COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1238 **Cir. Ct. No. 2014CV58**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

KAY ENGLEBERT,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CALUMET RIVER FLEETING, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Calumet River Fleeting, Inc. ("Calumet") appeals a $309,833.70 judgment entered in favor of former employee Kay Englebert for breach of Englebert's written employment agreement. Calumet argues that a

severance pay provision in the employment agreement is unenforceable under Wisconsin law and preempted by federal labor law. We reject these arguments and affirm the judgment.

¶2 Englebert cross-appeals the circuit court's refusal to award her prejudgment interest and reasonable attorney fees. We reverse the court's denial of prejudgment interest. As to attorney fees, we affirm in part and reverse in part. We remand the matter for further proceedings on those issues.

BACKGROUND

¶3 Calumet operates tug boats and barges for shippers on the Great Lakes, primarily in Chicago where it is headquartered. In June of 2011, Calumet's sole shareholder, John Selvick, hired his brother, Steven, to work for Calumet. In early 2012, Calumet began renting office space from Steven in Sturgeon Bay, Wisconsin.

¶4 John died in late 2012, and his widow, Kimberly Selvick, became sole shareholder, president and CEO of Calumet. In April 2013 Kimberly named Steven as Calumet's President and CEO. Steven's written employment agreement with Calumet gave him the authority and responsibility to hire, fire, and set compensation for the company's employees.

¶5 On May 29, 2013, Englebert left a secure, full-time job as an accountant for Door County Human Resources (DCHR). Prior to Steven's offer to join Calumet, Englebert had intended to work for five more years for DCHR before retiring. Englebert entered into a five-year employment agreement with Calumet as a full-time accountant. The agreement contained the following relevant provisions:

1. Term of Employment. Subject to the provisions for termination set forth below this agreement will commence effective July 1, 2013. Provided the Employee *is not terminated for cause, this employment shall continue for a term of five (5) years* from the commencement date of this Agreement. …

....

3. Duties of Employee. ...

This work shall be performed out of the Sturgeon Bay office and in the event Calumet chooses to close its office facilities in that area, Employee shall be allowed to perform her job out of her home [in Sturgeon Bay].

....

7. Termination of Agreement. Calumet can only terminate the Employee's employment should any of the following events occur:

a. The sale of Calumet ...; or

b. The decision by Calumet to terminate its business and liquidate its assets; [or]

c. The merger or consolidation of Calumet with another entity ….

8. *Early Termination and Severance Pay. In the event that Steven M. Selvick, for any reason, shall cease to hold the position of President & CEO for Calumet then this employment agreement shall immediately terminate and the Employee shall receive a lump sum severance payment that shall be equal to the following*:

a. If the termination occurs within one (1) year of the date of this agreement, one hundred (100) percent of the Employee's then current salary times the number of months remaining between the date of early termination and the end of the original five (5) year term of this employment agreement.

....

In addition the Employee shall receive an additional lump sum payment that shall be equal to one hundred (100) percent of the [E]mployee's then current monthly employee benefits times the same number of months remaining

> between the early termination date and the end of the original five (5) year term of this employment agreement.

(Emphasis added.)

¶6 On November 21, 2013, Kimberly terminated Steven's employment. A week later, Kimberly sent a letter to all of Calumet's Sturgeon Bay employees, including Englebert, advising them that the Sturgeon Bay office was closing and that their employment with Calumet would end unless they chose to relocate to Chicago. Englebert declined to relocate to Chicago and her employment with Calumet ended on November 29, 2013.

¶7 Englebert commenced this action against Calumet seeking severance pay pursuant to the Early Termination and Severance Pay provision (the severance provision) contained in paragraph 8 of the agreement, and prejudgment interest, plus reasonable attorney fees and unpaid overtime wages. Calumet answered, contending the severance provision was void and unenforceable under Wisconsin law and was preempted by federal labor law.

¶8 After a trial to the circuit court, the court issued a written decision in Englebert's favor. The court found the severance provision was negotiated to compensate Englebert for leaving a secure and lucrative job with DCHR to work for Calumet. The court further found that Steven viewed Englebert's hiring as critical to improving Calumet's financial performance, and that the amount of severance pay agreed to was necessary to induce Englebert to work for Calumet. As such, the court determined that the severance provision was an enforceable liquidated damages provision. The court also determined that federal labor law did not prevent enforcement of the severance provision.

