COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2814

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CAP GEMINI AMERICA, INC., A DELAWARE CORPORATION,

PLAINTIFF-APPELLANT,

V.

GARY M. RINGSTAD,

DEFENDANT,

WAYNE R. PURDY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Cap Gemini America, Inc. appeals a summary judgment which dismissed its action for damages arising from the breach of a non-

competition agreement by a former employee, Wayne Purdy.[1] Cap Gemini claims that the trial court erred when it concluded the covenant was unenforceable, as a matter of law. However, on the undisputed facts of this case, where the covenant is being invoked to restrain a data processor from doing nothing more than offering his services to the State at a lower price, we agree with the circuit court that the restrictive covenant was not reasonably necessary for the protection of Cap Gemini. Accordingly, we affirm the judgment.

BACKGROUND

Cap Gemini provides computer consulting services to customers throughout Wisconsin, including several state agencies. Its employees perform data processing and computer programming services for its clients, generally at the clients' places of business. These projects may take several months to complete, and thus give Cap Gemini's employees extended daily contact with its customers.

In November of 1991, Cap Gemini hired Gary Ringstad as a computer consultant. Cap Gemini assigned Ringstad to work on a number of projects for the Wisconsin Department of Health and Social Services (DHSS).[2] In June of 1993, Cap Gemini hired Wayne Purdy as a computer consultant. Purdy's employment contract included a non-competition clause, which provided in relevant part that:

> (a) You covenant and agree that you may not:
>
> (i) during the period of employment with CAP GEMINI and for one year following the termination of

[1] Cap Gemini's claims against defendant Gary Ringstad are not a subject of this appeal.

[2] Wisconsin Department of Health and Social Services has been renamed the Department of Health and Family Services.

> such employment for any reason, including involuntary termination without cause, solicit, sell or perform, for your own account or for any other entity, data processing professional services that are competitive with the services of CAP GEMINI, directly or indirectly, to or for any entity or customer for which you or employees under your managerial control (where applicable) has solicited, sold or performed any data processing services on behalf of CAP GEMINI during any part of the year immediately preceding the termination of your employment; provided, however, that this restriction shall, in the case of multilocation entities and customers, be limited to the location or locations of the entity or customer in question in which you or employees under your managerial control performed, sold or solicited services or to which you or they otherwise had access and offices of such entity or customer within a one hundred-mile radius of such location or locations….

Purdy worked on various projects for DHSS during the entire duration of his employment with Cap Gemini, and, although Purdy never worked directly with Ringstad on a specific project, the two worked in the same office at the Bureau of Information Systems at DHSS and became friends.

On December 2, 1994, Ringstad's employment with Cap Gemini terminated. He subsequently began doing business under the name of Data Processing Experts (DPE). He listed his new business on the State vendor bulletin for data processing services in April of 1995 and he began submitting bids on computer service contracts in competition with Cap Gemini.

Bidding for the contract on which Cap Gemini seeks damages began in July of 1995. The Center for Health Statistics, within the Division of Health at DHSS, requested bids from both DPE and Cap Gemini for two Clipper programming positions. Ringstad contacted Purdy to inquire whether he would be willing to work for DPE on the Clipper projects. When Purdy expressed interest, Ringstad submitted a bid identifying Purdy as the person who would perform the programming services on behalf of his firm. Purdy interviewed for one of the

positions for DPE while he was still employed by Cap Gemini. DPE was awarded that position.

Cap Gemini filed suit against both Ringstad and Purdy, alleging breach of their respective covenants not to compete. The parties filed cross-motions for summary judgment. On July 2, 1996, the circuit court dismissed Purdy because, as to the type of services he provided, a noncompete agreement was not necessary for the protection of Cap Gemini. This appeal followed.

DISCUSSION

Standard of Review.

