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Employment Law

Matthew P. Holt

Susan Zeller

EMPLOYMENT LAW

MATTHEW P. HOLT* and SUSAN ZELLER**

I. INTRODUCTION

This is the first year that the Annual Survey of New Mexico Law has included an article on employment law. Consequently, this Article attempts to review cases decided in the past few years, not just the survey year. This Article does not purport to discuss all the cases involving employment relations that were decided in recent years. Instead, we have chosen to focus on a few cases that modify or clarify the law as it heretofore existed in New Mexico.

This Survey Article begins with a look at a recent case that discusses an employer's liability for the intentional wrongdoings of his employees. It next discusses an employee's rights as against his employer. Several of the most interesting employment law cases dealt with teachers, so the focus of that section of this Article will be upon teachers. Finally, the Article will discuss the obligations of both employer and employee in the context of restrictive covenants contained in employment contracts.

II. EMPLOYERS' RESPONSIBILITIES FOR EMPLOYEES' WRONGDOINGS

Just as the law is well settled that an employer may be found liable for the unintentional torts of his employees,[1] so too may he be found liable for the employees' intentional wrongdoings.[2] The test in either case is the same: was the employee acting within the scope and in the course of his employment? While the actual analysis used to determine whether an employee is so engaged varies with the facts of each case,[3] the test adopted long ago is still employed:

> [A]n act is within the "course of employment" if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be

*Associate, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, New Mexico.

**Member, Class of 1985, University of New Mexico School of Law, Albuquerque, New Mexico.

1. *See* Armijo v. Albuquerque Anesthesia Serv., 101 N.M. 129, 134, 679 P.2d 271, 276 (Ct. App. 1984).

2. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968); Gonzales v. Southwest Sec. & Protection Agency, Inc., 100 N.M. 54, 665 P.2d 810 (Ct. App. 1983).

3. *See* Tinley v. Davis, 94 N.M. 296, 609 P.2d 1252 (Ct. App. 1980).

> done, although mistakenly or illadvisedly, with a view to further the master's interests, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.[4]

Although at least three New Mexico appellate decisions have discussed an employer's liability for the employee's intentional torts, only one has addressed the question of vicarious liability.[5] In *Gonzales v. Southwest Security & Protection Agency, Inc.*,[6] a patron at a wrestling match was handcuffed and beaten without cause by security guards hired to provide security services for the wrestling match.[7] The plaintiff sued not only the guards involved, but also the security agency for which they worked. A jury returned a verdict against both a guard and the employer.[8] The employer appealed, arguing that it should not be held vicariously liable for the guard's intentional misconduct. The court of appeals disagreed.

Relying on *McCauley v. Ray*,[9] the court started from the premise that an employer is vicariously liable for the intentional torts of an employee committed within the course of employment. The *Gonzales* court limited the broad statement of *McCauley*, however, and citing to the Restatement (Second) of Agency, suggested that liability attaches only if the employee's misconduct is foreseeable.[10] Referring to the commentary to the Restatement, the court noted the likelihood that security guards could be involved in altercations.[11]

The court, however, did not leave foreseeability at that point;[12] it went on to note specifically that the abuse was foreseeable because the guards were equipped with uniforms, handcuffs, guns, nightsticks, and the authority to keep the peace.[13] Thus, the court concluded that the beating

4. Miera v. George, 55 N.M. 535, 540, 237 P.2d 102, 105 (1951).

5. Gonzales v. Southwest Sec. and Protection Agency, Inc., 100 N.M. 54, 655 P.2d 810 (Ct. App. 1983).

6. 100 N.M. 54, 665 P.2d 810 (Ct. App. 1983).

7. *Id.* at 55, 665 P.2d at 811.

8. *Id.*

9. 80 N.M. 171, 453 P.2d 192 (1968).

10. 100 N.M. at 55, 665 P.2d at 811 (quoting Restatement (Second) of Agency § 245 (1958)):

> A master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpectable in view of the duties of the servant.

11. 100 N.M. at 56, 665 P.2d at 812 (citing Restatement (Second) of Agency § 245, comment C (1958)).

12. Had the court ended its analysis here, it would have implied that altercations involving guards are always foreseeable. Instead, the court noted the specific circumstances present in the case, which showed that the employer could have expected some confrontation. *But see infra* notes 16-17 and accompanying text.

13. 100 N.M. at 56, 665 P.2d at 812.

was a natural incident to the business in which the guards were engaged.

