SECOND DIVISION
November 8, 2011

No. 1-11-0553

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN BIRKHOLZ, Plaintiff-Appellant, v. CORPTAX, LLC, MLM INFORMATION SERVICES, PAUL MATTISON and DAVE SHEA, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 10-L-7330 Honorable Allen Goldberg, Judge Presiding.

O R D E R

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

¶ 1 *HELD*: The bonus referred to in the parties' employment agreement was based on company performance and not individual performance and was not guaranteed by the company or earned by the employee so employee was not entitled to the bonus under the Illinois Wage Payment and Collection Act. Employer reasonably exercised its discretion in determining, as part of employee's discipline, that employee would be ineligible for any bonus.

¶ 2 Brian Birkholz filed a one-count complaint against his former employers under the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 155/5 for failing to pay him a bonus he alleged he earned. The defendants filed motions to dismiss pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615 and 5/2-619. The circuit court, relying on *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536 (2009), concluded that a year-end bonus, the amount of which is based on future events, is not an unequivocally promised bonus and, therefore, is not earned income recoverable under the IWPCA and dismissed the plaintiff's case under 2-619. For the following reasons, we affirm.

¶ 3 Plaintiff, Brian Birkholz was hired by defendants to serve as its VP Chief Financial Officer with a start date of January 8, 2007 and a yearly salary of $195,000.00. In addition to his fixed salary, appellant was provided with an incentive plan which included the possibility of a bonus and a value creation plan. Certain requirements regarding confidentiality, ethics and termination were also outlined in the employment agreement. In late 2009 following an extensive, independent, financial audit of Corptax, Birkholz, as CFO and others were disciplined for their role in overstating revenue and expenses at the company. A part of Birkholz's discipline was to deem him ineligible to receive any 2009 year-end bonus as outlined in his offer of employment referred to in the “Incentive Plan" section of his employment agreement.

¶ 4 Birkholz, despite his issued disciplinary action, argues that he earned his 2009 bonus and it should be paid to him as wages under the IWPCA. Specifically, Birkholz’s complaint alleges that his former employers are in violation of the IWPCA because he was not paid the 2009 bonus outlined in his Incentive Plan following his April 2010 termination.

¶ 5 A motion to dismiss under section 2-619 if the Illinois Code of Civil Procedure concedes, for purposes of the motion, that the plaintiff's claim is legally sufficient but raises defects, defenses or other affirmative matters that can be established by external submissions that act to defeat the claim. *Seip v. Rogers Raw Materials Fund, L.P., et al.,* 408 Ill. App. 3d 434, 438 (2011). When reviewing a circuit court's disposition of a case pursuant to a section 2-619 motion to dismiss, this court must view all pleadings and supporting documents in a light most favorable to the non-moving party. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393 (2009). When a cause of action is dismissed pursuant to a section 2-619 motion, the question for this court is whether the circuit court was correct in determining that no genuine issue of material fact exists and whether defendant was entitled to a judgment as a matter of law. *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d at 438-39.

¶ 6 Section 2-619 of the Illinois Code of Civil Procedure requires that "[i]f the grounds [for dismissal] do not appear on the face of the pleading attacked the motion shall be supported by affidavit***." An affirmative matter as that term is used in section 2-619 (a)(9) of the Illinois Code of Civil Procedure has been described as something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of fact unsupported by allegations of specific facts contained in the complaint. *Zahl v. Krupa*, 365 Ill. App. 3d 653 (2006). We review an order granting a motion to dismiss pursuant to section 2-619 *de novo. Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d at 439. Additionally, resolution of whether the circuit court was correct in deciding the issue in favor of defendants requires us to construe a portion of the IWCPA. Because the construction of a statute is a question of law, our review is *de*

novo. *O'Loughlin v. Village of River Forest*, 338 Ill. App. 3d 189, 191 (2003). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. *Raintree Homes, Inc. v. Village of Long Grove,* 209 Ill. 2d 248, 261 (2004) (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979,987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on proper ground").

¶ 7 Defendants supported their section 2-619 motion with affidavits from two company officials along with corporate documents that established the original employment agreement between Birkholz and the defendants and another document which outlined Birkholz's discipline for his involvement as CFO in serious accounting errors at the company. Plaintiff's discipline included altering the duties for which he was originally hired, transferring his accounting oversight duties to the company's Controller and deeming him ineligible for any 2009 bonus. The document established that Birkholz was informed of the discipline and acquiesced to it. Plaintiff escaped termination. One of his subordinate employees was not so fortunate.

¶ 8 In response to defendant's motion, Birkholz filed his own affidavit which does not address the defendant's issued discipline which, in effect, altered the original terms of their employment agreement. Birkholz's affidavit amounts to nothing more than his opinion that he tried his best when attempting to execute his duties as CFO before those duties were transferred to the company's Controller. His affidavit can best be described as self-serving and conclusory without any supporting factual material. Affidavits which consist of conclusory allegations are insufficient to defeat the properly submitted facts in a section 2-619 motion. See *Allegis Realty Investors, et al.,*

v. Novak, 379 Ill. App. 3d 636, 641 (2008).

