

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2007AP2595

Cir. Ct. No. 2006CV88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LINETTE A. BROWN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

FOLLETT CORPORATION,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Follett Corporation appeals a summary judgment awarding sales commissions to Linette Brown in a wage claim action. Brown cross-appeals, arguing the court erred by not holding an evidentiary hearing on her

claim for double damages. Brown also contends the court erroneously failed to award her prejudgment interest. We reject Follett's argument that Brown was not entitled to commissions. We also reject Brown's claim that she is entitled to an evidentiary hearing on the double damages issue. However, we conclude Brown was entitled to prejudgment interest, and we therefore reverse and remand for the court to award prejudgment interest.

BACKGROUND

¶2 Brown was employed by Follett as an automation consultant from November 2001 until she became a telephonic account manager in April 2004. She was a telephonic account manager until she resigned on July 9, 2004. In both positions, Brown marketed software to school districts and was compensated, in part, with sales commissions.

¶3 This dispute involves three accounts for which Brown obtained purchase orders.¹ While Brown obtained the purchase orders prior to her resignation, Follett did not invoice the accounts until afterwards. Brown was not required to perform any work beyond obtaining the purchase orders to receive commissions. When Follett claimed Brown was not entitled to the commissions, Brown filed a claim with the Department of Workforce Development's Equal Rights Division.

¹ The parties stipulated that the amount of the commissions was \$15,567.21.

¶4 Brown prevailed in the investigator’s initial determination, but that determination was reversed by the section chief. Brown then filed this action in circuit court, asserting a wage claim under WIS. STAT. ch. 109. Brown moved for summary judgment, seeking the commissions, attorney fees, double damages, and prejudgment interest. Follett also moved for summary judgment. Relying on language in the applicable compensation plans, Follett contended Brown was not entitled to the commissions because her sales were not invoiced until after her resignation.

¶5 While the commissions were under different compensation plans because Brown held different job titles, the relevant language in those plans is similar. The plans state the employee can earn “[m]onthly commission for selling new systems – a commission for all software, products, and services bought in conjunction with a new automation system.” New systems are “credited” or “applied” to the “commission plan” upon invoice. Further, a condition precedent to receiving any commission is that the employee “has actually earned the [commission], as defined above, while in the company’s employ.”

¶6 Construing the compensation plans, the circuit court concluded the commissions were paid when invoiced, but earned when the systems were sold. Therefore, the court concluded Brown was entitled to the commissions. The court awarded Brown attorney fees but denied her claim for double damages, concluding Follett “does not appear to be withholding the commissions because of unjust reasons, but merely because they do not believe the commissions are due....” For this same reason, the court denied prejudgment interest.

DISCUSSION

¶7 We review summary judgments de novo, applying the same methodology as the circuit court. *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.²

¶8 Under WIS. STAT. § 109.03(5), an employee has a “right of action against any employer for the full amount of the employee’s wages due on each regular pay day as provided in this section and for increased wages as provided in [WIS. STAT.] § 109.11(2), in any court of competent jurisdiction.” “Wages” include, among other things, commissions “agreed upon between the employer and the employee or provided by the employer to the employees as an established policy.” WIS. STAT. § 109.01(3).

¶9 We first address Follett’s claim that Brown is not entitled to the commissions under the compensation plans. Follett maintains that commissions were only earned when invoiced, while Brown relies on the circuit court’s distinction between when commissions are earned and paid. Alternatively, Brown argues the compensation plans are ambiguous and should be construed against Follett.

¶10 We conclude the compensation plans are ambiguous and construe those ambiguities against Follett. Ambiguities in contract language are construed

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

against the drafter. *Seitzinger v. Community Health Network*, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. A contract provision is ambiguous if it is fairly susceptible to more than one construction. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶11 Under the compensation plans, a condition precedent to Brown receiving a commission was that she earn it while employed by Follett. However, it is unclear when commissions are “earned.” Brown relies on language stating commissions are earned by “selling” new systems, while Follett relies on language stating systems are “applied” when invoiced. The problem with both positions is that it is unclear what “selling” or “applied” mean under the plans.³ Brown reads the two words as referring to different things—when commissions are earned and paid—while Follett reads “applied” as defining when systems are sold and therefore earned.

