LEGAL WRITING INSTITUTE
WORKSHOP ON CRITIQUING STUDENT WORK
Led by Megan McAlpin and Joan Rocklin, University of Oregon School of Law
Philadelphia, Pennsylvania
July 1, 2014

MATERIALS

1. Introduction and Directions
2. Memorandum from Partner
3. Summary of Analysis
4. Billings v. Paris Fashions
5. Daniels v. Daniels
6. Klinger v. Hamilton
7. Wilson v. Foster

SCHEDULE

Morning
9:30-10:15 The First Draft: Critiquing Organization and Analysis
10:15-10:30 Break
11:00-12:15 Small Group Sessions: Practice Critique

Afternoon
1:15-2:00 Small Group Sessions: Discuss Critique
2:15-2:30 Break for Spotlight Presentation and Golden Pen Award
4:15-5:00 Efficiency and Consistency: The Eternal Quest
INTRODUCTION AND DIRECTIONS

Goal of the Workshop

The goal of the Workshop on Critiquing Student Work is to introduce basic critiquing strategies to new writing professors. The workshop aims to mirror the actual process by which an LRW professor provides feedback to a student.

Workshop Method

The workshop will begin with a discussion of critiquing strategies to give effective written feedback on student-written work. After the discussion, participants will critique a sample student draft of an objective memo based on the materials included in this packet and then break into small discussion groups to discuss the critique. The morning sessions focus on critiquing organization and analysis. During the afternoon, participants will attend a presentation about grading and commenting efficiently.

Objective Memorandum for Workshop Critique

The sample student draft will be a portion of an objective memo addressing the enforceability of a non-competition clause in an employment agreement. The problem is a common law problem in a mythical jurisdiction with four relevant cases.

Preparing for the Workshop

Please read the memorandum from the partner assigning the problem to the student and the four cases. Each court’s analysis includes two major issues: (1) whether the employer has a “legitimate interest” in restricting an employee and (2) whether the covenant “reasonably protects” that legitimate interest. The student sample (which you will critique during the workshop) will address only the issue of whether the employer has a “legitimate interest.” Please focus on that issue in preparing for the critique. To assist you, I have included a quick summary of the analysis with the cases.
MEMORANDUM

TO: Associate
FROM: Abigail Lopez
RE: International Tools, Inc: Non-competition Agreement
DATE: May 20, 2014

Our client, International Tools, Inc., would like to hire Chris Oliver as a sales representative. Chris Oliver, however, currently works for Midwestern Farm Equipment, and his contract with Midwestern contains a non-competition clause. International Tools would like to know whether the non-competition clause would prevent Mr. Oliver from working for International Tools.

The non-competition clause in Mr. Oliver’s employment contract prevents him from

working as a sales representative for another farm equipment distributor in the State of Hamilton for two (2) years after termination of employment with Midwestern.

International Tools does distribute farm equipment and is located in Hamilton. International Tools distributes Chinese-built farm equipment to dealers in Hamilton and throughout the United States. The dealers then sell the farm equipment to individual farmers. (Midwestern sells the same type of farm equipment to dealers, but Midwestern sells domestically manufactured farm equipment.)

To help me advise International Tools, please write a memo explaining whether Midwestern Tools will be able to enforce the non-competition agreement against Mr. Oliver. Please focus on whether Midwestern has a legitimate interest. Another associate has researched and will write about the other issues. Hamilton does not have a statute dealing with non-competition clauses in employment agreements, and, unfortunately, the case law is limited. I have provided you with the four cases that appear to be on point. Please rely on those cases for your analysis.

Here’s the information I obtained from the client that I think will be relevant to your discussion.

- Mr. Oliver started with Midwestern in 2000 and has been servicing most of his customers for at least 6 years.
- In Mr. Oliver’s capacity as a Midwestern sales representative, he makes all contacts with his customers. If a dealer needs technical assistance when servicing the equipment, the dealer calls Midwestern’s technical support department.
- Mr. Oliver visits his customers about once a month. During those visits he
determines whether Midwestern’s farm equipment has been selling well and whether customers of the dealer have been reporting any mechanical difficulties.

