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EMPLOYMENT LAW

Limited Success in Enforcing Post-Employment Restrictions Against Employees

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Special to the Legal

While many companies require senior managers and sales employees to sign restrictive covenants, it is unusual for post-employment disputes to reach the stage of litigation. As such, the recent decision in *Freedom Medical v. Whitman*, No. 18-4155 (E.D. Pa. Oct. 29, 2018 (Beetlestone, J.)), is noteworthy for the extensive discussion of the law regarding restrictive covenants and protection of employer's trade secrets.

Both Freedom Medical Inc. and MedOne Equipment Services are medical equipment sales companies. Gerry Whitman and two former co-workers, Josh Oderlin and Jason Cavanaugh, all regional sales managers, left Freedom Medical over a period of several months and began working for MedOne.

THE MEDICAL SUPPLY BUSINESS

Freedom Medical rents and sells medical equipment to hospitals, nursing homes and other health care providers. The providers do business through "group purchasing" organizations and Freedom Medical, unlike MedOne, is a "preferred provider" for three of the nation's four largest such



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organizations. Freedom Medical takes numerous steps to ensure that its pricing information, business plans and customer lists (collectively referred to as its "confidential information") remain confidential—including limiting access to such information on its computer and requiring employees to sign a restrictive covenant prohibiting work in the industry for one year after termination. While each of the employees violated their restrictive covenants by working for MedOne and each took various information from the company upon leaving, Freedom Medical's request for a preliminary injunction against them, as well as against MedOne, had only limited success.

Specifically Freedom Medical sought to enjoin its former employees from working for MedOne for the duration of their respective restrictive covenants and to enjoin their use of Freedom Medical's confidential information.

The court held a two-day hearing in late October and issued its decision a few days later.

INJUNCTION SOUGHT

In issuing a preliminary injunction, the factors considered by the court are: the movant's likelihood of success on the merits, the irreparable harm that could be suffered in the absence of an injunction, whether the equities tip in favor of the movant and whether an injunction is in the public interest. All four factors must be present in order for an injunction to be granted.

TRADE SECRET PROTECTION

The court first addressed Freedom Medical's claim that all of the defendants had misappropriated its trade secrets in violation of the Federal Defend Trade Secret Act and the Pennsylvania Uniform Trade Secrets Act. The initial inquiry under both statutes is whether the information allegedly misappropriated is a "trade secret" in order for the statutes to apply. Both statutes generally define a trade secret as information that:

“the owner has taken reasonable means to keep secret; derives independent economic value, actual or potential, from being kept secret; is not readily ascertainable by proper means; and others who cannot readily access it would obtain economic value from its disclosure or use.”

For all of the employees, the court found that Freedom Medical had taken reasonable steps to keep its price schedules and other confidential information secret. Further, the court found that Freedom Medical derived economic value from having its pricing schedules secret, as public knowledge of the schedules would allow competitors to undercut it in the marketplace.

As to whether the pricing schedules were readily ascertainable, the court found that generally, “pure pricing information is not protectable because that information is known to the customer” who could then disclose the same. However, in this instance, at least one of the individuals had taken spreadsheets with aggregate pricing information. Unlike the price of any particular item or items, the court observed that generally the “compilation of pricing information” will be afforded greater protection.

LIMITED SUCCESS

Freedom Medical, however, could not carry the day to show that it was likely to succeed on its claim that Whitman had misappropriated its trade secrets. Specifically, while Whitman had emailed himself Freedom Medical’s pricing information the day before his resignation, he testified that he had deleted the email shortly thereafter and had only used it to ensure that certain deals were closed before he left. There was no evidence that he had shared it with MedOne employees. Without any evidence to the contrary, the court advanced no further with respect to the misappropriation claim against Whitman.

Defendant Cavanaugh similarly took pricing information and there was evidence that he had shared it with other MedOne employees

after leaving Freedom Medical. With respect to Cavanaugh, the court then considered whether his continued use of the information was likely to cause Freedom Medical “irreparable harm.” Because Cavanaugh was no longer employed by MedOne at the time of the hearing, there was no showing of irreparable harm and an injunction against him was also not issued.

However, defendant Oderlin was enjoined from further using Freedom Medical’s trade secrets because he, like Cavanaugh had shared the pricing information with his new MedOne colleagues and Oderlin remained employed by the company, thereby establishing a rea-

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sonable basis for the court to find that he was continuing to take advantage of Freedom Medical’s trade secret. Both the equities and public interests were found to favor injunctive relief and the injunction was issued.

RESTRICTIVE COVENANTS

With respect to the breach of contract/restrictive covenant issues, after determining that Pennsylvania law would apply, the court reviewed the three factors to be considered: a restrictive covenant must relate to a contract for employment; it must be supported by adequate consideration; and the covenant must be reasonably limited in both time and territory.

Because the employees’ restrictive covenants were contained in employment contracts signed at the commencement of each individual’s employment, the first two issues were found to favor enforcement. The court

considered, however, whether a worldwide limitation was appropriate. The court found that “broad geographic restrictions” will be reasonable so long as they are roughly consonant with the scope of the employee’s duties,” see *Victaulic v. Tieman*, 499 F.3d 227, 237 (3rd Cir. 2007). Because each of the individuals was a “regional” sales manager, the court found that the appropriate geographic scope would be their particular sales regions. Under Pennsylvania law, the court found that it had the authority to reform the geographic scope to each individual’s sales territory.

As a practical matter, because Cavanaugh no longer works for MedOne and Whitman had changed his sales territory, the only enforceable restrictive covenant from an injunctive standpoint was against Oderlin, who appeared to have the ability to obtain business from his former clients at Freedom Medical. While Pennsylvania law generally permits an employee to pursue “his livelihood in the manner he chooses,” there is a countervailing interest in the sanctity of contracts, particularly where a company seeks to protect its business from harm that will result from the breach of the agreement. Thus, Oderlin was enjoined from continuing his work in his region for MedOne.

When considering post-employment litigation against former employees, planning is the key. While Freedom Medical had only limited injunctive success, this was due largely to circumstance. The company had in place measures demonstrating both its interest in protecting its confidential information and the terms of an enforceable restrictive covenant. Notably, the court was able to reform the overly broad geographic scope of the employment restriction, thereby subrogating its enforceability. •