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WILLIAM BENNETT WAS A RADIO ANNOUNCER employed by the Storz Broadcasting Company. The contract of employment between Bennett and the Broadcasting Company contained a restrictive covenant that prohibited him, upon termination of his employment, from accepting employment with any other station within a radius of thirty-five miles of any Storz station for a period of eighteen months.

His employment with Storz having terminated, Bennett was about to take a position with another station when his former employer wrote a letter to his prospective new employer which read, in part,

> . . . We are authorized to advise you that if there is any violation of the contract referred to on the part of Mr. Bennett that we will be instructed to institute appropriate legal proceedings. . . .[1]

Bennett brought an action against his former employer, alleging that this letter prevented his being hired and constituted an act of tortious interference. Whether or not Bennett was correct in his allegation and whether or not his former employer was justified in its act were the questions presented to the court in the case of *William Bennett v. Storz Broadcasting Company.*[2]

The answers to these questions turned on the court's interpretation of the following issues: what acts constitute actionable interference; was the contract of employment between the plaintiff and the defendant, and/or the negative covenant contained therein, valid; was the existence of a contract crucial or even necessary for an action to lie; could there be any justification for the defendant's acts; and lastly, could the court award a summary judgment in such a case or must the case be decided on its facts as determined by a jury?

These questions and their answers also constitute the basic issues of this topic—interference by a previous employer.

The Requisites of Tort

It is a basic principle of all torts that one owes another a duty to avoid the negligent or willful doing of an act which will result in damage or injury to the other, unless some legal justification exists excusing that act.[3] Not only must there be a legal duty owed by the actor but there must also exist in the injured party a corresponding legal right which

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1 270 Minn. 525, 134 N.W.2nd 892 (1965).

2 *Ibid.*

3 Macrum v. Security Trust & Savings Co., 221 Ala. 419, 129 So. 74 (1930).

was affected by the conduct complained of.[4] Going a step further, having established a duty in the actor and a right in the injured party (*i.e.*, a legal relationship), still, if the conduct of the actor is to constitute a tort, a wrong must have been committed, either as a breach of that duty or a violation of that right.[5]

The mere fact that one party has suffered a loss as the result of the conduct of another is not sufficient, standing alone, to constitute a tort.[6] If all other requisites are not met, it is merely *damnum absque injuria.*[7] By the same token, if all requisites are met, the complete absence of any legal injury destroys the possibility of the existence of a tort.[8]

The intentional doing of some injurious act without legal justification is termed legal malice,[9] and is not to be confused with malice in the sense of hatred or spite which is generally material only as it affects the issue of punitive damages.[10]

The Tort of Malicious Interference

The tort of interference is any intentional act that constitutes an invasion of another's property, property rights or personal rights, causing an injury without just cause, privilege or excuse.[11]

It has often been held that the right to pursue one's business, calling, trade or occupation is deemed a property right which the law will protect against any wrongful or unjustified and malicious interference.[12] Such malicious interference with a person's right to pursue a lawful business or occupation has been held to constitute an actionable tort.[13]

Similarly considered as a property right is a person's right to make a contract, whether of employment or otherwise. Any act of malicious interference which results in either the breach of a contract or in the preventing of the making of a contract, when done otherwise than in the legitimate exercise of the actor's own rights, or without justification, and

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[4] Bennett v. Illinois Power & Light Corp., 355 Ill. 564, 189 N.E. 899 (1934); Metropolitan Life Ins. Co. v. Tye, 295 Ky. 697, 175 S.W.2d 366 (1943).

[5] Smith v. Okerson, 8 N.J. Super. 560, 73 A.2d 857 (1950); Metropolitan Life Ins. Co. v. Tye, *supra* note 4; Hilleary v. Bromley, 146 Ohio St. 212, 64 N.E.2d 832 (1946); Bennett v. Illinois Power & Light Corp., *supra* note 4.

[6] Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 214 N.W. 754 (1927).

[7] Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300 (App. D.C. 1937).

[8] Mike v. Lian, 322 Pa. 353, 185 A. 775 (1936).

[9] Reichman v. Drake, 89 Ohio App. 222, 100 N.E.2d 533 (1951).

[10] *Ibid.*

[11] Reichman v. Drake, *supra* note 9; Soucy v. Wysocki, 139 Conn. 622, 96 A.2d 225 (1953).

[12] Carter v. Knapp Motor Co., Inc., 243 Ala. 600, 11 So.2d 383, (1943); National Life & Acc. Ins. Co. v. Wallace, 162 Okla. 174, 21 P.2d 492 (1933).