- Mr. Oliver is not a personal friend of any of his customers.
- Mr. Oliver had no experience selling farm equipment before he took the job with Midwestern. After he took the job, Midwestern provided on-the-job training for about two years.

Please let me know if you have any questions.

              AZL
SUMMARY OF THE LAW

This is a summary of Hamilton’s law regarding an employer’s legitimate interest in restricting an employee’s future work. This summary is provided so that you can more easily critique a student analysis about whether Midwestern Farm Equipment has a legitimate interest in restricting Chris Oliver’s employment opportunities.

Enforceability of a Covenant Not to Compete. Hamilton courts have established a balancing test to assess the validity of a non-competition agreement. On one side of that balance is the employee’s right to earn a living. On the other side of that balance is the employer’s right to protect itself from an employee who wishes to use an advantage gained during employment to compete against the employer. Hamilton courts balance these interests by requiring the employer to show that it has a “legitimate interest” in restricting the employee from working. If the employer can show it has a legitimate interest, then the court requires that the restrictions reasonably protect that legitimate interest. (The student sample focuses on the employer’s legitimate interest.)

Legitimate Interest. An employer has a legitimate interest in restricting an employee’s future work if the employee has acquired enough of a “personal hold” on the employer’s customers that the customers would likely follow the employee to a competitor. To determine whether an employee has established a personal hold, Hamilton courts consider the “totality” of the employee’s relationship with the customers, including whether the employee was the exclusive or primary contact with the customers, the regularity and frequency of the employee’s contact with the customers, and the duration of the employee’s relationship with customers.

Reasonableness of Restrictions. Not included because the student sample will not address this issue.
William BILLINGS
v.
PARIS FASHIONS, Inc.

Supreme Court of Hamilton.

April 2, 1965.

MURPHY, Justice.

Factual Background
Plaintiff operates a chain of clothing stores in several large cities around the country. The defendant became the manager of the plaintiff’s store in Mercy Springs on April 4, 1960. At the time the defendant was hired, he signed an employment agreement that included a noncompetition clause. The clause provided that the defendant would not directly or indirectly enter into or engage in the same business as plaintiff in the city of Mercy Springs for a period of four years after his employment with plaintiff ceased. The defendant’s main responsibilities were to assist customers who came into the store to buy clothing. He was also responsible for managing the other store employees. At most times, the store was staffed with a minimum of 10 salespeople. In March, 1963, the employee quit his job with plaintiff and opened a competing clothing store in Mercy Springs. The employer filed this action to enjoin defendant from carrying on that business in the city of Mercy Springs. The trial court dismissed the action. The plaintiff appeals.

Discussion
The question is whether the noncompetition clause in the employment agreement is enforceable. In this connection it should be immediately recognized that the agreement is one in partial restraint of trade since it limits the right of a party to work and to earn a livelihood. Such contracts are looked upon with disfavor, cautiously considered, and carefully scrutinized. Arthur Murray Dance Studios v. Witter, Ohio Com.Pl. 62 Ohio L.Abst. 17, 105 N.E.2d 685. This approach has been influenced by a concern for the average individual employee who, as a result of his unequal bargaining power, may be found in oppressive circumstances. It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable. On the other hand, it is important to allow businesses to protect themselves from unfair competition. Accordingly, the enforceability of each such clause must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee.

*101 Therefore, the test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer’s legitimate interest, in terms of the time, territory, and subject matter. 35 Am.Jur., Master and Servant, s 99; 36 Am.Jur., Monopolies, Combinations, and Restraint of Trade, ss 78 and 79. See, Combined Ins. Co. v. Bode, 247 Minn. 458, 77 N.W.2d 533. This case fails the first part of this test. A restraint is necessary for the protection of
the employer when the employee obtains a personal hold on the employer’s customers. In this case, the plaintiff is unable to show that defendant had such a relationship with its customers. Plaintiff’s business is selling men’s and women’s clothing to walk-in customers. The employee did not meet with the same customers regularly. Any salesperson could assist the customers when they walked into the store. If an employee’s job requires him to work with the same customers regularly, those customers may be attracted to him personally, and therefore are likely to go with him should he enter the service of a competitor. The employee in this case did not have that type of relationship with the employer’s customers.

