Wyoming Law Journal

Volume 1 | Number 3 Article 11

December 2019

Restriction on Employee's Use of Confidential Information Gained During Course of Employment

Wilbur O. Henderson

have invariably involved private individuals and were actions in tort for trespass,[11] or nuisance,[12] or for injunctive relief against such torts.[13]

The dissenting justices, Black, J. and Burton, J., were of the opinion that the effect of this decision would be to impose new constitutional barriers upon legislation and regulation pertaining to air commerce, that the old concepts of private ownership of land should not be introduced into the field of air regulation, and that the allegations of noise and glare relied on by the complaint constituted, at best, an action in tort.

The transitory period that followed the introduction of the automobile and the train caused similar difficulties. Domestic animals were frightened at the sight and the sound of the new machines. The airplane is now as much a part of our modern world as either the train or the automobile, and it is believed that fowls will eventually become accustomed to planes in the same manner that domestic animals have become accustomed to other machines.

Since the United States had not given its consent to be sued in tort the complainant based his claim on the constitutional ground of taking of property. However, since this decision has been handed down, Congress has passed the Federal Tort Claims Act[14] which allows actions against the government without its consent where claims are made on account of damage to or loss of property caused by the acts of government employees acting within the scope of their employment.

In view of these premises, since the landowner has not been wholly excluded from the use and enjoyment of his land, and since it is the consequence of the object in flight that has caused the damage, it would seem that granting relief on this constitutional ground may have been premature.

J. L. THORPE

RESTRICTION ON EMPLOYEE'S USE OF CONFIDENTIAL INFORMATION GAINED DURING COURSE OF EMPLOYMENT

Plaintiff spent $240,000.00 on exploration and geological surveys of a portion of Oklahoma, to obtain information which was regarded as confidential. Defendant had been employed as a geologist by plaintiff to help acquire this knowledge, and subsequent to his employment defendant disseminated the information to the general public and plaintiff's competitors. In an action to stop

---

11. Cory v. Physical Culture Hotel Co. (C.C.A. 2nd Cir. 1937) 88 F. (2d) 411, U.S. Av. R. 15; (1938) Hinman v. Pacific Air Transport Co. (C.C.A. 9th Cir. 1936) 84 F. (2d) 755, Cert. denied (1936) 300 U.S. 654, 57 Sup. Ct. 431, 81 L. Ed. 865; Smith v. New England Aircraft Co. (1930) 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300; Burnham v. Beverly Airways (1942) 311 Mass. 628, 42 N.E. (2d) 575.
12. People v. Dycer Flying Service (1939) U.S. Av. R. 21; Vanderslaice v. Shawn (Del. Ch. 1942) 27 A. (2d) 87.
13. Swetland v. Curtiss Airports Corp. (C.C.A. 6th Cir. 1932) 55 F. (2d) 201, 83 A.L.R. 319; Delta Air Corp. v. Kersey (1942) 193 Ga. 862, 20 S.E. (2d) 245; Burham v. Beverly Airways Inc. (1942) 311 Mass. 628, 42 N.E. (2d) 575; Thrasher v. City of Atlanta, (1934) 178 Ga. 514, 173 S.E. 817, 99 A.L.R. 158.
14. Chap. 753, Public Law 601, Title IV, United States Code, Congressional Service (1946).

the further use of such information, the court *held,* that defendant should be enjoined from further disseminating or using any confidential maps, information or other data obtained while working for plaintiff. The law implies a contract on part of an employee not to disclose to others, nor to use to his own advantage and detriment of his employer, any secret process or confidential information which the employee had obtained as a result of his employment. However, defendant was not to be enjoined from practicing his profession as a geologist as long as he did not use the confidential information. *Superior Oil Co. v. Renfroe,* (D.C.W.D. Okla. 1946) 67 F. Supp. 277.

The principle that an employee may be enjoined from disseminating confidential information which he gained during the course of his employment to the general public is well-established,[1] but its application presents difficulties. What is confidential information? Is there an implied contract that an employee will not use confidential information after his employment? Does confidential knowledge constitute a property right? Do good faith and unfair competition form a basis for the proposition? On what legal premise should the rule be sustained?

An express contract that the employee will not compete after employment or disclose confidential information presents little difficulty. Courts grant damages for breach of such contract in the ordinary case.[2] In the absence of an express contract, the authorities are not in accord as to their methods of justifying the principal. Some English courts have implied a contract in the absence of an express contract,[3] while other English cases have held that there is a property right in the information, and on this premise equity compelled the defendant to refrain from utilizing the knowledge.[4] The court in *Measures Brothers, Limited v. Measures*[5] compelled the defendant to return lists of customers which he had taken from his previous employer, in addition to enjoining the defendant from using such information. The court held that the paper was of great value, thus implying a property right in that information. A few cases have granted injunctions on the theory of the existence of a property right in spite of the existence of an express contract not to disclose information after employment.[6] Why the courts resorted to the property theory in a situation in which an ex-