[13] Leibovitz v. Central National Bank, 75 Ohio App. 25, 60 N.E.2d 727 (1944); Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318, (1948); Voltube Corp. v. B. & C. Insulation Products, Inc., 20 N.J. Super. 250, 89 A.2d 713 (1951).

with the intent of injuring another or benefiting at another's expense, is also deemed tortious and constitutes an actionable wrong.[14]

Even though the existence of a contract is not essential to the existence of a tort,[15] interference with a contract or with the right to contract is a tort, where the evidence establishes sufficiently that, but for such interference, the contract would have been made or carried out.[16] It has been held that a mere showing by the injured party of an intentional interference with his contract rights is sufficient to establish a prima facie case, upon which it becomes incumbent on the actor to show legal justification for his acts.[17]

As regards employment, an act on the part of a previous employer with the intent to cause injury by preventing future employment constitutes malicious interference. This is also the very essence of the actionable offense of blacklisting.[18] But blacklisting, like other acts of interference, is not a wrong unless actual damages occur.[19]

Thus it would seem from the discussion above that the law governing the tort of interference is clear cut and easily applied. But law is applied to facts, and facts vary. Law, likewise, is subject to interpretation. Many questions remain unanswered. Specifically, what acts by a previous employer which cause injury to the future business or employment of a former employee constitute actionable malicious interference? What effect, if any, does the existence of a contract of employment containing a negative covenant, restraining the former employee after termination of employment, have on the former employer's acts? Under what conditions may a previous employer's acts, which would otherwise be tortious, be so legally justified as to relieve or excuse him from liability?

Acts of Interference by a Previous Employer

Once a plaintiff has sufficiently established a prima facie case of malicious interference by the defendant, the burden shifts to the defendant to produce such evidence as will show a legal justification for his acts so as to relieve himself of liability.[20] Whether or not the defendant successfully establishes such a legal justification is a question of fact for a

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[14] Coleman v. Whisnant, 225 N.C. 494, 35 S.E.2d 647 (1945); Reichman v. Drake, *supra* note 9.

[15] Peru Heating Co. v. Lenhart, 48 Ind. App. 319, 95 N.E. 680 (1911); Owen v. Williams, *supra* note 13.

[16] Leibovitz v. Central National Bank, *supra* note 13; Paul's Drugs, Inc. v. Southern Bell Telephone & Telegraph Co., 175 So.2d 203 (D. Ct. App., Fla., 1965).

[17] Owen v. Williams, *supra* note 13; Wilkinson v. Powe, 300 Mich. 275, 1 N.W.2d 539 (1942); Reeves v. Scott, 324 Mass. 594, 87 N.E.2d 833 (1949).

[18] Johnson v. Oregon Stevedoring Co., Inc., 128 Ore. 121, 270 P. 772 (1928).

[19] Willner v. Silverman, 109 Md. 341, 71 A. 962 (1909).

[20] Owen v. Williams, *supra* note 13; Wilkinson v. Powe, *supra* note 17; Reeves v. Scott, *supra* note 17.

jury to determine.[21] (The questions of circumstances and tests applied to determine the existence of a justification are discussed below.)

Similarly, the plaintiff's attempt to establish a prima facie case revolves around the facts. A few examples will illustrate the variety of situations with which the courts have had to deal.

In one case the plaintiff had been employed by the defendant for eleven years, doing freight claim work. He had become an expert in the field and had made many friends among the freight claim agents of various carriers. He developed an enmity with certain officers and agents of the defendant, resulting from his discovery that they were "mulcting" certain railroads and from his efforts to collect a claim against a steamship company in which the defendant owned stock. He was systematically demoted several times and finally discharged, after which the defendant sent 128 letters, mostly to carrier representatives, which stated that the plaintiff was no longer in the defendant's employ. The plaintiff alleged that as a result of the defendant's acts he had been prevented from earning a living and that the letters caused his former friends in official positions to shun him. He claimed that these acts were committed as part of a malicious and continuing plan. The court held that the acts constituted a malicious interference with the plaintiff's right to earn a living.[22]

In another action the defendant, a hospital physician, claimed that the plaintiff, a graduate nurse, had disparaged him to his patients. The plaintiff denied these statements. Nevertheless, the defendant excluded her from nursing at the hospital by threatening not to send any more patients there. Here the court felt that the plaintiff's inability to obtain employment at any hospital in good standing resulted from the defendant's interference with her employment and held the defendant liable.[23]

Compare the above cases with *Wabash R. Co. v. Young*,[24] in which the defendant railroad prevented the plaintiff from being employed by another railroad by stating to the other railroad that the plaintiff was a labor agitator. Here it was held that the defendant's act did not constitute a malicious interference with the plaintiff's business.