Because the employer did not have a legitimate interest in restricting the employee, there was no need for a noncompetition clause. Therefore, we do not need to analyze the reasonableness of the restrictions.

Affirmed.
WAHL, Justice.
Richard Daniels (the “employee”) brought suit against Daniels, Inc. (the “agency”) seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. After a trial, the district court held that the clause was enforceable. The employee appeals.

Factual Background
The agency is a family-run insurance company. The employee is the eldest son of the owner, Everett Daniels. The employee began working for the agency in June 1967. At the beginning of his employment, the employee signed an employment agreement that included a non-competition clause. The non-competition clause precluded the employee, upon termination of his employment with the agency for any reason, from engaging in the insurance business for a period of five years within a 50-mile radius of Minneapolis, St. Paul, or Duluth.

Over a period of years, the employee was trained and acquired expertise in the sale of probate and court bonds. As the employee was entrusted with greater responsibility, the father phased himself out of that part of the business. By 1972, the employee was in charge of the agency’s bond business and was often the exclusive contact between the agency and its bond customers. He met most of his clients a few times each month. Most of the bond clients had been clients for several years.

Due to a conflict between the employee and his father about the business, the employee left the agency on January 13, 1978. At the time of trial, the employee had not accepted employment with any other insurance agency.

Discussion
The only question in this appeal is whether the non-competition clause was enforceable. The test of enforceability of a non-competition clause in an employment agreement was well stated in Billings v. Paris Fashions, 316 N.E.4th 100, 101 (1965):

"[T]he test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer’s legitimate interest, in terms of the time, territory and subject matter.

*311 In this case, the trial court found the agency had a protectable interest in its client relationships and the non-competition clause reasonably protected that interest. We agree and affirm the trial court’s decision.

In Billings, the court found that the employer did not have a protectable interest in restricting the employee from working because the employee did not have a personal hold on the employer’s clients. This case is very different. Here, the employee was the exclusive contact with his customers for a long period of time, meeting with them often. See Billings, 316 N.E.4th at 101.

[Analysis of the reasonableness of the agreement deleted.] Affirmed.
(Cite as 545 N.E.4th 619)

Thomas W. KLINGER

v.

HAMILTON STATE BANK

Supreme Court of Hamilton

Aug. 6, 1985.

LESLIE, Justice.

Plaintiff brought suit seeking declaratory judgment declaring a non-compete clause in his employment contract to be unenforceable. After a trial on the matter, the district court held that the clause was unreasonable and therefore invalid. The defendant appeals.

Factual Background

In October of 1983, Hamilton State Bank (defendant) and Thomas W. Klinger (plaintiff), entered into an employment contract. Under the terms of the written contract the plaintiff would become a vice president responsible for servicing commercial accounts. The employee was the only employee of the bank who called on the commercial clients. He met with his clients several times a month. The employment contract contained a non-competition clause. Under the provisions of this clause, the plaintiff could not accept employment with any financial institution within a defined trade area for a period of three years following termination of his employment.

Approximately four months after the plaintiff began working for the defendant he received what he considered a better offer from another bank and asked to be released from his contract with the defendant. The defendant refused. The plaintiff immediately brought this suit to declare the non-competition clause invalid. Following a trial, the court entered judgment declaring that the non-competition clause was unenforceable. The defendant appeals, claiming that the clause was reasonable and enforceable. Because we find the defendant’s arguments unpersuasive, we affirm.

Discussion

Non-competition clauses like the one involved here have long been carefully scrutinized by courts and have been traditionally disfavored as restraints on an individual’s ability to make a living. See Billings v. Paris Fashions, Inc., 316 N.E.4th 100 (1965). As we said in Billings: “[o]ne who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable.” However, a court may enforce a non-competition clause if it is necessary to protect reasonable interests of an employer, and does not impose unreasonable restraints on the rights of the employee. Billings, 316 N.E.4th at 100, 101.

