



Employer Improperly Reduced “Stay Bonus” Based on FMLA Leave

Following a merger or ownership change, many companies offer employees a “stay bonus”—an incentive to remain in their positions during the transition period. In *Dierlam v. Wesley Jessen Corp.*, an Illinois federal district court has held that an employer ran afoul of the FMLA in calculating such a bonus. When the company Valerie Dierlam worked for was sold, the acquiring company offered her a stay bonus of 50% of her base salary if she remained “actively employed” with the new company for one year. After the transition period ended, the company prorated Dierlam’s stay bonus because, during the year, she had taken 12 weeks of approved FMLA leave to adopt a child. Immediately thereafter, Dierlam resigned and signed a separation agreement with an express waiver of all FMLA claims. Nonetheless, she sued the company, alleging among other things that the stay bonus reduction violated the FMLA. The court rejected the company’s argument that Dierlam had waived the FMLA claim, declaring the waiver unenforceable under a Department of Labor (DOL) regulation that prohibits employees from waiving, or employers from inducing employees to waive, their rights under FMLA. The court granted summary judgment for Dierlam and awarded her the remainder of her stay bonus, holding that under another DOL regulation that prohibits employers from disqualifying an employee from certain attendance-based bonuses based solely on the employee’s having taken FMLA leave, the employer had improperly prorated Dierlam’s bonus. Employers should carefully review their bonus practices with the understanding that an employee’s FMLA leave may not justify a reduction in their bonus award.

Extra Work and Heightened Scrutiny for Employee Who Complained of Discrimination May Constitute Retaliation

A Federal appellate court has held that loading an employee down with additional work and subjecting him to extra scrutiny in response to a discrimination complaint could constitute illegal retaliation. In *Ford v. General Motors Corp.*, a black employee claimed his employer retaliated against him in violation of Title VII after he filed a race discrimination complaint with the EEOC. The employee, George Ford, alleged that after he filed his EEOC complaint he was forced to work harder and suffered closer supervisory scrutiny than other employees—he allegedly was told “if he sneezed, he would be fired.” Believing he was being set up to fail so GM could fire him and jeopardize his pension, Ford quit, and claimed constructive discharge. GM claimed the closer scrutiny was due to Ford’s performance issues, and prevailed on summary judgment. The Sixth Circuit Court of Appeals reversed, concluding that GM “may well have been watching him more closely than normal to find a reason to terminate him in retaliation for his EEOC filing.” Additionally, the court found that Ford’s new performance issues, when compared with Ford’s successful performance at GM for over 30 years prior to the EEOC complaint, could support his claim of retaliation. Employers should be aware that

such adverse changes in the conditions of employment, and not just formal disciplinary actions, can in some circumstances form the basis for a retaliation claim.

Jury Awards \$8.5 Million Against Employer Who Lied to Other Employees About Reason for Employee’s Termination

A Mississippi jury recently awarded a former Wal-Mart employee \$8.5 million in a defamation suit following his termination for allegedly stealing chewing tobacco. In *Griggs v. Wal-Mart Stores Inc.*, a Wal-Mart truck driver, Lamon Griggs, had picked up a package of chewing tobacco to purchase when he recalled he urgently needed to call his supervisor. As he left the store, Griggs told the store’s “greeter” that he had the tobacco but had to step out. Nonetheless, the store’s security guard stopped him before he could return to the store with the merchandise, and Wal-Mart terminated Griggs pursuant to its policy on employee shoplifting. In response to a revolt by fellow truck drivers who did not believe the shoplifting allegations, a Wal-Mart supervisor told them that the store had a videotape of Griggs stealing the tobacco and suspected him in other thefts—neither of which was true. Griggs filed a defamation suit, and the jury awarded him \$1.5 million in actual damages and \$7 million in punitive damages. To avoid such liability, employers should properly train their supervisors and managers on how to handle inquiries about former employee’s departures, and take steps to insure that such personnel do not fabricate justifications for terminations.

Ex-Partner Sues Law Firm for Defamation Concerning Allegedly False Statements About Reason for Departure

A former partner at Pillsbury Winthrop (formerly Pillsbury, Madison & Sutro) has sued his former law firm for defamation and interference with contract, claiming \$45 million in damages from statements the law firm made in connection with his departure. A rival firm announced that the partner would be joining its ranks in September. In response, Pillsbury issued a press release stating that an investigation revealed “a reasonable likelihood” that the partner had engaged in sexual harassment and that he had experienced “a significant decline in productivity.” Following the negative publicity created by the Pillsbury press release, the partner withdrew from his partnership at the rival firm. In his complaint, the partner denies Pillsbury’s statements, claims that Pillsbury made no determination concerning whether or not he had engaged in sexual harassment, and further alleges that Pillsbury’s statements violated a confidentiality agreement between him, the firm and a third party. While it remains to be seen how this lawsuit will turn out, it serves as an important reminder to employers to be conscious of the potential impact of statements regarding an employee’s departure. While post-departure statements or comments may prove necessary on occasion, employers should carefully consider the nature and extent of their comments and the potential liability from such comments.

