

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
CASE NO. 416589

SWAGELOK COMPANY,)
)
Plaintiff,)
vs.)
)
MICHAEL YOUNG,)
)
Defendant.)
)

**RULING ON PLAINTIFF'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER**

Christopher A. Boyko, J.

This matter came on for hearing upon the Plaintiff Swagelok Company's (Swagelok) Motion for a Temporary Restraining Order filed August 30, 2000. The single issue for this Court's determination, which will in turn determine the propriety of a TRO at this time, is the enforceability of the noncompete agreement that the Defendant Michael Young ("Defendant") signed in September of 1998. Upon the direction of the Court, both parties filed briefs on the issue, which were both supplemented by oral arguments. Upon consideration of the facts and legal arguments presented by both parties, the Court concludes that the noncompete agreement lacks sufficient consideration and is unenforceable as a matter of law. This determination does not effect the other remedies, if any, available to Swagelok under Ohio law.

I. Factual and Procedural Background

The following facts have been stipulated by the parties for the purposes of Swagelok's motion. On December 19, 1994, Swagelok hired the Defendant Young as a

sales training manager, on an at-will basis. Some three and a half years later, on August 6, 1998, Swagelok presented the Defendant with an "Employment Agreement," which contained at paragraph 9 a "noncompete clause" that provided as follows:

I [the employee] acknowledge my awareness the during the term of my employment I may have access to certain procedures, business philosophies and marketing strategies that are proprietary to the Company and are a valuable asset to the Company. Therefore, during my employment hereunder and during the one-year period after termination of my employment for any cause whatsoever, I will not, either on my own behalf or as an employee, agent or representative of any person or corporation, engage, either directly or indirectly, in any segment of any business if that segment is competitive with the segments of the business of the Company with which I have been associated. The term "business of the company" [sic] as used in this paragraph means and includes the business in which the Company is engaged on this date and any other or additional business in which it engages hereinafter during the term of my employment.

For the purposes of the Agreement, the Company shall be deemed to be in the above business only in those geographic areas where it is conducting said business.

It is agreed that the restriction contained in this Paragraph 9 shall not act to prohibit the engagement of the undersigned in any capacity by any party, including present customers of the Company, providing the business of the Company is merely as an incident to said party's primary business.

The Defendant executed the agreement the same day on which Swagelok presented him with it. The parties do not dispute that the underlying consideration for the agreement was the Defendant's continued at-will employment with Swagelok as a sales training manager at the same compensation and with the same job duties and responsibilities as existed prior to his signing the agreement.

The Defendant continued his employment with Swagelok under the terms of this agreement until Swagelok terminated his services on January 31, 2000. At some point in

time after Defendant's termination, Swagelok's came to learn that the Defendant was engaging in activities that Swagelok believed to be in violation of the Employment Agreement. Upon this information and belief, Swagelok, on August 30, 2000, filed its complaint for injunctive and monetary relief, attaching as Exhibit A the Employment Agreement. Together with its complaint, Swagelok moved for a temporary restraining order/preliminary injunction to prevent the Defendant from violating the terms of the Employment Agreement. The Court granted Swagelok's motion *ex parte* on August 30, 2000. On September 12, 2000, this Court met with counsel for both sides, at which time counsel for defendant argued that the noncompete aspect of the Employment Agreement was unenforceable for lack of consideration. This court scheduled a hearing on September 26, 2000, and ordered both parties to submit briefs on the issue of the consideration required for noncompete agreements in at-will settings.

II Law and Analysis

It is a settled principle of contract law that for an agreement to rise to the level of a legally enforceable contract, it must be supported by consideration. Canter v. Tucker (1996), 110 Ohio App.3d 421, citing Chrysalis Health Care, Inc. v. Brooks (1994), 65 Ohio Misc.2d 32, . The requirement of consideration applies to new contracts as well as any agreement to modify an existing contract. Lee Supply Corp. v. Triangle Capital Corp. of Ohio (February 14, 1997), Montgomery App. No. 15995, 1997 Ohio App. LEXIS 812. As with any other contract, a noncompete agreement must be supported by consideration. Willis Refrigeration, Air Conditioning & Heating Inc. v. Maynard (January 18, 2000), Clermont App. No. CA99-05-047, 2000 Ohio App. LEXIS 102; Prinz Office

Equipment Co. v. Pesko (January 31, 1990), Summit App. No. 14155, unreported, 1990 Ohio App. LEXIS 367.

