UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SALVATORE ZICCARELLI,	)	
	)	
Plaintiff,	)	
	)	**Case No. 17 C 3179**
v.	)	
	)	
THOMAS J. DART, Sheriff of Cook County, Illinois and COOK COUNTY, ILLINOIS, a Municipal Corporation and Body Politic, WYOLA, FMLA representative and employee of Thomas J. Dart, Cook County Sheriff,	)	**Honorable John Tharp**
	)	
Defendants.	)	

DEFENDANTS' MOTIONS *IN LIMINE*

NOW COME Defendants, through their attorney, Kimberly M. Foxx, State's Attorney of Cook County, through her assistants Kathleen Ori and Nazia Hasan, and for their motions *in limine* seeking to bar Plaintiff from presenting evidence or argument regarding issues that are not relevant, confusing, and highly prejudicial, state as follows:

INTRODUCTION

During Plaintiff Salvatore Ziccarelli's 27-year career with the Defendant Cook County Sheriff's Office ("Sheriff's Office"), he requested FMLA leave and the Sheriff's Office approved these requests. *Ziccarelli v. Dart*, 35 F.4th 1079, 1082 (7th Cir. 2022). FMLA leave is a common benefit utilized by Sheriff's Office's employees and is managed and processed by the Human Resources Department within the Sheriff's Office. From 2007 through early 2016, Plaintiff used between 10 and 169 hours of FMLA leave each year. *Id.* The Sheriff's Office never disciplined Plaintiff for taking FMLA leave. By September 2016, he had used 304 hours of his allowable 480 hours of FMLA leave for the year. *Ziccarelli* 35 F.4th at 1082.

The sole issue at trial will be whether the Sheriff's Office and Wylola Shinnawi, the Sheriff's Office's now-retired FMLA manager, interfered with Plaintiff Salvatore Ziccarelli's FMLA rights during a telephone call in September 2016. In order to prevail at trial, Plaintiff must prove by a preponderance of the evidence that Ms. Shinnawi discouraged him from taking FMLA when he asked to take eight additional weeks of FMLA leave and that he was prejudiced by her comments. If the jury finds Ms. Shinnawi's account of the telephone call more credible, Plaintiff has no viable FMLA claim. *Ziccarelli*, 35 F.4th at 1082, n.2.

Counsel for Plaintiff and Defendants have met and conferred. Based on that meeting, it is anticipated that Plaintiff may try to introduce evidence of damages that he cannot recover (and ask the jury to award those damages) and introduce evidence that has little or no relevance, but would have a substantial and unfair prejudicial effect. Specifically, Defendants anticipate that Plaintiff will seek to introduce the following evidence:

(1) evidence and testimony that Plaintiff believes he is entitled to damages of backpay, pension, and reinstatement despite his decision to retire;

(2) evidence or argument regarding emotional distress and trauma allegedly suffered by Plaintiff;

(3) testimony regarding other damages that are not compensable under the FMLA;

(4) testimony regarding alleged retaliation / purported constructive discharge by Defendants against Plaintiff;

(5) testimony or argument that Defendants discriminated against Plaintiff based on his age;

(6) testimony of witnesses, including experts, not previously disclosed or designated;

(7) testimony regarding the indemnification obligations of Cook County or testimony that Cook County is a joint employer, and

(8) testimony or opinion that generally, the employees of the Cook County Sheriff's Office are incompetent.

A Court's authority to rule on motions *in limine* springs from its inherent authority to manage trials. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002). The purpose of such motions is to perform a "gatekeeping function and permit[] the trial judge to eliminate from further consideration evidentiary submissions that clearly ought not to be presented to the jury because they clearly would be inadmissible for any purpose." *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997). Motions *in limine* sharpen the focus of later trial proceedings and permit the parties to focus their preparation on those matters that will be considered by the jury. *Id.*

Motion in Limine No. 1: This Court should preclude evidence and testimony that Plaintiff is entitled to backpay, pension credit, and reinstatement.

