2012 IL App (2d) 111320-U
No. 2-11-1320
Order filed September 19, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRUCE BURKE,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-L-1449
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	Honorable
	)	Patrick J. Leston,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: Plaintiff's bonus pursuant to an incentive program was not an "earned bonus" within the meaning of the Wage Act. Further, notions fair dealing and honesty do not require that the incentive program's eligibility requirements be construed as unenforceable forfeiture provisions. Thus, defendant was entitled to judgment as a matter of law. We affirmed the judgment of the trial court.

¶ 1 Plaintiff, Bruce Burke, is a former employee of defendant, Zurich American Insurance Company. In December 2007, defendant informed plaintiff that he had been approved to receive a bonus totaling $35,389.15 for 2007 that would be paid in either March or April 2008. However, defendant terminated plaintiff's employment prior to the bonus being paid because plaintiff's

conduct violated various corporate policies. Thereafter, plaintiff filed a three-count complaint pursuant to the Illinois Wage Payment and Collection Act (the Wage Act) (820 ILCS 115/1 *et seq.* (West 2008)). The trial court granted defendant's motion to dismiss with respect to counts I and III, and subsequently granted defendant's motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1005 (West 2008)) with respect to count II. Plaintiff appeals, contending that the trial court erred in granting summary judgment in defendant's favor. We affirm.

¶ 2 I. Background

¶ 3 The pleadings, depositions, admissions, affidavits, and agreed statement of facts reflect the following. Defendant is a corporation in the insurance industry conducting business in Illinois. In 2003, defendant implemented a short-term incentive program (incentive program) providing an annual bonus for eligible employees that would be paid in either March or April of the following calendar year. Plaintiff worked for defendant from April 1, 2001 until being terminated on March 13, 2008. At the time of his termination, plaintiff worked in a managerial position for plaintiff and directly managed 12 employees. In 2006, plaintiff's base salary was $136,702.80, which was increased to $141,000 in October 2007. Plaintiff was eligible for the incentive program and, in April 2004, received a 2003 incentive program bonus totaling $13,922.57. Defendant did not provide the incentive program to employees in 2004. In April 2006, plaintiff received a 2005 incentive program bonus totaling $23,791.55, and in April 2007, plaintiff received a 2006 incentive program bonus totaling $34,175.75.

¶ 4 In 2007, defendant again provided an incentive program for employees. Pursuant to the incentive program's description, the program was intended "to provide reward opportunities based

on business division or [g]roup function results, business or service unit results and individual results." Paragraph 7 of the incentive program's description, governing participation, provided that an eligible employee of certain groups will be eligible if the employee:

> "C. Is not on *** probation and has not violated [c]ompany policy as of the time incentive awards are decided or actually paid out; and
>
> D. Is in good standing with [defendant] at all times, including the time of payment, as determined by [defendant] in its sole discretion."

Paragraph 8 of the incentive program's description outlined the incentive program's rules. Subparagraph 8.P provided:

> "The employee's manager or CEO has the discretion to disallow an incentive award for any employee at any time."

Paragraph 9 of the description further provided:

> "The CEO has the sole right to determine the performance targets and results for any given year. The CEO, [b]usiness [u]nit head, or department head has the right to revise, modify or take away an incentive award to accommodate circumstances that may arise with respect to an individual [p]articipant, in his or her sole discretion. The [incentive program] may be terminated, amended, or modified by [defendant] at any time with or without notice to [p]articipants in [defendant's] sole discretion ."

On March 10, 2008, defendant sent an email to managers setting forth a timeline for when performance reviews should be conducted and when eligible employees could receive their incentive program bonuses for 2007. Plaintiff's manager scheduled to meet with plaintiff on March 15, 2008 to inform plaintiff of his bonus pursuant to the incentive program. A computer screenshot tracking

the 2007 incentive program bonus reflected that the "status of process" for plaintiff's bonus at that time was "Approved," and that the "effective date" was April 4, 2008.

¶ 5 At the beginning of March 2008, defendant learned of a complaint made against plaintiff by an employee that plaintiff formerly supervised. The employee claimed that, earlier that year, plaintiff sent her emails she described as "very inappropriate," "very unprofessional," and "very alarming." The employee provided a copy of one email to Joe Swanson, a senior human resources business consultant with defendant. Swanson, along with other members from defendant's human resources department, investigated the employee's complaint and determined that plaintiff violated defendant's anti-harassment policy. Defendant also learned that plaintiff made unauthorized purchases from a corporate credit card.

