

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OKIDATA, a division of :
OKI AMERICA, INC., : CIVIL ACTION
 : NO. 97-4930
Plaintiff, :
 :
v. :
 :
AMERICAN TRADE SERVICES, INC., :
 :
Defendant. :

AMERICAN TRADE SERVICES, INC., :
 :
Cross-claim Plaintiff, :
 :
v. :
 :
JEAN L. COADY, :
 :
Cross-claim Defendant. :

M E M O R A N D U M

BUCKWALTER, J.

June 10, 1998

Currently before the Court is Cross-claim Defendant's motion for summary judgment on each of the remaining cross-claims in this commercial dispute. Each of the cross-claims hinges upon whether or not the Cross-claim Defendant violated a restrictive covenant contained in an employment agreement that she signed seven months after beginning employment with the Cross-claim Plaintiff. Because any consideration for the Agreement was insufficient as a matter of law, I will enter judgment for Cross-claim Defendant on each of the Cross-claims.

I. BACKGROUND

Cross-claim Defendant Jean Coady began working for Cross-claim Plaintiff American Trade Services (ATS) as an "executive assistant" in December 1996. Coady became "acting president" of ATS on March 26, 1997, although neither her duties, salary nor actual status changed. While ATS's chairman states that ATS informed Coady upon her employment that she would have to sign an employment agreement containing a restrictive covenant (Agreement) (Taylor affidavit at ¶ 4-10), she did not actually sign such the Agreement until May 22, 1997, six months after her employment and two months after her designation as president.

It was apparently Coady's responsibility to type up her own employment agreement, but several events prevented preparation of the Agreement, including, inter alia, Coady's wedding. (Id. at ¶ 6, 8). Taylor states that an attorney eventually drafted the Agreement, and that, upon counsel's advice "in consideration of the delay in preparation and execution of the employment agreement, she would be provided with two additional items of consideration -- two hundred (\$200.00) dollars worth of trade credits, plus two weeks written notification of termination." (Id. at 10).

According to the Agreement, Coady undertook generally not to take actions during her employment that might harm ATS's existing business relationships, (Agreement at 2.2 (a)(Coady Exh.

K)); not to compete with ATS within a 100 mile radius of ATS's Ardmore, Pennsylvania office for one year after leaving ATS; and that she would:

not at any time during the term of this Agreement, or any time thereafter, disclose to any person, corporation, firm, partnership or similar organization . . . any information whatsoever pertaining to the business or operations of ATS .
. . .

Id. at 2.2 (d).

Coady further agreed that, upon termination of her employment with ATS, she would turn over:

all paper, document [sic], tax returns, working papers, correspondence, memos and any all other [sic] documents in Employee's possession relating to the business of ATS.

Id. at 2.3.

In the meantime, ATS became embroiled in a dispute with Plaintiff Okidata over whether ATS was to pay for the purchase of several Okidata printers in cash or in trade credits. ATS's counsel Richard Squire collected forty documents relevant to the dispute, which he labeled "hot docs" and turned over to Coady. Squire also prepared an affidavit for Coady regarding her knowledge of the disputed transaction, and he asked her to review it. To indicate her disagreement with portions of the affidavit, Coady wrote the word "No" in the margins next to four of its seven paragraphs. Shortly thereafter, Coady ended her employment. ATS alleges that before and after Coady left ATS, she made disparaging comments about ATS and Taylor to Okidata. The record demonstrates that she contacted Okidata soon after she

left ATS and provided her version of the transaction, as well as a copy of the marked-up draft affidavit and the selected documents, along with the notation: "these are what Dick Squire calls the 'Hot Docs.'"

After Okidata commenced this litigation against ATS over the printer transaction, ATS cross-claimed against Coady alleging that these actions constituted a breach of her employment contract, and that she had conspired with ATS to breach the Agreement. (ATS does not allege that Coady competed with it following her employment). ATS also claims to be "entitled to contribution from Jean Coady in the event that the Court determines it is liable to Okidata for damages." (Cross-complaint at ¶ 102). Although Okidata and ATS have settled their primary dispute, ATS's cross-claims against Coady survive, and she now moves for judgment as a matter of law as to each of these cross-claims.

II. DISCUSSION

A. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the

case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party must demonstrate the existence of a fact issue as to each element of its claim, and a disputed factual matter presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255.

B. Breach of Employment Agreement

Under Pennsylvania law:

[I]n order to be enforceable a restrictive covenant must satisfy three requirements: (1) the covenant must relate to [be ancillary to] either a contract for the sale of goodwill or other subject property or to a contract for employment; (2) the covenant must be supported by adequate consideration; and (3) the application of the covenant must be reasonably limited in both time and territory.

Piercing Pagoda, Inc. v. Hoffner, 351 A.2d 207, 210 (Pa. 1976) (quoted in Davis & Warde, Inc. v. Tripodi, 616 A.2d 1384, 1386-87 (Pa. Super. 1992)).

While the offer of employment provides sufficient consideration for a restrictive covenant contained in an employment contract made at the commencement of employment, Modern Laundry & Dry Cleaning Co. v. Farrer, 536 A.2d 409, 411 (Pa Super. 1988), a restrictive covenant entered into subsequent to the commencement of the employment relationship, while

potentially "ancillary" and therefore valid, see, e.g., John G. Bryant Co. v. Sling Testing & Repair, Inc., 369 A.2d 1164 (1977), must be "supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status." Davis & Warde, 616 A.2d at 1387, quoting Modern Laundry, 536 A.2d at 411 (citing George W. Kistler, Inc. v. O'Brien, 347 A.2d 311 (1975)); see also Harsco Corp. v. Zlotnicki, 779 F.2d 906, 910 (3d Cir. 1985); Maintenance Specialties, Inc. v. Gottus, 314 A.2d 279 (1979).