1. Empire Steam Laundry v. Lozier, (1913) 165 Cal. 95, 130 Pac. 1180; Morrison v. Woodbury, (1919) 105 Kan. 617, 185 Pac. 735; Wireless Specialty Apparatus Co. v. Mica Condenser Co., (1921) 239 Mass. 158, 131 N.E. 307, 16 A.L.R. 1170; John Byrne v. Thomas F. Barrett, (1935) 268 N.Y. 199, 197 N.E. 217, 100 A.L.R. 680; Colonial Laundries, Inc. v. John J. Henry, (1927) 48 R.I. 332, 138 Atl. 47, 54 A.L.R. 343.
2. Peabody v. Norfolk, (1868) 98 Mass. 452, 96 Am. Dec. 664; Tode v. Gross, (1891) 127 N.Y. 480, 28 N.E. 469. In both cases the contract provided for liquidated damages in case of a breach of the contract. However a stipulation in a contract fixing the amount of liquidated damages to be recovered for breach of the contract does not prevent specific performance unless the contract manifests an intent to give the defendant the option of paying damages in place of performance of his promise. McClintock, Equity (1936) sec. 58, p. 97.
3. Lamb v. Evans, (1893) 1 Ch. D. 218; Helmore v. Smith, (1885) 35 Ch. D. 449; Yovatt v. Winyard, (1895) 1 J. & W. 394.
4. General Billposting Co. v. Atkinson, (1908) 1 Ch. D. 537; Measures Brothers, Limited v. Measures, (1910) 1 Ch. D. 336.
5. (1910) 1 Ch. D. 336.
6. Peabody v. Norfolk, (1868) 98 Mass. 452, 96 Am. Dec. 664; Salmon v. Hertz, (1885) 40 N.J. Eq. 400, 2 Atl. 379.

press contract existed is difficult to understand. Equally difficult to comprehend is the desire by a few courts to find an implied contract even in cases where an express contract already existed.[7]

In the United States the majority of the cases dealing with the subject of confidential information are concerned with customer lists taken by an employee on termination of his employment and the subsequent use of that information in competition with his previous employer. It has been held that there is no property in such knowledge, for the route may be exploited by any individual.[8] Other cases hold that there may be a property right in a written list of customers and addresses, but that there may not be such property right in the mere knowledge of such list.[9] It seems unreasonable to refuse an employer protection merely because an employee memorized a customer list rather than copying or taking the actual copy. In any respect, although differing in their reasoning, the courts are in accord in granting injunctions if the employee has taken a physical list of customers' names and addresses.[10]

It is submitted that a sales plan or a business scheme is sufficiently analogous to confidential information to be treated by the same principle. However, if there is no fiduciary relationship between the parties, courts will not enjoin the use of a business scheme that has been disclosed to the defendant by the plaintiff.[11] Those courts hold dogmatically that there must be a fiduciary relationship to warrant an implied contract. However, when a case arises in which there exists no fiduciary relationship and no express contract, it would seem that modern business ethics as to prevention of unfair competition would be sufficient for courts to apply some means to grant the plaintiff relief. Inconsistent is the fact that equity will enjoin a third party from dealing with the confidential information when it appears that he had notice of the fiduciary relationship or contract but persists in utilizing that information through the employee to his own advantage and plaintiff's detriment.[12] Certainly there is no fiduciary relationship between the employer and the third person.

The court in the instant case attempted to ascertain just what the term "confidential information" included. The attempt demonstrated that it cannot be done concretely. Geologists, recognized as experts in the field in which the plaintiff was engaged, testified that any information of which the employer might

7. Eastman Kodak Co. v. Reichenbach, (1892) 29 N.Y. Supp. 1143, 79 Hun. 183; Thum Co. v. Tlozynski, (1897) 114 Mich. 149, 72 N.W. 140
8. Kansas City Laundry Service Co. v. Jeserich, (1923) 213 Mo. App. 71, 247 S.W. 447.
9. Garst v. Scott, (1923) 114 Kan. 676, 220 Pac. 277, 34 A.L.R. 395; Federal Laundry Co. v. Zimmerman, (1922) 218 Mich. 211, 187 N.W. 335; Grand Union Tea Co. v. Dodds, (1910) 164 Mich. 50, 128 N.W. 1090.
10. Stevens & Co. v. Stiles, (1909) 29 R.I. 399, 71 Atl. 802, 20 L.R.A. (N.S.) 933; French Bros. Bauer Co. v. Townsend Bros. Milk Co., (1925) 21 Ohio App. 177, 152 N.E. 675; John Davis & Co. v. Miller, (1918) 104 Wash. 444, 177 Pac. 323; People's Coat, Apron & Towel Supply Co. v. Light, (1916) 157 N.Y. Supp. 15, 171 App. Div. 671.
11. Haskins v. Ryan, (1906) 71 N.J. Eq. 575, 64 At. 436; Bristol v. Equitable Life Assurance Soc. of United States, (1892) 132 N.Y. 264, 30 N.E. 506; Stein v. Morris, (1916) 120 Va. 390, 91 S.E. 177.
12. Westervelt v. National Paper & Supply Co., (1900) 154 Ind. 673, 57 N.E. 552; Stone v. Goss, (1903) 65 N.J. Eq. 756, 55 Atl. 736; Macbeth-Evans Glass Co. v. Schnelbach, (1913) 239 Pa. 76, 86 Atl. 688.

have exclusive control, and which would be detrimental to him if utilized by a competitor, would be confidential information. This seems to be the best treatment of the subject. By applying the test of whether or not such information would be detrimental to the employer if utilized by a competitor, a distinction might be made between confidential information and mere general business knowledge which an employee would of necessity acquire from exposure to his work.

There has been a tendency to extend the laws relating to confidential information into the laws against unfair competition.[13] In the last analysis it is suggested that this remedy should be extended to apply to this problem. Recognizing this, some cases have implied a contract or relied on the property theory but emphasized as well that such conduct on the part of the defendant should constitute unfair competition.[14]

WILBUR O. HENDERSON

13. John Davis & Co. v. Miller, (1918) 104 Wash. 444, 177 Pac. 323.
14. See Witkop & Holmes Co. v. Boyce, (1908) 112 N.Y. Supp. 874, 878, 61 Misc. 126; Empire Steam Laundry v. Lozier, (1913) 165 Cal. 95, 130 Pac. 1180, 1183.