

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>SALVATORE ZICCARELLI,</b>	)	
	)	
Plaintiff,	)	
	)	Case No. 17 CV 3179
v.	)	
	)	Hon. John J. Tharp
<b>THOMAS J. DART, Sheriff of Cook County,</b>	)	judge presiding
<b>Illinois and COOK COUNTY, ILLINOIS, a</b>	)	
<b>Municipal Corporation and Body Politic,</b>	)	
<b>WYOLA SHINNAWI,</b>	)	
	)	
Defendants.	)	

**DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFF'S SECOND MOTION TO REOPEN DISCOVERY**

Defendants Thomas J. Dart, Sheriff of Cook County, Wylola Shinnawi, and Cook County, by their attorney, KIMBERLY M. FOXX, State's Attorney of Cook County through her Assistant, Nazia Hasan, oppose Plaintiff Salvatore Zicarelli's second motion to reopen discovery, and in response state as follows:

**INTRODUCTION**

Plaintiff filed this suit against Sheriff Thomas Dart, Shinnawi, and Cook County alleging violations of his rights under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601. After discovery, the district court granted the Defendants' motion for summary judgment on all claims. Plaintiff appealed summary judgment as to only his FMLA claims and on appeal, the Seventh Circuit affirmed the granting of summary judgment in favor of Defendants on the FMLA retaliation claim, however, reversed the district court's granting of summary judgment on his FMLA interference claim, finding that, if Plaintiff's recounting of the conversation with Shinnawi was true, he was discouraged from taking FMLA leave, it could constitute

FMLA interference. *Zicarelli v. Dart*, 35 F.4th 1079, 1081 (7th Cir. 2022). The only issue at trial is whether Defendants interfered with Plaintiff Salvatore Zicarelli's rights under the FMLA in September 2016. In order to prevail at trial, Plaintiff will have to prove by a preponderance of the evidence that Shinnawi, the FMLA leave manager, discouraged him from taking FMLA when they spoke on the phone in September 2016.

As stated in Plaintiff's second motion to authorize additional discovery [ECF No. 130], discovery closed in January 2018 and the Court granted summary judgment in favor of Defendants on all of Plaintiff's claims in June 2018. On March 21, 2023, Plaintiff's filed a motion to reopen discovery [ECF No. 122], which the Court denied on March 27, 2023 [ECF No. 123]. Plaintiff files a second motion seeking to reopen discovery [ECF No. 130] to introduce evidence of alleged "emotional trauma, psychiatric treatment, homelessness, and other PTSD symptoms that occurred after the close of discovery in January of 2018." Defendants oppose the request because: (1) these damages are not allowed under an FMLA interference claim; and (2) Plaintiff's individual mental state does not matter in the context of an FMLA interference claim.

### **ARGUMENT**

The Supreme Court ruled that damages recoverable under FMLA are strictly defined and measured by actual monetary losses. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 739-740 (2003). Plaintiff's compensatory damages are only for any wages, salary, employment benefits, or other compensation denied or lost to the employee by reason of the violation. 28 U.S.C. 2617(a)(1)(A)(i)(I).

#### **I. The FMLA does not allow for emotional distress, consequential or punitive damages.**

Under the FMLA, an "employer is liable only for compensation and benefits lost 'by reason of the violation,' § 2617(a)(1)(A)(i)(I), for other monetary losses sustained 'as a direct result of the violation,' § 2617(a)(1)(A)(i)(II), . . . [t]he remedy is tailored to the harm suffered." *Ragsdale v. Wolverine*

*World Wide, Inc.*, 535 U.S. 81, 89 (2002). Emotional distress, consequential and/or punitive damages are not allowed under the FMLA. See § 2617(a)(1)(A)(i)(I). In its ruling, the Seventh Circuit did not hold that Plaintiff's "snowballing consequences" were recoverable under the FMLA but instead stated that "[t]he district court may have its hands full on remand, particularly if plaintiff tries to blame snowballing consequences, including even early retirement, on his conversation with Shinnawi. As skeptical as we might be about those efforts, we believe those issues need to be sorted out in the district court in the first instance." *Zicarelli*, 35 F.4th at 1090. The remand instructions did not authorize reopening discovery.

