IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Salvatore Ziccarellli,	)	
	)	
Plaintiff	)	
	)	No. 17-cv-3179
-vs-	)	
	)	*(Judge Tharp)*
Thomas J. Dart, etc., et al	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION TO AUTHORIZE ADDITIONAL DISCOVERY

The Court should reject the arguments defendants raise in opposition to plaintiff's motion to authorize additional discovery. Plaintiff shows below that the Court should allow the parties 120 days to undertake additional fact and expert discovery.

I. Additional discovery relevant to plaintiff's psychological status when he took early retirement

Shortly before plaintiff took early retirement, Dr. Danish Hangora (plaintiff's treating psychiatrist) prescribed that plaintiff take time off from work to receive in-patient treatment in an eight-week psychotherapy program. Plaintiff contends that defendant Shinnawi interfered with his right to take FMLA leave when she told plaintiff that the Sheriff would fire plaintiff if he took FMLA leave to comply with Dr. Hangora's prescription. Defendant Shinnawi disputes this contention.

Plaintiff seeks to reopen discovery to present expert opinion about his diminished ability to make rational decisions when he opted for early retirement. This proposed expert opinion is consistent with the rule permitting expert testimony in domestic abuse cases to explain how "victims … typically respond to such abuse," *United States v. Young*, 316 F.3d 649, 658 (7th Cir. 2002), or to "assist the jury in understanding a victim's behavior before, during, and after a rape." *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 745 (7th Cir. 2003). Here, the proposed expert testimony would explain to the jury how persons suffering from PTSD flashbacks triggered by workplace stressors are unable to make a reasonable cost-benefit analysis about career decisions.

Defendants do not dispute that an understanding of plaintiff's psychological state when he opted for early retirement would help the jury assess his testimony about Shinnawi's advice. Nor do defendants suggest that plaintiff should have gathered this expert evidence before discovery closed in 2018.

Defendants limit their argument to asserting that plaintiff's decision to take early retirement must be judged by the objective "reasonable person" standard for FMLA retaliation claims (ECF No. 133 at 3-4), rather than by the subjective standard of whether a person in plaintiff's circumstances

would have been discouraged from exercising his FMLA rights. The Court should reject defendants' argument because it is inconsistent with 29 U.S.C. § 2615(a)(1) and is not faithful to the decision of the Seventh Circuit in this case.

Section 2615 of the FMLA sets out the acts prohibited by the statute. Section (a) describes two actionable claims under the FMLA:

> **(1) Exercise of rights**
>
> It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
>
> **(2) Discrimination**
>
> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

29 U.S.C. § 2615(a).

Defendants ask the Court to apply to subsection (1) the "reasonable employee" standard of the anti-discrimination provisions of Title VII, e.g., *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993);. The Seventh Circuit applied this standard to FMLA discrimination claims arising under 29 U.S.C. § 2615(a)(2) in *Cole v. Illinois*, 562 F.3d 812, 815-16 (7th Cir. 2009).

A different standard applies to "interference" claims, as in this case, that arise under § 2615(a)(1). Unlike a discrimination claim, where the employee must prove "discriminatory or retaliatory intent," an interference

claim "requires only proof that the employer denied the employee his or her entitlements under the Act." *Kauffman v. Fed. Exp. Corp.*, 426 F.3d 880, 884 (7th Cir. 2005). The Seventh Circuit applied the distinction between discrimination claims and interference claims in its decision in this case.

The Court of Appeals rejected plaintiff's constructive discharge claim (which arose under § 2615(a)(2)), finding that "a reasonable employee" would not "just give up and walk away from his job, benefits, and treatment plan entirely based on one conversation in which, under his version of the facts, the employer's representative was simply wrong." *Ziccarelli v. Dart*, 35 F.4th 1079, 1090 (7th Cir. 2022.) The Seventh Circuit, however, did not apply this "reasonable employee" standard to plaintiff's § 2615(a)(1) claim of interference with the exercise of FMLA rights, which it remanded for trial. *See id.* at 1087 n. 6, where the Court of Appeals discussed FMLA interference claims.

If plaintiff's FMLA interference claim was, as defendants argue, controlled by the same "reasonable employee" standard as the constructive discharge claim, the Court of Appeals would not have remanded the interference claim. That is, if the same standard applied to both claims, the Court would have affirmed judgment on the interference claim based on its finding that it was not objectively reasonable for plaintiff to "just give up

and walk away from his job." *Ziccarelli*, 35 F.4th at 1090. The Appellate Court did not apply the same standard to both claims, and this Court must follow suit.

Defendants rely on language in footnote 35 in *Preddie v. Bartholomew Consolidated School Corporation*, 799 F.3d 806 (7th Cir. 2015). (ECF No. 133 at 4.) The pertinent holding in *Preddie* is that the plaintiff's evidence would have allowed a jury to find that statements made on behalf of the school district "were meant to convey the message that … there would be adverse consequences [for taking FMLA leave]." *Id.* at 818. The Court of Appeals made the same finding in this case:

> Evidence of a link between Shinnawi's alleged discouragement and Ziccarelli's decision not to take his remaining FMLA leave for 2016 is sufficient to require a trial. A reasonable jury that believed Ziccarelli's account could find that the Sheriff's Office violated § 2615(a)(1) and that the violation prejudiced Ziccarelli's access to his remaining FMLA leave hours for 2016.