Normally, a court will not inquire into the adequacy of consideration once consideration is found to exist. Rogers v. Runfola & Associates, Inc. (1991), 57 Ohio St.3d 5. However, a court must, as an initial matter, make the threshold determination that the purported consideration is itself legally sufficient to support a contract. See Keenan v. Keenan (April 25, 1986), Lucas App. No. L-85-242, unreported, 1986 Ohio App. LEXIS 6534; see also Manning v. Brucato (January 23, 1986), Cuyahoga App. No. 49361, unreported, 1986 Ohio App. LEXIS 5359 at * 5 (“There is a distinction between sufficiency of consideration * * * and its adequacy. So long as the consideration is valuable, it does not become insufficient merely because it may not be adequate”); cf. Judy v. Louderman (1891), 48 Ohio St. 562. In this regard, Ohio courts have uniformly held that in the context of noncompete agreements, sufficient consideration exists when the agreement is executed contemporaneously with the initial acceptance of employment. Cohen & Co. v. Messina (1985), 24 Ohio App.3d 22,25; see Willis Refrigeration; Prinz. In this situation, presumably, a mutual exchange of promises occurs: the employee promises not to compete upon termination of employment and the employer promises to hire the employee.¹ Prinz at * 9.

However, a different situation arises where the noncompete agreement is introduced into the employment relationship after the date of initial hire. In such

¹ Indeed, such an arrangement does not create a traditional at-will employment relationship, and for the reasons discussed infra, such a situation is much different than when the noncompete is inserted into a traditional at-will setting.

situations, particularly when the employment is at-will, the issue of consideration must be reexamined because of the inherent tensions existing between the reciprocal equality associated with traditional at-will employment and the designedly one-sided nature of the protection afforded by noncompete agreements which, once introduced, fundamentally change the overall nature of the underlying relationship between the parties that formed the very basis of the original employment arrangement.

In Cohen & Co. v. Messina the Eighth District Court of Appeals held at the

Syllabus:

A client-ownership provision appearing in a personnel manual is void for want of consideration where the client-ownership provision was not included in the original contract of employment but first appeared in the personnel manual after the employer-employee relationship began and was strictly for the protection of the employer.

The Cohen court reasoned as follows:

* * * [T]he disputed provision was not in the original contract, and, in fact, was not announced until after Messina had been employed with the company for sixteen months. Furthermore, Messina's position, duties, and the nature of the business remained exactly the same as before the manual was distributed; the employment relationship was "at will," and the company assumed no obligation it did not already have. The trial court found that continuation of Messina's employment was the only consideration the company gave him. " * * * [N]either the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party. * * * " Thus, * * * the trial court was correct in ruling that mere continuation of employment, without additional consideration, is insufficient to support

the client-ownership provision as a contract.^{2 3}

Cohen at 25 (citations omitted).

This Court would, normally, find the Cohen decision to be dispositive of the issue, but for two unique circumstances. First, the continuing vitality of Cohen in the 8th District is called into question by two more recent unreported decisions, H.R. Graphics, Inc. v. Perry (January 30, 1997), Cuyahoga App. No. 70696, unreported, 1997 Ohio App. LEXIS 324, and Cole National Corp. v. Koos (December 22, 1994), Cuyahoga App. No. 66760, unreported, 1994 Ohio App. LEXIS 5781. Specifically, while both H.R. Graphics and Cole National addressed the issue of noncompete agreements signed after the commencement of employment, both did so without reference to the Cohen decision. Although both H.R. Graphics and Cole National are distinguishable from the present case in that (1) it is unclear whether the employees in H.R. Graphics or Cole National remained "at-will" following the signing of their respective noncompete agreements and (2) the employees in both cases received additional benefits in conjunction with the noncompete agreements, both courts nonetheless stated that "it has been held that continued employment serves as sufficient consideration to support a noncompete

² Although the restrictive covenant at issue in Cohen involved a client-ownership provision and not a noncompete agreement, each type of restriction essentially imposes limitations upon an employee's engaging in activities competitive with his/her former employer.