Even though the only claim remaining is a FMLA interference claim and even though Plaintiff voluntarily retired in September 2016, in addition to seeking damages of his remaining sick time, Plaintiff seeks damages of three years of backpay, pension, and reinstatement. Specifically, in his recent deposition, Plaintiff testified as follows:

> Q: … But, okay, so you're seeking back pay from when you left the sheriff's office in September 2016 through the time that you got better?
> ***
> Okay, so it that 2016 through 2019 then. Three years or what – what time period?
>
> A: I would say, I would say that time from that you can see that I have been evaluated to the point where you can see I'm able to approach life again. So what, what do you say '16-'18?
> ***
> So it took me three years --- three years to get better. Yes, ma'am, it did.
>
> ***
> Q: Am I correct that it took you several years to be in a psychological condition where you could go back to work?
>
> A. Yes.

11/3/2023 Ziccarelli Transcript 31:14-23; 62:5-63:5; 65:3-6. This testimony is inadmissible for several reasons.

Here, 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." *Ziccarelli*, 35 F.4th at 1090. Now, in addition to seeking damages of his remaining sick leave, it appears that Plaintiff intends to ask the jury to award three years of backpay, pension, and reinstatement, and has indicated his intent to use a document setting forth the pay differential as an exhibit. This Court is the gatekeeper and should exclude such testimony as not relevant, highly speculative, undeveloped, and prejudicial. Thus, other than his remaining sick leave that he could have used in conjunction with his remaining FMLA time and which he was not paid out for when he retired, this Court should preclude this damages testimony and asking for such an award because these damages are not permitted under the circumstances.[1] Moreover, it could be the Court and not a jury, to decide whether Plaintiff would be entitled to the equitable relief of backpay and reinstatement.[2]

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) (emphasis added). Here, the Seventh Circuit concluded

[1] Caselaw indicates that a plaintiff may not collect damages for periods of time in which he otherwise would have been unable to work for his employer. "An employee also has no right to reinstatement--and, therefore, damages--if, at the end of his twelve-week period of leave, he is either unable or unwilling to perform the essential functions of his job." *Franzen v. Ellis Corp.*, 543 F.3d 420, 426 (7th Cir. 2008) (concluding that if the plaintiff was either unwilling or unable to return to work at the expiration of his FMLA leave, the plaintiff could be lawfully terminated and not entitled to damages resulting from this termination).

[2] The Seventh Circuit has not ruled on whether back pay under the FMLA is an equitable remedy for the Court, rather than the jury, to decide. See *Franzen v. Ellis Corp.*, 543 F.3d 420, 426 (7th Cir. 2008).

Plaintiff voluntarily retired a few days after his conversation with Ms. Shinnawi and held that his retirement did not constitute a constructive discharge:

> One feature of this case makes the prejudice analysis for plaintiff's interference claim more complicated: his decision to retire from the Sheriff's Office shortly after his conversation with Shinnawi. As we explain below, even plaintiff's version of that conversation falls far short of evidence that could support a claim for constructive discharge.

Ziccarelli v. Dart, 35 F.4th 1079, 1090 (7th Cir. 2022). Thus, because Plaintiff chose to retire, the Sheriff's Office did not *cause* Plaintiff to suffer from lost wages and pension credits, and evidence of what he could have earned is not relevant, highly speculative, and unduly prejudicial.

Additionally, while the Court re-opened discovery to allow for additional discovery on damages, Plaintiff did not produce any document regarding lost pension benefits nor did he identify any individual who could testify regarding the issue. See Exhibit A, Plaintiff's Response to Defendants' Supplemental Requests for Production. Moreover, Plaintiff would have needed to designate an expert to opine on lost pension benefits and has not done so. As stated above, the only claim at issue is FMLA interference (there is no constructive discharge claim). Plaintiff's decision to seek early retirement and forego future salary and making future pension contributions (and receiving future pension benefits from the Cook County Pension Board, a separate entity) is undeveloped, highly speculative, not relevant to his FMLA interference claim, confuses the issues at trial, and is prejudicial to Defendants.

Motion in Limine No. 2: This Court should bar all evidence or argument regarding emotional distress and trauma allegedly suffered by Plaintiff.