¶ 6 On March 13, 2008, defendant terminated plaintiff's employment because plaintiff violated defendant's anti-harassment policy, credit card policy, and defendant's policy regarding the unauthorized use of defendant's property. Defendant offered plaintiff a separation agreement equal to one month of his salary, but plaintiff rejected the agreement. In a letter dated April 16, 2008, defendant advised plaintiff that he would not receive the 2007 bonus. The letter explained that, because the program required an employee to be in good standing with defendant to be eligible for the program, and because defendant terminated plaintiff for violating various company policies, plaintiff was not entitled to his bonus for 2007.

¶ 7 On December 16, 2008, plaintiff filed his complaint. As amended, count I alleged that, in early 2008, plaintiff "had become aware of the strong possibility that he was going to be terminated due to a reduction in work force." Plaintiff alleged that, pursuant to the Wage Act, he should have received a bonus of at least $28,200 and, if he was terminated pursuant to a reduction in force plan,

an addition 6 months' of severance pay. Count II alleged that, pursuant to the Wage Act, plaintiff was entitled to a bonus pursuant to the incentive program of "at least $28,200" because he earned the bonus during the 2007 calendar year. Count III alleged that, "due to [defendant] continuing to hold out the [incentive program] as a carrot to entice his performance, [plaintiff] reasonably believed that he would receive a bonus for worked performed in 2007." Count III further alleged that plaintiff did not accept the separation agreement because he believed that he was entitled to receive the "promised 2007 bonus" of at least $28,200. Count III sought recovery of that bonus pursuant to the doctrine of promissory estoppel.

¶ 8 On July 6, 2009, defendant filed a motion to dismiss plaintiff's first-amended complaint. On September 17, 2009, the trial court granted defendant's motion with respect to counts I and III, but denied the motion with respect to count II. On October 5, 2011, defendant moved for summary judgment on count II of plaintiff's first-amended complaint, which the trial court granted on December 8, 2011. Plaintiff timely appealed.

¶ 9 II. Discussion

¶ 10 The only contention plaintiff raises on appeal is whether the trial court erred in granting summary judgment in favor of defendant. Plaintiff does not challenge the dismissal of counts I and III. In support of his contention, plaintiff argues that the incentive program was not a discretionary bonus. Rather, plaintiff argues that his bonus pursuant to the incentive program was an "earned bonus" within the meaning of the Wage Act because the bonus resulted from work he performed in 2007 and defendant approved his bonus before terminating his employment. Plaintiff further argues that the participation requirements put forth in the incentive program's description "are really

forfeiture provisions," and that principles of honesty and fair dealing render those provisions unenforceable.

¶ 11 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits, and other relevant matters on file show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 59 (2004) (citing *Prowell v. Loretto Hospital*, 339 Ill. App. 3d 817, 822 (2003)). In determining whether a genuine issue of material fact exists, we must construe the pleadings, affidavits, and admissions strictly against the movant and liberally in favor of the nonmoving party. *Chubb Insurance Co.*, 349 Ill. App. 3d at 59. This court reviews *de novo* a trial court's ruling on motions for summary judgment. *Id.* (citing *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278 (2001)).

¶ 12 Resolution of this issue requires us to interpret the statutory phrase "earned bonus" within section 2 of the Wage Act. That section provides:

> "For all employees *** 'wages' shall be defined as any compensation owed an employee by an employer pursuant to an employment contract or agreement between the 2 parties, whether the amount is determined on a time, task, piece, or any other basis of the calculation. Payments to separated employees shall be termed 'final compensation' and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the

employer pursuant to an employment contract or agreement between the 2 parties." 820 ILCS 115/2 (West 2008)).