¶ 9 The IWPCA regulates wage payments and is primarily concerned with the prompt and full payment of wages due to workers at the time of their separation from employment. *Conlon-Moore Corp. V. Cummins*, 28 Ill. App. 2d 368, 373 (1960). Defendants argue that they do not owe any bonus to plaintiff and plaintiff fails to state a claim that they are in violation of the IWPCA.

¶ 10 Birkholz insists that the 2009 Incentive Plan bonus was an "earned bonus" which he is entitled to as wage compensation under the IWPCA, in spite of any disciplinary action deeming him ineligible for any 2009 bonus. The plaintiff relies on Section 2 of the IWPCA which states, in pertinent part: "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 2006) (*emphasis added*).

¶ 11 The IWPCA does not define the term "earned bonuses." In interpreting what the legislature meant by "earned bonuses," this court must ascertain and give effect to the intent of the legislature. *Illinois Dept. of Healthcare & Family Service v. Warner*, 227 Ill. 2d 223, 229 (2008). The most reliable indicator of the legislature's intent is the language of the statute. Legislative language is given its ordinary and popularly understood meaning. *Id.* at 229. Furthermore, this court must presume that when the legislature enacted the IWPCA, it did not intend to produce an absurd or unjust result. *Vine Street Clinic v. HealthLink, Inc*., 222 Ill. 2d 276, 282 (2006).

¶ 12 Bonuses characterized as "earned bonuses" are typically based solely on individual

production or individual performance. *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 544 (2009). In this case, the bonus Birkholz is claiming was clearly based on the overall performance of the firm. In the case of Birkholz's employment, the lion's share of his compensation came in the form of his $195,000.00 salary. This figure does not include the worth of any other benefits.

¶ 13 The incentive bonus in this case was strictly discretionary because it was based on the overall performance of the company and not ascertainable from the efforts of any particular employee. In fact, the success of the company may have been achieved in spite of the under-performance of any particular employees. Therefore, this bonus is not an "earned bonus" under the IWPCA. The discretionary nature of the bonus which Birkholz seeks to recover was underscored when the company exercised its discretion by giving plaintiff double the bonus provided for in the employment agreement in a prior year and prior to discovering plaintiff's alleged machinations. Similarly, the company exercised its discretion after its evaluation of Birkholz's role in the unusual accounting practices he was involved in and informed him that, as a part of his discipline, he was ineligible for any bonus in 2009. In March 2010, any 2009 bonuses were distributed to eligible employees. Because of his discipline, Birkholz was an ineligible employee. In April 2010, Birkholz, an at-will employee, was terminated. This lawsuit to attempt to lay claim to a 2009 bonus followed. Upon termination, the portion of his employment agreement that was unaltered by his discipline set out his termination payments which did not include payment of bonuses and did not give him any rights to incentives offered pursuant to his employment contract.

¶ 14 The *Camillo* case relied on by Birkholz is not on point. *Camillo v. Wal-Mart Stores, Inc.* 221

Ill. App. 3d 614 (1991). The *Camillo* court ordered the payment of a bonus *pro-rata*, reasoning that because the only eligibility factor for a manager to receive a bonus was that he be on the payroll and actively working. It was not tied in any way to improved company performance. The company's bonus period was calculated from February 1 through January 31. Plaintiff was terminated on December 31. The court concluded that the bonus was analogous to "earned vacation". In the twenty years since *Camillo,* no other appellate court has ruled on the concept of an "earned bonus." In the instant case, the incentive plan did not unequivocally guarantee that Birkholz would be paid a bonus each year. We look to the terms of the incentive plan which states:

> "Your annual target bonus is 30% of your annual salary. The target bonus will be earned on the Company achieving its Adjusted EBITDA target. (Adjusted EBITDA is EBITDA less capitalized software and capital expenditures). The bonus will be paid within 3 months of the end of the fiscal year for which the bonus was earned and you must be employed at that time in order to receive the bonus. No bonus will be paid if the actual results are 20% lower than the financial targets for the year for every additional 1% of financial target over 80% (up to 100%) you will earn 5% of your target bonus so that at 100% of financial target you will receive 100% of target bonus. For every additional 1% of financial target over 100% you will earn 2% up to 150% of financial target with a maximum bonus you can earn of 60% of your salary(i.e. 200% of your bonus). The basis of calculating the actual results will be the same as that used to

calculate the financial targets."

