Appeal No. 2013AP1392 **Cir. Ct. No. 2012CV859**

WISCONSIN COURT OF APPEALS
DISTRICT I

RUNZHEIMER INTERNATIONAL, LTD.,

PLAINTIFF-APPELLANT,

V.

DAVID FRIEDLEN AND
CORPORATE REIMBURSEMENT SERVICES, INC.,

DEFENDANTS-RESPONDENTS.

FILED

APR 15, 2014

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Curley, P.J., Fine and Brennan, JJ.

Pursuant to WIS. STAT. RULE 809.61, this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Is consideration in addition to continued employment required to support a covenant not to compete entered into by an existing at-will employee?

BACKGROUND

This is an action by Runzheimer International, Ltd. to enforce a restrictive covenant agreement between Runzheimer and former employee David Friedlen. The trial court determined that the agreement—which Friedlen signed

after nearly twenty years of employment with Runzheimer—was unenforceable because the consideration that purportedly supported the agreement was illusory.

In 2009, after Friedlen had been working at Runzheimer as an at-will employee for nearly twenty years, Runzheimer required Friedlen to sign a restrictive covenant agreement. The reasonableness and scope of the agreement is not directly relevant to the appeal.[1] It suffices to say that the agreement prohibited Friedlen from providing "restricted services" to any of Runzheimer's competitors within the geographic area that he had covered for Runzheimer during the course of his employment. What is important is that by its terms, the agreement was a condition of Friedlen's continued employment and his participation in the company's yearly incentive plan.

The agreement provided no additional benefit beyond the opportunity to remain employed. Friedlen remained an at-will employee who could be fired at any time without cause. The agreement did not increase Friedlen's salary, nor did it make him eligible for incentives that he had not been eligible for prior to signing the agreement. The sole benefit to Friedlen was the opportunity to continue working for Runzheimer. Friedlen testified in his deposition that he felt "forced" to sign the agreement and understood that he would be fired if he refused to do so.

In 2011, about two years after Friedlen signed the agreement, Runzheimer fired him, and, shortly thereafter, Friedlen began working for

[1] Because the trial court found that the agreement was unenforceable due to a lack of consideration, it did not reach the issue of whether the restrictions in the agreement were enforceable under WIS. STAT. § 103.465. Therefore, neither do we.

Corporate Reimbursement Services, Inc. ("CRS"), a Runzheimer competitor. Runzheimer consequently filed the instant action against Friedlen and CRS (hereafter collectively referred to as "Friedlen") to enforce the restrictive covenant agreement. Friedlen in turn moved for summary judgment, claiming that the agreement was invalid because it lacked sufficient consideration. The trial court, concluding that the opportunity to continue at-will employment and participate in the yearly incentive plan were not additional forms of consideration but were instead illusory, agreed with Friedlen and granted summary judgment.[2] Runzheimer now appeals.

ANALYSIS

On appeal, Runzheimer argues that "the issue of whether continued at-will employment is sufficient consideration for a restrictive covenant agreement is a question of first impression in Wisconsin." According to Runzheimer, no Wisconsin case analyzes the situation here—where an existing employee enters into a restrictive covenant after he or she has already begun working.

Runzheimer would have us reverse the trial court's determination, then, not on past precedent, but on the grounds that the trial court's decision is contrary to Wisconsin's treatment of restrictive covenants entered into *at the start of* employment. *See, e.g.*, ***Wisconsin Ice & Coal Co. v. Lueth***, 213 Wis. 42,

[2] The trial court granted summary judgment on three of the four claims alleged in Runzheimer's amended complaint. It granted summary judgment on the claims for: Count I, breach of contract against Friedlen; Count III, tortious interference with a contract against CRS; and Count IV, tortious interference with prospective business relationship against both defendants. The trial court denied summary judgment on Count II, common law misappropriation of confidential information against both defendants. Friedlen and CRS do not appeal the denial of summary judgment on Count II.

