IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

LABOR READY, INC.	: DECEMBER TERM 2000
v.	: No. 3264
TROJAN LABOR and SALLY CZEPONIS	:
	: Control No. 121759

O R D E R

AND NOW, this 25th day of January 2001, upon consideration of the Petition of plaintiff, Labor Ready, Inc., for a Preliminary Injunction, the response of defendant, Sally Czeponis, all relevant documentation and after a full hearing and oral argument, and in accord with the Findings of Fact, Discussion and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that the Petition is **Denied**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION

ALBERT W. SHEPPARD, JR., J. .... January 25, 2001

These Findings of Fact, Discussion and Conclusions of Law are being filed contemporaneously with, and in support of this court's Order denying the plaintiff's Petition for a Preliminary Injunction.

BACKGROUND

Plaintiff-petitioner, Labor Ready, Inc., seeks to enforce a restrictive covenant against its former employee, defendant-respondent, Sally Czeponis ("Czeponis"). Labor Ready provides temporary laborers to various industries. Czeponis worked for Labor Ready for six months. In the last two months of employment, she was Labor Ready's coordinator for its client Metro Machine. Metro Machine refurbishes ships at the Philadelphia Navy Yard. As a coordinator, Czeponis called Labor Ready's branch officers to request workers for the Metro Machine site, she signed those workers in and out, and she filled out weekly invoices for the hours that they worked.

On November 18, 2000, Labor Ready terminated Czeponis, alleging that Czeponis was behind on her invoicing. Labor Ready has since alleged that Metro Machine was dissatisfied with Czeponis. Czeponis then went to work for Labor Ready's competitor, Trojan Labor. Like Labor Ready, Trojan Labor provides temporary workers to Metro Machine at the shipyard. Czeponis did essentially the same job for Trojan Labor that she did for Labor Ready.

Labor Ready sued Czeponis alleging breach of the restrictive covenant, misappropriation of trade secrets and tortious interference. Labor Ready also seeks a preliminary injunction barring Czeponis from working for Trojan Labor.[1]

The court denies the petition. There are no trade secrets at issue in this case. Where no trade secrets are at issue, an employer may not enforce a restrictive covenant against an employee fired for poor performance. The following Findings of Fact, Discussion and Conclusions of Law are submitted in support of this court's contemporaneous Order.

[1]Labor Ready also sued Trojan Labor. In response, Trojan Labor terminated Czeponis and Labor Ready discontinued its action against Trojan Labor. (N.T. 5, 53, 196-97). Trojan Labor will likely rehire Czeponis if the court denies the injunction. (N.T. 53, 196).

FINDINGS OF FACT

1. Plaintiff, Labor Ready, is a State of Washington corporation with three branch offices in Philadelphia, Pennsylvania: South Philadelphia, Center City and West Philadelphia. (Ex. P-5; N.T. 13, 16).

2. Labor Ready provides temporary labor to various industries. One of Labor Ready's clients is Metro Machine. Metro Machine refurbishes ships at the Philadelphia Navy Yard ("shipyard"). (N.T. 18). Labor Ready provides fire watchers and laborers to Metro Machine. (N.T. 13).

3. Defendant, Sally Czeponis, began working for Labor Ready in May 2000 as a Manager in Training. (N.T. 10-11). She signed an "Employment Contract and Statement of At Will Employment." (Ex. P-5; N.T. 62).

4. The employment contract contained the following non-competition and non-solicitation agreement:

> It is understood and agreed that the nature of the methods employed in Company's business is such that Employee will be placed in a close business and personal relationship with the customers of Company. Thus, during the term of this Employment Contract and for a period of one (1) year immediately following the termination of Employee's employment, for any cause whatsoever, so long as Company continues to carry on the same business, said Employee shall not, for any reason whatsoever, directly or indirectly, for him/herself or on behalf of, or in conjunction with, any other person, persons, company, partnership, corporation or business entity:
>
> (a) Call upon, divert, influence or solicit or attempt to call, divert, influence or solicit any customer or customers of Company;
> (b) Divulge the names and addresses or any information concerning any customer of Company;
> (c) Own, manage, operate, control, be employed by, participate in or be connected in any manner with the ownership, management, operation or control of the same, similar, or related line of business as that carried on now by Company within a radius of ten (10) miles from Company's office at which Employee was last employed; and
> (d) Make any public statement or announcement, or permit anyone else to make any public statement or announcement that Employee was formerly employed by or connected with Company.
>
> * * *

(Ex. P-5, ¶ 15).

