IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID M. DICKSON and CHRISTOPHER G. STELZER,	)	**No. 27745-3-III**
	)	
Respondents,	)	
	)	**Division Three**
v.	)	
	)	
AVISTA ENERGY, INC.,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Schultheis, C.J. — Energy traders David Dickson and Christopher Stelzer worked under employment contracts with Avista Energy, Inc. when Avista sold its operating assets to another company. Mr. Dickson and Mr. Stelzer received pay and bonuses pending the sale. Before their last day of work at Avista, the traders accepted positions with the purchasing company and demanded that Avista pay severance benefits for termination under their employment contracts. Avista refused. The traders sued for breach of contract. The court granted summary judgment in their favor and awarded them contractual attorney fees and double severance payments under RCW 49.52.070 as exemplary damages for

willful deprivation of severance. Avista appeals.

The issues on appeal are whether the severance clause in the employment contracts was triggered by Avista's sale of its assets and, if such severance payments were due, whether the matter was the subject of a bona fide dispute that precludes exemplary damages under RCW 49.52.070. We conclude that the severance clause was triggered and the trial court correctly ordered exemplary damages. We therefore affirm and grant the traders attorney fees as provided in RCW 49.52.070.

FACTS

Mr. Dickson and Mr. Stelzer were energy traders for Avista. Both traders signed employment contracts with Avista.[1] On April 17, 2007, Avista announced the sale of its operating assets to Coral Energy Holding, L.P., a subsidiary of Shell Oil Company. The transaction closed on July 30. While Avista's assets were sold to Coral, Avista retained the stock in its company.

Mr. Dickson signed a contract on May 22 accepting a position with Coral in Spokane. Mr. Stelzer signed an offer of employment with Coral on June 8 for a position in San Diego. Mr. Stelzer ultimately turned down the offer due to the higher cost of living and decrease in benefits connected to the Coral position.

[1] The contracts set forth identical terms relevant to this appeal.

The traders received communications from various Avista benefits personnel, each referencing the traders' termination date of June 30, 2007. Further, according to Dennis Vermillion, Chief Operating Officer of Avista, there were no jobs available for the traders at Avista after June 30.

On September 4, the traders sent a letter to Avista, demanding payment under the severance provision of their respective employment contracts with Avista. Each contract had the same severance provision:

> Upon termination of the Employee's employment by the Company without Cause, Avista will pay the Employee a single lump sum severance payment equal to a total of twelve months (12) of the Employee's then current monthly salary to the Employee, less all applicable taxes payable on the first regular payroll following the Employee's last day of employment. Employee shall be subject to a three (3) month non-competition period as described in Section 8.

Clerk's Papers (CP) at 78, 99.

In its response, Avista claimed that the severance provision of the contracts was not triggered because the traders voluntarily chose to resign their positions by accepting employment with Coral.[2]

The traders filed suit on November 16, 2007, seeking declaratory relief and money damages for breach of contract and unpaid wages. Following discovery, the parties filed

[2] Avista has since abandoned this position.

competing motions for summary judgment. The traders argued that the terms of the contracts provided for the payment of the severance benefits. Avista argued that severance benefits were not due the traders because the traders' contracts did not expressly provide that the sale of the company's assets triggered the severance clause.

After oral argument on October 3, 2008, the trial court issued a memorandum opinion on October 23, deciding the matter in the traders' favor. The court entered orders and judgments after finding Avista liable for exemplary damages under RCW 49.52.070, prejudgment interest, and attorney fees. This timely appeal follows.

DISCUSSION

a. Severance

An order of summary judgment in a declaratory judgment action is reviewed de novo, in which the appellate court performs the same inquiry as the trial court. *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). "Facts and reasonable inferences are considered in the light most favorable to the nonmoving party and questions of law are reviewed de novo." *Id*.

"The purpose of contract interpretation is to determine the intent of the parties." *Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, 194 P.3d 221 (2008) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990)); *see Tanner Elec. Coop. v. Puget*

Sound Power & Light, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) ("The touchstone of contract interpretation is the parties' intent."). The intent of the parties controls the interpretation of all contract terms. *Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976). "We search for intent th[r]ough the objective manifest language of the contract itself." *Navlet*, 164 Wn.2d at 842 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). "Contract construction involves the application of legal principles to determine the legal effect of contract terms." *Id.* (citing *Hearst*, 154 Wn.2d at 502 n.9).