Defendant argues that the restriction imposed was necessary to protect the interests of the bank. We disagree. The defendant did not have a legitimate interest in restricting the plaintiff. The relevant inquiry is whether the employee had a personal hold on the defendant’s customers like the employee in Daniels.
515 N.E.4th 310 (1980). Although the regularity and quality of contacts the plaintiff had with the defendant’s customers is similar to the type of relationship we found sufficient in Daniels, in that case the employee worked with the employer’s customers for several years. Here, the plaintiff did not have a personal hold on the defendant’s customers. He worked for defendant for only four months before being discharged. Therefore, he established no special connections with the bank’s customers as a result of his employment. It is unlikely that any of the defendant’s customers would follow the plaintiff to a competitor. See Daniels, 515 N.E.4th at 310-11. Affirmed.
LANSING, Justice

Plaintiff brought suit seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. The district court held that the clause was reasonable and therefore valid. The plaintiff appeals.

Factual Background
Wilson’s custom publishing division creates, designs, prints and distributes custom magazines for companies across the United States. Wilson is one of approximately 12 major national custom publishers, although there are several smaller operations. In January 1980 Wilson hired Neal Foster, who had 27 years of experience in marketing, as an account executive. Foster solicited business and assisted Wilson’s clients in developing marketing strategies, spending at least one day a month with each customer. Foster was the primary contact between Wilson and all of the clients to which he was assigned. Most of his clients had been doing business with Wilson for at least five years. On September 28, 1987, Wilson terminated Foster’s employment, allegedly because his aggressive style conflicted with corporate policy. In October 1987 Foster joined another custom publishing corporation. Wilson threatened action based on the following non-competition clause that was included in the employment agreement Foster signed at the time he was hired:

For a period of 18 months from termination of employment, I shall not, directly or indirectly, engage in or solicit or have any interest in any person, firm, corporation, or business that engages in or solicits, the publication or marketing of any custom publication, promotion piece, catalog, calendar, or any other printed material for any customer that has done business with the custom publishing division of Wilson within the period of one year immediately prior to my termination of employment.

Foster brought this action seeking a declaratory judgment that the non-competition clause is unenforceable. After a trial, the trial court found that the clause is enforceable. Foster appeals.

Discussion
Because restrictive covenants are agreements in restraint of trade, we have consistently held that such agreements should be strictly construed. Therefore, they are enforced only to the extent reasonably necessary to protect the goodwill of the employer. Billings v. Paris Fashions, Inc., 316 N.E.4th 100, 101 (1965). Foster argues that the noncompetition agreement does not protect any legitimate interest of Wilson’s because he did not have a sufficiently close relationship with
Wilson’s customers. He also argues that the agreement itself is unreasonable in scope and duration. We disagree.

(1) Client relationships. Employers have a legitimate interest in protecting themselves against the deflection of customers by their employee if the employment has provided the employee with the opportunity to establish a personal hold on the employer’s customers. *Billings*, 316 N.E.4th at 101. Although Foster disavows any “sensitive relationship” with his customers, the totality of Foster’s relationship with Wilson customers was sufficient to give Wilson a legitimate interest in protecting itself against him. Foster worked regularly for at least five years with most of his clients. He was the primary contact between the business and the customers. Clearly, it was likely that his customers would follow him to a competitor. Therefore, he had a personal hold on the employer’s customers. *See Klinger v. Hamilton State Bank*, 545 N.E.4th 619, 620 (1985) (evidence showed that employee did not develop any special relationships with customers).

(2) Reasonableness of restriction. The subject matter, temporal duration and geographic area of the restriction do not appear unreasonable, given the national character of Wilson’s business and the time required to establish a relationship between Foster’s former customers and his replacement. *See Klinger*, 545 N.E4th at 620.

Affirmed.