Less well reasoned is the court's conclusion that the guard's misconduct arose out of his attempt to perform the employer's business. The evidence showed that the plaintiff had already left the auditorium when he was approached by the guards, thrown to the ground, handcuffed, and then returned to a small room in the auditorium where he was beaten.[14] Citing to cases from New Mexico and other jurisdictions, the court summarily stated that "[t]he trial court also properly determined that the guards' conduct substantially arose out of an attempt to perform Southwest's business."[15] In light of the facts, the attack upon the plaintiff apparently did not arise from a desire to "perform the master's business,"[16] but instead arose from the "personal motive [here brutality] on the part of the servant."[17] Although a theory might have been fashioned to show that the guard was attempting to serve the employer and, hence, to justify the jury's verdict,[18] the conclusory approach adopted by the court suggests that the brutality of a guard, once issued a weapon, will always be seen as furthering the employer's service.

A number of cases have sought to impose liability on an employer for his servant's torts, not through vicarious liability, but by allegations that the employment act itself constitutes negligence.[19] Foremost among these cases is *F & T Co. v. Woods*.[20] The defendant in *Woods* had employed a deliveryman, Sanders, knowing that he was an ex-convict. Three days after delivering a television set to the plaintiff for F & T, Sanders returned to the plaintiff's house and raped her. At the time of the rape, Sanders was not acting within the scope of his employment.[21]

Only days before the plaintiff was raped, a police detective spoke with Sanders' employer about another rape that had recently occurred. A purse belonging to the first victim was found in the trash area of defendant's business. The detective suspected a black man had committed the rape and advised the employer that the only black man in the vicinity of the

14. *Id.* at 55, 665 P.2d at 811.

15. *Id.* at 56, 665 P.2d at 812 (citing Miera v. George, 55 N.M. 535, 237 P.2d 102 (1951).

16. *See* Miera v. George, 55 N.M. 535, 540, 237 P.2d 102, 105 (1951).

17. *See id.*

18. The court, for example, could have found that a confrontation between the plaintiff and another person, which continued after the plaintiff left the auditorium, could have incited further trouble and led the guards to believe they should quelch the disturbance and hold the plaintiff for the police. Even so, it is hard to imagine that beating a handcuffed man could reasonably have been thought to be in furtherance of employment, though it might be said to have had its emotional origins in quelching the conflict between the plaintiff and the other person.

19. *E.g.*, F & T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979).

20. 92 N.M. 697, 594 P.2d 745 (1979).

21. *Id.* at 698, 594 P.2d at 746. Not only is rape obviously not part of a deliveryman's duties, but Sanders was not on company time, was not using a company vehicle, and did not have company permission to enter the victim's apartment. *Id.*

rape was one of F & T's deliverymen. F & T employed two blacks. The detective did not advise the employer that Sanders was the suspect.[22]

The plaintiff advanced two closely allied theories of liability: negligent hiring and negligent retention. The court held that both theories were subject to a two-part analysis. First, the employer must be negligent in hiring or retaining the tortfeasor.[23] Second, assuming negligence, that negligence must proximately cause the harm of which the plaintiff complains.[24]

Although the court agreed that there was enough evidence to raise a factual issue as to whether F & T had negligently hired Sanders, it held that, as a matter of law, there was no proximate relation between the hiring and the rape.[25] Citing to other cases finding a want of proximate cause as a matter of law, the court held that F & T could not have foreseen the rape at the time it hired Sanders.[26]

Turning to the issue of negligent retention, the court considered the additional evidence of the first rape and the information conveyed to the employer. The court rejected this theory. It is not clear, however, whether the court found that no negligence existed or whether it found that there was no proximate cause. The court apparently found no proximate cause, given that the court agreed that a factual issue existed as to whether the employer negligently hired Sanders and given the additional evidence pertaining to the information conveyed to the employer.[27]

Even though the court rejected the plaintiff's arguments in *Woods,* it did so on the facts, not on the law. Indeed, the court specifically stated that the case was not meant to "foreclose all causes of action against employers based upon the negligent hiring or negligent retention of an

22. *Id.* at 701, 594 P.2d at 749.

23. *Id.* at 699-700, 594 P.2d at 747-48. The court specifically held that the employer is negligent in its hiring not only if it knows of the employee's dangerous propensities, but also if it should have known. *Id.* at 699, 594 P.2d at 747.

24. *Id.* at 699-700, 594 P.2d at 747-48.

25. *Id.* at 701, 594 p.2d at 749.