During Plaintiff's second deposition, counsel for Plaintiff conceded that damages for emotional trauma, psychiatric treatment, and other PTSD symptoms are not recoverable under the FMLA. 11/3/2023 Ziccarelli Transcript 30:21-23: "[W]e're not seeking emotional distress. If you want me to stipulate to that, I'd be glad to do that." Counsel further stated: "I think it's pretty clear from the opinion from the law that we can't get all those juicy emotional distress damages . . ." *Id.*

31:8-11. Therefore, this Court should bar Plaintiff from trying to introduce evidence of emotional trauma, psychiatric treatment, and other PTSD symptoms that occurred after his conversation with Ms. Shinnawi. 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). Since the FMLA does not allow for emotional distress damages, the Court should preclude such testimony as not relevant under FRE 401 and confusing the issues under FRE 403. See *Steck v. Bimba Mfg. Co.*, 1997 U.S. Dist. LEXIS 17112, *9 (N.D. Ill. October 29, 1997) ("Because damages for emotional distress and punitive damages are unavailable under the FMLA, such testimony's probative value would be outweighed by its possible prejudicial impact.").

Similarly, Defendants believe that Plaintiff may try to introduce testimony or other evidence that Plaintiff was suffering from mental health issues, including PTSD, around the time he had his telephone call with Ms. Shinnawi. Specifically, Plaintiff has indicated his intent to call Dr. Danish Hangora, his psychiatrist from 2016, to testify at trial. Plaintiff identified Dr. Hangora in his Rule 26(a)(1) disclosures as having knowledge regarding "Plaintiff's condition and need for treatment, request for FMLA leave." This Court should bar Dr. Hangora's testimony under FRE 401 and 403 for two reasons.

First, there is no evidence that Ms. Shinnawi was aware that Plaintiff was experiencing any mental health issues and, in fact, Plaintiff testified at his first deposition that he did not tell Ms. Shinnawi why he needed additional FMLA leave: "That's why I called Wylola because I need to take more FMLA, but I didn't let her know between the doctor and patient's confidentiality for HIPAA, my HIPAA right, what I was taking this for." 12/20/2017 Ziccarelli Dep.: 45:2-6.

Second, if Plaintiff intends to introduce testimony that he did not have the capacity to make the decision to retire, that testimony should be barred under FRE 401 and 403 because it is not relevant, confuses the issue, and is highly prejudicial. 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.* Thus, *even if* Plaintiff was suffering from diminished mental capacity at the time of his telephone call with Ms. Shinnawi, it is not relevant and this Court should exclude it.

Motion in Limine No. 3: This Court should bar any testimony regarding any other damages that are not compensable under the FMLA.

In Plaintiff's Motion to Reopen Discovery, Plaintiff indicated that he suffered homelessness after he retired. During Plaintiff's second deposition, counsel for Plaintiff indicated that he would not be seeking compensation for experiencing homelessness or for selling his home. "[I]t's not ruining his life with homelessness, it's not that other stuff. That's not in this case anymore." 11/3/2023 Ziccarelli Transcript 31:20-23. As such, to the extent Plaintiff seeks to have evidence admitted regarding his alleged homelessness this Court should bar such testimony as not relevant and prejudicial under FRE 401 and 403.

Motion in Limine No. 4: This Court should bar any testimony regarding alleged retaliation / purported constructive discharge by Defendants against Plaintiff.

Defendants anticipate that Plaintiff may try to elicit testimony that he was denied FMLA leave in retaliation for previously taking FMLA leave, for previously filing a lawsuit against the Sheriff's Office, and/or that he was constructively discharged after his telephone call with Ms. Shinnawi. This Court should bar such testimony under FRE 401 and 403 because it is not relevant, confuses the issue at trial, and could be unfairly prejudicial. *First*, such testimony is not relevant because the Seventh Circuit held that Plaintiff did not have a retaliation or constructive discharge claim: he voluntarily

chose to retire. *Ziccarelli*, 35 F.4th at 1092. The only claim remaining is an FMLA interference claim. *Second*, there is no evidence that Ms. Shinnawi was aware of Plaintiff's previous lawsuit against the Sheriff's Office. *Third*, since there is no evidence that Ms. Shinnawi verbally denied Plaintiff's FMLA request (and in fact there is no evidence that there was a request—rather, Plaintiff inquired about how much FMLA time he had remaining), there could be no retaliation because there was no adverse action. As such, this Court should prohibit such testimony.