Here, the issue is whether the traders were terminated without cause, thereby triggering the provision that entitles them to 12 months' pay as severance. Avista argues that regardless of the provision of the contracts, the facts of this case are governed by this court's decision in *Lardy v. United States Testing Co., Inc., Severance Pay Plan*, 84 Wn. App. 825, 930 P.2d 347 (1997). As the traders point out, numerous facts distinguish their case from *Lardy*.

Lardy involved the sale of a hazardous waste testing facility that was sold to another company. 84 Wn. App. at 826. The employees were informed of the impending sale and were given the option of continued employment with the new company. The majority of the employees agreed to continue as employees of the new company. The employees

never missed a day of work due to the sale and continued with the same job, at the same facility, at the same or similar tasks, and for almost the same compensation. *Id.* at 826-27.

The selling company had a severance plan under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(1)(B). The plan unambiguously stated that "[e]mployees may receive severance benefits only if terminated due to a work force reduction." 84 Wn. App. at 829. The employees sought severance benefits, which the trial court awarded. *Id.* at 827. This court reversed, holding that "the employees were not part of a work force reduction." *Id.* at 829.

While the event triggering the severance provision in *Lardy* was a reduction in work force, the event triggering the severance provision here was "termination of the [traders'] employment by the Company without Cause." CP at 78, 99. In *Lardy*, as here, the contract did not define the key phrase or term that triggers the provision. 84 Wn. App. at 829.

The *Lardy* court reasoned that a work force reduction did not occur because, although the selling company "technically eliminated positions within the company," the employees' positions remained intact—the positions continued to be filled by the same employees doing the same work, but for a different entity. *Id*. The court observed, "'The sale of a business is qualitatively different from a reduction in force or elimination of a

specific position.'" *Id*. at 829-30 (quoting *Lesman v. Ransburg Corp*., 719 F. Supp. 619, 621 (W.D. Mich. 1989), *aff'd*, 911 F.2d 732 (6th Cir. 1990)). The contract in *Lardy* evidently had no other mention of the severance-triggering term "work force reduction." That is not the case in the matter before this court; the traders' contracts limited the events that trigger termination.

The traders' contracts stipulate that "[e]ither party may terminate the Employee's employment at any time, with or without ('Cause,') as defined below." CP at 78, 99. The contracts specify that the duration of the traders' employment was from April 1, 2000 "until such time as the Employee's employment is *terminated as provided by the terms of this Agreement*." CP at 76, 97 (emphasis added). Thus, under the contracts, the events that constitute termination are limited to the events expressly stated within the contracts.

There are five events contemplated by the contracts that result in termination.

1. Termination of the trader by Avista without cause.

2. Termination of the trader by Avista with cause.

3. Voluntary termination by the trader.

4. The trader's rejection of a reassignment to a comparable position within "the Corporation or any of its affiliates or subsidiaries," which is considered a voluntary termination. CP at 79, 100.

5. The trader's rejection of reassignment of a noncomparable position, which is deemed involuntary termination.

As stated, the traders argue that the first event applies—they were terminated without cause. Neither Avista nor the traders argue that scenarios two through five apply. We note that if the traders accepted reassignment under scenarios four and five, they would not qualify for severance because only rejection of the reassignment constitutes termination. But the traders were not reassigned within Avista. Although the contracts expressly provided for termination upon rejection of reassignments within Avista, they did not expressly provide for termination upon the acceptance of employment with a non-Avista successor company. Thus, the first termination scenario applies here. The traders were terminated without cause.

Avista argues that under *Lardy*, "it is important to look to the specific purpose of [the company's] plan as well as the purpose of severance plans generally." *Lardy*, 84 Wn. App. at 830. Relying on a case from the First Circuit, the court in *Lardy* stated, "the usual purpose of severance plans is, 'first and foremost, to provide employees with a buffer against the privations which so often attend unforeseen layoffs.'" *Id*. (quoting *Allen v. Adage, Inc*., 967 F.2d 695, 702 (1st Cir. 1992)). Thus, "'[I]n the absence of language indicating otherwise, . . . a severance pay plan is geared to sheltering loyal workers from a

precipitous loss of income.'" *Id*. (alterations in original) (quoting *Allen*, 967 F.2d at 702).

