

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

Salvatore Zicarelli,)	
)	
<i>Plaintiff</i>)	
)	No. 17-cv-3179
<i>-vs-</i>)	
)	<i>(Judge Tharp)</i>
Thomas J. Dart, etc., et al)	
)	
<i>Defendants.</i>)	

PLAINTIFF'S MOTIONS IN LIMINE

This case is on remand from the Seventh Circuit. *Zicarelli v. Dart*, 35 F.4th 1079 (7th Cir. 2022). The parties have filed their proposed pre-trial order. Plaintiff requests that the Court rule on the following matters in advance of trial:

1. Allow remote testimony by Dr. Hangora

On September 15, 2016, Dr. Danish Hangora, a psychiatrist, advised plaintiff to take 8 weeks off from work and “attend PHP for high level of anxiety.” (“PHP” is a day treatment program that requires patients to attend the program several days per week.) After plaintiff received this recommendation, he spoke with the Sheriff’s FMLA coordinator. The “hotly disputed” contents of that conversation are the main factual issue in this case. *Zicarelli*, 35 F.4th at 1081.

Plaintiff seeks to call Dr. Hangora to testify about his medical records and his recommendation. Plaintiff will not solicit any opinions.

Plaintiff disclosed Dr. Hangora as a potential witness; his records were used by defendants at plaintiff's deposition. Counsel has interviewed Dr. Hangora; neither party has deposed him.

Dr. Hangora works at a clinic for persons of limited means at the Will County Health Department. Plaintiff expects that Dr. Hangora's testimony will take no more than fifteen minutes. Rather than take Dr. Hangora away from his patients, plaintiff proposes to present testimony from Dr. Hangora by remote video. Defendant opposes remote testimony.

Rule 43 of the Federal Rules of Civil Procedure allows the Court to permit testimony by "contemporaneous transmission." Rule 43 requires "good cause in compelling circumstances and with appropriate safeguards."

The district court in *Sallenger v. City of Springfield*, No. 03-3093, 2008 WL 2705442 (C.D. Ill. July 9, 2008), confronted a similar situation. There, the plaintiff sought to call the treating physician to testify about "his treatment efforts and observations of [plaintiff's decedent] immediately following the relevant incident." *Id.* at *1. As in this case, the physician "is an independent witness who is not under the control of either party." *Id.* Similarly, the physician's "employment presents a very unique need for his

presence at work.” *Id.* The Court in *Sallenger* granted the request to present the physician’s testimony by “contemporaneous transmission.” The Court should do the same here.

2. Evidence about the Sheriff’s written policies

The Sheriff seeks to introduce several exhibits relating to his written policies about FMLA leave. These exhibits include the Sheriff’s written “Family and Medical Leave of Absence” policy and the Sheriff’s “Unauthorized Absence” policy. The Court should exclude these exhibits (Defendants’ Exhibits 1 and 2) as well as any argument or testimony about these policies.

The Seventh Circuit identified the sole disputed question of fact in this case as whether plaintiff can show that “the Sheriff’s office interfered with, restrained, or denied FMLA benefits to which he was entitled.” *Zicarelli*, 35 F.4th at 1089. The only evidence that plaintiff will present on this issue concerned his telephone conversation with Wylola Shinnawi, the Sheriff’s FMLA coordinator. The Sheriff’s written policies do not have any bearing on whether or how the jury should resolve the factual dispute over whether Shinnawi told plaintiff “don’t take any more FMLA. If you do so, you will be disciplined.” *Id.*

The Sheriff’s rules are not relevant to proving Shinnawi’s habit or routine practice in responding to requests for FMLA leave. Nor do they have any bearing on Shinnawi’s truthfulness or any other disputed issue.

The Court should exclude the exhibits and preclude testimony or argument about the Sheriff's FMLA policies.

3. FMLA requests for physical problems

Plaintiff requested FMLA leave in 2006, 2008, 2011, 2012, 2013, and 2014 for physical issues. Defendant seeks to introduce into evidence documents associates with these grants of FMLA leave. (Defendants' Exhibit 3-9.) These documents and the grants of FMLA leave are not relevant to the question at issue in this case, whether the Sheriff's Office interfered with plaintiff's FMLA rights in 2016. The Court should exclude the exhibits and preclude testimony or argument about grants of FMLA leave for physical problems.

4. Plaintiff's decision to resign must be judged by a subjective standard

Defendants intend to argue that plaintiff's decision to retire must be judged by an objective standard. As stated in Defendants' Proposed Instruction 5: "This test uses an objective standard, based on how a reasonable employee might react, not the plaintiff's subjective feelings."

Defendants' argument is inconsistent with the decision of the Seventh Circuit in this case.

The Court of Appeals in this case rejected plaintiff's constructive discharge claim, 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." *Zicarelli*, 35 F.4th at 1090. The Seventh Circuit did not, however, apply this standard to plaintiff's claim of interference with the exercise of FMLA rights that it remanded for trial.

The Court of Appeals would not have remanded plaintiff's FMLA interference claim if that claim was controlled by the same "reasonable employee" standard of the constructive discharge claim. The Court of Appeals could not have applied its finding that it was not objectively reasonable for plaintiff to "just give up and walk away from his job," *Zicarelli*, 35 F.4th at 1090, when it remanded this case for trial on plaintiff's claim of interference with the exercise of FMLA rights.

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.

Footnote 35 in *Preddie* includes the following:

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.

Defendants ask the Court to read this language from *Preddie* as an express holding that the same “reasonable person standard” applies to FMLA retaliation claims and claims of interference with the exercise of FMLA rights, as presented in this case. (ECF No. 133 at 4.) Defendants do not, however, attempt to reconcile their reading of footnote 35 in *Preddie* 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 for trial on plaintiff’s FMLA interference claim.

This Court, of course, may not second-guess the decision of the Court of Appeals and should therefore reject any jury instruction on an objective standard and preclude any evidence or argument about an objective standard.

Respectfully submitted,

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