26. *Id.* at 700, 594 P.2d at 748 (citing Bouldin v. Sategna, 71 N.M. 329, 378 P.2d 370 (1963), and Maestas v. Alameda Cattle Co., 36 N.M. 323, 14 P.2d 733 (1932)). *Accord* N.M. U.J.I. Civ. 12.10. The court employed the conventional proximate cause analysis, looking to see if the hiring's "natural and continuous sequence" produced an injury that was foreseeable and otherwise unlikely to happen.

27. A reasonable man might have considered that there was evidence that one of two employees was the focus of a police investigation into this rape. It appears quite arguable, therefore, that the employer should have inquired into this matter. Sanders' first contact with the victim was during his employment, two days after his employer met with the police. Hence, a strong argument can be fashioned that, but for his continued employment, Sanders never would have met the victim. This, coupled with Sanders' criminal record and the first rape, could have established foreseeability. Because causation is normally a question of fact and not law, Armstrong v. Indus. Elec. & Equip. Serv., 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981), it is not clear why the case was not allowed to go to the jury.

employee. Whether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case."[28]

III. EMPLOYMENT RELATIONSHIPS: THE UNIQUE STATUS OF TEACHERS

Cases involving a particular class of employees rarely present issues so unique that separate discussion is needed as to them. A teacher, however, is a rare bird. As teachers are usually employees of the state, teachers' employment contracts are subject to certain constitutional scrutiny. Several cases dealing with teachers have made their way to the appellate courts of New Mexico in recent years.

Of potential impact to many are the ramifications of *New Mexico State Board of Education v. Stoudt*.[29] Katherine Stoudt was discharged from her position as a certified school teacher with the Taos Municipal Schools "for immoral conduct": Ms. Stoudt had committed the unforgivable sin of being, simultaneously, unwed, pregnant, and a resident of a small community.[30] At issue was whether the combination of these three factors constituted "good and just cause" for termination of the employment relation, as was required by her contract.[31] The court held they did not.[32]

The supreme court appeared to agree that immoral conduct, under certain circumstances, could constitute good ground for dismissal.[33] The

28. 92 N.M. at 701, 594 P.2d at 749.

29. 91 N.M. 183, 571 P.2d 1186 (1977).

30. *Id.* at 185, 571 P.2d at 1188. The letter of discharge from the Taos Board of Education stated:

> The reason for the board's decision is that because you are unmarried and pregnant, you have engaged in conduct which is held to be immoral in the Taos community, and, in the opinion of the board, your continued presence in the classroom and as a coach would have a potentially adverse effect upon your teaching effectiveness and upon the moral climate at Taos High School.

31. *Id.* at 186, 571 P.2d at 1189. By its terms, Ms. Stoudt's employment contract provided:

> This contract may be terminated by the Board for cause, including unsatisfactory work performance, incompetency, insubordination, physical or mental inability to perform the required duties *or for any other good and just cause.*

Id. at 186, 571 P.2d at 1189 (emphasis in original).

Also at issue was whether the action of the State Board of Education violated Ms. Stoudt's constitutional rights. *Id.* at 184, 571 P.2d at 1187. Because the court held that the dismissal was without good cause, the constitutional question was not analyzed. *Id.* at 187, 571 P.2d at 1190.

32. *Id.* Procedurally, following the Taos Board of Education's dismissal of Ms. Stoudt, she appealed the dismissal to the State Board of Education, which, in a *de novo* hearing, sustained the Taos Board's dismissal of Ms. Stoudt. She then appealed the State Board's ruling to the New Mexico Court of Appeals, which reversed the State Board and ruled that Ms. Stoudt be reinstated with back pay. The State Board appealed the court of appeals' decision to the New Mexico Supreme Court.

The appellate standard of review of an administrative decision required affirmance unless the State Board's ruling was: "'(1) *arbitrary, capricious, or unreasonable;* (2) *not supported by substantial evidence;* or (3) *otherwise not in accordance with the law.*'" *Id.* at 185, 571 P.2d at 1188 (citing N.M. Stat. Ann. § 77-8-17(J) (Supp. 1975)). (Emphasis in opinion.)