The reasonableness of a covenant not to compete depends upon the facts and circumstances surrounding it. ***Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton***, 101 Wis.2d 460, 471, 304 N.W.2d 752, 757 (1981). Therefore, the development of the facts is important in restrictive covenant cases, and summary judgment is only available when the moving party establishes a record sufficient to demonstrate that there is no triable issue of material fact on any issue presented.[3] Nonetheless, when "both parties file counter-motions for summary judgment, and neither argues that factual disputes bar the other's motion, the facts are deemed stipulated" and summary judgment is appropriate. ***Hussey v.***

[3] It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. Section 802.08, STATS.; ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint to determine whether it states a claim, and then review the answer, to determine whether it presents a material issue of fact or law. ***Id.*** If we determine that the complaint and answer are sufficient, we proceed to examine the moving party's affidavits, to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits, to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.***

Outagamie County, 201 Wis.2d 14, 18, 548 N.W.2d 848, 850 (Ct. App. 1996). Since neither party in this case contends that any material fact needs to be resolved by trial,[4] we will independently determine as a matter of law whether the facts already of record satisfy the requirements necessary to an enforceable covenant not to compete.

Noncompete.

Wisconsin law favors the mobility of workers. ***Gary Van Zeeland Talent, Inc. v. Sandas***, 84 Wis.2d 202, 214, 267 N.W.2d 242, 248 (1978). As a result, contracts which operate to restrict trade or competition are *prima facie* suspect in this state, and will be liberally construed in favor of employees. ***Wausau Medical Center, S.C. v. Asplund***, 182 Wis.2d 274, 281, 514 N.W.2d 34, 38 (Ct. App. 1994); § 103.465, STATS. Nonetheless, restrictive covenants may serve to prevent the dissemination of confidential business information or unfair competition. ***Id.*** at 283, 514 N.W.2d at 38-39. Accordingly, § 103.465[5] provides:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or thereafter, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any such restrictive covenant imposing an unreasonable restraint is illegal, void and unenforceable even as to so much of the covenant or performance as would be a reasonable restraint.

[4] The parties do dispute whether Purdy, through DPE, actually competed with Cap Gemini in breach of Purdy's agreement when each company bid on and was awarded a separate position. However, this dispute becomes immaterial if the covenant itself was unenforceable.

[5] 1995 Act 225, § 347 amended § 103.465, STATS., to make it gender neutral, effective May 1, 1996.

To be enforceable, a covenant not to compete "must (1) be necessary for the protection of the employer; (2) provide a reasonable time restriction; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the employee; and (5) not be contrary to public policy." ***Fields Foundation, Ltd. v. Christensen***, 103 Wis.2d 465, 470, 309 N.W.2d 125, 128 (Ct. App. 1981).

Our first inquiry under this five-pronged test is whether Purdy's covenant not to compete was reasonably necessary to protect Cap Gemini. ***Id.*** at 471, 309 N.W.2d at 129. When considering an employer's need for protection, this court examines both the circumstances under which the contract was made and the facts surrounding the employment itself. ***Wausau Medical Center***, 182 Wis.2d at 283-85, 514 N.W.2d at 39. Generally:

> An employer is not entitled to be protected against legitimate and ordinary competition of the type that a stranger could give. There must be some additional special facts and circumstances which render the restrictive covenant reasonably necessary for the protection of the employer's business.

Lakeside Oil Co. v. Slutsky, 8 Wis.2d 157, 163, 98 N.W.2d 415, 419 (1959). The most common employer interests which might justify a restriction on the employee's activities are customer contacts, confidential business information, and any unique skills which the employee acquired from the employer. ***Fields Foundation***, 103 Wis.2d at 471, 309 N.W.2d at 129.

