

Abstract

This paper presents a case brief of the case between Nike, Inc. v Eugene McCarthy where the former accuses the later for bridging a non-compete agreement signed between the two. There are several factors and provisions of the law that the court looked at before coming to the conclusion. The aim of the paper is to identify the facts of the case, the issues presented, the holding of the court, and the rationale for that holding.

Key words: non-compete, plaintiff, court, employer, employee

Title: Case Brief

Citation Information: United States Court of Appeals, Ninth Circuit. *NIKE, INC., Plaintiff-Appellee, v. Eugene McCARTHY, Defendant-Appellant. No. 03-35818*

Facts of the Case

Nike had employed McCarthy in their accounts department. The agreement of non-compete between the two parties restrained McCarthy from engaging in any businesses that are related to what Nike Was engaged in or which were a competition to Nike's subsidiaries. McCarthy had an agreement of non-compete with his employer, Nike before getting another job with a different employer. The non-compete agreement requires that an employer cannot work for another competing company one year after them willingly, or through any other means, leave their current job.

McCarthy had not violated this agreement even after he was chosen as the regional sales officer for Reebok, a fierce competitor of Nike, because the new employer had not confirmed McCarthy's employment status. McCarthy is a party to the agreement of non-compete which is established under the Oregon Revised Statute of agreement between employer and employee.

McCarthy's bona fide advancement was not clearly defined as he worked for the competing company for some time, before getting the Offer Letter and starting to earn official salary.

The non-compete agreement does not provide room even for consultancy services to which McCarthy might have claimed that he was working a personal capacity to give services to the Reebok.

There was the question on the power of the district court to reinforce the preliminary injunction on matters that took place several years ago and whose agreement was stipulated to expire within one year of the matter taking place. The non-compete signed between McCarthy and Nike stipulated a period of 1 year since the bona fide advancement that happened in 1997. The court put a preliminary injunction in 2004 (*NIKE, INC., Plaintiff-Appellee, v. Eugene McCARTHY, Defendant-Appellant, 2004*).

Issues Presented

At the time McCarthy was accepting employment from Nike, was he still confined under the non-compete agreement with his former employer? What does bona fide advancement imply when it comes to enforcing the non-compete agreement between the employer and the employ?

McCarthy was accessed to Nike's confidential information could be used against the plaintiff. The non-compete agreement required an employee not to engage in any competing business that would affect the sales or the operations of the employer.

There is confusion in the understanding of what constitutes a bona fide advancement because McCarthy argues that his move to Reebok falls was under bona fide advancement and, therefore, he is not bound by the non-compete agreement.

If McCarthy had not worked for Reebok for sometime before getting the letter of offer, the non-compete agreement would not have applied. However, since he engaged in some consultative work prior to getting the letter of offer, he, potentially, gave out consultancy services to Reebok while still bound by the non-compete agreement with his employer. It means that he was still bound by that particular agreement (Twomey & Jennings, 2010).

The Holding

McCarthy had worked in a position that allowed him to access very confidential information at Nike and, therefore, the case was put in favor of Nike to enforce the non-compete agreement with the defendant. As accounts manager who had rose through the ranks, McCarthy had access to information. They include; strategic plan, specific launch dates, lists of customers, and new products ordered six months before they are produced.

The fact that McCarthy's position at Nike enabled him to access confidential information meant that he had an unfair advantage and, therefore, possibility of interfering with the former employer's business. Thus, he was restraint through the non-compete agreement not to participate in any competing business.

Citing *Kelite*, 294 P.2d at 329 the court argued that McCarthy could take advantage of the knowledge of his former employer's confidential information to take unfair advantage in doing business. This was a sufficient reason to restrain him from engaging in a competing business with Reebok

McCarthy had argued that Nike failed to show that it had protectable interest in the information or knowledge that McCarthy held in terms of experiences and skills even though Nike had spent a lot on job-training. The plaintiff had protectable interest because the defendant had access to confidential information that the plaintiff demonstrated that it could be used against him.

The court refused to consider McCarthy 'argument that non-compete with his employer lacked proper statutes to enable enforcement because he failed to present the argument that could satisfy the court. This was because his main argument was that the court had erred in setting the preliminary injunction in 2004 based on the restriction of one year provided in the non-compete agreement (Twomey & Jennings, 2010).

The Rationale

The court argued that McCarthy had the obligation to honor the non-compete agreement because he did not leave immediately to work for Reebok but engaged in activities that were prohibited under the agreement.

The plaintiff argued that the defendant had important information relating the business which was acquired during the time of his employment at the company. Acting in the position of director of sales, McCarthy acquired knowledge about the launch dates, product allocation, new product development, product orders and strategic sales plans that split into three years. The information that the defendant was accused to have was not general in the sense of the business industry.

The defendant noted that the acquisition of confidential information was not a sufficient reason to justify the enforcement of the non-compete agreement arguing that the plaintiff had failed to show a substantial risk resulting from his having the information. The court found that the actual use of information was not a prerequisite for enforcement of a non-compete clause

Nike proved that the matter was within its protectible interest, arguing through one of its executives that indeed McCarthy was accessed to confidential information such as strategic plans, launch dates, and customer lists that could be potentially used against it.

The defendant failed to show that the issue at hand was a concern of bona fide advancement and unfair competition as opposed to non-compete agreement, which had heavier reprisals than the former two.

It was argued that an employee's knowledge about confidential information is a reason to justify the reinforcement of the non-compete agreement. The court had determined that indeed, a substantial risk existed that could allow the defendant to divert part of the employer's business information to other unrelated purposes.

The court, basing on the cases of *Volt Servs. Group v. Adecco Employment Servs., Inc.*, 178 Or.App. 121, 35 P.3d 329, 334 (2001) determined that customers contacts were of essence to any business that they formed a protectible interest. It was especially so in a case where the nature of the contact can be used to divert all or part of the customer's business. The court found that McCarthy had access to confidential information like the product allocation, product development, and sales strategies that were substantially putting the Nike at a risk of losing customers (Oregon Injunction Law, 2012).