Ziccarelli, 35 F.4th at 1090 (cleaned up).

Defendants ask the Court to read footnote 35 in *Preddie* as holding that the "reasonable person standard" applies to FMLA retaliation claims (like the claim in *Preddie* brought under § 2615(a)(2)) as well as to interference claims brought under § 2615(a)(1), as in this case. (ECF No. 133 at 4.) This footnote states, in pertinent part, as follows:

> Dr. Clancy did not make overt threats that additional absences would result in discipline or non-renewal of Mr. Preddie's

> contract; that, however, is not determinative. Rather, the critical question is whether the employer's actions would discourage a reasonable employee from taking FMLA leave. *Cf. Cole v. Illinois*, 562 F.3d 812, 816 (7th Cir.2009) (applying reasonable person standard in FMLA retaliation claim).

Preddie, 799 F.3d at 818 n.35.

Footnote 35 in *Preddie* is inconsistent with the decision of the Court of Appeals in this case to affirm the grant of summary judgment on plaintiff's FMLA retaliation claim while reversing and remanding for trial on plaintiff's FMLA interference claim.

The "mandate rule" requires this Court to follow the express and implied rulings of the Court of Appeals. *In re A.F. Moore & Associates, Inc.*, 974 F.3d 836, 840 (7th Cir. 2020). The Court should therefore submit to the jury the factual dispute about plaintiff's conversation with defendant Shinnawi and allow the additional discovery plaintiff requests.

II. Additional discovery on plaintiff's continued loss of compensation and benefits

Plaintiff opted for early retirement on September 26, 2016. Discovery closed in January of 2018. Plaintiff seeks to reopen discovery to marshal the evidence about the damages plaintiff incurred after the close of discovery.

Plaintiff intends to prove at trial that because he took early retirement, he lost wages, forfeited 320 hours of sick time, lost health insurance, was forced because of financial exigencies to begin to withdraw his pension contributions before he would have received pensions payments at age 55,

and, as recognized by *Trahanas v. N.W.U.*, 64 F.4th 842 (7th Cir. 2023), suffered damage to his professional reputation.

Discovery closed about five and a half years ago. The amount of plaintiff's lost wages could not be determined at that time. The same is true for the loss attributable to termination of health insurance, pension, and damage to plaintiff's professional reputation.

Defendants agree that these damages may be recovered under the FMLA, which allows recovery for "compensation and benefits lost 'by reason of the violation,' § 2617(a)(1)(A)(i)(I), [and] for other monetary losses sustained 'as a direct result of the violation,' § 2617(a)(1)(A)(i)(II)." (ECF No. 133 at 2.)

Defendants raised the affirmative defense of failure to mitigate damages in their Third Affirmative Defense to their Answer to the Complaint. (ECF No. 15 at 11.) Defendants are likely to cross-examine plaintiff to attempt to show that he is seeking damages "for periods of time in which he otherwise could not have worked for the company." *Simon v. Coop. Educ. Serv. Agency #5*, 46 F.4th 602, 612 (7th Cir. 2022) (cleaned up).

There is an obvious need for further discovery by all parties to allow a fair presentation of plaintiff's economic losses. The Court should therefore grant plaintiff's request to reopen discovery.

III. Evidence about plaintiff's psychological state after he opted for early retirement

Plaintiff intends to present evidence about the emotional trauma, psychiatric treatment, homelessness, and PTSD symptoms that he experienced after the close of discovery in January of 2018. Defendants oppose plaintiff's request to reopen discovery to allow factual development of these issues.

Defendants argue that plaintiff's "psychiatric condition, homelessness, PTSD, [and] emotional trauma" (ECF No. 133 at 3) are not relevant to damages. Defendants base their argument on the rule that emotional distress damages may not be awarded for violations of the FMLA. Plaintiff is mindful of this rule and seeks to introduce evidence that his psychiatric issues and homelessness affected his ability to search for and obtain new employment.

Plaintiff's psychiatric issues are also relevant to his prayer (included in his complaint, ECF No. 1 at 7) for reinstatement, a remedy authorized by the FMLA. *Kohls v. Beverly Enterprises Wisconsin, Inc.*, 259 F.3d 799, 804 (7th Cir. 2001). As the Seventh Circuit held regarding reinstatement under the ADEA: "The court has discretion to grant or deny reinstatement and it may consider a number of factors in exercising that discretion, including hostility in the employment relationship and the lack of an available position to which to reinstate the plaintiff." *Downes v. Volkswagen of Am., Inc.*, 41

F.3d 1132, 1141 (7th Cir. 1994). In this case, the Court would be well within its discretion to condition reinstatement on evidence that plaintiff is physically and psychologically capable of returning to work as a correctional officer.

The Court should allow discovery into plaintiff's ability to work in the five years that have elapsed since plaintiff took early retirement.

IV. Conclusion

It is therefore respectfully requested that the Court allow the parties 120 days to undertake additional fact and expert discovery.

Respectfully submitted,

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