COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2294

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

MILWAUKEE PRECISION CASTING, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

MARK E. HAGEDORN AND CONNIE L. HAGEDORN,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

JOSEPH BEBEE,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

FRED GRIESHABER CHICAGO VACUUM CASTING CORPORATION, AND STARK PRECISION CASTING CORPORATION,

THIRD-PARTY DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Joseph Bebee appeals the trial court's findings that he failed to prove that he was entitled to overtime wages from his former employer, Milwaukee Precision Casting (MPC). He also appeals several of the trial court's findings which served as the underpinnings for the trial court's determination that Bebee breached his fiduciary duty of loyalty to MPC, claiming the findings are clearly erroneous. MPC cross-appeals both the trial court's refusal to award it prejudgment interest and the trial court's failure to include in the amount of damages for the breach of fiduciary duty the salary paid to Bebee. With respect to Bebee's claims of error, because the trial court's findings are neither clearly erroneous nor against the great weight and clear preponderance of the evidence, we affirm. With regard to MPC's cross-appeal, we decide the issues *de novo* and determine that prejudgment interest was unavailable under these facts and that the salary paid to Bebee was properly not included in the trial court's damage award. Accordingly, we affirm.

I. BACKGROUND.

Bebee began working for MPC in 1991 as a computer programmer and was paid $36,000 a year. Before working for MPC, Bebee had worked for H&H Tool, Inc., a company owned by Mark Hagedorn. After MPC, through its owner and sole stockholder, Fred Grieshaber, bought H&H's equipment and hired both Mark and his wife, Connie Hagedorn, Bebee followed the Hagedorns to MPC.

In June 1994, Bebee and the Hagedorns were terminated from MPC because Grieshaber discovered that Bebee and Mark Hagedorn, with Connie's assistance, had been doing side jobs, using MPC's equipment and materials. None of the money earned from the side jobs went to MPC, nor was MPC reimbursed for any of the supplies they used. As a result, MPC sued both the Hagedorns and Bebee claiming that the side jobs constituted a breach of loyalty to MPC and demanded that the company be compensated by being paid the proceeds of all of their side jobs and the salaries paid to them during this time. Both the Hagedorns and Bebee counter-sued.[1] Bebee's suit sought unpaid overtime wages which he claimed were due him pursuant to the federal Fair Labor Standards Act (FLSA).[2] All of the suits were tried to the court.

At trial, the parties and their witnesses gave conflicting testimony and, according to the trial court, the credibility of the witnesses was crucial to the outcome of the case. The trial court found in favor of MPC on its main claim, finding Hagedorn and Bebee breached their duty of loyalty, but the trial court awarded as damages only the amounts earned from their side jobs.

In its written decision, the trial court found that Bebee had failed in his burden of proof on his claim for the alleged unpaid overtime wages. Bebee claims that the trial court erred as a matter of law in finding that he failed to prove his case. Bebee also challenges the trial court's finding that Grieshaber, the president of MPC, never had any discussions or agreements with either Bebee or

[1] After the trial the Hagedorns filed a Chapter 13 case. By stipulation between the Hagedorns and MPC, their appeals were stayed pending further proceedings. At this writing, the stipulation is still in effect.

[2] 29 U.S.C.A. § 207(a)(1).

Hagedorn permitting them to engage in side jobs and he claims the trial court erred in finding that Grieshaber did not have any knowledge that Hagedorn and Bebee were doing side jobs at the company. He also disputes the trial court's finding that Precision Castings of Tennessee (PCT), one of the companies for which he did side jobs, was a competitor of MPC. He argues these factual findings are clearly erroneous and, as a result, MPC cannot recover on its claim of breach of loyalty. Further, Bebee claims that the knowledge of various MPC employees who knew that side jobs were being performed at MPC should be imputed to Grieshaber and, as a consequence, MPC has waived its right to bring suit.

MPC cross-appeals the trial court's failure to award prejudgment interest and the trial court's failure to include Bebee's salary in the damages. MPC argues it met the requirements to be awarded prejudgment interest and, under existing case law, it should be awarded Bebee's salary as damages.

