

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 19, 2013**

Diane M. Fremgen  
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. 2011AP2445**

**Cir. Ct. No. 2010CV3748**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**BARBARA M. JUNGE,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**ABS GLOBAL, INC.,**

**DEFENDANT-RESPONDENT-CROSS-APPELLANT.**

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APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Barbara Junge appeals that part of an order denying her summary judgment motions and dismissing her wage and breach of contract claims against ABS Global, Inc. ABS cross-appeals that part of the order

denying its summary judgment motion and dismissing its counterclaim for breach of contract. We reject the parties' respective arguments and affirm the order.

### **BACKGROUND**

¶2 The following facts are undisputed. In January 2009, Junge and several other employees were laid off from their employment with ABS. At that time, Junge's hourly wage was \$19.32 and she had no written employment agreement. At a January 28, 2009 meeting with ABS's director of human resources, Junge was informed her employment would end effective January 30, 2009. She was offered the choice of fully concluding her employment on January 30 or continuing to work for ABS under a termination agreement containing a "working severance package." This package would allow Junge to work in a transitional role for a limited time.

¶3 ABS calculated the amount of Junge's working severance by multiplying her thirty-five years of employment with the company by an amount equal to one week of wages at time-and-a-half, resulting in compensation totaling \$40,572. This amount was divided into two categories. One consisted of "working severance" in the amount of \$19,706.40, to be paid in equal installments on regular pay days through May 31, 2009; and the other consisted of a "lump sum payment" of \$20,865.60, to be paid "following the completion of the working severance."

¶4 Junge understood she would receive the working severance amount and the lump sum payment only if she continued working through the working severance period. Junge opted to accept the termination agreement. Junge worked forty hours per week during the working severance period and was paid bi-weekly on regular pay days. She received payroll statements on her pay days showing her

hourly wage of \$28.42. Junge questioned the amount when she received her first paycheck and was informed that she was no longer being paid her pre-termination wage, and the working severance rate was now her pay. Junge continued working through the working severance period and received all payments contemplated under the termination agreement, including the lump sum payment.

¶5 Junge subsequently filed a wage claim with the Wisconsin Department of Workforce Development (“DWD”). When DWD was unable to resolve Junge’s claim, she filed suit in the circuit court. Junge argued that although ABS made its severance payments to her, it failed to pay her \$13,137.60 in wages earned after her termination date. Junge calculated this amount by multiplying her \$19.32 pre-termination wage rate by forty hours for the seventeen weeks of the working severance period. Junge sought double her unpaid wages, plus litigation expenses, including reasonable attorney fees pursuant to WIS. STAT § 109.03 (2011-12).<sup>1</sup> She alternatively claimed that ABS breached the termination agreement “by paying her \$13,370.60 less than the amount set forth in the agreement.” ABS counterclaimed, asserting that Junge breached the agreement by bringing a claim released under the agreement.

¶6 The parties filed competing summary judgment motions. The court ultimately denied the motions and dismissed the parties’ respective claims. This appeal and cross-appeal follow.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

**DISCUSSION**

¶7 We review summary judgment independently, applying the same standards as the circuit court. *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296-97, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 296.

¶8 On appeal, the parties repeat the arguments that were raised and rejected by the circuit court. Because the circuit court’s decision is well reasoned and clearly articulated, and squarely addresses the parties’ respective arguments, we adopt it by reference with a minor modification, and affirm. *See* WIS. CT. APP. IOP VI(5)(a) (Jan. 1, 2012). The minor modification is to correct an inadvertent reference. The last full sentence before the disposition on page four of the decision is corrected to read: “Therefore, the *defendant’s* motion for summary judgment on its counterclaim is denied and, because as a matter of law the contract was not breached by the filing of the claims in question, the counterclaim must be dismissed.”

*By the Court.*—Order affirmed.

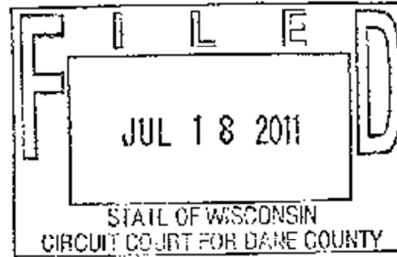
This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

Barbara M. Junge

Plaintiff,

ABS Global, Inc.

Defendant



Case No. 10CV3748

A handwritten signature in black ink, appearing to be "D. J. ...".

DECISION AND ORDER ON MOTIONS FOR RECONSIDERATION AND FOR SUMMARY JUDGMENT

The court had previously denied motions for summary judgment in this case. The parties jointly requested reconsideration and submitted a statement of stipulated facts. The court grants the motion for reconsideration and reconsiders the motions for summary judgment below.

The complaint in this case makes two claims. First, that under Wis. Stat. Ch. 109, there are wages due the plaintiff for her work during the working severance period. Second, in the alternative, that she has not been fully paid under the termination agreement because under that agreement she was due her regular wages for her hours worked during the working severance period, in addition to the working severance and the lump sum payment.

In its answer the defendant denies both claims, and makes a counterclaim alleging that she has breached the release provisions of the termination agreement by making her claim.

Plaintiff has moved for summary judgment on her claims and the defendant has moved for summary judgment dismissing plaintiff's claims and on its counterclaim. The party moving for summary judgment has the burden to establish a *prima facie* case by evidentiary affidavits. To make a *prima facie* case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. *Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 394, 793 N.W.2d 860, 862. If the moving party, plaintiff or defendant, meets its *prima facie* burden, the opposing party must allege specific evidentiary facts which establish that there are genuine issues of material fact.