43-44, 250 N.W. 819 (1933) (restrictive covenant entered into at start of at-will employment is enforceable). According to Runzheimer, there should be no difference in how courts treat restrictive covenants entered into at the start of employment and those entered into after years of employment because "every day is a new day both for employer and employee in an at-will relationship." *See* ***Copeco, Inc. v. Caley***, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992).

While Runzheimer initially appears to be arguing in favor of a rule under which the mere opportunity to continue in an at-will position will suffice as consideration, the company additionally suggests that we follow the lead of other jurisdictions that follow this rule but include one important modification. In these jurisdictions, continued at-will employment can suffice as consideration, but only after a court evaluates the circumstances occurring after the restrictive covenant was signed to determine whether the agreement was reasonable. For example, in Illinois, continued at-will employment can constitute sufficient consideration for a restrictive covenant, but the employee must remain employed for a "'substantial period'" after signing the agreement. *See* ***Curtis 1000, Inc. v. Suess***, 24 F.3d 941, 946 (7th Cir. 1994) (citation omitted). *See also, e.g.*, ***Lucht's Concrete Pumping, Inc. v. Horner***, 255 P.3d 1058, 1062-63 (Colo. 2011) (*en banc*) (holding that continued at-will employment can form consideration for a restrictive covenant in Colorado, but that the agreement must then be assessed for "reasonableness," and noting that "'legitimate consideration for the covenant exists as long as the employer does not act in bad faith by terminating the employee shortly after the employee signs the covenant'") (citation omitted).

Adopting the aforementioned rule would require that Wisconsin make an exception to the traditional rule that "the law does not inquire into the adequacy of the consideration to support a promise, only its existence." *See*

Curtis 1000, 24 F.3d at 945 (suspending the "traditional" rule of refusal to inquire into reasonableness of consideration for restrictive covenants made during course of employment in Illinois); ***Brown and Brown, Inc. v. Mudron***, 887 N.E.2d 437, 440 (Ill. App. 3rd 2008) (same); *see also* ***Town of Waukesha v. 164 of Waukesha Ltd. P'ship***, 2009 WI App 147, ¶21, 321 Wis. 2d 656, 774 N.W.2d 814 ("In deciding whether there is consideration to support a contract [in Wisconsin], we are not concerned with the adequacy of the consideration."). But it would also be consistent with the law in Wisconsin and elsewhere that all contracts must be entered into and fulfilled in good faith. *See* ***Wisconsin Natural Gas Co. v. Gabe's Constr. Co.***, 220 Wis. 2d 14, 21-22, 582 N.W.2d 118 (Ct. App. 1998). Runzheimer argues that adopting an exception to the traditional rule in these circumstances is preferable to the alternative: a workplace in which employers would circumvent any rule prohibiting restrictive covenant agreements for existing employees by firing existing employees and rehiring them "the following day with a fresh covenant not to compete." *See* ***Curtis 1000***, 24 F.3d at 947.

Friedlen, in contrast, argues that this is *not* an issue of first impression. According to Friedlen, Wisconsin law already clearly states that continued employment alone does not constitute sufficient consideration to support a covenant not to compete; additional consideration is required. *See* ***Star Direct, Inc. v. Del Pra***, 2009 WI 76, ¶50, 319 Wis. 2d 274, 767 N.W.2d 898 ("employers may not compel their existing employees to sign restrictive covenants without additional consideration"). Friedlen also points out that this rule, stated in ***Star Direct***, is followed in numerous jurisdictions—*see e.g.*, ***Access Organics, Inc. v. Hernandez***, 175 P.3d 899, 904 (Mont. 2008); ***Labriola v. Pollard Grp., Inc.***, 100 P.3d 791, 794 (Wash. 2004); ***Cox v. Dine-A-Mate, Inc.***, 501 S.E.2d 353, 356 (N.C. Ct. App. 1998); ***Poole v. Incentives Unlimited, Inc.***, 548 S.E.2d 207,

209 (S.C. 2001); ***Freeman v. Duluth Clinic, Ltd.***, 334 N.W.2d 626, 630 (Minn. 1983); ***Environmental Prods. Co. v. Duncan***, 285 S.E.2d 889, 890 (W. Va. 1981)—and with good reason: "[w]hen a current employee is required to sign a non-compete agreement, the employer and employee are not on equal bargaining ground[;] the employee is vulnerable to heavy economic pressure to sign the agreement in order to keep his job." *See* ***Access Organics, Inc.***, 175 P.3d at 904.