¶12 Both interpretations of the plans are plausible, but the plans’ language does not clearly dictate one interpretation over the other. Being fairly susceptible to more than one interpretation, the plans are ambiguous about when commissions are earned. *See Management Computer Servs.*, 206 Wis. 2d at 177. The compensation plans, which describe Follett’s policies of compensating employees, were evidently drafted by Follett. Therefore, we construe the ambiguity against Follett and conclude Brown is entitled to her commissions

³ The compensation plans use inconsistent language throughout, contributing to their overall ambiguity. For example, some portions of the plans refer to “sales” being applied upon invoice, while others refer to “new systems” being applied upon invoice. Further, the plans refer to sales being “applied” to the “commission plan,” though it is unclear what the “commission plan” is relative to the compensation plans. This makes the use of the word “applied” that much more confusing because it is unclear to what they are being applied.

because she sold the systems and earned the commissions under the plans while still employed by Follett. *See Seitzinger*, 270 Wis. 2d 1, ¶22.

¶13 Follett contends that principles of contract law are inapplicable here because the compensation plans were Follett's company policies, not contracts, and Brown did not plead a contract claim. However, regardless of whether the compensation plans were contracts, Follett offers no alternative argument for how ambiguity in the plans should be construed. It merely argues the plans are unambiguous. Because we conclude the plans are ambiguous, we adopt Brown's position and construe the ambiguity against Follett.

¶14 In Brown's cross-appeal, she claims the court erred by concluding, without the benefit of an evidentiary hearing, that she was not entitled to double damages under WIS. STAT. § 109.11(2)(b), which states:

In a wage claim action that is commenced after the department has completed its investigation under s. 109.09(1) and its attempts to settle and compromise 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 to an employee and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 100% of the amount of those wages due and unpaid.

This statute does not require a court to impose a penalty, but allows a court to do so in the exercise of its discretion. *Lynch v. Crossroads Counseling Ctr., Inc.*, 2004 WI App 114, ¶31, 275 Wis. 2d 171, 684 N.W.2d 141. A penalty is appropriate for wrongful withholding of wages for "dilatatory or other unjust reasons." *See Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., S.C.*, 2005 WI App 217, ¶54, 287 Wis. 2d 560, 706 N.W.2d 667.

¶15 We reject Brown’s argument that she was entitled to an evidentiary hearing. Brown claims she should have been permitted to present evidence that Follett denied the commissions in retaliation for her leaving the company. However, she points to no averments in the summary judgment record supporting an inference that Follett’s refusal to pay the commissions was retaliatory. Further, our review of the record reveals none.⁴ The circuit court did not err by failing to hold an evidentiary hearing when no genuine factual dispute was presented. *See* WIS. STAT. § 802.08

¶16 Finally, we address Brown’s claim that she was entitled to prejudgment interest. Prejudgment interest on damages is appropriate when there is a reasonably certain standard of measurement for ascertaining the amount owed. *Olguin v. Allstate Ins. Co.*, 71 Wis. 2d 160, 168, 237 N.W.2d 694 (1976). When the amount owed is readily determinable, the withholding party should be “held responsible for making such application correctly and liable for interest if he [or she] does not.” *Id.*

¶17 We conclude Brown was entitled to prejudgment interest. The commissions owed to Brown were ascertainable under a reasonably certain standard of measurement—the formula provided by the compensation plans. *See id.* at 168. Neither party contends the compensation plans are ambiguous on the measure of the commissions. Further, the amount to the commissions was stipulated by the parties. On remand, we direct the court to award Brown prejudgment interest.

⁴ It does not appear that Brown even argued the discharge was retaliatory in her summary judgment briefs to the circuit court.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