¶ 13 The primary objective of statutory interpretation is to give effect to the intent of the legislature, and the most reliable indicator of legislative intent is the language of the statute given its plain, ordinary, and popularly understood meaning. *Gardner v. Mullins*, 234 Ill. 2d 503, 511 (2009). If the statutory language is clear, a reviewing court does not need to resort to extrinsic aids of construction, such as legislative history. *Northern Kane Educational Corp. v. Cambridge Lakes Education Ass'n*, 394 Ill. App. 3d 755, 758 (2009). Nonetheless, when reviewing a statute, we also consider the subject it addresses and the legislature's apparent objective in enacting the statute while presuming that the legislature did not intend to create absurd, inconvenient, or unjust results. *Fisher v. Waldrop*, 221 Ill. 2d 102, 112 (2006).

¶ 14 Although the Wage Act does not define "earned bonus," prior Illinois courts have interpreted that term. In *Camillo v. Wal-Mart Stores, Inc.*, 221 Ill. App. 3d 614 (1991), the plaintiff worked for the defendant as an assistant manager before the defendant terminated his employment on December 31, 1986. *Id.* at 615-16. While employed, the defendant offered a bonus program to assistant managers that provided:

> "Our assistant managers are paid a bonus each year. The amount of the bonus is based on two things, corporate net profit and length of service. *** The assistant manager's bonus year is the same as the [defendant's] fiscal year, February 1 through January 31. The assistant manager must be on the payroll and actively working on January 31, or they will forfeit their bonus. *Id.* at 616-17.

The plaintiff brought an action to recover wages or final compensation under the Wage Act, claiming that he was entitled to a *pro rata* share of his bonus for the 1986 fiscal year. *Id.* at 616-17.

¶ 15 The court in *Camillo* concluded that the plaintiff was entitled to a *pro rata* bonus for the 1986 fiscal year. *Id.* at 621-22. The reviewing court interpreted the term "earned bonus" similar to the term "earned vacation" within the Wage Act and concluded that the plaintiff earned his *pro rata* bonus just as he would have earned vacation pay *pro rata*. *Id.* at 619-22. The court noted that the plaintiff worked for the entire Christmas season, "a notoriously difficult time of year," and that the defendant made it impossible for the plaintiff to earn his bonus by firing him on December 31, 1986. *Id.* at 622. The court in *Camillo* further noted that the principle of promissory estoppel applied because the defendant promised the plaintiff a large bonus in return "for his hard work during a minimum 54-hour work week," and that promise induced the plaintiff to stay at the job. *Id.* In awarding the plaintiff a *pro rata* share of his bonus, the court in *Camillo* nonetheless cautioned:

> "We are mindful of the latitude employers must have in operating their businesses and that intrusion into the business affairs of a corporation is not always desirable. We would not want this opinion to serve as a chilling effect on true 'bonuses' given by employers to employees. Black's Law Dictionary defines a 'bonus' as '[a] consideration or premium in addition to what is strictly due. A gratuity to which the recipient has no right to make a demand.' [Citation.] However, the bonus in question is clearly compensation to which [the] defendant was entitled to a *pro rata* share." *Id.* at 622-23 (citing Black's Law Dictionary 182 (6th ed. 1990).

¶ 16 More recent, this court addressed the definition of "earned wages" within the meaning of the Wage Act. In *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536 (2009), the plaintiff filed

a complaint seeking final compensation pursuant to the Wage Act, claiming that he was entitled to a *pro rata* share of a performance bonus. *Id.* at 540. The plaintiff was the vice president of sales for the defendant and he received a base salary in addition to a performance bonus based on an annual increase in the percentage of incoming sales. Specifically, the agreement between the parties provided that the plaintiff would earn a bonus of $2,000 for every 1% increase in released incoming orders, ranging from a $10,000 bonus if incoming sales increased 5% to a $40,000 bonus if incoming sales increased by 20%. *Id.* The agreement further provided that the defendant would guarantee the plaintiff's base salary for 6 months for early termination by the defendant, unless the defendant terminated the plaintiff for substantial cause, in which case the defendant would guarantee the plaintiff's salary for 60 days. *Id.* In October 2006, the defendant terminated the plaintiff's employment for cause and plaintiff filed suit pursuant to the Wage Act claiming, in part, that he was entitled a *pro rata* share of his 2006 performance bonus. *Id.* at 540-41. The trial court granted the defendant's motion for summary judgment.