II. BEBEE'S APPEAL

Standard of Review

"Findings of fact by the trial court will not be upset on appeal unless they are clearly erroneous and against the great weight and clear preponderance of the evidence." ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 281 (1979). To command a reversal of a finding of fact, "evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence." ***Id.***

A. Bebee's claim for unpaid overtime wages.

Bebee claims the trial court erred in finding that he was not entitled to overtime wages from MPC pursuant to the Fair Labor Standards Act. Bebee posits that the trial court's ruling should be reviewed as a matter of law and thus be subject to review *de novo*. Bebee contends this is so because he established at trial "a prima facie claim for unpaid overtime wages under FLSA."[3] He asserts that he proved at trial that he was eligible for overtime and that his testimony set forth the numerous hours of overtime for which he received no payment and this testimony was unrefuted. Thus, he concludes the trial court erred in failing to award him the unpaid wages. We disagree.

First we note that the trial court's decision on this matter is not subject to *de novo* review. At trial, the matter was disputed; thus, the trial court was required to evaluate the evidence, including the credibility of the witnesses. Consequently, the correct standard of review is the same as that of the trial court's other factual findings. As noted, we do not reverse the trial court's factual findings unless the trial court's determinations are clearly erroneous and a reviewing court "must accept the trial court's view of the credibility of the

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[3] 29 U.S.C.A. § 207(a)(1) of the Fair Labor Standards Act reads:

> Except as otherwise provided in this section, *no employer shall employ any of his employees* who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, *for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.*

(Emphasis added.) See also 29 U.S.C.A. § 207(a)(2) for incorporation of Fair Labor Standards Amendments of 1966 into this chapter.

witnesses unless [the reviewing court] can say the trial court was wrong on credibility as a matter of law." ***Seraphine v. Hardiman***, 44 Wis.2d 60, 65, 170 N.W.2d 739, 742 (1969).

Bebee based his suit for overtime on the FLSA rule that for workers who are eligible, the law requires that a worker be paid for a "workweek longer than forty hours … at a rate not less than one and one-half times … the regular rate." 29 U.S.C.A. § 207(a)(1). As noted by MPC, case law has placed the burden of proof to "succeed in a claim that an employer has violated the FLSA" on the employee who "bears the burden of proving beyond a preponderance of the evidence that he indeed worked overtime, as well as proving the number of hours worked overtime." *See* ***Crawford Prod. Co. v. Bearden***, 272 F.2d 100, 104 (10th Cir. 1959). The trial court dismissed Bebee's claim, finding that MPC "did not violate the FLSA in any respect, particularly with respect to its alleged failure to pay defendants' overtime pay," and further found that "based upon the credible evidence and the record, it has not been proven that the plaintiff failed to pay overtime compensation and liquidated damages provided in the FLSA." A review of the evidence supports the trial court's findings.

Although Bebee testified he had not been paid the wages due him for overtime work, he conceded he had no written evidence of this fact. He argues that the reason he has no written evidence is the fault of MPC and this fact should not be held against him. As a result, his claim for overtime is only an estimate of the hours he worked, not an exact listing of the actual days and hours. Further, Bebee premised his estimate of overtime hours by using a mathematical formula. He used the generated tooling billings of MPC and applied the average reasonable hourly costing rate for a similar tool shop. Using these figures, he calculated the hours needed to generate MPC's billings. He then extrapolated from this

information the hours he must have worked from the amount of billings generated. As part of his calculation, he also factored in that he, rather than Mark Hagedorn, who was busy with other duties, was primarily responsible for this work. According to these calculations, Bebee claimed he worked approximately sixty hours a week, entitling him to significant overtime pay.

Other evidence, however, suggested that Bebee's claim was unfounded. Testimony established that Bebee had routinely been paid overtime in the past and that no company policies prohibited overtime. Additionally, the woman in charge of payroll testified she had never been told of Bebee's complaint that overtime pay due him was not paid. In fact, evidence was submitted that Bebee was the only employee to complain he had not been paid overtime. Even his co-defendant, Connie Hagedorn, who was responsible for calling in Bebee's hours to payroll, testified she had no record to support Bebee's request for overtime pay. Further, while Bebee characterizes his testimony as showing a "prima facie claim for unpaid overtime," it is apparent that the trial court was unimpressed with Bebee's testimony. The trial court noted that it would have been difficult for Bebee to have worked sixty hours a week overtime plus, as he claimed, working as many as thirty-one hours a week at his side jobs. This ninety-one hour work week was, according to the trial court, unlikely. It is also apparent that the trial court found Bebee untruthful, as the trial court specifically found him untruthful in several other respects, including his contention that Grieshaber had permitted him to do side jobs. Thus, the evidence supports the trial court's conclusion that Bebee did not meet his burden of proof.[4]