¶9 The court further found that, at the time of her discharge, Englebert's salary was $65,000 annually, or $5,416.67 per month, and there were fifty-five months remaining under the terms of her agreement. The court awarded judgment to Englebert of $309,833.70[1] in severance pay, $2,694.80 in overtime pay, and $1,347.40 for the fifty-percent increase of the overtime pay pursuant to WIS. STAT. § 109.11(2)(a) (2015-16),[2] plus statutory attorney fees of $500, costs and disbursements. The court denied Englebert's request for prejudgment interest and reasonable attorney fees. The court subsequently denied Calumet's motion for reconsideration. Calumet now appeals, and Englebert cross-appeals.

DISCUSSION

I. Enforceability of the severance provision under Wisconsin law

¶10 Calumet argues that when viewed under the totality of the circumstances, the stipulated damages provided for in the severance provision bear no relationship to any harm caused by Englebert's termination and, as a result, the

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[1] The circuit court calculated Englebert's severance at $297,916.85 based on her monthly salary and the number of months remaining. The court then added $216.67 per month in 401(k) matching contributions to Englebert's salary to arrive at a total of $309,833.70. On appeal, Calumet does not challenge the correctness of the court's calculations, and we will not address the issue further.

[2] Calumet does not appeal the award of overtime pay or damages under WIS. STAT. § 109.11(2)(a) (2013-14). Although the severance provision provided Englebert a claim for one hundred percent of her then current monthly employee benefits, Englebert does not appeal the circuit court's finding that she failed to establish the amounts per month she was paid for health insurance, life insurance and dental benefits prior to termination or its failure to award those benefits. An issue raised in the circuit court, but not raised on appeal, is deemed abandoned. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

severance provision is unreasonable and unenforceable. Englebert argues the severance provision is an enforceable liquidated damages agreement. Under Wisconsin law, a liquidated damages provision in a contract will generally be enforced, but a penalty will not. ***McConnell v. L.C.L. Transit Co.***, 42 Wis. 2d 429, 438, 167 N.W.2d 226 (1969).

¶11 Review of the circuit court's decision concerning the enforceability of a liquidated damages clause presents a mixed question of fact and law. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). While we overturn a circuit court's factual determination only when it is clearly erroneous, ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615, here, the material facts are not disputed by the parties. Whether agreed-upon facts meet a particular legal standard is a question of law subject to de novo review. *See* ***Stern ex rel. Mohr v. DHFS***, 222 Wis. 2d 521, 528, 588 N.W.2d 658 (Ct. App. 1998).

¶12 The test regarding the validity of a contracted stipulated damage provision is reasonableness under the totality of the circumstances. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 361, 377 N.W.2d 593 (1985). Courts may consider several factors in determining reasonableness, including:

> (1) Did the parties intend to provide for damages or for a penalty?; (2) Is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract?; and (3) Are the stipulated damages a reasonable forecast of harm caused by the breach?

Id. However, these factors are neither exclusive, nor are they conclusive as to the reasonableness of the clause in question. ***Id.***

¶13 While the ***Koenings*** court emphasized consideration of the totality of the circumstances giving rise to the stipulated damages clause, it held that the "touchstone of the reasonableness under the totality of the circumstances test must still be the relationship of anticipated and actual harm to the stipulated amount of damages." ***Id.*** at 371. Stipulated damages clauses should be upheld as long as the parties did not agree to some kind of penalty, in addition to compensatory damages, for one party's breach of contract. ***Id.*** at 369.

¶14 Calumet does not dispute that the circuit court correctly calculated the amount called for under the severance provision as $309,833.70, nor does it contend the $309,833.70 includes any agreed-upon penalty in addition to actual compensatory damages. Given there is no dispute that the stipulated damages and the anticipated actual harm to Englebert are equal, there is no penalty included in the severance provision. Therefore, the amount of stipulated damages under the severance provision is reasonable.