¶ 17 On appeal, this court affirmed the trial court's determination. The court in *McLaughlin* discussed various federal court cases interpreting "earned bonuses" within section 2 of the Wage Act, noting:

> "[I]n determining whether an employee is entitled to a *pro rata* share of a bonus, the federal court has drawn a distinction between whether or not the employee was unequivocally promised a bonus by his or her employer. If no such unequivocal promise was made, then the employee is not entitled to any part of the bonus pursuant to section 2 of the Wage Act." *Id.* at 544.

The court in *McLaughlin* found the distinction drawn in the federal court "appropriate" and "consistent with Illinois Department of Labor regulations construing the Wage Act." *Id.* Specifically, the court in *McLaughlin* concluded that section 300.500(a) of Title 56 of the Illinois Administrative Code "indicates that the right to a bonus must be unequivocal as the employee does not have a right to it until he or she has performed the requirements set forth in the contract." *Id.* (citing 56 Ill. Adm. Code §300.500, added at 16 Ill. Reg. 13837, eff. September 1, 1992). The court in *McLaughlin* concluded that the language in the parties' agreement did not constitute an unequivocal guarantee that the plaintiff would receive the bonus, but rather, the "bonus was clearly conditional, dependent on whether sales for the defendant increased over the previous year." *McLaughlin*, 395 Ill. App. 3d at 544. Therefore, because the bonus referred to in the agreement was not guaranteed to be paid, the plaintiff was not entitled to a *pro rata* share of the bonus.

¶ 18 In this case, plaintiff's 2007 bonus was not an "earned bonus" within section 2 of the Wage Act. Similar to the agreement in *McLaughlin*, the incentive program bonus here is clearly conditional and dependent on a number of considerations. See *id.* Specifically, paragraph 7.C of the incentive program description provides that, for an employee to be eligible to participate in the incentive program, the employee must not be in violation of any company policy at the time the an incentive award is decided or "actually paid." Paragraph 7.D further provides that the employee must be "in good standing with [defendant] at all times, including the time of payment, as determined by [plaintiff] in its sole discretion." Based on the foregoing, the incentive program agreement did not contain an "unequivocal promise" that plaintiff would be paid a bonus based solely on his performance in 2007. Rather, the bonus program contained additional requirements for an employee to be eligible.

¶ 19 Defendant's notification that plaintiff had been "approved" for a 2007 bonus did not create a genuine issue of material fact regarding whether defendant unequivocally promised plaintiff that he would receive a 2007 bonus. Moreover, the parties agreed at oral how plaintiff eventually learned that he had been approved for a 2007 bonus. Specifically, the computer screen shot tracking plaintiff's 2007 incentive program noted that the "Status of Process" of plaintiff's bonus was "approved." However, the screen shot further reflected that the "effective date" for the 2007 bonus was April 4, 2008. Thus, because the screen shot specified that the bonus would not be effective until April 4, 2008, it did not modify defendant's discretionary bonus into an unequivocal promise to plaintiff that the bonus for 2007 would be paid. Rather, it merely notified plaintiff of the status of his 2007 bonus and when the bonus would become effective.

¶ 20 In reaching our determination, we find *Camillo* distinguishable in two respects. First, the bonus program at issue in *Camillo* is significantly different from defendant's incentive program here. In *Camillo*, the bonus program description provided that "[o]ur assistant managers *are paid* a bonus each year." (Emphasis added.) *Camillo*, 221 Ill. App. 3d at 614. The defendant based the bonus on two things, corporate net profits and length of service, and the only condition for receiving a bonus was the employee being on the payroll on January 31st of the following year. *Id.* at 616-17. Thus, unlike the incentive program description here—which contained various conditions, was based on an employee's performance, and specified that a bonus pursuant to the program was discretionary—the bonus program in *Camillo* specified that assistant mangers would be paid a bonus each year based on corporate net profits and length of service, without taking performance into account. That the bonus program in *Camillo* did not take an employee's performance into

consideration for awarding a bonus is a clear indication that the bonus program constituted an unequivocal promise that a bonus would be paid.

¶ 21 Second, the conduct leading to the plaintiff's termination in *Camillo* is distinct from plaintiff's conduct here. In *Camillo*, the plaintiff experienced a number of reprimands regarding his work habits beginning in July 1986. *Id.* at 615. However, in October 1986, the plaintiff received a "satisfactory" written performance evaluation, although he did not receive a usual pay raise at that time. *Id.* at 616. Despite being aware of the plaintiff's performance issues in July, the defendant did not terminate him until December 31, 1986, after the "notoriously difficult" holiday shopping season ended and a few weeks before the plaintiff would be eligible for the bonus. *Id.* at 622.