## UNDISPUTED FACTS

The following material facts are undisputed. In January, 2009 Jungc and 33 other ABS employees were laid off. At that time her wage was \$19.32 per hour and there was no written employment agreement. ABS offered Jungc a "working severance package." The packages allowed her to work in a transitional role for a short time. ABS calculated the total amount of Jungc's severance by multiplying her 35 years of service by an amount equal to one week of wages at time-and-a-half. The resulting compensation totaled \$40,572. This was divided into two categories. One described as "working severance" in the amount of \$19,708.40, to be paid in equal installments on regular pay days through May 31, 2009, and the other a "lump sum payment" of \$20,865.60 to be paid "following the completion of the working severance." ABS hoped the package would induce Jungc to continue working on an interim basis through May, 2009.

At a meeting with ABS's director of human resources on January 28, 2009 Jungc was told her employment would end effective January 30, 2009. She was offered the choice of fully concluding her employment on January 30, 2009 or continuing to work for ABS under a termination agreement containing the working severance package described above. She understood that she would receive the "working severance" amount and the "lump sum payment" in the agreement only if she continued working through the "working severance period." After thorough consideration, Jungc accepted the termination agreement and signed it on January 30, 2009.

Jungc worked 40 hours per week during the working severance period and was paid bi-weekly on regular pay days. She received payroll statements on her pay days and they showed her compensation at \$28.42 per hour. Jungc questioned the amount when she received her first check and was told that she was no longer being paid her pre-termination wage but that the working severance was now her pay. Jungc continued working through the working severance period and received all payments called for under the termination agreement.

## DECISION

### 1. The Wage and Breach of Contract Claims

The elements of a wage claim under Wis. Stat. §109.03 are 1) that the person was an

employee and 2) that there was an agreement between the employee and employer for remuneration for the services provided by the employee ("wages") and 3) that the employer has not paid the full amount of wages due under the agreement.

In this case plaintiff does not allege the existence of any agreement between the employee and the employer other than the termination agreement and her prior employment. The undisputed fact is that Junge's employment under the parties' previous, unwritten agreement ended on January 30, 2009. The only agreement governing the relations of the parties after that date for which there is evidence is the termination agreement. Nothing in the language of that agreement required payment of any amounts other than the working severance and the lump sum payment. It is undisputed both of those amounts were paid in full. Therefore, the plaintiff has failed to meet her burden of establishing a *prima facie* case that there were unpaid wages due her or that the contract was breached, and the plaintiff's motions for summary judgment must be denied.

Conversely, the defendant has met its burden of establishing a *prima facie* defense that would defeat the plaintiff's claims. It has established that the plaintiff's prior employment was terminated on January 30, 2009, thus ending the prior agreement between the employee and employer. It has also established that the amounts specified in the termination agreement were paid in full. These undisputed facts defeat both the wage claim and the breach of contract claim. They are not countered by any evidentiary facts alleged by the plaintiff that would create a genuine issue of material fact. Therefore, defendant's motion for summary judgment dismissing the plaintiff's claims is granted.

## 2. The Counterclaim

The plaintiff did not file an answer or reply to the defendant's counterclaim. The averments of fact alleged in the counterclaim are deemed admitted. Wis. Stat. §802.02(4). In any case, even if the failure to reply to the counterclaim did not have that effect, the facts alleged in the counterclaim are undisputed: the parties entered into an agreement, the agreement contained a release, and the plaintiff brought a claim before the Department of Workforce Development. Thus, the plaintiff has met its *prima facie* burden of establishing facts on which it could prevail and the defendant has not offered evidentiary facts that would create a genuine issue of material fact. The only remaining question is whether on the undisputed facts there has

been a breach of the contract. Whether those facts amount to a breach of contract is a question of law. *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, 301 Wis. 2d 752, 781, 734 N.W.2d 169, 183.

The failure to reply to the counterclaim is only an admission of the averments of fact in the counterclaim, not of the legal conclusion asserted in the claim, i.e. that "The plaintiff has breached the Agreement by bringing a claim released under the agreement." Counterclaim at ¶5. Because the plaintiff's brief in opposition to the motion for summary judgment on the counterclaim offered an argument against summary judgment (Plaintiff's Response Br. At 6) plaintiff has not conceded summary judgment on this question of law.

The termination agreement includes a release of claims "arising heretofore out of any matter, occurrence or event existing or occurring prior to the execution" of the agreement. The claims made plainly arose out of the agreement itself and the plaintiff's post-agreement employment. The unambiguous language of the release clause does not encompass the claims the plaintiff made. Therefore, the plaintiff's motion for summary judgment on its counterclaim is denied and, because as a matter of law the contract was not breached by the filing of the claims in question, the counterclaim must be dismissed.

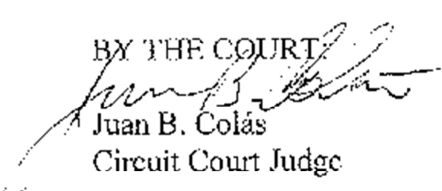
#### ORDER

For the reasons stated above, the plaintiff's motions for summary judgment are denied and the complaint is dismissed and the defendant's motion for summary judgment on its counterclaim is denied and the counterclaim is dismissed.

Under Wis. Stat. §808.03 this is a final order for purposes of appeal.

Dated July 18, 2011.

BY THE COURT

  
Juan B. Colás  
Circuit Court Judge

Copy: Counsel (BY FAX ONLY)