³ While the Cohen case involved a personnel manual, the Cohen court recognized that "Ohio courts have given effect to provisions in employment manuals * * * as part of the employment contract." Id. at 23-24.

agreement.” H.R. Graphics at *9; Cole National at *12.⁴

Second, in the years since Cohen a slew of Ohio’s appellate districts have rejected the reasoning of Cohen as it applies to noncompete agreements between employer and employee when such are introduced by the employer after an at-will employment relationship has already begun. Willis Refrigeration, Air Conditioning & Heating Inc. v. Maynard; see Financial Dimensions, Inc. v. Zifer (December 10, 1999), Hamilton App. Nos. C-980960, C-980993, unreported, 1999 Ohio App. LEXIS 5879 at *10-11 and cases cited therein at footnote 3.⁵ Collectively, these cases stand for the rule of law that the employer’s act of continuing to employ the employee after the employee signs a noncompete agreement is of itself sufficient consideration to support the agreement. The position taken in these cases rests upon the assumption that, as a practical matter, every day is a new day for both employer and employee in an at-will relationship, with no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to “day one.” Implicit in this reasoning is the necessary corollary that as a result of the at-will nature of the employment, neither employer nor employee is obligated to continue the relationship for any period of time, and that any continued employment, therefore, goes beyond what the employer and

⁴ Both H.R. Graphics and Cole National cited as support the 5th District decision of Copeco, Inc. v. Caley (1992), 91 Ohio App.3d 474.

⁵ However, a number of other jurisdictions have concluded that mere continued employment does not constitute sufficient consideration. See Prinz; Apronstrings, Inc. v. Tomaric (August 7, 1987), Lake App. No. 11-272, unreported, 1987 Ohio App. LEXIS 8206; Sash and Storm, Inc. v. Thompson (December 22, 1997), Allen App. No. 1-97-43, unreported, 1997 Ohio App. LEXIS 5830, at the dissent.

employee are already obligated to do and thereby constitutes sufficient consideration. *See Copeco, Inc. v. Caley* (1992), 91 Ohio App.3d 474, 478, and *Financial Dimensions, Inc. v. Zifer* at *10. In *Trugreen LP v. Richwine* (June 29, 1994), Clark App. No. 3098, unreported, 1994 Ohio App. LEXIS 2806 at * 7-8 the 2nd District extended this line of reasoning to its logical conclusion:

The distinction between an indefinite promise of employment made when an employee is initially hired and an indefinite promise of employment to an existing employee seems artificial to us. It would either permit the employer who finds itself in legitimate need of covenants not to compete from certain of its employees to fire them all and then require them, as a condition of being re-hired, to execute covenants not to compete, or, worse yet, it would require the employer to fire those employees and inform them that as much as it would like to re-hire them, it is forced to hire new employees to replace them, so that it may obtain covenants not to compete that are reasonably related to its legitimate business needs. We doubt that an employee who would be fired so that he could be replaced with an employee who could properly be required to execute a legitimate covenant not to compete as a condition of his initial hire would appreciate the benevolent paternalism implicit in preventing the employer from simply requiring the existing employee to execute a covenant not to compete as a condition of his continuing employment.

This Court is aware that, ultimately, the distinction drawn between the presentation of noncompete agreements at the commencement of employment and their insertion subsequent to the initial hire may be a fine one. Nonetheless, such a distinction is important due to the overall nature of the at-will employment relationship. Specifically, the issue of consideration in this context becomes crucial in that the original foundation of the underlying at-will relationship which is created at the inception of employment becomes itself fundamentally altered by the insertion of a noncompete

agreement because the initial mutuality of at-will "freedoms"⁶ essentially disappears upon its insertion. In other words, by virtue of the noncompete, the employee becomes bound by additional conditions that are foreign to traditional at-will settings while the employer continues to operate under traditional at-will principles.⁷

It is within this context, then, that the Court must determine what constitutes sufficient consideration to support these types of agreements introduced "midway" in the employment relationship. The Court makes this determination keeping in mind the three distinct sets of competing interests at stake in the context of noncompete agreements: (1) those of employers, who utilize such agreements as a means of protecting against the potential misuse of information gained during employment, which in turn facilitates research and development in their respective fields; (2) those of employees, who wish to use acquired skills, knowledge, and experience to enhance their trades or professions within a free market; and (3) those of the general public, which stands to reap the respective benefits that perforce flow from (1) and (2).⁸ See, generally, Tracy L. Staidl,

⁶ These mutual at-will "freedoms" are the freedom of the employee to seek work elsewhere as he or she so desires and the freedom of the employer to discharge the employee at any time, for any reason not contrary to law, or for no reason at all. See Onysko v. Cleveland Public Radio (July 27, 2000), Cuyahoga App. No. 76484, unreported, 2000 Ohio App. LEXIS 3368, citing Mers v. Dispatch Printing Co. (1985), 19 Ohio St.3d 100.