Coady first attacks the covenant as too remote in time from the commencement of her employment or designation as president to be considered "ancillary" to her employment relationship with ATS. ATS's argument on this point appears to be that Coady always knew she would have to sign an agreement, despite the delay. As Coady notes, this explanation ventures beyond the four corners of the Agreement, but I need not determine whether it creates a fact issue as to whether the covenant was indeed ancillary to Coady's employment, as ATS cannot create a fact issue as to the necessary element of consideration.

As stated, a restrictive covenant entered into subsequent to employment is valid only if supported by a "corresponding benefit" to the employee. Coady contends that the Agreement was not. Whether consideration is adequate to support

a restrictive covenant is an issue of law for the Court to decide. Davis & Warde, 616 A.2d at 1387.

Although Coady signed the Agreement two months after her elevation from "executive assistant" to "president," ATS has not argued that the change in title furnished consideration, and it is obvious that it did not, as a matter of law. Despite Coady's nominal upgrade, there was no beneficial change in her employment status, as she received no salary raise or other financial benefit. See Davis v. Warde, 616 A.2d at 1390 (Cavanaugh, J., dissenting) ("Restrictive covenants, however, have been found valid where it was absolutely clear that an employee received a change in status that either enabled him to increase his earnings substantially or provided him with the potential to increase his earnings substantially."); Modern Laundry, 536 A.2d at 412 ("After signing the employment contract, [employee] experienced a significant change in his employment status," including greater responsibilities and increased compensation).

Additionally, although ATS promised to give Coady two weeks pre-termination notice, the benefit, if any, was slight, as the Agreement specified that she would remain an at-will employee, and Pennsylvania courts have held that such notice provisions do not constitute sufficient consideration. See

Maintenance Specialties, 314 A.2d at 281 n. 1; Capital Bakers, Inc. v. Townsend, 231 A.2d 292, 294 (Pa. 1967).

ATS also relies on the \$200 in trade credits which it granted Coady when she signed the Employment Agreement. Coady argues that the credits were not sufficient, and moreover, that she did not avail herself of these credits. ATS responds with documentation that Coady and her husband used the credits for payment of a two-night stay at the Doubletree Hotel in Plymouth Meeting for their honeymoon. (Taylor affidavit at ¶ 11). I note that the documentation indicates only that Mr. and Mrs. James Coady stayed two nights -- April 26 and 27, 1997 -- at a cost of \$159. (Plaintiff's Exh. C). As Coady notes, this stay occurred one month before she signed the Agreement, while the Agreement speaks of her receipt of trade credits in the future tense.

The relationship between the hotel receipt and the Agreement is thus ambiguous at best; regardless, the receipt does not create an issue of material fact, because, even if Coady did use a portion of the trade credits, those credits are insufficient as a matter of law to provide adequate consideration for a one year restrictive covenant, as they can be characterized as neither "significant," nor "substantial." See Davis & Warde, 616 A.2d at 1391 (Cavanaugh, J., dissenting) ("the \$100 payment alone, without more, is surely not akin to the significant rights the employee would give up through a one year restrictive

covenant."); Modern Laundry, 536 A.2d at 412; cf., Insulation Corp., 667 A.2d at 733 ("\$2,000 annual raise and change of employment status from 'at-will' to a written year-to-year term upon signing the agreement was adequate consideration"); Davis & Warde, 616 A.2d at 1388 (finding consideration sufficient where "not only were [employees] offered continued employment with new responsibilities, but each was given a cash payment, a guarantee of certain job benefits, including a favorable change in the employer's automobile reimbursement policy, and a guaranteed severance benefit in the event of termination"); Wainwright's Travel Service, Inc. v. Schmolck, 500 A.2d 476, 478 (Pa. Super. 1985) (ownership interest in corporation was sufficient consideration); In re: Monaghan, 141 B.R. 80, 83 (Bankr. E.D. Pa. 1992) ("[A]dequate consideration existed for the restrictive covenant in the form of plaintiff's offer of reemployment to defendant.").

C. Civil Conspiracy and Contribution claims

Because I find the Agreement to be unenforceable as a matter of law, I will also enter judgment for Coady on ATS's claim that she conspired with Okidata to violate the Agreement.¹

¹ Further, while ATS has referred to a common law claim for breach of loyalty, independent of any contractual relationship between Coady and ATS, it has offered no evidence or law supporting such a duty, beyond an oblique statement in its brief that it will, if necessary, move at trial to "conf[or]m its pleadings to the proof." (ATS's brief at 2 n. 1). This statement apparently refers to evidence to support the existence of a common law claim. Because the time to proffer such evidence is on summary judgment rather than at trial, I will deem any claim for breach of a common law duty of loyalty abandoned.

The only remaining claim -- for contribution -- must also fail. Coady argues, that the settlement between ATS and Okidata moots this claim, as it required ATS to pay no more than the amount it originally contended it owed Okidata. Accordingly, Coady's actions, which cannot be said to have breached any contract between she and Coady, can also not be said to have caused ATS any damage. I will interpret ATS's silence on this point as acquiescence and accordingly enter judgment for Coady on this claim, as well as on the breach of contract and civil conspiracy claims.

An Order follows.

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JEAN L. COADY, :
 :
Cross-claim Defendant. :

O R D E R

AND NOW, this 10th day of June 1998, upon
consideration of Cross-claim Defendant's Motion for Summary
Judgment (Dkt. # 27), Cross-claim Plaintiff's Response thereto
(Dkt. # 29), and Cross-claim Defendant's Reply, it is hereby
ORDERED that, in accordance with the accompanying Memorandum, the
Motion is **GRANTED**, and judgment is entered for Cross-claim
Defendant. The Clerk shall mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.