33. 91 N.M. at 187, 571 P.2d at 1190.

court recognized, however, the inherent vagaries of conduct that might be called "immoral" and declined to promulgate guidelines as to what constitutes immoral conduct which would justify discharging a teacher.[34] Even though the court specifically stated that the issue was decided "solely upon the narrow confines of the facts" of the particular case before it,[35] several guideposts can be discerned from *Stoudt* by analyzing why the court would not join in the board of education's condemnation of Ms. Stoudt's pregnancy:

1. Her prior work record showed that she was a competent and effective teacher;[36]
2. Although the school board later voted to request Ms. Stoudt's resignation, initially the school board offered to reemploy Ms. Stoudt for another school term after learning of her pregnancy;[37]
3. Ms. Stoudt's doctor advised that her pregnancy would not interfere with her work;[38]
4. At the time Ms. Stoudt was discharged, five other unwed mothers were serving as teachers in the Taos Municipal Schools, and no action was taken against them;[39] and
5. Ms. Stoudt had the support of the superintendent of schools, her principal, the director of Title IX programs, an assistant attorney general, and 208 local individuals.[40]

Without analyzing the above factors or commenting on their relative significance, the court agreed that Ms. Stoudt was wrongfully discharged, stating that the board had failed to make a prima facie showing of good cause to support her termination.[41] The action of the State Board of Education, therefore, was "arbitrary, unreasonable and not supported by substantial evidence."[42]

Beginning with several premises as to what "good cause" must mean in this context, it is possible to hypothesize as to the basis for the court's ruling. Any activities totally unrelated to one's ability to teach should not be regarded as "good cause" for termination. The alleged immoral

34. *Id.*
35. *Id.*
36. Ms. Stoudt was a fully certified high school teacher. During her employment with the Taos school system, her work performance ratings were satisfactory or better. In April 1976, Ms. Stoudt was recommended by the high school principal and superintendent for reemployment. *Id.* at 184, 571 P.2d at 1187.
37. On May 10, 1976, Ms. Stoudt advised the high school principal of her pregnancy. On May 11, 1976, the principal told the director of instruction and Title IX coordinator of Ms. Stoudt's pregnancy. Also on May 11, a notice of reemployment was sent to Ms. Stoudt, notifying her of the reemployment offer. *Id.*
38. *Id.*
39. *Id.* at 185, 571 P.2d at 1188.
40. *Id.*
41. *Id.* at 187, 571 P.2d at 1190.
42. *Id.*

conduct engaged in was not the pregnancy condition, but the premarital intercourse. The uncontradicted evidence showed that Ms. Stoudt was a good teacher before she became pregnant;[43] no evidence was introduced that she lost this ability once pregnant. The court refused to entertain any implied argument that premarital intercourse would have interfered with Ms. Stoudt's teaching.[44] Further, Ms. Stoudt's doctor had specifically advised that Ms. Stoudt would be able to carry out all normal activities.[45]

Having come this far, the only possible argument that could be advanced was that her students would either be repelled by her and thus unable to learn effectively from her or would feel that engaging in premarital intercourse was being condoned by the school system.[46] As evidence against the former, however, was the petition advanced by some 208 parents and students, asking that Ms. Stoudt retain her position.[47] As evidence against both (or at least as evidence that the school board did not see this as a real problem), witness that the school board signed Ms. Stoudt on for another year after learning she was pregnant[48] and that the Taos Municipal Schools had five other unwed mothers serving as teachers against whom they had taken no action.[49]

The lesson to be learned from *Stoudt* is a form of analysis. First, one must determine what "good cause" the school board alleges. Next, one must conceive of every argument how this behavior will affect the teacher's job (not only his or her abilities, but any possible reflection on the school). Once this has been done, one must seek public support, if appropriate, and determine whether the school board treats others who are similarly situated in a dissimilar manner. If it does, this apparently is strong evidence that the board is acting not on the cause alleged, but instead, is acting capriciously.

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43. *Id.* at 184, 571 P.2d at 1187.

44. The court stated:

> The words 'for any other good and just cause' have no reasonably defined meaning in the law. These words do not allow the State Board to revoke a teacher's certificate for any reason that is not related to the purposes of the Certified School Personnel Act, which purpose is to protect the public against incompetent teachers and to insure proper educational qualifications, 'personal fitness' and a high standard of teaching performance.

Id. at 186, 571 P.2d at 1189 (citing Amador v. New Mexico State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969)).

45. 91 N.M. at 184, 571 P.2d at 1187.

46. According to the findings of the State Board of Education, "Appellant Stoudt's unwed pregnancy, evidencing as it did a violation of the moral standards of the Taos community, could have a *potentially adverse affect* [sic] upon Appellant's teaching effectiveness, upon the students and the educational environment at Taos High School." *Id.* at 186, 571 P.2d at 1189 (emphasis in original).

47. *Id.* at 185, 571 P.2d at 1188.

48. *Id.* at 184, 571 P.2d at 1187.

49. The court noted that "the Taos Board had itself excluded the status of being an unwed mother from its definition of what constitutes sufficient good and just cause for dismissal." *Id.* at 186, 571 P.2d at 1189.

