COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2190

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

GARY E. BIRON,

PLAINTIFF-RESPONDENT-CROSS APPELLANT,

v.

ALLIEDSIGNAL INC.,

DEFENDANT-APPELLANT-CROSS RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

ROGGENSACK, J. Gary Biron sued AlliedSignal Inc. for breach of an employment contract, after he had received a severance package from AlliedSignal. He claimed an entitlement to compensation through July 31, 1992.

AlliedSignal denied breaching Biron's contract and raised an affirmative defense to further payment because of the severance already paid. The court found a breach, but that the contract ended Exhibit, 1992. It also concluded that no setoff of the severance was due to AlliedSignal. AlliedSignal appeals only the determination in regard to setoff and Biron appeals the court's determination about the term of the contract. Because we conclude the factual findings of the circuit court, which are not clearly erroneous, support the conclusion that AlliedSignal had not proved a right to setoff, and because the factual finding in regard to the termination date for the contract is not clearly erroneous, we affirm the judgment.

BACKGROUND

Gary Biron was employed in La Crosse, Wisconsin by Norplex Oak Inc., a division of AlliedSignal Inc., when he was asked to take an assignment in Singapore, as the president of Norplex/Oak-Singapore Ltd. After he had been in Singapore for several years, AlliedSignal asked Biron to move to Taiwan to become the president and general manager of Norplex Oak Materials Taiwan Ltd., another of AlliedSignal's operations. A commitment to remain in Taiwan for two years was requested by AlliedSignal and made by Biron. The parties signed an agreement setting forth the compensation Biron would be paid for the Taiwan employment.

Sometime after his move to Taiwan, Biron began to experience difficulties with AlliedSignal's management and his assignment in Taiwan was terminated on September 16, 1991. Biron was offered a lower level job in La Crosse or a severance package. He accepted the severance package and then sued for breach of contract, claiming as damages the compensation he would have received if the Taiwan employment had continued through July 31, 1992.

After a trial to the circuit court, it found that Biron's contract for Taiwan employment ran through February 29, 1992. It also found that Biron was not terminated according to the terms of his contract and that he was terminated without cause. Therefore, it concluded AlliedSignal breached the contract. The court awarded Biron $147,782 in damages for the compensation he would have received if AlliedSignal had continued his employment in Taiwan through February 29, 1992.

AlliedSignal claimed that any damages assigned for a breach of contract should be offset against the severance package Biron had already received. The circuit court examined the testimony relevant to AlliedSignal's claim. In regard to severance, it found that, "As best I can tell, everybody got one. They varied, but everybody got a separation package … what he got is only what he would have gotten if the contract had run its course. And I think from all the testimony I've seen, the separation package is standard with AlliedSignal." The court then determined that no offset was due AlliedSignal.

AlliedSignal appeals only the circuit court's refusal to offset the severance benefits from the contract damages. Biron appeals the court's finding that his Taiwan contract was not extended through July 31, 1992. We conclude that the circuit court's factual findings in both regards are not clearly erroneous. Therefore, we affirm the judgment.

DISCUSSION

Standard of Review.

We will affirm the circuit court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS.; ***Hur v. Holler***, 206 Wis.2d 334, 341, 557 N.W.2d 429, 432 (Ct. App. 1996).

Severance Benefits.

Biron sued for breach of his contract of employment. As damages, he sought the wages and all of the associated compensation he would have been paid by AlliedSignal if the Taiwan contract had run through July 31, 1992. Prior to starting the lawsuit, Biron had received a severance package, which AlliedSignal contends should have been setoff against Biron's recovery for its breach of the employment contract.

AlliedSignal did not plead a right to setoff or recoupment[1], but it did raise accord and satisfaction as an affirmative defense and it clearly brought its claimed right to the circuit court's attention. By whatever name the litigants chose

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[1] As Wisconsin courts have long held,

> A setoff is a demand which the defendant has against the plaintiff, arising out of a transaction *extrinsic* to the plaintiff's cause of action. Since it is purely statutory in origin, all of the statutory requirements must be strictly complied with. A recoupment, on the other hand, is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the *same* transaction. Since it is of common-law origin and is distinct from setoff, the statutory requirements regarding setoff do not apply, and recoupment may be pled defensively, … (as an affirmative defense).