5. The employment contract contained a confidentiality agreement:

> Employee agrees not to disclose any Confidential Information to others, use any Confidential Information for his/her own benefit or make copies of any Confidential Information without the express written consent of an officer of Company. Employee further agrees that upon request of an officer of Company, he shall immediately return all Confidential Information, including any copies of Confidential Information in his/her possession.

(Ex. P-5, ¶ 13).

6. The employment contract defines Confidential Information as including:

> (a) The ideas, methods, techniques, formats, specifications, procedures, designs, systems, processes, data and software products which are unique to Company;
> (b) All customer, marketing, pricing and financial information pertaining to the business of the Company;
> (c) All operations, sales and training manuals;
> (d) All other information now in existence or later developed which is similar to the foregoing; and
> (e) All information which is marked as confidential or which, by its nature, is confidential.

(Ex. P-5, ¶ 11).

7. Czeponis' salary was $36,000 per year. (Ex P-5, ¶ 7; N.T. 12, 100, 103, 182-83).

8. The employment contract stated that it "shall be governed and construed in accordance with the laws of the State of Washington." (Ex. P-5, ¶ 21).

9. Czeponis received six weeks of manager training. The training included taking applications, paying wages, assigning jobs to workers, doing weekly inventory and closing. (N.T. 11, 180). She then worked for two and a half months as a branch manager in the West Philadelphia. (N.T. 180). Her duties as a branch manger were administration and sales. (N.T. 180-82).

10. On September 18, 2000, Labor Ready transferred Czeponis from the management position to a coordinator position at the shipyard. (N.T. 13, 15, 103).

11. Czeponis worked on site in a trailer outside Metro Machine's shipyard facility and in the shipyard contractors' lunchroom. (N.T. 16-17).

12. Czeponis' duties were calling Labor Ready's local offices to ask for workers, signing workers in and out, giving workers equipment, checking on board the ship to see that workers were in place, and preparing invoices for the hours that workers worked. (N.T. 13, 16, 17-18, 20, 22-23, 84-88).

13. Czeponis knows various aspects of Labor Ready's business. She knows the hourly bill rates that Labor Ready charges Metro Machine. (N.T. 27-28). She knows the hourly pay rates that Labor Ready pays the workers. (N.T. 30). She knows how Labor Ready invoices Metro Machine for those workers. (N.T. 24-31).

14. As a coordinator, Czeponis did not have access to the Labor Ready's computer network. (N.T. 119-20, 185). She does not know Labor Ready's overhead costs, Workers Compensation costs or drug screening costs. (N.T. 29-32).

15. Czeponis knows the identities of many of Labor Ready's temporary workers. (N.T. 21-22).

16. Jordan Morris -- Labor Ready's District Manager for the district in which Czeponis worked -- terminated Czeponis on Friday, November 17, 2000. (N.T. 33-34, 61, 72, 78).

17. The reason for the termination was that Czeponis was three weeks behind in her invoicing. (N.T. 36, 73). In addition, Morris believes that Metro Machine was "absolutely" unhappy with Czeponis' performance. (N.T. 129).

18. Morris told Czeponis that he might have a position for Czeponis at a different Labor Ready site, but that he would not know about it until the following Wednesday. (N.T. 36-38, 80-83). Czeponis told Morris that she was not interested in the new position. (N.T. 39, 83).

19. The week after her termination, Czeponis sought work with Trojan Labor. (N.T. 40).

20. Trojan Labor provides temporary workers to Metro Machine at the shipyard. (N.T. 45-46).

21. On November 22, 2000, Czeponis began working for Trojan Labor. (N.T. 190).

22. Czeponis did essentially the same job for Trojan Labor that she did for Labor Ready. (N.T. 45-47).

23. Czeponis was not involved with negotiating Metro Machine contracts or setting Metro Machine bill rates while working for Labor Ready or Trojan Labor. (N.T. 47).

24. The number of workers that Labor Ready supplied to Metro Media decreased in December 2000. (N.T. 90-91, 149-52).

25. Czeponis did not sign up any of Labor Ready's workers to work for Trojan Labor. (N.T. 52-53).

DISCUSSION

Labor Ready's complaint has three counts: (1) breach of contract, (2) misappropriation of trade secrets, and (3) tortious interference with business relations. The employment contract designates Washington law as governing interpretation of the contract. The court will apply Washington law to Labor Ready's contract claim and Pennsylvania law to Labor Ready's common law tortious interference claims. Since Labor Ready may be basing its trade secret claim on the confidentiality agreement in the contract and on the common law of trade secrets, the court will analyze that claim under both Pennsylvania and Washington law.