In *Martin v. Southern Wheel Co.*,[25] defendant discharged plaintiff, telling him that he would never get work anywhere as long as he (defendant) could prevent it. Plaintiff brought this action after having unsuccessfully tried to obtain employment for about ten months. It was the

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[21] Bennett v. Storz Broadcasting Co., *supra* note 1; Owen v. Williams, *supra* note 13.

[22] Ledwith v. International Paper Co., 64 N.Y.S.2d 810 (1946), 66 N.Y.S.2d 625, aff'd without op. 271 App. Div. 864 (1946), 67 N.Y.S.2d 688, leave to app. den. 271 App. Div. 916 (1947).

[23] Owen v. Williams, *supra* note 13.

[24] 162 Ind. 102, 69 N.E. 1003 (1904).

[25] 32 Ga. App. 477, 123 S.E. 912 (1924).

court's opinion that these facts were not sufficient to permit a finding of interference with the plaintiff's right to employment.

Legal authority, as sketched above, indicates that as to the question, "what acts constitute malicious interference?", the law is the same whether the actor be the injured party's previous employer or any other third party interfering with the rights of the injured party. The statement that one may not interfere with another's rights applies to both. Only the peculiar relationship of employer-employee provides justifications unique because of that relationship.

Legal Justification, Excuse, or Privilege

> . . . The courts have not attempted to formulate a rule by which justification or lack of justification may be determined, but have said that in general the issue is largely one of fact for the jury; the standard being reasonable conduct under all the circumstances of the case. . . .[26]

Thus it is held that under certain circumstances and in certain situations one's acts, otherwise tortious, may be justified or privileged.[27]

In *Standard Oil Co. v. Bertelsen* the court said:

> . . . A man's right to labor in any occupation, in which he is fit to engage is a valuable right which should not be taken from him, or limited. . . .[28]

But even after making so unqualified a statement, the court went on to say that there were cases where this principle may be superseded by considerations of justice or necessity.[29]

One ordinarily has a right to be secure in the contracts he makes and to be allowed to pursue his business or employment free from the interference of others, except in a case where such others are acting in pursuance of a superior or at least equal but conflicting right.[30]

If a defendant can show that his interference with the plaintiff's employment was justified by some legal object which he had a right to assert, he may avoid liability for his acts.[31] Thus, if acts which are ordinarily tortious are to be justified, the defendant must show that he sought to acquire some legitimate, direct and immediate benefit to himself by so

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[26] Carnes v. St. Paul Union Stockyard Co., 164 Minn. 457, 205 N.W. 630, 632, Note, 10 Minn. L. Rev. 448 (1925).

[27] Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941).

[28] 186 Minn. 483, 487, 243 N.W. 701, 703 (1932).

[29] *Ibid.*

[30] Bennett v. Storz Broadcasting Co., *supra* note 1; Roraback v. Motion Picture Machine Operators' Union of Minneapolis, 140 Minn. 481, 168 N.W. 766, 3 A.L.R. 1290 (1918); Jensen v. Lundorff, 258 Minn. 275, 103 N.W.2d 887 (1960); National Life & Accident Ins. Co. v. Wallace, *supra* note 12; Owens v. Automotive Engineers, Inc., 208 Okla. 251, 255 P.2d 240 (1953).

[31] Roraback v. Motion Picture Machine Operators' Union of Minneapolis, *supra* note 30; Owens v. Automotive Engineers, Inc., *supra* note 30.

acting.[32] The true purpose for invading another's rights must be the bettering of one's own lawful business, rather than the destroying of another's employment or business.[33]

An employer, like an employee, also has a property right in his business, and if he is acting to protect his own rights, he is privileged to interfere,[34] so long as the means he uses are proper and legal.[35]

In the strictest sense, when an act of interference is justified and the means used are lawful, no tort has been committed.[36]

In any event, the burden of proving a justification for interference with someone's employment is on the interferor, and the court will view the evidence most favorably for the other party.[37]

Effect of Negative Covenants in Contracts of Employment

An employment contract containing a covenant restricting an employee's right to work or to exercise his right to gainful employment after termination of employment is in at least partial restraint of trade, is looked upon by the courts with disfavor, and is strictly interpreted by them.[38]

Such covenants will be held valid, however, if entered into for the honest purpose of protecting a legitimate interest of the party in whose favor they are imposed, if reasonable between the parties, and if not injurious to the interests of the public.[39] Such factors as the following are considered in determining validity: 1) The necessity of restraint for the protection of the business or good will of the employer, 2) regard for the nature of the employment, 3) The length of time for which it is imposed, 4) the territorial extent of the restriction, 5) the rights of the employee to work and earn a livelihood within the limits of his talents, and 6) regard for the protection of the interests of the public.[40]

Thus, the validity of such covenants is determined in each particular case on its own facts, taking into consideration the subject matter, the nature of the business, the situation of the parties, and the circumstances

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[32] Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N.E.2d 1 (1943).