[4] Because of our decision on the first issue, it is not necessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

B. Bebee's claim concerning the breach of loyalty.

Bebee also claims that the trial court erred in concluding that he breached his duty of loyalty to MPC. Bebee disputes several of the trial court's factual findings, arguing that they are contrary to the great weight and clear preponderance of the evidence. First, he claims that the trial court erred in accepting Grieshaber's testimony that he never discussed or gave permission to Bebee or Hagedorn to do side jobs and that he did not know that Hagedorn and Bebee were conducting their own side business at MPC. Second, Bebee argues that the trial court erred in finding that PCT, a company for which a side job was performed, was a competitor of MPC. With regard to the second factual finding, Bebee construes the trial court's decision that he breached his duty of loyalty as hinging on the finding that PCT was a competitor of MPC. Bebee asserts that because PCT was not a competitor of MPC, the trial court erred in finding that MPC proved all the elements of the tort of a breach of fiduciary duty. Finally, he argues that MPC's claim should be dismissed because other employees of MPC were aware of the side jobs and this knowledge should be imputed to Grieshaber, thus constituting a waiver to the breach of fiduciary duty claim. We disagree.

Bebee's contention that the trial court erred in finding both that Grieshaber had not agreed to permit side jobs and that Grieshaber did not know of the side jobs fails because the trial court's findings are neither clearly erroneous nor against the great weight and clear preponderance of the evidence. There is ample evidence in the record to support the trial court's findings.

MPC sought damages from both the Hagedorns and Bebee claiming they breached their duty of loyalty. MPC cites the RESTATEMENT (SECOND) OF AGENCY § 387 as authority for its cause of action. It reads: "[U]nless otherwise

agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." MPC further points to comment b of § 387 of the Restatement to explain that the agent's duty "is not only to act solely for the benefit of the principal in matters entrusted to him … but also to take no unfair advantage of his position in the use of information or things acquired by him because of his position as agent." RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958).

MPC also cites the RESTATEMENT (SECOND) OF AGENCY § 394 for further discussion of this duty: "Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed." MPC further cites comment a of § 394, which states in relevant part:

> Under the rule stated in this Section, the agent commits a breach of duty to his principal by acting for another in an undertaking which has a substantial tendency to cause him to disregard his duty to serve his principal with only his principal's purposes in mind. Thus, an agent has a duty not to act for a competitor of his principal unless this is permitted by the understanding of the parties.

Bebee argues he should be relieved of the requirements reflected in the Restatement because there was an agreement between the principal and the agent, relieving him of the duty of acting solely for the principal. Bebee contends that the only credible evidence supports a finding that Grieshaber agreed that Hagedorn and Bebee could do side jobs for former H&H customers and that Grieshaber was aware of their activities at the factory. As support for this position he relies on his own testimony and that of Mark Hagedorn. They both testified at trial that Grieshaber orally agreed to the side jobs and signed a letter which outlined their agreement. Bebee states that their testimony was further

corroborated by four undated letters faxed to Grieshaber at his Chicago office. Bebee argues that one of them, Exhibit 57, specifically contained evidence of the agreement with Grieshaber that the men could do side jobs after hours at MPC with the compensation going only to them. Testimony was submitted at trial that a signed copy of Exhibit 57 was placed in Hagedorn's briefcase, which was last seen in Hagedorn's office at MPC and that the briefcase was not returned despite several requests. Bebee admits that the testimony of Grieshaber directly contradicts his claim that there was both an oral and a written agreement permitting side jobs. Bebee, however, insists that the trial court's findings with respect to this issue are erroneous because the revelation that Bebee failed to report his income from the side jobs to the Internal Revenue Service (IRS) "prejudicially impacted the trial court's ability to impartially and objectively weigh the evidence presented at trial," and "the evidence of record overwhelmingly demonstrates that Mark's and Joe's performance of the side jobs was anything but clandestine." We disagree.