Plaintiff need not reopen discovery to explore Plaintiff's psychiatric condition, homelessness, PTSD, emotional trauma or other consequential damages because the FMLA does not allow for such damages. Courts have repeatedly held that the FMLA does not allow for emotional distress or punitive damages. *Arrigo v. Link*, 836 F.3d 787, 798 (7th Cir. 2016) (The discovery on damages also would have been different, as FMLA damages do not include emotional distress and punitive damages, while ADA and Title VII claims do); *Trabanas v. Northwestern Univ.*, 64 F.4th 842 (7th Cir. 2023) (FMLA does not allow awards of emotional distress or punitive damages); *Bell v. Illinois Department of Human Services*, No. 19 C 3829, 2019 WL 6726124, at \*4, 2019 U.S. Dist. LEXIS 213199, at \*4 (Durkin, J., N.D. Ill. Dec. 11, 2019) (motion to strike relief for emotional distress damages in FMLA case granted because plaintiff mistakenly relied on *Farrell v. Tri-County Metropolitan Transportation District of Oregon*, 530 F.3d 1023 (9th Cir. 2008), which "merely held that the plaintiff could recover damages for days of work that he missed because of stress he suffered resulting from the wrongful denial of FMLA leave.") Furthermore, courts have held that the FMLA does not allow for consequential damages or nominal damages. *Tubey v. Illinois Tool Works, Inc.*, No. 17 C 3313, 2017 WL 3278941, at \*8, 2017 U.S. Dist. LEXIS 121802, at \*8 (Leinenweber, J., N.D. Ill. Aug. 2, 2017) (reiterating that the listed statutory damages are the only categories allowed under the FMLA).

Plaintiff cannot recover for damages under the FMLA except for those enumerated damages—wages, salary, benefits or other compensation lost—allowed under the FMLA and therefore, discovery need not reopen.

**II. Testimony regarding Plaintiff's psychiatric condition impacting his decision to resign is not relevant to the FMLA claim.**

Plaintiff also proposes to reopen discovery to explore his particular psychiatric or mental condition that allegedly made him more susceptible to the decision to retire. Discovery need not reopen because in the May 31, 2023 court appearance presenting this motion, even Plaintiff's counsel conceded that Plaintiff's decision to retire was not reasonable.

The Seventh Circuit set out the remand instructions as follows: to show an FMLA interference violation under § 2615(a)(1), Plaintiff must show that: (i) he was eligible for FMLA protections; (ii) the Sheriff's Office was covered by the FMLA; (iii) he was entitled to leave under the FMLA; (iv) he provided sufficient notice of his intent to take leave; and (v) the Sheriff's Office interfered with, restrained, or denied FMLA benefits to which he was entitled. See 29 U.S.C. § 2615(a)(1). *Zicarelli*, 35 F.4th at 1089. To recover for a violation of § 2615(a)(1), Plaintiff must also show he was prejudiced by the unlawful actions of the Sheriff's Office. *Id.* In an FMLA interference claim, the important question is whether the employer's actions would discourage a reasonable employee from taking FMLA leave. *Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806, 818 n.35 (7th Cir. 2015). The reasonable employee test uses an objective standard, based on how a reasonable employee might react, and does not consider the plaintiff's subjective feelings. *Freelain v. Village of Oak Park*, 888 F.3d 895, 902 (7th Cir. 2018). An employee who is particularly sensitive to an employer's slights receives no greater protection than one who is able to shrug them off. *Id.*

Consequently, any testimony regarding Plaintiff's subjective state of mind or psychiatric condition does not have any bearing on the FMLA interference claim and discovery need not be

reopened. Evidence regarding Plaintiff's specific psychiatric condition which may have made him more susceptible to alleged discouragement is not relevant because a plaintiff must be held to an objective, reasonable employee standard. Therefore, the parties need not explore Plaintiff's unique psychiatric circumstances and this Court should deny Plaintiff's motion.

**CONCLUSION**

WHEREFORE, Defendants Thomas J. Dart, in his official capacity as Sheriff of Cook County, Wylola Shinnawi, and Cook County, request that this Court deny Plaintiff's second motion to reopen discovery, and grant any other relief the Court deems just and proper.

Respectfully submitted,

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