In order to generate a protectable interest through the customer contact theory, an employee must have "such control or influence over the customers that the employee would be able to take the customers away." ***Wausau Medical Center***, 182 Wis.2d at 288, 514 N.W.2d at 41. When determining whether the employer has a protectable interest in confidential business

information, this court should consider such factors as "the nature and character of such information, including the extent to which it is vital to the employer's ability to conduct its business, the extent to which the employee actually had access to such information, and the extent to which such information could be obtained through other sources." ***Rollins Burdick Hunter***, 101 Wis.2d at 470, 304 N.W.2d at 757. Finally, ordinary training and experience gained through working for the employer do not constitute unique skills. ***Behnke v. Hertz Corp.***, 70 Wis.2d 818, 822, 235 N.W.2d 690, 693 (1975) (quoting RESTATEMENT OF CONTRACTS § 516 cmt. h (1932)).

Applying these legal principles to the facts of this case, Cap Gemini has not carried its burden to prove that Purdy's covenant not to compete was reasonably necessary to protect Cap Gemini against unfair competition or the dissemination of its trade secrets. First, although Purdy did have prolonged contact with the representative of one of Cap Gemini's customers, Purdy was not in a position to exert control or influence over the customer in the sense that he could take its business away from Cap Gemini. Cap Gemini had already been awarded contracts with the State for several projects. Purdy had no ability to take any of those projects. Furthermore, once a State project is completed, there is no guarantee of future contracts. *See* ***Wausau Medical Center***, 182 Wis.2d at 289, 514 N.W.2d at 41 (contrasting the services of a surgeon with whom a patient typically has but one encounter with those of a general practitioner).

Also with regard to future contracts, Cap Gemini failed to show how the mere fact of Purdy's prior contact with DHSS personnel would translate into a successful bid, since the State is obligated in most cases to award contracts to the

lowest approved bidder.[6] *See* § 16.75, STATS., *and* WIS. ADM. CODE § Adm. 8.03(1). The bid for Purdy's services was a unit price of $27.50, as opposed to Cap Gemini's unit price of $34.50. Thus, while it may be true that Purdy's prior services for the agency as a Cap Gemini employee would be relevant to the agency's analysis of whether DPE was a responsible bidder, Purdy's prior contacts with DHSS simply would have been insufficient to attract the State's business away from Cap Gemini absent a lower bid. Cap Gemini was not entitled to protection against legitimate price competition of this nature.

Cap Gemini also failed to show that Purdy threatened any protectable interest which the company might have had in confidential business information. First, information about the procurement needs of state agencies is public, and could hardly be considered confidential. Moreover, any compilation of Cap Gemini's state customers would be rendered useless by the bidding procedure in which the service providers are required to register on the State vendor bulletin for data processors, and are then contacted by the State. Finally, as Cap Gemini concedes, there is absolutely no basis for concluding that Purdy's data processing services were unique.

In short, the record fails to demonstrate any special circumstances which would render Purdy's covenant not to compete necessary for the protection of Cap Gemini's business. This was not an instance where a salesman built a stream of customer referrals for his employer, and then attempted to divert the

[6] Cap Gemini argues that the State's obligation to award a contract to the lowest responsible bidder is inapplicable here because DPE's bid was only $9,900 and $10,000 is the floor at which competitive bidding begins to be required. This argument is unpersuasive; especially in light of the fact that Cap Gemini's own bid in excess of $10,000 would have been sufficient to trigger the mandatory state bidding procedures.

stream to himself. There was no stock of customers, but rather a single government agency which was not free to base its purchase decisions on the nature of its relationship with any particular vendor. Purdy offered no more in the way of competition after he left Cap Gemini than he could have achieved before he worked there. Because our conclusion that Cap Gemini lacked a protectable interest sufficient to restrain trade is dispositive as to the covenant's validity, we need not address whether the covenant satisfies the other elements of the reasonableness test.[7]

CONCLUSION

Because the materials submitted by Cap Gemini failed to show that restricting Purdy's post-employment activities was reasonably necessary to protect the company from unfair competition, Purdy's covenant was invalid and unenforceable as a matter of law. Summary judgment was properly granted in Purdy's favor.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] For instance, we do not decide today whether public policy would prohibit enforcement of a covenant which would act to restrain trade with the State, or whether such a covenant would violate a bidding company's certification that it made no attempt to keep any other firm from submitting a bid.