¶15 Calumet disagrees, arguing the language in the severance provision "convincingly demonstrates" that the compensation provided under the severance provision bears little—if any—relationship to the anticipated harm. Calumet's argument is based solely upon four hypothetical scenarios it posits, all involving the triggering mechanism of Steven's termination. Calumet observes that: (1) if Steven was not terminated, Englebert would not be entitled to receive the severance compensation no matter how outrageous or unjust the reasons for her termination; (2) if Steven was terminated and Englebert was not terminated, Calumet contends she could still be entitled to the severance compensation even though still employed by Calumet; (3) if both Steven and Englebert were terminated as a result of Calumet's sale, liquidation or merger with another entity, Englebert would still receive the severance compensation, even though she was

terminated for one of the reasons permitted by the agreement; and (4) if Calumet was sold or merged with another entity, and Steven was terminated, quit his employment, died, was demoted, or became disabled, and Englebert continued to be employed, she would still receive the severance compensation. Calumet argues any of those scenarios renders the severance provision unreasonable.

¶16 We reject Calumet's argument that its hypothetical scenarios show the severance provision operates unreasonably under the facts here. Where "resolution of issues depends on hypothetical or future facts, they are not ripe for adjudication and will not be addressed by this court." ***Tammi v. Porsche Cars N. Am., Inc.***, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783. Here, all four of Calumet's hypotheticals assume facts not in the record. Whether an award of liquidated damages under those hypothetical scenarios might constitute a penalty or be otherwise unreasonable is not before us. Liquidated damages clauses are not analyzed on theories of what might have been or what could be; they are enforced, or not, based on what actually occurred. *See* ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 476, 309 N.W.2d 125 (Ct. App. 1981).

¶17 In addition, the right to agree to condition severance pay upon the occurrence of any event, so long as the agreement is not unlawful, is protected by the principle long recognized by Wisconsin courts that parties have the freedom to contract as they see fit. *See* ***Solowicz v. Forward Geneva Nat'l, LLC***, 2010 WI 20 ¶41, 323 Wis. 2d 556, 780 N.W.2d 111. We conclude Calumet and Englebert were free to agree to the triggering mechanism of Steven's removal as president and CEO here as a means of entitling Englebert to the severance compensation.

¶18 Calumet counters that the so-called "triggering mechanism" of the stipulated damages clause—i.e., Steven's termination as Calumet's president and

CEO—was unreasonable under the totality of circumstances, and that neither ***Koenings*** nor ***Wassenaar*** limit a court's reasonableness analysis to the relationship between the anticipated and actual harm. However, the court in ***Koenings*** held that "stipulated damages clauses may also be enforceable under the totality of the circumstances where they serve other valid economic purposes, such as allaying fears of job security." ***Koenings***, 126 Wis. 2d at 371. Calumet does not dispute that the severance provision's purpose was to ensure Englebert's job security, nor does it dispute that the triggering mechanism of Steven's termination hinged on the same concern. As the court did in ***Koenings***, we recognize Englebert's job security was a valid purpose supporting the reasonableness of the severance provision, including the triggering mechanism of Steven's termination.

II. Preemption by federal labor law

¶19 During Englebert's employment with Calumet, Local 2070 of the International Longshoremen's Association (the Union) and Calumet entered into a collective bargaining agreement (CBA) that governed the terms and conditions of employment for Calumet employees who were members of the bargaining unit, which included Englebert. The CBA provided that "[t]he Employer hereby recognizes the Union as the sole exclusive collective bargaining agent for all Members of the Collective Bargaining Unit ... with respect to their wages, hours of employment, rate of pay, and other terms and conditions of employment."

¶20 While the CBA was in effect, Steven and Englebert negotiated and entered into the employment agreement without the knowledge or consent of the Union. Englebert's employment agreement materially changed some of the terms and conditions of Englebert's employment from those found in the CBA.

¶21 In late December 2013, Englebert's attorney sent a demand letter to Calumet with Englebert's severance claim. Calumet then investigated and discovered that Steven had entered into individual employment agreements with five members of the bargaining unit, including Englebert. The Union filed an unfair labor practice charge against Calumet with the National Labor Relations Board (NLRB). It alleged that Calumet bypassed the Union and illegally dealt directly with those five members—including Englebert—in negotiating and entering into the individual employment contracts.