Not all school boards, of course, act capriciously. Some will discharge an employee for what appears to be sound reason. This does not mean, however, that the termination is proper. Submitted for your consideration is *New Mexico State Board of Education v. Board of Education* [hereinafter referred to as *Bryant,* the name of the teacher involved].[50]

Sharon Bryant was a teacher employed by the Alamogordo School Board.[51] When her father was later elected as a member of the local school board, the board determined that her continued employment would violate New Mexico's anti-nepotism law.[52] The law in question provided in relevant part: "No local school board shall employ or approve the employment of any person in any capacity by a school district if the person is related by consanguinity or affinity within the first degree to any member of the school board governing the district."[53] In Bryant, the supreme court held that "employ" refers to an initial hiring, as distinguished from "reemployment."[54] Because the school board could refuse to "reemploy" Ms. Bryant only if "good cause" were shown, the annual reemployment process was solely to review a teacher's performance.[55] Based upon the statute's failure to distinguish between employment and reemployment, the court found the statute ambiguous and turned to traditional concepts of statutory construction.[56]

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50. 95 N.M. 588, 624 P.2d 530 (1981).

51. Ms. Bryant was hired for the 1975-76 school year when she was not related to any school board member. She acquired tenure upon the execution of her 1978-79 contract. Her father, desiring to seek a position on the school board, requested an opinion from an assistant attorney general regarding whether his election bid would affect members of his family employed by the school district. The assistant attorney general responded that New Mexico's anti-nepotism statute had been interpreted as not affecting individuals already employed by a school system at the time of a relative's election to the school board. The same opinion was also communicated to the school board. Bryant's father won election to the board in March 1979. *Id.* at 589, 624 P.2d at 531.

52. The board reached this decision despite Ms. Bryant's having received "high marks" for her teaching and the superintendent's recommendation of her reemployment. *Id.* at 589-90, 624 P.2d at 531-32.

53. N.M. Stat. Ann. § 22-5-6 (1978). This case was decided prior to the 1981 amendment which provides in relevant part: "No local school board shall initially employ or approve the initial employment in any capacity of a person who is the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter or daughter-in-law of a member of such local school board." N.M. Stat. Ann. § 22-5-6 (Repl. Pamp. 1981).

54. 95 N.M. at 590, 624 P.2d at 532.

55. *Id.* at 591, 624 P.2d at 533. The pertinent provision in Ms. Bryant's employment contract stated:

> This contract may be terminated by the Board for cause, including unsatisfactory work performance, incompetency, insubordination, physical or mental inability to perform the required duties or for any other good and just cause. . . .

Id.

56. *Id.* The court applied the "guiding principle" of statutory construction: "The statute should be interpreted consistent with legislative intent." *Id.* (citing State *ex rel.* Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977)). In so doing, the court not only analyzed the language of the statute, but also the statute's objective and "the wrong to be remedied." 95 N.M. at 591, 624 P.2d at 533. *See also* Chavez v. State Farm Mut. Ins. Co., 87 N.M. 377, 533 P.2d 100 (1975).

Reasoning that the anti-nepotism statute was adopted to prevent action which "justifiably arouses public suspicion that the teacher was hired on the basis of relationship rather than merit,"[57] the court held that the statute referred only to an initial hiring. Such suspicions do not continue to afflict a teacher whose competency has been established by years of service.[58]

Further, the court reasoned that the anti-nepotism statute could refer only to an initial hiring, as any other reading would put the anti-nepotism statute in conflict with N.M. Stat. Ann. sections 22-10-15 and 22-10-17 (1978).[59] These statutes, which provide that a tenured teacher can only be discharged for cause, give the teacher a sense of security which could be frustrated if events out of his or her control (such as election of a family member to the school board) could constitute good cause for termination.[60]

Teachers, even tenured teachers, should not be led astray by the court's holdings in *Stoudt* and *Bryant*. There are limits to how far the court will go in protecting a teacher's security. *Atencio v. Board of Education*[61] demonstrates just such a limit. Atencio, once a tenured teacher in Penasco, New Mexico, left his position as a teacher to become an administrator for the same school district. After one year as the district's superintendent, he was discharged. He then sought to be reemployed as a teacher. Notwithstanding his earlier status as a tenured teacher, he was refused the job.