The stated objective in the *Lardy* contract was "'[t]o ensure *equitable treatment* of employees being terminated from the company.'" *Id*. (emphasis added) (alteration in original). It was because this objective was not helpful in the specific inquiry before the court that the court also considered the general purpose of such plans, which the court deemed is to "'tide an employee over while seeking a new job.'" *Id*. (quoting *Sly v. P.R. Mallory & Co*., 712 F.2d 1209, 1211 (7th Cir. 1983)). Considering the "equitable treatment" objective in the contract, the court concluded:

> [The selling company's] denial of severance benefits to employees who remained employed by [the purchasing company] did not amount to inequitable treatment, especially since the employees did not lose income or their jobs. Several courts have found that providing severance benefits in similar circumstances constitutes a windfall. *Without a specific directive in the severance plan providing for severance pay under these circumstances, this court will not impute such an obligation on the employer*.

Id. at 830-31 (emphasis added) (footnote omitted).

Avista interprets the last sentence of this quote to mean that in *any case* involving an employee's acceptance of employment by a purchasing company, the selling company is not bound by the severance provision of its contract with the employee unless the contract expressly provided for severance pay in the company's sale of assets to another. Such a broad interpretation clearly was not intended. The traders aptly state the reason

that Avista's interpretation of *Lardy* is untenable: "Avista Energy's argument to delete a specific provision in an employment contract through judicial fiat would render meaningless both the contractual concept of consideration and mutuality of obligation." Resp'ts' Br. at 33. Instead, "It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004).

In the quoted reference, the *Lardy* court declines to "impute" an obligation for severance pay "under the[] circumstances" presented in *Lardy*. 84 Wn. App. at 831. Because there was nothing in the *Lardy* contract to connect the actual event of a sale of corporate assets with the sole contemplated severance-triggering event of a reduction in work force, the severance payment was not justified.

Unlike in *Lardy*, the traders' contracts do not expressly state the objective. The contracts do, however, differentiate, based on the various possible scenarios of termination, the amount of lump-sum severance that is due a terminated employee as well as the length of time the employee would be unavailable for employment under the noncompetition clause of the agreement. Such a distinction was not made for employees in *Lardy* because there was only one scenario under which the employees would be entitled to severance—a reduction of work force.

Under the subject contracts, a trader terminated without cause is entitled to 12 months' salary and is subject to a 3-month noncompetition period; a trader who is either terminated with cause or voluntarily terminates his employment is not entitled to severance and is subject to a 3-month noncompetition period; a trader who rejects reassignment to a comparable position within Avista is entitled to 6 months' salary and is subject to a 6-month noncompetition period; and a trader who rejects a noncomparable position is entitled to 12 months' salary and is subject to a 3-month noncompetition period. Because the number of months' pay for severance is not directly tied to the number of months the traders would be unavailable for the same work, the severance pay cannot be said to be meant to compensate solely for being out of work.

As some courts have stated:

> While one purpose of severance pay is to alleviate the consequent need for economic readjustment, economic need is immaterial if the contract provides for severance pay regardless of the existence or nonexistence of economic need. Severance pay may, and frequently does, exist where there is no interruption whatever in the continuity of employment. The contractual terms control.

Demerath v. Nestle Co., 121 Wis. 2d 194, 198-99, 358 N.W.2d 541 (Ct. App. 1984) (citations omitted); *accord Willets v. Emhart Mfg. Co.*, 152 Conn. 487, 490, 208 A.2d 546 (1965); *Mace v. Conde Nast Publ'ns, Inc.*, 155 Conn. 680, 683-84, 237 A.2d 360 (1967).