Zweck v. D P Way Corp., 70 Wis.2d 426, 433-34, 234 N.W.2d 921, 925 (1975).

to call the affirmative defense,[2] it was AlliedSignal's burden to supply the finder of fact with sufficient credible testimony to persuade it that AlliedSignal had the right it claimed. *See generally* 80 C.J.S. *Set-Off and Counterclaim* §§ 2 and 3 (1953); 20 AM. JUR. 2d *Counterclaim, Recoupment, and Setoff* §§ 2, 5 and 6 (1995). For Wisconsin cases recognizing recoupment as a separate remedy, see ***Peterson v. Feyereisen***, 203 Wis. 294, 234 N.W. 496 (1931); ***Hildebrand v. American Fine Art Co.***, 109 Wis. 171, 85 N.W. 268 (1901); ***DeWitt v. Cullings***, 32 Wis. 298 (1873); ***Norton v. Rooker***, 1 Wis. 195 (1842).

AlliedSignal argues that it "is undisputed that the plaintiff had no contractual or other right to severance benefits, and the trial court so found." We disagree with the appellant for several reasons. First, it was AlliedSignal's burden to prove it had the right to a setoff, rather than Biron's burden to prove AlliedSignal lacked such a right.[3] *See* ***Zweck***, 70 Wis.2d at 434, 234 N.W.2d at 925. Yet, every argument in the appellant's brief assumes that Biron had to prove he had a right to the severance he had been paid, rather than recognizing that AlliedSignal needed to prove its claim for setoff. Second, the circuit court did make an explicit factual finding that Biron would have gotten the severance package, even if AlliedSignal had not terminated his assignment in Taiwan. It stated, "(W)hat he got is only what he would have gotten if the contract had run its course." The trial court found that severance packages were "standard" at AlliedSignal. That finding evinces a lack of proof for the claimed setoff.

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[2] We use the term setoff in this opinion to conform with the term chosen by the parties.

[3] Contrary to the statement on page 4 of the dissent, it is not the position of the majority opinion that it was AlliedSignal's burden to prove a negative, *i.e.*, that Biron had no right to severance. Rather, AlliedSignal had an affirmative duty to prove it had a right to setoff, either through the agreement it made with Biron when the severance was paid or at some other time.

Third, it is conceivable that Biron had other avenues for pursuing severance, which he did not need to pursue because AlliedSignal had already paid it. For example, when an employer makes a practice of paying severance to terminated employees, without the benefit of a separate agreement showing that the payments satisfy all claims an employee has against the employer arising out of his/her employment, those payments may rise to the level of an entitlement under the Employee Retirement Income Security Act (ERISA).[4] 29 U.S.C. § 1001 *et seq*. *See* ***Tobin v. Ravenswood Aluminum Corp.***, 838 F.Supp. 262, 272 (S.D. W.Va. 1993) (ERISA claims for severance are separate from claims for regular compensation); ***Clay v. ILC Data Device Corp.***, 771 F.Supp. 40, 44 (E.D. N.Y. 1991) (claim for ERISA severance benefits was actionable, even though severance pay policy was unwritten and alleged severance was unfunded); ***Strzelecki v. Schwarz Paper Co***., 824 F.Supp. 821, 872 (N.D. Ill. 1993) (prior practices of paying severance may rise to the level of an ERISA benefit even though there is no written plan, the payments are serial or lump sum). Or, the trial court could simply have concluded that there was a separate contract for the payment of the severance benefits Biron had already received and that he did not accept those benefits with the agreement that he would not sue AlliedSignal for breach of contract. Whatever its basis, the circuit court clearly found Biron had a right to receive severance, in addition to compensation in the amount he would have received if he had remained employed in Tiawan through February 29, 1992. In so finding, it also found AlliedSignal had not proved a right of setoff.

[4] We do not imply that we have examined the merits of any ERISA claim which Biron might have brought. We raise the ERISA issue only to show the monies paid for severance could be viewed in a variety of ways.