The supreme court rather easily found that the board properly refused to treat Atencio as tenured.[62] A 1979 amendment to the Certified School Personnel Act[63] provided that the "voluntary resignation . . . by a certified school instructor with tenure rights . . . shall extinguish all tenure rights of the certified school instructor."[64] Anticipating that Atencio would counter that his employment as a certified school administrator would allow him

57. 95 N.M. at 591, 625 P.2d at 533.
58. *Id.*
59. *Id.*
60. The court noted:

> The nepotism statute and the teacher tenure statutes serve a common public purpose. Each favors employment on the basis of merit. The teacher tenure system is intended to encourage qualified personnel to make a lifetime profession of teaching, to stimulate them to seek positions in the school systems requiring qualifications of teachers, to protect them in their employment from the whims of those possibly politically minded, and to insure their continuance in employment. . . . Nepotism statutes are aimed at avoiding inefficiency in public office by preventing officials from favoring their relatives and appointing those who may not be qualified to serve.

Id. at 591-92, 624 P.2d 533-34 (citation omitted).
61. 99 N.M. 168, 655 P.2d 1012 (1982).
62. *Id.* at 172, 655 P.2d at 1016.
63. N.M. Stat. Ann. §§ 22-10-1 to -26 (Cum. Supp. 1984).
64. 1979 N.M. Laws ch. 86, § 1 (codified at N.M. Stat. Ann. § 20-10-14 (Cum. Supp. 1984)).

to retain his tenure rights and was not a "resignation," the court pointed out that N.M. Stat. Ann. section 22-10-16(B) (1978) specifically provides that the rights accruing to a teacher do not apply to a certified administrator.[65] Atencio, therefore, had lost his prior status.

The lesson for teachers is clear. If alternative employment is sought, tenure in the teaching position is jeopardized if a resignation is tendered. Although not yet decided, all tenure rights apparently remain in force during a leave of absence. In order to preserve tenure status, therefore, a leave of absence should be requested, rather than the submission of a resignation.

IV. RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS: *MANUEL LUJAN INSURANCE, INC. V. JORDAN*

Restrictive covenants in employment contracts have not occupied a favored position in the law.[66] Such provisions generally have been regarded as unreasonable restraints on trade.[67] In *Manuel Lujan Insurance, Inc. v. Jordan,*[68] however, the New Mexico Supreme Court not only upheld the validity of a restrictive covenant not to compete, but also, by inferring the intent of the parties, broadened the scope of the covenant.[69]

Manuel Lujan Insurance, Inc. ("Lujan") hired Larry Jordan as the salaried manager of Lujan's bond department.[70] Jordan was hired by Lujan based upon his expertise in the bond field and in hopes that he would develop Lujan's business and reputation in their bonding department.[71] Jordan and Lujan entered into an employment contract, effective December 1, 1980, drafted by Lujan, which provided in pertinent part that:

> [I]n event the Employee shall leave the employment of the Company, or if his employment is terminated by the Company for any reason or cause whatsoever, he shall not for a period of two (2) years from the date of termination of employment solicit the customers (policyholders) of the Company, either directly or indirectly. The purpose of this paragraph is to insure that the Employee for the periods set out herein, will not in any manner directly or indirectly enter into competition with the Company on [sic] the customers of the Company as of date of termination.[72]

On June 7, 1982, Jordan resigned from his position with Lujan.[73] Prior to the expiration of the two-year noncompetition term, Jordan engaged

65. 99 N.M. at 171, 655 P.2d at 1015.

66. Kniffin, *Employee Noncompetition Covenants: The Perils of Performing Unique Services,* 10 Rut.-Cam. L.J. 25 (1978).

67. Flood v. Kuhn, 407 U.S. 258, 287 (1972) (Douglas, J., dissenting).

68. 100 N.M. 573, 673 P.2d 1306 (1983).

69. *Id.* at 576, 673 P.2d at 1309.

70. *Id.* at 574, 673 P.2d at 1307.

71. *Id.*

72. *Id.* at 575, 673 P.2d at 1308.

in bonding transactions with entities which had been customers of Lujan while Jordan was under Lujan's employ.[74]

Lujan acquired a temporary restraining order prohibiting Jordan from engaging in post-employment competition for Lujan's bond clientele.[75] Lujan also sought an injunction and damages, claiming that Jordan's post-employment activities violated the employment contract's covenant not to compete.[76] Jordan counterclaimed for withheld salary and damages occasioned by the issuance of the restraining order.[77] The district court enjoined Jordan from competing for Lujan's customers for the two-year period, awarded to Lujan the commissions generated by Jordan on the relevant accounts, and denied Jordan relief from damages resulting from the issuance of the restraining order.[78]

On appeal, Jordan contended that the employment restriction prohibited him only from soliciting Lujan's bond customers,[79] not from accepting business from them.[80] Lujan argued the converse: that the contract denied Jordan both the ability to solicit and the right to accept unsolicited business for two years following his resignation.[81]