Two references in the traders' contracts suggest that the severance benefits are, at

least in part, consideration for the noncompetition clauses.[3] This shows that the severance was bargained for. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833-34, 100 P.3d 791 (2004). Further, section 7.4(e) of the contracts limits the traders' rights and Avista's liability for involuntary termination to those expressly identified in the contracts, a substantial concession to which the traders agreed. *See, e.g., Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517-23, 210 P.3d 318 (2009) (enforcing a contract provision limiting the rights or remedies where the contract terms were as a whole negotiated by the parties).

There is no indication that the severance was bargained for in the *Lardy* case. A bargained-for provision supported by consideration is enforceable. *Labriola*, 152 Wn.2d at 833.

The traders raise other facts pertinent to the context of the transaction, particularly

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[3] Those provisions read: "*As part of the consideration* for the compensation and benefits to be paid to Employee hereunder, in keeping with Employee's duties as a fiduciary, and in order to protect the Company's interest in the trade secrets of the Company, and *as an additional incentive for the Company to enter into this Agreement*, the Company and Employee agree to the Non-Competition provisions of this Section. . . .

". . . .

"Employee understands that the foregoing restrictions may limit his ability to engage in certain businesses during the period provided for above, but acknowledges that Employee will receive sufficiently high remuneration and other benefits under this Agreement to justify such restriction." CP at 80-81, 101-02 (emphasis added).

events that occurred after the agreement, which support their position.[4] Avista does not claim that these are material issues of fact that preclude summary judgment. In fact, Avista does not claim that any material issue of fact precludes summary judgment on this issue. The contracts are enforceable as a matter of law.

b. Exemplary Damages

It is unlawful for an employer to "[w]ilfully and with intent to deprive the employee of any part of his wages" or to "pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract." RCW 49.52.050(2).

As a civil penalty for such a violation, RCW 49.52.070 makes the employer liable for "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees." This statute is construed liberally "'to see that the employee shall realize the full amount of the wages which by statute, ordinance, or contract he is entitled to receive from his employer, and which the employer is obligated to pay, and, further, to see that the employee is not

[4] Under the context rule, courts also ascertain intent of contracting parties by "'viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Berg*, 115 Wn.2d at 667 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

deprived of such right, nor the employer permitted to evade his obligation, by a withholding of a part of the wages.'" *Ellerman v. Centerpoint Prepress, Inc*., 143 Wn.2d 514, 520, 22 P.3d 795 (2001) (internal quotation marks omitted) (quoting *Schilling v. Radio Holdings, Inc*., 136 Wn.2d 152, 159, 961 P.2d 371 (1998)).

Avista argues that double damages were not warranted because there was a bona fide dispute as to the interpretation of the parties' contracts. An employer's failure to pay wages is deemed not willful if "a 'bona fide' dispute existed between the employer and employee regarding the payment of wages." *Schilling*, 136 Wn.2d at 160. In order to constitute a bona fide dispute, the issue must be "fairly debatable." *Id.* at 161.

Usually the determination of willfulness is a question of fact reviewed under the substantial evidence standard. *Champagne v. Thurston County*, 163 Wn.2d 69, 81, 178 P.3d 936 (2008). But questions may be resolved on summary judgment where there is no dispute as to the material facts. *Id.* at 81-82. The material facts are not disputed here.

"An employer's nonpayment of wages is willful and made with intent 'when it is the result of knowing and intentional action.'" *Wingert v. Yellow Freight Sys., Inc*., 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (quoting *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987)). "There is no stringent test to determine willfulness." *Morrison v. Basin Asphalt Co.*, 131 Wn. App. 158, 163, 127 P.3d

1 (2005) (citing *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 37, 111 P.3d 1192 (2005)). Instead, the court simply determines if "the failure to pay was volitional or that the employer 'knows what he is doing, intends to do what he is doing, and is a free agent.'" *Flower*, 127 Wn. App. at 37 (internal quotation marks omitted) (quoting *Schilling*, 136 Wn.2d at 160).

Avista relies heavily on *Champagne*, 163 Wn.2d 69 to support its argument opposing exemplary damages. In *Champagne*, county employees challenged the county's practice of paying overtime wages at the end of the month following the month in which the employees earned overtime. On appeal, the court held that although the lag time violated a former administrative rule that required an employer to pay its employee at no longer than monthly intervals, the county's practice complied with the overtime provisions of the parties' collective bargaining agreement. A new version of the administrative rule permitted the county's practice.