Our review of the relevant authority leads us to conclude that both parties are partially right. While Friedlen correctly quotes ***Star Direct*** for the proposition that "employers may not compel their existing employees to sign restrictive covenants without additional consideration," *see* ***id.***, 319 Wis. 2d 274, ¶50, neither ***Star Direct***, nor the case on which it relies for this conclusion, ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 837-39, 520 N.W.2d 93 (Ct. App. 1994), is factually analogous to the situation before us. Thus, it appears that while there is some guidance available, the law in Wisconsin regarding this issue is unclear.

While ***Star Direct*** appears to be facially helpful, it did not concern a restrictive covenant entered into by an existing at-will employee. Rather, ***Star Direct*** considered whether a series of restrictive covenants—entered into at the inception of a new employment relationship, *see* ***id.***, 319 Wis. 2d 274, ¶¶7-8—was reasonably necessary to protect the employer's business, *see* ***id.***, ¶¶49-50. The employee seeking to invalidate the covenants noted that the employer had acted inconsistently by requiring restrictive covenants from new employees but not from existing employees, and claimed that this inconsistency was evidence that the covenants were unreasonable and unnecessary. *See* ***id.***, ¶50. The supreme court disagreed, noting that it was reasonable for a business to treat new employees differently from current employees because "employers may not compel their

existing employees to sign restrictive covenants without additional consideration." *See* ***id.***

NBZ, on the other hand, did conclude that a non-compete agreement entered into by an existing employee was unenforceable due to a lack of consideration, but did so under different circumstances from those before us. In ***NBZ***, this court did not expressly answer the question of whether "continued employment alone will serve as consideration for a covenant not to compete" as a general matter. *See* ***id.***, 185 Wis. 2d at 838. Instead, we held that under the particular circumstances before the court, there was no consideration. *See* ***id.*** at 837-39. Unlike the case before us, the employee's continued employment was not conditioned on her signing the non-compete agreement. *See* ***id.*** at 839 ("The trial court found that continued employment was not conditioned on signing the covenant."). Indeed, the employer in ***NBZ*** did not promise to do *anything* in exchange for the employee's signing of the agreement. *See* ***id.*** Consequently, one can read ***NBZ*** as implying that if the employer *had* conditioned continued employment on the employee's signing of the agreement, there may have been sufficient consideration. However, this reading would contradict the language of ***Star Direct***.

Given the seemingly unsettled state of the law on this issue and the circumstances before us, if we affirm the trial court based on the directive of ***Star Direct***, we risk contradicting the implicit holding of ***NBZ***. *See* ***NBZ***, 185 Wis. 2d at 839 (emphasizing that employer did not predicate continued employment on signing of the agreement). On the other hand, if we reverse the trial court, we contradict the language of ***Star Direct***, which we decline to do. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶¶57-58, 324 Wis. 2d 325, 782 N.W.2d 682 (court of appeals may not "dismiss a statement in a prior case from [the supreme court]

as dictum"); *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246, (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). Additionally, if we look to what occurred after the agreement was signed to discern whether there was in fact valid consideration, we necessarily create an exception to Wisconsin law. Given these challenges, and the fact that resolution of this issue not only requires careful consideration of public policy, but also concerns circumstances that are undoubtedly likely to recur, we request the guidance of the supreme court.

CONCLUSION

For the foregoing reasons, we respectfully request the supreme court's guidance as to whether additional consideration is required to support a covenant not to compete entered into during an at-will employment relationship.