The record reflects support for the trial court's finding. For example, Exhibit 11, testified to by Biron, recounts a December 1989 conversation Biron had with Don Jobe, AlliedSignal's vice president of far east operations, when they were negotiating the terms of Biron's Taiwan employment. The evidence reflects Jobe is reported to have said, "You know what kind of severance packages the company has given to others. If you add severance benefits on top of what you will earn in the assignment, how much would you need?" Furthermore, Exhibits 28 and 35, as testified to by Biron, list former upper level employees and the severance benefits they received. The court was free to accept that testimony as evidence of an agreement to pay severance in addition to the compensation for completion of the contract. Because there is credible evidence of record, we conclude the finding that Biron was entitled to severance benefits, in addition to the damages he was awarded for the early termination of his employment in Taiwan, is not clearly erroneous. This finding implicitly evinces the circuit court's determination that AlliedSignal did not prove a right to setoff.

AlliedSignal contends that a setoff between the payments made and those awarded by the trial court is required under the holding of ***Dehnart v.***

Waukesha Brewing Co., 21 Wis.2d 583, 124 N.W.2d 664 (1963),[5] a case which offsets unemployment compensation payments received from contract damages due, and also by the reasoning of ***Graefenhain v. Pabst Brewing Co.***, 870 F.2d 1198 (7th Cir. 1989), a discrimination case with a make-whole remedy. We conclude neither case compels the result AlliedSignal seeks. In ***Dehnart,*** permitting the receipt of unemployment compensation and the wages lost because of breach of contract would have resulted in a double recovery for the same lost wages. And, in ***Graefenhain,*** as well as the other discrimination cases cited by AlliedSignal, the plaintiff's remedy was to be made whole for losses due to the discrimination. Here, the court found that there was a right to lost wages in addition to the severance package that Biron would have received, even if his Taiwan contract had been completed.

AlliedSignal maintains the circuit court erred because the severance payments that employees received were entirely discretionary; therefore, Biron had no contractual right to severance. However, AlliedSignal's argument in this regard ignores what the court found, as well as what it did not find. For example,

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[5] The dissent also believes that ***Dehnart,*** and its progeny, require a different result in this case, because severance pay may serve a purpose similar to that of unemployment compensation, and because unemployment compensation is unavailable to a person who is receiving severance benefits. However, the conditions under which one may receive unemployment compensation are set by statute. While, the only limit on the payment of severance is the agreement of the parties.

Additionally, in ***Dehnart***, the arbitrator had made findings that the employees were due wages for only that period of time between the layoff and the termination date of the union-management contract and only for the loss that was caused by the layoff. Here, in contrast, the trial court made findings that Biron would have received severance after the termination date of the Taiwan contract and that its payment was independent of the breach of contract damages.

While a claim for setoff may be decided as a matter of law if the facts are undisputed, as the dissent asserts, the claim must still have factual findings to support it, if it is to prevail. Here, the factual finding of the trial court that Biron would have received severance even if the Taiwan contract had not been terminated prematurely is inconsistent with AlliedSignal's claim for relief.

it did not find that the severance packages provided by AlliedSignal were "discretionary," although it stated it kept waiting for evidence in that regard. Nor did it find any agreement that Biron accepted severance in lieu of the compensation he would have received if the Taiwan employment contract had been completed. Rather, the circuit court found that Biron would have gotten the severance, even if the Taiwan contract had run its full course.

While the record reflects testimony that supports AlliedSignal's position, it is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). Therefore, we will not overturn its factual findings unless they are clearly erroneous, which is not the case here.

In regard to Biron's cross appeal, the record also reflects credible evidence to sustain the court's finding that Biron's Taiwan contract concluded on February 29, 1992. For example, Exhibit 6, the expatriate employee agreement Biron signed for Taiwan states, "[Y]ou will be assigned to Norplex Oak Materials Taiwan, Ltd. for a minimum two-year period. The initial two-year period may be extended by mutual agreement of management and you." And, Jim Engh testified that no extension had been determined by mutual agreement. Therefore, we conclude the trial court's finding about the term of Biron's contract is not clearly erroneous.

We conclude the judgment of the circuit court must be affirmed.