¶22 The NLRB then filed a Complaint against Calumet, and Calumet and the NLRB reached an agreement. Under the terms of the settlement agreement, Calumet agreed it would no longer deal directly with members of the bargaining unit and would "rescind and give no effect to" the five individual employment agreements. The NLRB approved the settlement, and the Seventh Circuit ordered enforcement of the NLRB's order.

¶23 In the circuit court, Calumet argued Englebert's claim for severance pay was preempted by the NLRB's action and by the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq. The circuit court acknowledged that Englebert's employment contract with Calumet was the result of direct dealing in violation of Section 8(a)(5) of the Act. However, the court determined Englebert's state court severance pay claim was not preempted by the NLRB action.[3] On

[3] The circuit court determined that the NLRB action did not preempt Englebert's severance pay claim because Englebert was not a party to the NLRB action, and the NLRB settlement did not prohibit employees who were already terminated at the time of those proceedings from enforcing severance pay provisions. On appeal, Calumet does not argue the court erred in that regard. Issues raised in the circuit court, but not raised on appeal, are deemed abandoned. ***A.O. Smith***, 222 Wis. 2d at 491.

appeal, Calumet argues only that the circuit court erred in determining Englebert's claim was not preempted by the Act. Calumet cites ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), in which the Supreme Court set forth the standard for federal preemption under the Act, 29 U.S.C. § 151, et seq.:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245. We independently review the circuit court's interpretation of controlling law. ***Phelps***, 319 Wis. 2d 1, ¶36.

¶24 Calumet concedes that, as the party claiming preemption, it has the burden to prove that the claim is preempted by federal law. Calumet cites ***International Longshoremen's Ass'n v. Davis***, 476 U.S. 380 (1986), in which the Supreme Court described that burden:

> If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his [or her] case is one that the Board could legally decide in his [or her] favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board.

Id. at 395.

¶25 In support of meeting its burden of proof, Calumet cites 29 U.S.C. § 158(d), which states: "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Calumet argues that severance pay is among the terms and conditions of employment an employer

may not modify without the Union's knowledge and consent. *See* ***Champion Int'l Corp.***, 339 NLRB 672 (2003).

¶26 Calumet does not contend the CBA contained any provision concerning severance pay, or that the CBA was modified by Englebert's individual agreement. Calumet's argument is essentially that it violated the direct dealing prohibition in violation of § 8(a)(5) of the Act by failing to confer in good faith with the Union concerning Englebert's agreement, specifically the severance provision. However, the issue is not whether direct dealing alone preempts enforcement of the severance pay provision, but whether, regardless of that direct dealing, state court enforcement of the provision is preempted.

¶27 Englebert contends the NLRB does not require employees to forgo increases in wages and benefits when negotiated independent of the Union, citing ***House Calls, Inc.***, 304 NLRB 311, 314 (1991), and ***Dura-Vent Corp.***, 257 NLRB 430, 433 (1981). In ***House Calls***, the NLRB held that:

> [T]he Board does not require that employees forgo increases in wages and benefits. As it is not clear whether the change in compensation from hourly rate to piecework was a detriment or a benefit to the employees, we shall issue a restoration order conditioned on the affirmative desires of the affected employees as expressed through their bargaining agent.

House Calls, 304 NLRB at 314.

¶28 The severance pay is clearly a benefit to Englebert. Thus, we agree that, under the rationale stated in ***House Calls***, Englebert's severance pay is a benefit the NLRB would not require her to forgo, despite being the result of direct dealing. We therefore conclude Calumet has not met its burden to prove the NLRB could decide that the Act preempts Englebert's severance pay provision.

III. Englebert's cross-appeal regarding prejudgment interest

¶29 Englebert argues the circuit court erred by denying her claim for prejudgment interest on the severance pay award.[4] The court based its denial on two reasons: (1) the amount of severance pay was not readily ascertainable or subject to easy calculation; and (2) Calumet presented a reasonable, although unsuccessful, defense to nonpayment of the severance pay.

¶30 "Prejudgment interest may be awarded only if the amount of damages is ascertainable or determinable prior to judicial determination, i.e., where there is a reasonably certain standard of measurement when correctly applied one can ascertain the amount owed." ***Klug & Smith Co. v. Sommer***, 83 Wis. 2d 378, 384, 265 N.W.2d 269 (1978). Whether Englebert is entitled to prejudgment interest on her severance pay claim presents a question of law we review de novo. *See* ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 438, 265 N.W.2d 513 (1978).