Motion in Limine No. 5: This Court should bar any testimony or argument that Defendants discriminated against Plaintiff based on his age.

This Court should bar any testimony or evidence about alleged discrimination against Plaintiff based on his age under FRE 401 and 403. Summary judgment was granted on this issue in 2018. There is no evidence that Plaintiff's age had any effect on the conversation he had with Ms. Shinnawi. Such speculation during trial would be not relevant and has the potential to be highly prejudicial and this Court should bar such evidence.

Motion in Limine No. 6: This Court should bar witnesses not previously disclosed.

This Court should bar the testimony of any witness, including expert witnesses, that was not previously disclosed. In Plaintiff's Reply in Support of Motion to Authorize Additional Discovery [134], Plaintiff states that he "seeks to reopen discovery to present expert opinion about his diminished ability to make rational decisions when he opted for early retirement." However, and despite the Court reopening discovery, Plaintiff did not disclose an expert nor produce an expert report. Additionally, neither Plaintiff nor any medical provider produced any document that opines that Plaintiff was suffering from a diminished ability to make rational decisions at the time he retired from the Sheriff's Office. Moreover, even if he had designated an expert who opined that Plaintiff suffered from a diminished ability to make decisions, such opinion is not relevant because there is no indication that Ms. Shinnawi or anyone at the Sheriff's Office was put on notice of such a condition.

Additionally, as explained in Motion in Limine No. 1, Plaintiff did not disclose any witness from the Cook County Pension Board to testify regarding Plaintiff's pension payments or diminution in value of his pension. Plaintiff also did not disclose any witness from the Sheriff's Office to testify regarding salary or wages. Discovery closed on November 17, 2023. This Court should not allow a late disclosure of such a witness.

Motion in Limine No. 7: This Court should bar any testimony regarding the indemnification obligations of Cook County.

Should Plaintiff prevail at trial, the only damages that the jury could award for the FMLA interference claim would be the remaining sick leave that Plaintiff could have used with his remaining FMLA time that he had remaining when he retired. Whether such damages award would be paid by the Sheriff's Office or Cook County is inconsequential. See *Lawson v. Trowbridge*, 153 F.3d 368, 379 (7th Cir. 1998) ("In the general case courts exclude evidence of indemnification out of a fear that it will encourage a jury to inflate its damages award because it knows the government—not the individual defendants—is footing the bill."). Additionally, there is no evidence that would indicate that Cook County was a joint employer. Defendants ask this Court to prohibit Plaintiff from seeking testimony regarding indemnification obligations or any other references regarding Cook County being named as a defendant under FRE 403.

Motion in Limine No. 8: This Court should exclude testimony or argument that, generally, employees of the Cook County Sheriff's Office are incompetent.

Similarly, testimony or argument that the Sheriff's Office is a place of incompetence is not relevant and is outweighed by its prejudicial effect. This case centers on the fact question of what was said during a telephone call. Consequently, any argument or testimony regarding Defendants' alleged past conduct or opinions about such conduct have no connection to the disputed facts and is not relevant. The probative value of such evidence would solely go to propensity. Therefore, it has no relevance under Rule 401 and constitutes inadmissible character evidence under Rule 404(b). Even if

relevant, the danger of unfair prejudice and confusing the issues far outweigh the probative value and, in is unfair and not authorized by Rule 403 of the Federal Rules of Evidence.

CONCLUSION

For the reasons set forth in the Motion and herein, Defendants request the Court enter an order precluding Plaintiff from presenting evidence or argument regarding issues that are not relevant and highly prejudicial and for any additional relief this Court deems warranted.

Respectfully submitted,

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