CONCLUSION

The factual findings of the circuit court, that Biron would have received a severance package in addition to his wages and other benefits had he completed his two years in Taiwan and that Biron's contract terminated February 29, 1992 are not clearly erroneous. Additionally, the circuit court's finding in regard to the conditions under which severance was paid is inconsistent with the factual findings that were necessary to sustain AlliedSignal's claim for setoff. Therefore, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 96-2190(D)

DEININGER, J. *(dissenting).* I agree with the majority that the trial court's finding that Biron's overseas contract terminated on February 29, 1992, should not be disturbed. I write separately, however, because I would not affirm as a finding of fact the trial court's denial of an offset against contract damages for the severance pay Biron received from AlliedSignal. Rather, I conclude that the determination to deny the offset is a question of law, reviewable de novo by this court, which I would decide differently than did the trial court.

Most of the trial court's findings relevant to the severance pay issue are not disputed by the parties. Biron testified that his "Expatriate Assignment" letter, which the trial court concluded constituted an employment contract, did not include a severance package. Biron's counsel conceded in argument to the trial court that "[t]here is no guarantee of severance." The trial court acknowledged that employees of AlliedSignal were "not guaranteed" a severance package, but concluded Biron would have gotten one "if the contract had run its course" because "everybody got one." Although AlliedSignal had no written policy regarding severance pay, all employees who left AlliedSignal from positions equivalent to Biron's had received a severance package of some sort. The amount and duration of the severance pay each received was apparently a matter of negotiation between AlliedSignal and the departing employee.

Under the severance package negotiated by Biron and AlliedSignal, Biron was paid his base salary, plus "U.S. benefits" and 401(k) contributions, aggregating to $9961 per month, for twelve months following his termination. The first five monthly payments, totaling $49,805, covered the period from his

termination in September 1991, through February 1992, the time which the trial court found Biron's overseas contract was to have terminated. Biron also received various lump-sum payments and allowances, which, when added to the monthly payments, brought the total of the severance payments made to Biron to $169,543.

Although I believe that it is more inference than fact, I accept the trial court's finding that Biron would have received severance pay in some amount, for some duration, had he been discharged after his two-year overseas contract had expired instead of five months prior to its expiration. This does not necessarily mean, however, that severance pay he received following his termination on September 16, 1991, should not be allowed as an offset against damages flowing from the breach of his two-year overseas contract. I would classify the determination on offset as a question of law, which this court should decide de novo. *See* ***Compton v. Shopko Stores, Inc.***, 93 Wis.2d 613, 616, 287 N.W.2d 720, 721 (1980) (reviewing court not bound by finding of trial court, based on undisputed evidence, when the finding is essentially a conclusion of law).

The precise question raised by the present facts appears to be one of first impression in Wisconsin. I conclude, however, that under established legal standards for the computation and mitigation of contract damages in employment termination cases, AlliedSignal is entitled to an offset against contract damages, at a minimum, for the severance payments it made to Biron during the unexpired portion of his contract.

In ***Compton,*** the supreme court considered the nature and purposes of "severance pay," concluding that, among other things, "[s]everance pay, by definition, means compensation given to an employee upon the severance of his

employment relationship with his employer." ***Id.*** at 622, 287 N.W.2d at 724. The court noted that severance pay represents "accumulated compensation for past services," but that it is also "a form of compensation for the termination of the employment relation primarily to alleviate the consequent need for economic readjustment." ***Id.*** at 623, 287 N.W.2d at 725. Thus, the court concluded that severance pay serves much the same purpose as does unemployment compensation:

> If a person is receiving income in the form of severance pay, he has no need for unemployment compensation; the purposes for which unemployment compensation was established are being accomplished by severance pay.

Id. at 622, 287 N.W.2d at 724.