¶ 22 The timing of the plaintiff's termination in *Camillo* appeared suspect. The defendant had been aware of the issues with the plaintiff's performance since at least July 1986. This sequence of events raised an inference that the defendant was on notice of the plaintiff's performance but decided to retain him for the duration of the holiday shopping season, and to terminate him only at the very end of that season and a few weeks before he would have earned a non-performance based bonus. As the court in *Camillo* concluded, the suspicious timing of the plaintiff's firing raised concerns of honest and fair dealing on the part of the defendant. *Id.*

¶ 23 Conversely, in the present case, the timing of the plaintiff's termination did not raise the same concerns. Swanson's affidavit regarding the reasons for and timing of plaintiff's termination is not rebutted. Swanson averred in his affidavit that defendant learned at the beginning of March 2008 that plaintiff sent allegedly harassing emails to an employee he formerly supervised, and that he also made unauthorized purchases on a company credit card. Swanson averred that he investigated the allegations against plaintiff and that defendant terminated plaintiff on March 13, 2008. Thus,

defendant's termination of plaintiff in this case does not raise the suspicion that defendant fired plaintiff to avoid paying him a 2007 bonus. Rather, unlike *Camillo*, defendant here did not continue to employ plaintiff for several months after having notice of plaintiff's work-related misconduct, only to fire him a few weeks before he was set to be paid a bonus.

¶ 24 Finally we reject plaintiff's argument that the requirements of fair dealing and honesty dictate that the incentive program's eligibility requirements in paragraph 7 be construed as "forfeiture provisions," which are void and unenforceable as a matter of law. While we are concerned with paragraph 9's provision that the incentive program can be taken away by defendant at any time and without notice, that paragraph did not serve as the basis for defendant withholding plaintiff's 2007 bonus. Rather, as specified in defendant's April 16, 2008, letter, plaintiff did not receive a 2007 bonus because he did not meet the incentive program's eligibility requirement provided in paragraph 7.D that an employee be in good standing with the company when the bonus is actually paid. Plaintiff has presented no basis for this court to hold that the notions of honesty and fair dealing prohibit an employer from conditioning a bonus payment on an employee being in good standing with the company during the year in which the bonus is earned and on the date the bonus actually paid, even if that date is in the following calendar year.

¶ 25 As the court in *Camillo* noted, we believe that there is a strong public policy in affording employers latitude in operating their businesses, including bonus programs. See *Camillo*, 221 Ill. App. 3d at 622 (noting that courts should be mindful of the latitude employers must have in operating their businesses and that intrusion into the business affairs of a corporation is not always desirable). It is not the function of this court to rewrite an employer's bonus program by insisting that a bonus be paid even when, after conditionally approving a bonus, the employer later learns that

the employee violated various employer policies. This is particularly true when, as here, the incentive program specified that, to receive the bonus, an employee must be in good standing when the bonus is actually paid. To hold otherwise would have a chilling effect on employer's offering bonus programs.

¶ 26 In sum, we agree with the reviewing court in *McLaughlin* that a separated employee is not entitled to a bonus pursuant to section 2 of the Wage Act absent an unequivocal promise that the bonus would be paid. See *McLaughlin*, 395 Ill. App. 3d at 544. Here, the incentive program's description clearly reflected that a bonus pursuant to the program was discretionary and conditioned on a number of factors, including that an employee not violate any company policies and remain in good standing with defendant at the time of payment. Swanson's unrefuted affidavit reflects that plaintiff was not in good standing with defendant when the 2007 bonus became effective because plaintiff violated defendant's anti-harassment and credit card policies. Therefore, because there is no genuine issue of material of fact regarding whether defendant unequivocally promised plaintiff a 2007 bonus, the bonus was not an "earned bonus" pursuant to section 2 of the Wage Act. Accordingly, we hold that the trial court properly granted summary judgment in defendant's favor.

¶ 27 III. Conclusion

¶ 28 For the forgoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 29 Affirmed.