In its analysis, the court wrestled with what effect should be given to the second sentence of the covenant not to compete.[82] This sentence provided that the purpose of the covenant was to ensure that, for two years following termination of Jordan's employment, he would not "directly or indirectly" enter into competition with Lujan for its customers.[83] The first sentence, however, provided that Jordan agreed not to "solicit" Lujan's customers when he no longer worked for Lujan.[84] The court acknowledged that two interpretations were possible. First, the word "solicit" could be interpreted narrowly, meaning that Jordan could accept business from Lujan clientele, but not actively pursue the business.[85] Alternatively, the inclusion of the noncompetition standard in the second sentence might indicate that Jordan was precluded from either soliciting or accepting business from Lujan's customers.[86]

73. *Id.*
74. *Id.*
75. *Id.* at 574, 673 P.2d at 1307.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 575, 673 P.2d at 1308.
80. *Id.*
81. *Id.*
82. *Id.* at 576, 673 P.2d at 1309.
83. *See supra* text accompanying note 72.
84. *Id.*
85. 100 N.M. at 576, 673 P.2d at 1309.
86. *Id.* The court considered which interpretation was consistent with other contractual provisions. The other provisions detailed that Lujan indisputably controlled the business records and that Jordan was obligated to inform clients that he was dealing with the customers strictly as Lujan's representative.

The court opted for the second and broader interpretation.[87] The court determined the intention of the parties from their conduct.[88] Even though acknowledging that uncertainties in the interpretation of a contract should be construed strongly against the contract's drafter (in this case Lujan),[89] the court ruled that the parties' conduct was sufficiently express to overcome that presumption.[90]

The court found several factors persuasive. The evidence indicated that the primary purpose of Jordan's hiring was to establish Lujan's bond business.[91] Following Lujan's drafting of the contract, Jordan possessed the contract for over a week and reviewed it carefully.[92] The evidence also indicated that Lujan and Jordan had discussed the terms of the contract and that Jordan was advised of the noncompetition covenant.[93] Of more significance, prior to the execution of the contract, Jordan had specifically requested and was denied the inclusion of an addendum permitting him to engage in business with Lujan's customers following the termination of his employment by Lujan.[94] Finally, Jordan had twice offered to purchase Lujan's bond business following his resignation.[95]

Thus, the contract, accompanied by parol evidence, witnessed the parties' intention that Jordan, for two years following his resignation, would be prohibited from either soliciting or accepting business from Lujan's customers.[96] The court, accordingly, affirmed the district court's ruling.[97]

The court's reasoning is troublesome in two aspects. First, the court went beyond the four corners of the employment contract to discern the intention of the parties. The first sentence of the covenant expressly stated that Jordan agreed not to "solicit" the business of Lujan, either directly or indirectly, for two years following the termination of his employment. The term "solicit" is not ambiguous in its meaning.[98] "Solicit" connoted

87. *Id.* at 576-77, 673 P.2d at 1309-10.
88. *Id.*
89. *Id.* at 576, 673 P.2d at 1309.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 576-77, 673 P.2d at 1309-10.
97. *Id.* at 577, 673 P.2d at 1310.
98. "Solicit" is defined by Webster's New Collegiate Dictionary (G. & C. Merriam Company 1981) as:

> 1 a: to make petition to: ENTREAT b: to approach with a request or plea 2: to strongly urge (as one's cause) 3 a: to entice or lure esp. into evil b *obs:* to attempt to seduce c: to proposition (a man) esp. as or in the character of a prostitute . . . 1: to make solicitation: IMPORTUNE 2 *of a prostitute:* to offer intercourse to a man *syn* see ASK, INVITE.

some positive act on Jordan's part to entice business from Lujan. In agonizing over the weight to attach to the second sentence of the covenant in which Jordan agreed not to enter, directly or indirectly, into competition with Lujan, the court, by considering parol evidence, concluded that "solicit" means "accept."[99] Therefore, not only did the court violate the precept that ambiguities in a contract must be construed most strongly against the drafter of the document,[100] but it allowed an interpretation of the course of performance to redefine completely an express term in the contract.[101] Both are practices which the Restatement (Second) of Contracts expressly condemns.[102]

Additionally, the court failed to discuss policy considerations which normally accompany an analysis of the scope of restrictive anticompetition covenants. Generally, covenants not to compete are strictly construed in acknowledgment of "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood."[103] In weighing two adverse concerns—the employee's right to pursue his chosen career and the employer's right to protect his business interests—courts gauge the reasonableness of the noncompetition covenant.[104] In determining the reasonableness of the restraint, courts balance four factors: (1) the interest of the employer; (2) the interest of the employee; (3) the interest of the public; and (4) the uniqueness of the employee's services.[105] The covenant is enforced only to the extent necessary to protect these interests.[106]