¶31 Englebert's employment agreement provided that if her employment was terminated during the first year of her five-year term of employment, she was entitled to severance pay equal to one hundred percent of her then-current wages and benefits for the remaining term of the agreement. Englebert's paychecks showed that her monthly salary including Calumet's contribution to her 401(k)

[4] On appeal, Englebert does not contend the circuit court should have awarded prejudgment interest on the $2,694.80 award of overtime pay. Nor does Englebert challenge on appeal the circuit court's finding that she failed to establish the amounts per month she was paid for health insurance, life insurance and dental benefits prior, or its failure to award her damages for those benefits. Accordingly, Englebert makes no claim for prejudgment interest on those amounts.

was $5,633.34. At the time of her termination, there were fifty-five months left in her employment term. Englebert argues there is a reasonably certain standard of measurement for the amount of her severance pay, that is, $5,633.34 times fifty-five months.

¶32 Calumet argues the circuit court correctly determined that the amount of Englebert's claims was not readily ascertainable. The only factual support Calumet provides for this argument is that Englebert's post-trial brief in circuit court attached an eleven-page addendum, which Calumet contends showed a "collection of numbers, calculations, claims and statistics," all of which Englebert claimed supported her demand for $382,762.05 in severance pay. Calumet argues that the eleven-page addendum—and the fact that the circuit court arrived at a significantly different number than Englebert ($309,833.70)—suggests that Englebert's severance pay claim required complex calculations, thereby justifying the court's conclusion that the amount of severance pay was not readily ascertainable or subject to easy calculation.

¶33 We are unpersuaded by Calumet's argument. Englebert's total claim for severance pay, as outlined in the addendum to her post-trial brief, included amounts for various employment benefits that the circuit court did not award due to lack of proof. This limitation does not render the award of $309,833.70 based upon her monthly salary times her employment term "not readily ascertainable" by Calumet before this action was commenced. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶48, 266 Wis. 2d 124, 667 N.W.2d 751 ("The amount the company owed under the contract was easily calculable: salary and benefits for the remainder of the contract term."). We agree with Englebert that the severance pay was readily ascertainable.

¶34 The second basis for the circuit court's denial of prejudgment interest was that Calumet presented a reasonable defense to nonpayment of the severance pay. Englebert contends no Wisconsin court has ever held the availability of prejudgment interest should in any way be affected by the strength of the defendant's unsuccessful arguments against liability, and Calumet cites no law supporting that proposition. In ***Kernz***, the court rejected a similar argument for denying prejudgment interest and held that disputing liability does not make the damages undeterminable. ***Id.***, ¶48. Englebert is entitled to prejudgment interest because there is no dispute over the computation of liquidated damages. It is irrelevant that Calumet raised a reasonable—although unsuccessful—defense.

¶35 We conclude the circuit court erred in failing to award Englebert prejudgment interest on the $309,833.70 of severance pay and reverse the judgment to that extent.[5]

IV. Englebert's claim for attorney fees

¶36 The circuit court awarded Englebert statutory attorney fees of $500. Englebert argues the circuit court erred in failing to award her actual attorney fees for both her overtime and severance pay claims because she is the prevailing party in a case which includes a WIS. STAT. § 109.03(5) "wage claim."

¶37 When a plaintiff prevails in a wage claim brought under WIS. STAT. § 109.03(5), the court may allow, in addition to costs, a reasonable sum for expenses. WIS. STAT. § 109.03(6). In ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 401, 588 N.W.2d 67 (Ct. App. 1998), we determined that a

[5] On remand, the circuit court is to determine the appropriate rate of interest.

reasonable sum for expenses under § 109.03(6) includes reasonable attorney fees. Whether Englebert is entitled to attorney fees under an undisputed factual scenario presents a question of law that we review de novo. *See* ***Estate of Kriefall* v. *Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶16, 342 Wis. 2d 29, 816 N.W.2d 853.