⁷ Of course, even in at-will settings, employers do not enjoy unfettered ability to terminate employees. However, these limitations, whether imposed by statute or as a matter of public policy, exist external to the employment relationship, whereas noncompete clauses arise internally and therefore derive their authority from the employment agreement itself.

⁸ These interests resemble those factors, as set forth in Raimonde v. Van Vlerah (1975), 42 Ohio St.2d 21, 25, that courts consider when determining the

The Enforceability of Noncompetition Agreements When Employment Is At-Will:

Reformulating the Analysis, 2 Empl. Rights & Employ. Policy Journal 95 (1998). The ultimate balance struck, then, must on the one hand preserve the employer's right to protect its own interests through the use of noncompete agreements and, on the other, safeguard employees against potential abuses of that right.

This balance is best struck by requiring that when a noncompete agreement is introduced after the creation of an at-will relationship, a real exchange of value takes place between parties at the time the agreement is introduced. Because there is no question that the employee gives something of value to the employer by agreeing to a noncompete, the inquiry, then, must focus upon whether an employer in turn gives something of value to the employee at that time. In this respect, mere continued employment does not constitute something of value because it remains neither owed by the employer nor due to the employee even after the agreement is signed.⁹

Requiring that a real exchange of value occur at the time the noncompete is introduced both comports with the fundamental principles of contract law governing offer, acceptance, and consideration, and helps balance the respective bargaining

reasonableness of restrictive covenants once consideration is found to exist.

⁹ At least one Ohio court has held that "[w]here the employee willfully signs a non-competition agreement and remains employed by the employer for a number of years after signing * * * the continued employment is consideration for the signing." Sash and Storm, Inc. v. Thompson. While continued employment for a substantial period of time following the noncompete is certainly "of value" to an employee, its value is neither apparent nor ascertainable until the actual passage of such time. Thus, the value, if any, of this prospect at the time of signing is more ethereal than real and cannot suffice as consideration.

positions of the parties. This requirement does not interfere with the employer's autonomy in making business decisions because it imposes upon employers no greater obligations than those existing under the basic tenets of contract law. Furthermore, this requirement helps protect employees from the unilateral imposition of noncompete agreements thereby lessening the potential for coercion inherent in these types of transactions. Finally, it avoids undue judicial interference into the employer-employee relationship because once the parties demonstrate that a real exchange of value occurred at the time the noncompete was introduced, the court will not, absent extraordinary circumstances, examine the adequacy of the exchange as such inquiry would be improper.¹⁰ Rogers v. Runfola & Associates, Inc.; Judy v. Louderman at para. 2 of the syllabus.

Applying these principles to the present case, the Court finds that the employment agreement at issue lacks sufficient consideration. The parties do not dispute that the only "consideration" underlying the agreement was Defendant's continued at-will employment with Swagelok at exactly the same compensation and with exactly the same job duties and responsibilities as existed prior to the signing of the agreement. Thus, no real exchange of value occurred when the Defendant signed the agreement and it is therefore unenforceable as a matter of law.

III. Conclusion

Based upon the foregoing, this Court concludes that the noncompete agreement

¹⁰ Of course, once consideration is found to support the noncompete, the court would have to determine its reasonableness under Raimond v. Van Vlerah.

fails for lack of consideration. Having found that no consideration exists to support the noncompete agreement, this Court need not conduct a *Raimonde* analysis as to the reasonableness of the noncompete agreement at issue. Swagelok's Motion for a Temporary Restraining Order as it relates to the noncompete agreement is, accordingly, OVERRULED. Again, this determination does not preclude the other remedies, if any, available to Swagelok under Ohio law.

IT IS SO ORDERED.


CHRISTOPHER A. BOYKO, JUDGE

Date: November 14, 2000

CERTIFICATE OF SERVICE

A copy of the foregoing Ruling has been sent by regular U.S. Mail this 14~~th~~ day of November, 2000 to the following:

Jeffrey M. Embleton, Esq.
John F. Burke, III, Esq.
MANSOUR, GAVIN, GERLACK & MANOS CO. L.P.A.
55 Public Square
Suite 2150
Cleveland, Ohio 44113-1994
Attorneys for Plaintiff

Douglas K. Paul, Esq.
CHRISTLEY, HERINGTON & PIERCE
215 West Garfield Road
Suite 230
Aurora, Ohio 44202
Attorney for Defendant