In ***Dehnart v. Waukesha Brewing Co.***, 21 Wis.2d 583, 124 N.W.2d 664 (1963), the supreme court considered whether "unemployment compensation benefits received by plaintiffs subsequent to the breach of contract [should] be offset against plaintiffs' claims for damages[]." ***Id.*** at 589, 124 N.W.2d at 667. In concluding that the offset should be allowed, the court reviewed basic principles of contract damages and applied them to the circumstance where an employee receives unemployment compensation following a discharge which is subsequently determined to be a breach of an employment contract:

> The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach. Restatement, 1 Contracts, pp. 503 *et seq*., sec. 329; 5 Williston, Contracts (rev. ed.), p. 3762, sec. 1338. It is a corollary of this rule that a party whose contract has been breached is not entitled to be placed in a better position because of the breach than he would have been had the contract been performed. *Blair v. United States* (8th Cir. 1945), 150 Fed. (2d) 676, 678; *United Protective Workers v. Ford Motor Co*., *supra*, at page 53. If

> the instant plaintiffs were to recover as damages full back pay with interest for the period of employment lost by [the employer's] breach of contract, without deduction of the unemployment compensation benefits that they received for the same period, they would be placed in a better position than if the contract had not been breached.

Id. at 595-96, 124 N.W.2d at 670-71. The court also noted that the unemployment compensation benefits received by the plaintiffs embodied "an element of cost" to the employer, "which is a further reason for sustaining the circuit court's determination in allowing an offset of such benefits." ***Id.*** at 596, 124 N.W.2d at 671.

The majority concludes that AlliedSignal did not meet its burden to prove a right to setoff because it failed to establish that Biron was not entitled to severance pay. (Majority Opinion at 5-6) Under the trial court's findings, Biron would have received severance pay regardless of when he was discharged. But this "fact" does not distinguish Biron's circumstances from those of the ***Dehnart*** plaintiffs, who were also entitled to receive unemployment compensation following the termination of their employment. The entitlement to those benefits did not prevent the supreme court from authorizing an offset in ***Dehnart***, and neither should Biron's "entitlement" to severance pay preclude an offset here. I cannot, therefore, accept the majority's attempt to distinguish ***Dehnart*** on the basis that Biron had a "right" to both lost wages and the severance package. (Majority Opinion at 8).

The measure of damages to which a wrongfully discharged employee is entitled is "the salary the employee would have received during the unexpired term of the contract plus the expenses of securing other employment *reduced by the income which he or she has earned, will earn, or could with reasonable diligence earn, during the unexpired term.*" ***Wassenaar v. Panos***, 111

Wis.2d 518, 534, 331 N.W.2d 357, 365 (1983) (emphasis supplied). Here, Biron received payments from AlliedSignal totaling $169,543 following his discharge, at least $49,805 of which was "in the form of salary continuation" for the five months constituting the unexpired term of his contract. To not offset at least this latter sum against his contract damages results in a windfall to Biron: he received 100% of his contract damage award, plus all of the severance payments made by AlliedSignal to mitigate the economic impacts stemming from the termination of his employment.[6] *See* ***Compton***, 93 Wis.2d at 623, 287 N.W.2d at 725.

Like the ***Dehnart*** plaintiffs, had they been able to avoid an offset of their contract damages for the unemployment compensation they received, I conclude that Biron is "placed in a better position than if the contract had not been breached." *See* ***Dehnart***, 21 Wis.2d at 596, 124 N.W.2d at 671. Had the contract not been breached, Biron would have received his contracted compensation from September 1991 through February 1992, but he would not have received severance pay for that period. Under the present judgment, he receives both. While Biron should be restored to the position he would occupy absent AlliedSignal's breach, "the law should seek to protect against windfalls which might be gained by the nonbreaching party." ***Luebke v. Miller Consulting Engineers***, 174 Wis.2d 66, 74, 496 N.W.2d 753, 756 (Ct. App. 1993). Since I conclude that the majority's view of this case results in such a windfall, I respectfully dissent.

[6] The severance package included $119,532 paid out in 12 monthly installments following Biron's termination on September 16, 1991, and $50,011 in lump-sum payments. AlliedSignal sought offset for the $119,532 in monthly payments, plus interest at 5% on those payments through the date of trial, for a total of $145,815. As noted, $49,805 was paid in monthly installments from September 1991 through February 1992. The trial court did not consider what portions of the severance package should be allowed as an offset to Biron's damage award, because it concluded that none was allowable. I would remand the case for a determination of the proper amount to be offset and for entry of the resulting judgment.