First, we conclude that the trial court properly characterized Bebee's failure to report his side income to the IRS as "evidence of a clandestine scheme by the defendants to hide their activities in doing side jobs without the consent of the plaintiff." The trial court was free to sift through the conflicting evidence and determine what had merit. The trial court concluded that the failure to claim the side job monies on their income tax return was relevant to the ultimate issue as to whether there was an agreement with Bebee's employer to do side jobs. Conversely, the trial court decided that the circumstantial evidence mustered by the defense consisting of undated faxes was of little merit. The trial court discounted these exhibits by stating: "This court will give no weight to any of the self-serving, unverified items submitted by the defendant that they believe verify

this alleged agreement between the plaintiff and the defendants to do side jobs. These items are untrustworthy based upon the other evidence that contradicts any such alleged agreement."

We are not persuaded that the trial court's findings were "clearly erroneous." The trial court considered the exhibits, but felt the proffered exhibits were of little weight as compared to other evidence submitted at trial. The trial court found other evidence, including the lack of reporting of the side income, more persuasive. In support of the trial court's conclusion, the trial court noted that Mark's employment contract gave no permission to him to do side jobs, nor did MPC's employee handbook. Additionally, another witness established at trial that it was not the custom in this industry to permit employees to use company's supplies for their private enterprise. As noted, the strongest witness countering the appellant's argument was Grieshaber, who vigorously denied that any such agreement was reached with Bebee and Hagedorn.

Bebee also contends that the trial court erred in finding that Grieshaber was unaware of Hagedorn's and Bebee's activities. Bebee claims that Grieshaber had to know of the side jobs because he and Hagedorn made little attempt at hiding what they were doing from co-workers. Although possibly true, that fact does not decide the issue. What Bebee fails to realize is that the key to this dispute is not what the employees knew, but what Grieshaber knew. Grieshaber testified he was unaware of the practice and other witnesses supported Grieshaber's testimony. Several witnesses testified that they did not believe that Grieshaber, who spent significant time at his other out-of-state businesses, was aware of the situation.

Bebee asserts that the testimony of three defense witnesses "overwhelmingly" proved that Grieshaber was aware of the side jobs and approved of them. A review of their testimony, however, only allows, at best, the inference that Grieshaber may have had some limited knowledge that Mark Hagedorn was working on weekends and that, perhaps, Hagedorn was slow in finishing up projects left over from his own business. Their testimony establishes neither that Grieshaber agreed to let them do side jobs nor that he knew of the practice, and even if their testimony did, the trial court was free to disregard their testimony in favor of other evidence in the record.

The first of the three defense witness, Reid, stated he had a conversation with Grieshaber about Greishaber's overworking Mark Hagedorn because he could not get Mark to finish a project he undertook apparently before his employment with MPC. He testified that during this conversation no mention of side jobs was ever made. The second witness, Kinziger, whose testimony the trial court apparently found suspect because he was also suing MPC in a separate action when he testified, related at trial that he had had a discussion with Grieshaber about the extra work Mark was doing on weekends. Finally, the third witness, Najera, related that when he quit working for MPC, he told Grieshaber that another worker who disliked Mark Hagedorn had told him that Hagedorn was doing side jobs. According to Najera, Grieshaber responded to this statement by saying that "he had to have proof." When Grieshaber testified about this conversation, he recalled that the conversation centered on Mark's dishonesty, he denied that the conversation dealt with Mark's doing side jobs.

Given the conflicting testimony, we cannot conclude that the trial court's findings that "[t]here has been no credible evidence submitted to support the defendants' claim [that Grieshaber agreed to allow side jobs]" and that the

evidence presented by the defendants is "untrustworthy based upon the other evidence that contradicts any such alleged agreement" were clearly erroneous, as there is support in the record for the trial court's determination. It is the trial court's prerogative to decide who is believable and to discount or discard information to the contrary.