¶ 15 The bonus Birkholz seeks was identified as an "incentive plan" in Birkholz's offer of employment. It was an equivocal bonus which could only be calculated and paid out after ascertaining the company's year-end performance, not Birkholz's performance. The bonus was not mandatory and there was no fixed dollar amount. The fact that the company utilized the term "earned" in its incentive plan does not make the bonus described analogous to "earned vacation" or "earned salary" or even "earned bonus" amounts attached to an employee's piece work or over-target sales. The bonus was not guaranteed. Receipt of the bonus was dependent on the company's overall performance and Birkholz's adherence to company standards. The employment agreement did not provide that employees would have any vested interest in the incentive plan. Because the incentive plan did not contain language which guaranteed that employees would receive a bonus, it is unlike the *Camillo* case, which had an unequivocal promise that a bonus would be paid. In the instant case, the bonus was clearly conditional on whether the company's financial targets were achieved. Plaintiff's argument that because the incentive plan used the term "earned" in describing the plan, any bonus described or allocated under it should deemed an "earned bonus"within the meaning of the IWPCA is without merit. Long before the company's performance was finally tallied, Birkholz was disciplined, in part, by deeming him ineligible for any 2009 bonus. If the company's discipline had been more severe and it had fired Birkholz immediately, rather than in April 2010, Birkholz concedes he would have no IWPCA claim. This is the very type of absurd result that should be avoided in statutory construction cases.

¶ 16 This court previously indirectly addressed what is meant by an "earned bonus" when it

affirmed a jury verdict that awarded compensation to a plaintiff for his first quarter's work when that bonus was his only compensation for the quarter and was specifically tied to his individual performance. See *Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243 (2004). This holding is consistent with our analysis of what an constitutes an "earned bonus" under the IWPCA.

¶ 17 The *McLaughlin* case relied on by both parties answered the question of whether an executive who leaves his position before the company's performance measurement period for an annual bonus ends is entitled to a *pro-rata* share of the annual bonus. *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536 (2009). The *McLaughlin* court adopted a further distinction regarding bonus plans - those plans which are unequivocal or guaranteed and those plans which are equivocal or not guaranteed. The court, relying on the plaintiff's employment contract, held that the offer to McLaughlin of a bonus was not guaranteed. If no unequivocal promise was made, then the employee is not entitled to any part of the bonus pursuant to Section 2 of the IWPCA. *McLaughlin v. Sternberg Lanterns, Inc.* 395 Ill. App. 3d at 544. Our holding is consistent with *McLaughlin* in that no bonus to Birkholz was guaranteed. The *McLaughlin* court found that "the language in the parties' contract was not an unequivocal guarantee that the plaintiff would receive the bonus as compensation. Rather, the bonus was clearly conditional, dependent on whether sales for the [company] increased over the previous year." *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d at 544. In fact, Birkholz's employer exercised its discretion regarding the incentive plan and expressly rescinded Birkholz's eligibility for any 2009 bonus during Birkholz's disciplinary phase following the company's independent audit. This discipline had the effect of amending the parties' employment agreement.

¶ 18 Our holding is also consistent with the general usage of the word "bonus." In the business world, a "bonus" is understood to be a discretionary component of compensation. See *Comrie v. IPSCO, Inc.*, 636 F. 3d 839 (7th Cir. 2011). Birkholz received all of his compensation and is entitled to nothing else under the IWPCA. Based on the facts, defendants were in full compliance with the IWPCA. There was no mandatory bonus to be paid under the incentive plan. Defendants exercised their discretion in 2009 and informed plaintiff that he was ineligible for any 2009 incentive plan bonus. This was well before it could be determined with any certainty how much any employee's bonus would be. There are unpublished federal cases that are in agreement with the analysis we outline today. See *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d at 542-543 (2009) (discussion of two unpublished federal cases). Additionally, the Connecticut Supreme Court recently resolved any ambiguity in their state regarding bonuses by holding that discretionary bonuses are not wages subject to their state's wage statutes. See *Ziotas v. The Reardon Law Firm*, P.C., 296 Conn. 579 (2010); *see also Truelove v. Northeast Capital & Advisory, Inc*. 95 N.Y. 2d 220, 224 (2000) and *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295 (2001) (discretionary bonuses not tied to individual performance are not wages).

¶ 19 Birkholz also argues that there is a crucial factual question that precluded the circuit court from dismissing his IWPCA complaint. He wishes to litigate whether his discipline that deemed him ineligible for a 2009 bonus was justified. There are all sorts of problems with this contention. First and foremost, Birkholz never filed any administrative or other claim alleging an unjustified or wrongful discipline. In fact, he filed no such count in this case. He argues that a court cannot say he is not entitled to a bonus until it decides the underlying factual correctness of the discipline

he received. This argument is unavailing. The courts do not sit as super-personnel agencies who review and decide issues of long-past personnel matters in the context of reviewing such IWPCA claims. Birkholz never challenged the discipline he was given. He raises the issue in response to defendants' motion to dismiss and well after all bonuses were distributed in March 2010 and only after he was subsequently terminated in April 2010. He attempts to avoid dismissal without filing anything but his conclusory, self-serving affidavit. Birkholz had no reasonable expectation of a 2009 bonus following his discipline which specifically deemed him ineligible for one. The underlying correctness of this discipline never enters the picture. This lawsuit is a request for compensation under the IWPCA, not a review of past disciplinary action of an employer against his employee under retaliatory discharge, breach of contract or some other theory. Birkholz is not entitled to a bonus under either the IWPCA or his amended employment agreement.

¶ 20 For all the foregoing reasons, the circuit court ruling is affirmed.

¶ 21 Affirmed.