Applying these four factors to the employment relationship between Jordan and Lujan, it becomes clear that the enforcement of the noncompetition covenant in Jordan did not well serve public policy. Lujan's interest in the competition restriction is obvious. Lujan simply did not want Jordan engaging in any form of competition with Lujan's bond business. Precluding Jordan from accepting unsolicited business from Lujan's customers, however, probably is not a reasonable employment restriction or employer interest. Courts have interpreted reasonable employer interests to include prevention of an employee's use of trade secrets and processes of formulae, the disclosure of customer information, or the solicitation of business.[107] Prevention of the unsolicited acceptance

99. 100 N.M. at 576, 673 P.2d at 1309.
100. *See* Restatement (Second) of Contracts § 206 (1981).
101. 100 N.M. at 576, 673 P.2d at 1309.
102. *See* Restatement (Second) of Contracts § 203(b) (1981).
103. Purchasing Assocs., Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963).
104. *Id.*
105. Kniffin, *supra* note 66, at 25.
106. *See* Purchasing Assocs., Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963).
107. *See id.*

of the clients of a former employer, however, is in direct conflict with the second and third balancing factors, the employee's and the public's interest.

The employee obviously has a substantial interest in freedom and autonomy in the pursuit of his career. Employees are no longer considered as the property of the employer. Employees generally desire upward mobility and freedom to advance to more desirable positions. Courts carefully scrutinize anticompetition covenants in part because such provisions may inhibit an employee's occupational decisions.[108] Hence, courts have ruled that restrictive covenants banning competition within sizeable radii, as well as agreements not to compete for an excessive number of years, are unreasonable.[109]

Similarly, the public's interest often weighs against the reasonableness of a covenant not to compete. The public certainly has an interest in seeking the employment of the chosen businessman and an interest in preserving a market of free and open competition. Applied to the Jordan/Lujan relationship, not only was Jordan's interest in professional mobility substantial, but the former Lujan bond customers obviously sought the services of Jordan. Former potential customers, therefore, were thwarted in their market selection by the unavailability of Jordan's services in the marketplace.

Finally, in determining the reasonableness of a restrictive covenant, courts analyze the "uniqueness" of the employee's services.[110] "Uniqueness" has not been interpreted merely as meaning excellence in performance. Rather, "uniqueness" takes into account whether "the employee's services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury."[111] Accordingly, "uniqueness" tends to be a quantitative, rather than a qualitative, analysis. The dispositive inquiry, therefore, is not how well the employee performed, but whether he can be replaced.

Courts have held that such employees as recording stars, who provide unique services for whose absence the market cannot compensate, may be bound by restrictive covenants not to compete.[112] It is unlikely, however, that Jordan's services possessed such irreplaceable attributes. While Jordan was hired to develop Lujan's bond business and probably had developed a reputable expertise in his occupation, it is unlikely that Jordan

108. Kniffin, *supra* note 66, at 32.

109. *See* American Hot Rod Ass'n. v. Carrier, 500 F.2d 1269 (4th Cir. 1974), and R. Milgrim, Milgrim on *Trade Secrets*, § 3.020, 3-16 to 3-25 (1984).

110. *See* Reed, Roberts Assocs. v. Strauman, 40 N.Y.2d 303, 306, 353 N.E.2d 590, 592, 386 N.Y.S.2d 677, 679 (1976).

111. Purchasing Assocs., Inc. v. Weitz, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963).

112. *See* King Records, Inc. v. Brown, 21 App. Div. 2d 593, 252 N.Y.S.2d 988 (1964).

possessed such extraordinary capabilities so as to render him irreplaceable. Jordan's talents, therefore, probably were not of a quantitatively unique nature. A restrictive covenant precluding Jordan from either soliciting or accepting employment from Lujan's clientele was of doubtful reasonableness.

While not thoroughly reasoned, some implications can be drawn from the supreme court's ruling in *Manuel Lujan Insurance, Inc. v. Jordan*. The court clearly did not consider policy which militates against a broad interpretation of employment restrictive covenants. In fact, the court went beyond the explicit prohibition of solicitation to glean that the parties intended to enact a broad prohibition on acceptance of Lujan's customers. For future litigation, therefore, it is unlikely that the court will strictly construe the scope of an agreement not to compete, unless the issue of reasonableness of the covenant is directly before the court.