¶38 Englebert contends the circuit court erred in denying her actual attorney fees on her total overtime pay claim and the fifty percent increase.[6] Englebert also argues her severance award constitutes remuneration for personal services and is therefore wages under WIS. STAT. § 109.01(3). Englebert claims that because the severance pay constitutes wages under § 109.01(3), Calumet violated § 109.03(2) when it failed to timely pay her severance, thereby entitling her to reasonable attorney fees. In the event we determine the severance pay does not constitute § 109.01(3) wages, Englebert seeks only to recover that portion of her attorney fees attributable to the litigation of her overtime pay claim.

¶39 Englebert's attorney fees claims rely on the definition of the term "wages." WISCONSIN STAT. § 109.03(3) defines "wages" to "mean remuneration payable to an employee for personal services, including ... overtime pay, severance pay or dismissal pay." Because the statutory definition of wages specifically

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[6] The circuit court increased Englebert's overtime pay award by fifty percent pursuant to WIS. STAT. § 109.11(2)(a), which provides:

> In a wage claim action that is commenced by an employee before the department has completed its investigation under s. 109.09 (1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50 percent of the amount of wages due and unpaid.

includes "overtime pay" for personal services, Englebert is entitled to recover her reasonable attorney fees attributable to litigation of her claim seeking $2,694.80 in overtime pay. ***Jacobson***, 222 Wis. 2d at 401.

¶40 Englebert's additional award of $1,347.40 related to overtime pay was a "penalty" under WIS. STAT. § 109.11(2)(a). Given this is a statutory penalty, it cannot properly be considered wages because it is not "remuneration payable to an employee for personal services" under WIS. STAT. § 109.03(3). Englebert is not entitled to attorney fees related to the litigation of the statutory penalty claim. We therefore reverse the circuit court's award of $500 statutory attorney fees and remand the matter for a determination of Englebert's reasonable attorney fees attributable to litigation of her claim for overtime pay.

¶41 Englebert also argues the circuit court erred by failing to award her attorney fees related to her severance pay claim. While WIS. STAT. § 109.03(3) defines "wages" to include "severance pay," that benefit constitutes wages only if it is "remuneration payable to an employee for personal services." ***DILHR v. Coatings, Inc.***, 126 Wis. 2d 338, 344, 376 N.W.2d 834 (1985). Relying on ***Coatings***, the circuit court determined that Englebert's severance pay was "earned" by her termination from Calumet, not by any personal services that she provided to Calumet, so that her severance pay was not wages within the meaning of § 109.03(3).

¶42 In ***Coatings***, the employee had a four-year written employment agreement that included a liquidated damages provision obligating the employer to pay him a sum equal to his lost wages if he was terminated without cause prior to the end of the contract term. ***Coatings***, 126 Wis. 2d at 341. When his employment was terminated prior to the end of his contract term, the Department

of Industry, Labor and Human Relations brought an action on his behalf to recover the liquidated damages, arguing that the sums due to him under the provision were "wages" within the meaning of WIS. STAT. § 109.03(3). ***Coatings***, 126 Wis. 2d at 342. Our supreme court disagreed, holding that "compensation for a breach of contract is not 'remuneration payable to an employee for personal services,'" as provided in § 109.03(3). ***Coatings***, 126 Wis. 2d at 344. On that basis, the court held that the employee's claim for liquidated damages for breach of contract could not be brought under § 109.03(3). ***Coatings***, 126 Wis. 2d at 345.

¶43 The record in ***Coatings*** showed that the employee was fully compensated for all services that he performed prior to discharge, such that his severance pay constituted breach of contract damages rather than compensation for personal services. ***Id.*** Englebert contends she was not paid in full for services rendered because severance pay constituted deferred compensation for work performed prior to termination—an argument never made in ***Coatings***.

¶44 We are unpersuaded by Englebert's attempt to distinguish her claim from the claim in ***Coatings***. The record here shows, as it did in ***Coatings***, that, except for her overtime pay, Englebert's compensation was fully paid before her termination. Moreover, like the employee in ***Coatings***, Englebert was entitled to liquidated damages only because her employment contract was terminated. Englebert did not earn her severance pay by performing any personal services after her termination. The circuit court correctly determined that Englebert's severance pay did not constitute wages under WIS. STAT. § 109.03(3), and we affirm the denial of attorney fees attributable to litigation of Englebert's severance pay claim.

¶45 No WIS. STAT. RULE 809.25 costs on appeal are awarded to any party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.