"[A] preliminary injunction is a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). The court may grant the injunction only if the moving party establishes, among other things, a clear right to relief for an actionable wrong. School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 542 Pa.

335, 667 A.2d 5, 6 n.2 (1995); New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978). To have a clear right to relief in this situation, Labor Ready must show that the covenant is enforceable, that Czeponis misappropriated trade secrets, or that Czeponis tortiously interfered with Labor Ready's relationship with Metro Machine. Because Labor Ready has not made such a showing, the court must deny the petition.

I. LABOR READY HAS NOT SHOWN THAT IT HAS TRADE SECRETS OR THAT CZEPONIS MISAPPROPRIATED THOSE TRADE SECRETS.

Labor Ready argues that the court should grant the injunction to protect Labor Ready's trade secrets. The court disagrees. Labor Ready has not met its burden of showing that Czeponis knows Labor Ready's trade secrets.

The court need not decide whether Pennsylvania law or Washington law applies to Labor Ready's trade secret claim, because the law of either state would yield the same result. With or without a confidentiality agreement, Labor Ready is entitled to protect its trade secrets from disclosure. Bell Fuel Corp. v. Cattolico, 375 Pa.Super. 238, 544 A.2d 450, 458 (1988); Ed Nowogroski Ins., Inc. v. Rucker, 971 P.2d 936, 941-42 (Wash. 1999) (en banc). Whether particular information is a trade secret is a factual question, and Labor Ready, as the plaintiff, has the burden of proving that trade secrets existed requiring legal protection and that Czeponis misappropriated the trade secrets. Christopher M's Hand-Poured Fudge, Inc. v. Hennon, 699 A.2d 1272, 1275 (Pa.Super. 1997); West Mountain Poultry Co. v. Gress, 309 Pa.Super. 361, 455 A.2d 651, 652 (1983); Ed Nowogroski Ins., Inc., 971 P.2d at 941; 19 Rev.C.Wash Ann. §19.108.010.

Labor Ready has not met its burden. In Pennsylvania and Washington, trade secrets must be the particular secrets of the complaining employer, rather than information generally known in the trade or readily ascertainable through proper means. See Spring Steels, Inc. v. Malloy, 400 Pa. 354, 162 A.2d 370, 372-73 (1960) (finding that steel manufacturing process was not a trade secret where other firms besides plaintiff used the process); Renee Beauty Salons v. Blose-Venable, 438 Pa.Super. 601, 652 A.2d 1345, 1349-50 (1995) (finding that lists of hair salon's customers' names, telephone numbers and styling preferences were not protectible trade secrets because the information was easily obtainable through a number of sources); Rev. C. Wash. Ann. § 19.108.010(4)(a) (defining trade secret, in part, as "information . . . that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use . . . "); Boeing Co. v. Sierracin Corp., 738 P.2d 665, 674 (Wash. 1987) (en banc) (stating that trade secret law protects information that is novel and undisclosed). Though the petition includes an impressive list of items that Labor Ready argues need protection,[2] the hearing testimony showed that the Labor Ready information to which Czeponis had access was generally known in the temporary labor industry or readily ascertainable through proper means.

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[2]Those items are:

> unique, confidential business practices, models and data; customer lists; the names of key individuals within the organization of customers and potential customers relating to the particular needs of those customers and potential customers; customer habits and preferences; special needs and requirements of customers; recruiting methods; training methods; site selection models; compensation models; dispatch office layouts; pricing data; computer software and hardware; formats; manuals; methods and techniques of operation and training; and personnel files on all of its employees and marketing strategies.

Petition, ¶ 7. The employment contract also has a list of confidential information. Ex. P-5, ¶ 11. The court rejects any notion that a plaintiff might satisfy its burden in a trade secrets case merely by having the employee agree in the employment contract that trade secrets exist, or merely by averring in the petition that trade secrets exist and generally describing that information, without offering evidence of the trade secrets themselves and evidence that the defendant had access to the trade secrets.

The court is skeptical, then, when an employer attempts to have an unrepresented workaday employee agree that certain yet unseen information is a trade secret.