Affirming the trial court's summary judgment order in favor of the county, the court held that "the record lacks the requisite substantial evidence that gives rise to a finding of willful withholding on the part of the County." *Champagne*, 163 Wn.2d at 82. The court also noted that the employees did not "allege that bad faith or animus motivated the creation or administration of the additional pay system." *Id*.

Avista reasons that because the county's violation of the regulation in *Champagne* is analogous to Avista's breach of its contract, Avista should not be liable for double damages because the traders did not show that the breach was motivated by bad faith or animus. The traders' case is not analogous.

First, the denial of exemplary damages in *Champagne* was due to a total failure to carry the burden of showing willfulness on summary judgment. This is not surprising, given the procedural posture of the case. Summary judgment was granted in *Champagne* because the employees did not comply with the nonclaim statutes and had no opportunity to conduct discovery for evidence that the county acted with intent to deprive the employees of wages due. *Id.* at 82 n.11.

Second, *Champagne* does not hold that bad faith or animus is required to show willfulness; rather, it holds that evidence of bad faith or animus could support an inference of willfulness.

Finally, the dispute was rather complex. At issue was the interplay between the old administrative rule and the collective bargaining contract as well as the retroactive effect of the new rule and prospective effect of the old rule.

Similarly, other cases relied upon by Avista deal with complex issues, unsettled areas of law, the existence of an implied contract, or a dispute over the amount due. *See*

Bostain v. Food Express, Inc., 159 Wn.2d 700, 723, 153 P.3d 846 (bona fide dispute existed regarding (1) whether statutory overtime pay requirements applied only to hours worked within the state, (2) how the interpretive regulations promulgated by the Department of Labor and Industries affected the wage statutes, and (3) the effect of the commerce clause), *cert. denied*, 128 S. Ct. 661, 169 L. Ed. 2d 512 (2007); *Yates v. State Bd. for Cmty. Coll. Educ.*, 54 Wn. App. 170, 177, 773 P.2d 89 (1989) (rejecting teacher's claim that the school's failure to pay educational credits was willful where teacher claimed that although the school acted in accordance with the law, the law was unconstitutional).

The dispute in this case dealt with a term in the parties' employment contracts. As the traders point out, Avista's original reason for not paying the traders severance had to do with its claim that the traders voluntarily resigned. Avista changed its position when seeking summary judgment, arguing that under *Lardy*, as a matter of law, severance pay is not imposed on a selling company where the employees accept similar work from a purchasing company. Avista's enlistment of the *Lardy* argument on summary judgment evinces an attempt to extricate itself from a provision of the contracts it bargained for and benefited from. There is no bona fide dispute here.

Moreover, under Avista's rationale, an employer could avoid exemplary damages by claiming, regardless of the merit of the claim, that the terms of the contract were

unclear. A legal argument must have merit to be bona fide. *Dep't of Labor & Indus. v. Overnite Transp. Co*., 67 Wn. App. 24, 34-36, 834 P.2d 638 (1992). Avista's argument regarding *Lardy* lacks merit and appears contrived. A contrived argument does not make a bona fide dispute. *Flower*, 127 Wn. App. at 36. "That is especially true since [the employer] drafted the agreement and chose the terms that [it] now claims are debatable." *Id*. at 36-37. Exemplary damages were appropriate in this case.

c. Attorney Fees

The traders sought attorney fees below under RCW 49.52.070. The trial court granted the traders' motion. An employee who obtains a judgment for a violation of RCW 49.48.010 is entitled to reasonable attorney fees. RCW 49.48.030.

RCW 49.52.070 provides for the recovery of "costs of suit and a reasonable sum for attorney's fees" when a violation of RCW 49.52.050(2) has occurred. The traders are entitled to attorney fees on appeal. *Schilling*, 136 Wn.2d at 166.

CONCLUSION

We affirm the trial court's decisions enforcing the severance provision of the traders' contracts and exemplary damages. We award attorney fees to the traders on appeal, provided they comply with RAP 18.1.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Korsmo, J.