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Note from Applicant:

"I was going through the essay bank and thought that hopefully it helps someone see that you needed to discuss the Blue Pencil stuff to get a higher score."

MEMORANDUM

TO: Sylvia Baca

FROM: Applicant

DATE: July 27, 2021

RE: Industrial Sandblasting, Inc. v. Samuel Morgan

INTRODUCTION

As requested, I have prepared a draft for you to use in the oral argument in the case of Industrial Sandblasting v. Samuel Morgan for breach of contract to enjoin Mr. Morgan from doing any work in Columbia Coatings for one year. The draft below includes the cases provided as authority.

ARGUMENT

1. Is the covenant not to compete enforceable?

According to Columbia Stat. Ann, section 24-6-53(a), which states in relevant part: (a) enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted. Strom.

In Strom, the court held that the statute applied to contracts between employers and employees and thus it applied to the contract between Strom and Knox. The court found that the geographical scope was appropriate, applying only to that broadcast area surrounding the Columbia City. The provision restricts Strom's activity in the same media market as that in which his former employer operates. The court enforced the covenant in Strom's contract with Knox because it represented a fair balance of distinct and substantial harm to Knox, when compared to a relatively minor and incidental harm to Strom.

Here, in our present case, the statute applies to the contract between Sandblasting Industries and Mr. Morgan because Mr. Morgan was an employee of Mr. Cole.

Under the statute, we should uphold such a covenant only when strictly limited in time, territorial effect, and scope of the prohibited activities. In doing so, we must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee. Strom.

In the Fawcett, unlike the Strom case, the court provided that the facts indicate that the covenants in this case bore no relationship to Fawcett's need for protection from competitive practices after Markham left its employ. The covenant not to compete was invalid and should not be revised. In such situation, trial court does not err in refusing to "blue pencil" the contract.

In our present case, unlike Strom and more like the Fawcett case, the covenant is not appropriate because the covenant failed to have a geographical scope that is not overly broad, the scope of the activity was not specific, and the duration of the restriction was not reasonable per the discussion below.

Geographical Scope

The court will accept as prima facie valid restriction that covers the territory where the employee worked and the other employer does business. However, a restriction that extends that territory to areas in which the employee did not work is overly broad on its face, absent a strong justification other than desire not to compete with the former employee. Fawcett.

In our present case, the geographical scope was overly broad because the contract provided that "any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services and business anywhere in the State of Columbia." The contract prevented Mr. Morgan from working in the similar business anywhere in the State of Columbia even though Mr. Morgan's main area was Columbia City and a couple single jobs in other areas. The covenant's geographical scope was overly broad on its face because it would leave no place for Mr. Morgan to work in his home state. For Mr.

Morgan, it means that he won't have any work at all, after years of experience in the field.

Thus, the covenant's geographical scope was overly restrictive.

Scope of Activity

A former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the former employer. Our courts have approved as reasonable restriction that specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer. Such a restriction protects the employer's interests from competition in that area of service. Fawcett.

Here, the restriction was not reasonable because the activities mentioned where not specifically stated. The contract stated that "The contract between Industrial Sandblasting and Samuel Morgan provided that "employee will not own, operate, or work at any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services and business anywhere in the State of Columbia." These terms were very broad because the work of Mr. Morgan was more specialized because Mr. Morgan specialize in commercial sandblasting and he operated a crew and did estimate for Industrial Sandblasting.

However, Mr. Cole will claim that the activities were related to the employer's business and that Sandblasting provided training Mr. Morgan and Mr. Morgan worked for Sandblasting. Nevertheless, Mr. Cole and Sandblasting did not invest in Mr. Cole because Mr. Cole paid for completing his own QP certifications.

Thus, the scope of the activity was not specific.

Duration of Restriction

Our cases do not state a specific time period past which a given time restriction is per se unreasonable. Instead, the cases require employer who seek to uphold a time restriction to demonstrate how the restriction is necessary to the protection of the employer during the employee's transition to work for a competitor. An employer must prove specific facts and circumstances that support finding of necessity. Fawcett.

In our present case, the covenant to compete requires to Mr. Morgan to not work in the

industry for one year. Mr. Cole's testimony claims that the covenant is necessary because Mr. Morgan working for Columbia Coatings had a "big impact" on his business. Mr. Cole claims that Morgan was a key employee, especially when it come out to pricing out jobs and he is bringing them expertise that he was provided by Mr. Cole and as a result, Mr. Cole has lost several bids to Columbia Coatings already. However, the requirement that Mr. Morgan does not work for one year in the industry is not necessary because Mr. Cole will settle, at a minimum, for the court o keep Mr. Morgan from working in the industry, for "at least for long enough" for us to train someone the way Mr. Cole trained Mr. Morgan. This was possible because Mr. Cole had already hired another foreman the week before Mr. Morgan left and he knew pretty much what Mr. Morgan knew.

Thus, the duration restriction was not necessary.

2. Should the court Blue Pencil the contract?

Modifying a covenant to a more reasonable form, consistent with the situation and intentions of the parties. Fawcett.

In our present case, similarly to Fawcett, Mr. Cole might request that the court should modify the contract to more reasonable form in which the restrictive geographical area is only Columbia City, it mentions specific activities, and the duration of the restriction is reduced to the amount of time that it would take Mr. Cole to replace and train someone to the level or Mr. Morgan. However, the court should deny to blue pencil the contract because the covenant bore no relationship to Mr. Cole protection from competitive practices after Mr. Morgan left Sandblasting, Inc. Per discussed above, the covenant not to compete was invalid because of its restrictive geographical area, scope of the activity, and duration of the activity.

Thus, the court should deny blue pencilling the contract and should not modify the contract to a more reasonable form.

CONCLUSION

I thank you for the opportunity to prepare this draft for you to use during the closing

arguments. If I can be of any further assistance, please let me know.

Question #1 Final Word Count = 1265

END OF EXAM