Finally, Bebee argues that regardless of the trial court's other findings, MPC should not be allowed to sue him because MPC waived its right to do so. He posits that the collective long-standing knowledge of MPC's employees regarding side jobs should be imputed to Grieshaber and thus, waiver applies. He imputes the knowledge of his fellow employees to Grieshaber on a theory of corporate agency and then extrapolates from the rule of law found in ***Racine v. Weisflog***, 165 Wis.2d 184, 195-96 & n.3, 477 N.W.2d 326, 331-32 & n.3 (Ct. App. 1991), for his conclusion that MPC has waived its right to sue Bebee for his breach of loyalty. He is wrong for two reasons.

First, the fact that other employees knew of the side job arrangement does not defeat MPC's claim. The knowledge of Grieshaber's employees is not imputed to him under these facts because there is no evidence that they were Grieshaber's agents for this purpose. Second, even if some employees of MPC knew that Bebee and Hagedorn were doing side jobs, ***Racine*** does not establish waiver. ***Racine*** discusses the corporate opportunity doctrine. The underlying facts dealt with two men who were business partners with one having knowledge

of the other's actions concerning a separate business. The case does not stand for the proposition argued by Bebee and it is inapplicable to this fact situation.[5]

C. Trial court's finding concerning PCT as MPC's competitor.

Bebee asserts that the trial court erred in finding that PCT, a company that paid for side jobs, was a competitor of MPC. He relies on the testimony of the owner of PCT for his conclusion that since PCT was unaware of the existence of either MPC or its owner, PCT could not have been a competitor. Bebee then proposes that without this finding, the trial court could not have found that he violated his duty of loyalty to MPC. Bebee maintains that if PCT is not a competitor to MPC, MPC's claim fails. An examination of the record, however, particularly the trial court's decision, does not support Bebee's argument.

First, the trial court never made a finding that PCT was a competitor of MPC. Rather, the trial court's findings of fact on the matter state that the "side jobs activities [of Bebee and Mark Hagedorn] did affect the plaintiff company's production and its responsibilities to its own customers" and "Mark and Bebee interfered with the contractual relationships the plaintiff had with customers because while soliciting and performing side jobs for others while employed by the plaintiff, they were not able to timely fulfill the plaintiff's obligations to plaintiff's customers." Finally, the trial court found, "In effect, the defendants were disloyal to the plaintiff and their actions affected the efficiency of the plaintiff company's [sic] and the defendants basically *became the plaintiff's competitors while collecting a salary for* [sic] *the plaintiff.*" (emphasis added).

[5] We note that the trial court characterized Grieshaber as not being diligent in tending to his business affairs. Even if Grieshaber exhibited a lack of diligence, this fact did not relieve Bebee of his obligation.

Thus, the trial court never relied upon the fact that PCT was a competitor of MPC for its determination that Hagedorn and Bebee had violated the duty of loyalty imposed upon them in their capacity as employees. The trial court found that the true competitors to MPC were Bebee and Hagedorn because their actions in using MPC's equipment and materials and in their putting their work ahead of MPC's transformed them from loyal employees to competitors.[6]

III. MPC'S CROSS-APPEAL.

MPC has cross-appealed, claiming that the trial court erred in failing to award MPC prejudgment interest and in failing to include as damages the salary paid to Bebee during the time he was engaging in his breach of loyalty to MPC.

A. Trial court refusal to award prejudgment interest.

Whether a party is entitled to an award of prejudgment interest is a question of law which is reviewed by the appellate court *de novo*. ***Loehrke v. Wanta Bldrs., Inc.***, 151 Wis.2d 695, 706, 445 N.W.2d 717, 722 (Ct. App. 1989). Prejudgment interest is recoverable "only on damages that are either liquidated or liquidable. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped." ***Imark Indus., Inc. v. Arthur Young & Co.***, 141 Wis.2d 114, 138, 414 N.W.2d 57, 67 (Ct. App. 1987), *rev'd in part on other grounds*, 148 Wis.2d 605, 436 N.W.2d 311 (1989).

[6] Nevertheless, the record would support a finding that PCT was a competitor of MPC. The president of PCT testified that his company was in the same line of work at MCT and the companies competed for the same work in a national market.

