold on the defendant's customers. He worked for

defendant for only four months before being discharged. Therefore, he established no special connections with the bank's customers as a result of his employment. It is unlikely that any of the defendant's customers would follow the plaintiff to a competitor. See Daniels, 515 N.E.4th at 310-11.

Affirmed.

561 N.E.4th 815
(Cite as 561 N.E.4th 815)

WILSON PUBLISHING COMPANY
v.
Neal T. FOSTER

Supreme Court of Hamilton

June 21, 1988.

LANSING, Justice

Plaintiff brought suit seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. The district court held that the clause was reasonable and therefore valid. The plaintiff appeals.

Factual Background

Wilson's custom publishing division creates, designs, prints and distributes custom magazines for companies across the United States. Wilson is one of approximately 12 major national custom publishers, although there are several smaller operations. In January 1980 Wilson hired Neal Foster, who had 27 years of experience in marketing, as an account executive. Foster solicited business and assisted Wilson's clients in developing marketing strategies, spending at least one day a month with each customer. Foster was the primary contact between Wilson and all of the clients to which he was assigned. Most of his clients had been doing business with Wilson for at least five years. On September 28, 1987, Wilson terminated Foster's employment, allegedly because his aggressive style conflicted with corporate policy. In October 1987 Foster joined another custom publishing

corporation. Wilson threatened action based on the following non-competition clause that was included in the employment agreement Foster signed at the time he was hired:

For a period of 18 months from termination of employment, I shall not, directly or indirectly, engage in or solicit or have any interest in any person, firm, corporation, or business that engages in or solicits, the publication or marketing of any custom publication, promotion piece, catalog, calendar, or any other printed material for any customer that has done business with the custom publishing division of Wilson within the period of one year immediately prior to my termination of employment.

Foster brought this action seeking a declaratory judgment that the non-competition clause is unenforceable. After a trial, the trial court found that the clause is enforceable. Foster appeals.

Discussion

Because restrictive covenants are *816 agreements in restraint of trade, we have consistently held that such agreements

561 N.E.4th 815

(Cite as 561 N.E.4th 815, *816)

should be strictly construed. Therefore, they are enforced only to the extent reasonably necessary to protect the goodwill of the employer. *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100, 101 (1965). Foster argues that the noncompetition agreement does not protect any legitimate interest of Wilson's because he did not have a sufficiently close relationship with Wilson's customers. He also argues that the agreement itself is unreasonable in scope and duration. We disagree.

1) Client relationships. Employers have a legitimate interest in protecting themselves against the deflection of customers by their employee if the employment has provided the employee with the opportunity to establish a personal hold on the employer's customers. *Billings*, 316 N.E.4th at 101. Although Foster disavows any "sensitive relationship" with his customers, the totality of Foster's relationship with Wilson customers was sufficient to give

Wilson a legitimate interest in protecting himself against him. Foster worked regularly for at least five years with most of his clients. He was the primary contact between the business and the customers. Clearly, it was likely that his customers would follow him to a competitor. Therefore, he had a personal hold on the employer's customers. See *Klinger v. Hamilton State Bank*, 545 N.E.4th 619, 620 (1985) (evidence showed that employee did not develop any special relationships with customers).

2) Reasonableness of restriction. The subject matter, temporal duration and geographic area of the restriction do not appear unreasonable, given the national character of Wilson's business and the time required to establish a relationship between Foster's former customers and his replacement. See *Klinger*, 545 N.E.4th at 620.

Affirmed.