Czeponis knows what Labor Ready pays its workers per hour, but this information is available simply by asking those workers what they earn. Czeponis knows Labor Ready's invoicing practices, but Labor Ready offered no evidence of how its invoicing practices are different from other firms' invoicing practices. Czeponis knows the identities of Labor Ready's workers, but this information is available simply by screening workers at the shipyard lunchroom. She knows the identities of certain Metro Machine personnel, but this information is available simply by calling Metro Machine. See Fidelity Fund, Inc. V. DiSanto, 347 Pa.Super. 112, 500 A.2d 431, 437 (1985) (holding that customer information is not protectible as a trade secret if a competitor would "merely need to contact the customers to get such information.").

At best, the only secret that Czeponis knows is the bill rate: the amount Labor Ready charges Metro Machine per worker per hour. Morris testified that Labor Ready does not know Trojan Labor's bill rate. The court is skeptical of Labor Ready's claim that the bill rate is a secret. It would be in Metro Machine's interest to disclose Labor Ready's bill rate to Trojan Labor and Trojan Labor's bill rate to Labor Ready in order to drive down the bill rate. Even if it were a secret, Czeponis' knowledge of Labor Ready's bill rate, alone, would not warrant ordering her not to work for Trojan Labor.

Labor Ready offered vague testimony about databases and computer programs. But Labor Ready did not introduce the programs or databases as evidence or otherwise help the court to understand how this information is secret. Perhaps more important is that these databases and programs were in an office that Czeponis rarely visited and in computers to which Czeponis had no access. (N.T. 120).

Because Labor Ready has not shown that Czeponis knows any Labor Ready trade secrets, Labor Ready's right to relief on its trade secret claim is not clear.[3]

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[3]Czeponis testified briefly about billing, sales and computer information to which she had access in her two and a half months as a manager at the West Philadelphia branch. (N.T. 181-82). The parties did not develop this testimony sufficiently for the court to make a finding whether this information was a trade secret or whether the information had anything to do with Metro Machine.

II. LABOR READY HAS FAILED TO SHOW CLEARLY THAT THE NON-COMPETITION AND NON-SOLICITATION AGREEMENT IS ENFORCEABLE.

The non-competition and non-solicitation agreement -- which the court will call a restrictive covenant -- is not enforceable because Labor Ready terminated Czeponis for poor performance. See Insulation Corp. of America v. Brobston, 446 Pa.Super. 520, 667 A.2d 729, 734-37 (1995).

Washington law applies to interpretation of the employment contract. (Employment Contract ¶ 21; N.T. 7). In Washington, a restrictive covenant is enforceable if (1) the restraint is necessary for the protection of the employer's business or goodwill, (2) the restraint does not impose on the employee any greater restraint than is reasonably necessary to protect the employer's business or goodwill, (3) the loss of the employee's services and skills does not cause an injury to the public so great as to warrant nonenforcement of the covenant and (4) the covenant is reasonably limited in time and geographic scope. Perry v. Moran, 748 P.2d 224, 228-229 (Wash. 1987) (en banc); Wood v. May, 438 P.2d 587, 588 (Wash. 1968).[4] The enforceability of a restrictive covenant is a matter of law. Perry, 748 P.2d at 228.

Czeponis argues that the covenant is not enforceable against her because Labor Ready terminated her for poor performance. The court agrees.

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[4]Washington's standard for enforcement of a restrictive covenant is substantively the same as Pennsylvania's. In Pennsylvania, a restrictive covenant between an employer and an employee is enforceable at equity if (1) it is ancillary to an employment relation, (2) it is reasonably limited in duration and geographic scope, and (3) enforcement is necessary to protect a legitimate business interest of the employer without imposing an undue hardship on the employee. John G. Bryant Co. v. Sling Testing & Repair, Inc. 471 Pa. 1, 369 A.2d 1164, 1168 (1977); Robert Half of Pennsylvania, Inc. v. Feight, April 2000, No. 1667, op. at 13 (C.P. Phila. June 29, 2000) (Herron, J.). In some situations, as in Washington, Pennsylvania courts must determine whether enforcement will injure the public. New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, 1385 (1978); Philadelphia Ear, Nose & Throat Surgical Assocs. v. Roth, January 2000, No. 2321, op. at 15 (C.P. Phila. March 13, 2000) (Sheppard, J.).

In Washington, a restrictive covenant is enforceable to protect the client goodwill that the departing employee created on behalf of the employer. Perry, 748 P.2d at 227-29; Wood, 438 P.2d at 589; see also John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 369 A.2d 1164, 1167-68 (1977). But Labor Ready alleges that Metro Machine was dissatisfied with Czeponis' performance and that Metro Machine was dissatisfied with its relationship with Czeponis.[5] Therefore, Labor Ready has determined that Czeponis did not create goodwill with Metro Machine, and there is no goodwill to protect by enforcing the covenant. Perry, 748 P.2d at 227-28. See Insulation Corporation of America, 667 A.2d at 734-37.