[33] National Life & Accident Ins. Co. v. Wallace, *supra* note 12; Bennett v. Storz Broadcasting Co., *supra* note 1.

[34] Owens v. Automotive Engineers, Inc., *supra* note 30; Petit v. Cuneo, 290 Ill. App. 16, 7 N.E.2d 774 (1937).

[35] Petit v. Cuneo, *supra* note 34.

[36] Alfred W. Booth & Bro. v. Burgess, 72 N.J.Eq. 181, 65 A. 226 (1906); Owens v. Automotive Engineers, Inc., *supra* note 30.

[37] Bennett v. Storz Broadcasting Co., *supra* note 1.

[38] Bennett v. Storz Broadcasting Co., *supra* note 1; Arthur Murray Dance Studios of Cleveland v. Witter, 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952); Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964).

[39] Bennett v. Storz Broadcasting Co., *supra* note 1; Arthur Murray Dance Studios of Cleveland v. Witter, *supra* note 38; Gates-McDonald Co. v. McQuilkin, 33 Ohio L. Abs. 481, 34 N.E.2d 443 (1941).

[40] *Ibid.*

of the particular case. But where the facts show that the restraint on the employee is greater than is necessary to protect the interests of the employer, or that the restraint imposes undue or oppressive hardship on the employee, or that the restraint will interfere with public interests, such restraint will be held invalid, unreasonable, and unenforceable.[41]

The court upheld such a covenant in *Briggs v. Butler*,[42] in which the plaintiff had brought an action to restrain the defendant, Butler, from violating the terms of a contract of employment between them. The restrictive covenant in this contract had provided that the defendant would not engage in the advertising business in competition with the plaintiff in Toledo, Ohio, or in any city in the United States or Canada where the plaintiff did business, for a period of five years following the termination of her employment. The court felt that this restraint was valid as it met the tests and was reasonable as to time and space.

But a similar agreement, in *Gates-McDonald Co. v. McQuilkin*,[43] was held by the court to be an unreasonable restraint of trade, because it restricted the employee in the exercise of a gainful occupation. Here, the defendant had covenanted not to work for anyone, anywhere in the State of Ohio, in the area of workmen's compensation insurance, for a period of three years following the termination of his employment. Six weeks after he had been fired, the defendant opened his own service to employers, soliciting the plaintiff's clients, and was working for at least two of them. The plaintiff's attempt to restrain him was unsuccessful.

The factual nature of the questions discussed in this section was illustrated in *William Bennett v. Storz Broadcasting Company*,[44] when the court refused the defendant's motion for a summary judgment, deciding that the issue, whether the restrictive covenant justified the defendant's acts, was a question of fact for a jury to decide. (It should be noted that a nearly identical restriction in *Skyland Broadcasting Corp. v. Hamby and WAVI, Inc.*[45] was held valid. That action was brought by the previous employer against the employee on the employee's violation of the contract.)

Conclusion

It would appear that the statement that one may not interfere with the contract rights of another unless legally justified applies equally to the injured party's previous employer as well as to any other third party. The peculiar relationship of employer-employee does, however, provide

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[41] Extine v. Williamson Midwest, Inc., *supra* note 38; Gates-McDonald Co. v. McQuilkin, *supra* note 39; Arthur Murray Dance Studios of Cleveland v. Witter, *supra* note 38.

[42] 140 Ohio St. 499, 45 N.E.2d 757 (1943).

[43] *Supra* note 39.

[44] *Supra* note 1.

[45] 2 Ohio Op.2d 426, 141 N.E.2d 783 (1957).

unique opportunities for acts of interference and equally unique justifications (*e.g.,* the right to fair and honest competition). The existence of a contract of employment and a restrictive covenant contained therein will, in certain situations, supply a justification for an otherwise tortious act. Further, it is unnecessary to a right of action for interference with a plaintiff's employment that a contract relationship have existed and been disturbed. (See, for example, *Owen v. Williams.*[46]) Lastly, it would appear that under no circumstances will an act of interference be justified if the means employed were not reasonable in the circumstances.

Thus, no standard test can be drawn nor universal rule applied. Each case must be weighed on its own merits to determine whether a particular act constituted interference and whether that act was justified. In any case this is a *question of fact.*

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[46] 322 Mass. 356, 77 N.E.2d 318 (1948).