Case law also gives some guidance as to when prejudgment interest is not awardable. These circumstances include when there are multiple defendants and when there exists a genuine dispute. *See* ***Beacon Bowl, Inc. v. WEPCO***, 176 Wis.2d 740, 777, 501 N.W.2d 788, 803 (1993); ***Klug & Smith Co. v. Sommer***, 83 Wis.2d 378, 385, 265 N.W.2d 269, 272 (1978). Both circumstances exist here. MPC sued multiple parties, Mark and Connie Hagedorn and Bebee, and proof of a genuine dispute can be inferred from the fact that not all the money damages sought by MPC were awarded by the trial court. While MPC argues that Bebee could easily have determined his liability, we disagree. The causes of action were not easily severable, and MPC sought monies from Bebee and the Hagedorns, both from the side jobs and the return of their salaries, making the damages an unfixed and indeterminate amount.

B. Return of Bebee's salary.

Standard of Review

"[W]hether [an employer] has met its burden of establishing a prima facie case [that it is entitled to the return of compensation paid to a disloyal employee] is a question of law which [the reviewing] court may examine independently …." ***Burg v. Miniature Precision Components, Inc.***, 111 Wis.2d 1, 12, 330 N.W.2d 192, 198 (1983) (citing ***Seraphine v. Hardiman***, 44 Wis.2d 60, 65, 170 N.W.2d 739, 742 (1969)). MPC submits that the trial court's failure to include the salary paid to Bebee in its determination of the damages was error. MPC cites ***Burg*** as support for the inclusion of the salary paid out to a disloyal employee as damages. In ***Burg*** the court articulated that the employer bears the burden of proving not only that the employee was disloyal, but also that this disloyalty so affected the on-the-job performance that it would constitute an unjust

enrichment to allow the employee to retain the wages. *See* ***id.*** at 8-9, 330 N.W.2d at 195-96. MPC argues that it has met this burden of proof. Bebee disagrees and argues that any disloyalty engaged in by him did not result in his actions being antagonistic to the performance of his duties to MPC. Bebee also argues that in applying the equitable test found in ***Hartford Elevator, Inc. v. Lauer***, 94 Wis.2d 571, 580-81, 289 N.W.2d 280, 284-85 (1980), for determining whether a disloyal employee should be required to pay back earned wages, requires this court to affirm the trial court. To a limited extent, we agree with Bebee.

While the facts in ***Burg*** bear many factual similarities to this case, there are crucial differences. In ***Burg***, the employee started a business which competed with his employer. In his capacity as manager, the employee farmed out work to his company and evidence was introduced that the employee's attendance, job performance, and internal production of the department deteriorated after he began his own company. Here, Bebee engaged in a separate business by doing side jobs with MPC's equipment and materials and, as found by the trial court, his "business" competed with his employer's. The two major distinctions between the relevant facts here and those in ***Burg*** are: (1) Bebee contributed to MPC's success, whereas in ***Burg*** the employer's business deteriorated; and (2) Bebee spent many hours on MPC's work, while in ***Burg*** the employee worked primarily on his own business. Consequently, permitting Bebee to retain his salary would not result in an unjust enrichment to Bebee because he did do substantial work for MPC.

Further, when we apply the test found in ***Hartford Elevator***, we reach the same conclusion. ***Hartford Elevator*** states that evaluating whether the salary of a disloyal employee should be returned requires a consideration of "the nature and extent of the employee's services and breach of duty; loss, expenses

and inconvenience caused to the employer by the employee's breach; and the value to the employer of the services properly rendered by the employee." ***Id.*** at 586, 289 N.W.2d at 287. Although he was guilty of a breach of his duty of loyalty to MPC, Bebee did not work exclusively at the side jobs. He worked extensive hours for MPC, doing his own work as well as Hagedorn's. He also was a crucial employee for MPC, and several witnesses confirmed that few people could have done his job at the factory. Consequently, without his successfully completing his MPC tasks, MPC would not have enjoyed the success it did. Thus, Bebee's work contributed to the company's significant billings. Finally, the damages already assessed against Bebee will reimburse the company for its losses. Thus, in applying the ***Hartford Elevator*** test, a return of Bebee's salary to MPC would result in "an unjust deprivation" to Bebee, and an unjust enrichment to MPC. Thus, we conclude that requiring Bebee to return his salary would be unfair and we affirm the trial court's decision to exclude the salary of Bebee in the damages awarded to MPC.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.