The Pennsylvania Superior Court's instruction on this issue is persuasive. In Insulation Corporation of America, the Pennsylvania Superior Court held that an employer who terminates an employee for poor performance cannot enforce a restrictive covenant against that employee.

> The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests. . . .[T]he circumstances surrounding [the employee's] termination . . . . [affect] both the legitimacy of the employer's interests and the degree of hardship imposed upon the departing employee.

Insulation Corporation of America, 667 A.2d at 735-737. See also All-Pak, Inc. v. Johnston, 694 A.2d 347, 352 (Pa.Super. 1997). The court knows of no decision by a Washington court addressing whether an employer may enforce a restrictive covenant where the employer terminates the employee for poor

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[5]Morris might have testified that Czeponis' relationship with Metro Machine was poor to avoid any claim that Labor Ready wrongfully terminated Czeponis. Though the court is not sure that Czeponis' relationship with Metro Machine was as bad as Morris would have the court believe -- counsel for Czeponis offered as evidence a January 4, 2001 letter from Metro Machine employee Edwin Danner praising Czeponis's performance -- the court need not resolve the dispute at this stage. To justify terminating Czeponis, Labor Ready has argued that Czeponis' relationship with Metro Machine was bad. Equity bars Labor Ready from arguing the opposite -- that the same relationship was good -- to justify enforcement of the restrictive covenant.

performance. But the concerns on which the Pennsylvania Superior Court based its holding in Insulation Corporation of America -- the legitimacy of the employer's business interests and the hardship on the employee -- are also concerns in Washington. The court predicts that, if confronted with that issue, the Washington Supreme Court would adopt the Pennsylvania Superior Court's holding in Insulation Corporation of America.

As a matter of law, Labor Ready may not restrain Czeponis to protect an interest it admits is worthless. Insulation Corporation of America, 667 A.2d at 735-737.

Labor Ready also argues that the restrictive covenants are enforceable to protect trade secrets and to protect training that Czeponis received from Labor Ready. The court disagrees. There are no trade secrets at issue in this case, and in Washington, employee training, alone, is not a sufficient interest on which to base enforcement of a restrictive covenant. Copier Specialists, Inc. v. Gillen, 887 P.2d 919, 920 (Wash.App. 1995) (holding that covenant not to compete was not enforceable to protect only the training that the employee received from his employer).

Because there is no legitimate business interest on which to base enforcement of the restrictive covenant, Labor Ready's right to relief on its contract claim is not clear.

III. LABOR READY DOES NOT HAVE A CLEAR RIGHT TO RELIEF ON ITS CLAIM OF TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS.

Labor Ready argues that Czeponis tortiously interfered with its current and prospective business relations with Metro Machine. There is no credible evidence to demonstrate that Czeponis had inappropriate contact with any Labor Ready Employees at the Metro Machine site.

Assuming for the sake of argument that Czeponis caused Metro Machine to divert business from Labor Ready to Trojan Labor, Labor Ready must still show that Czeponis' conduct was not justified or privileged. Hennessy v. Santiago, 708 A.2d 1269, 1278 (Pa.Super. 1998); Thompson Coal Co. v. Pike Coal

Co., 488 Pa. 198, 412 A.2d 466, 471 (1979). At best, Labor Ready has shown that Czeponis acted in competition with Labor Ready. Competition without using wrongful means is a justified interference and is not actionable. Gilbert v. Otterson, 379 Pa.Super. 481, 550 A.2d 550, 554 (1988); Restatement (Second) of Torts § 768. Therefore, Labor Ready does not have a clear right to relief on its tortious interference claim.

CONCLUSIONS OF LAW

1. Labor Ready has not shown the existence of trade secrets to which Czeponis had access.

2. Labor Ready has not demonstrated that Czeponis tortiously interfered with Labor Ready's business relationship with Metro Machine.

3. Enforcing the restrictive covenant is not necessary to protect Labor Ready's business or goodwill.

4. Enforcing the restrictive covenant would impose a greater restraint on Czeponis than is reasonably necessary to protect Labor Ready's business or goodwill.

5. Labor Ready has not shown a clear right to relief on any of its claims.

Based on all matters of record, and the foregoing, this court will enter a contemporaneous Order denying the Petition for Preliminary Injunction.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.