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' RESPONSE IN OPPOSITION TO
PLAINTIFF'S 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 response in opposition to Plaintiff's motions *in limine* state as follows:

INTRODUCTION

As the pre-trial materials indicate, the parties have differing views of what is at issue at trial and what damages (if any) are recoverable. Defendants maintain that there was no FMLA interference and that during the brief telephone call in September 2016, Wylola Shinnawi provided accurate information about Plaintiff's remaining FMLA time. Defendants intend to present evidence on this narrow issue. Plaintiff's motions *in limine* demonstrate that he believes that the issue is not so narrow and fundamentally disagrees on his burden of proof. This Court's rulings on the motions *in limine* and preliminary rulings on jury instructions will help narrow the issues for trial.

1. This Court Should Not Permit Dr. Hangora To Testify Remotely.

Defendants maintain that Dr. Hangora has no relevant information to testify about because there is no indication that anyone at the Sheriff's Office was aware of the specifics of any of Plaintiff's

health conditions during the relevant time period. Indeed, Plaintiff testified that he did not share why he wanted to take additional FMLA leave: "I didn't let [Ms. Shinnawi] 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. Moreover, it is undisputed that Plaintiff never entered the treatment program that Dr. Hangora recommended. Accordingly, Defendants filed a motion *in limine* seeking to bar testimony regarding Plaintiff's mental state. [Doc. 840 at 6]

Regardless, if this Court permits Dr. Hangora to testify at trial, it should be done in person. In the trial setting specifically, Civil Rule 43 commands that "[a]t trial, the witnesses' testimony must be taken in open court" and only for "good cause in compelling circumstances with appropriate safeguards" may the court permit testimony by remote transmission. Fed. R. Civ. P. 43(a). The Advisory Committee notes to the 1996 Amendments to Rule 43(a) caution that contemporaneous transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial. *Perotti v. Quinones*, 790 F.3d 712, 723 (7th Cir. 2015) ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.")

Plaintiff has not and cannot demonstrate good cause for having Dr. Hangora testify remotely. Instead, Plaintiff cites a single Central District Court of Illinois decision where that court permitted an emergency room doctor who treated the plaintiff immediately following the incident at issue. *Sallenger v. City of Springfield*, 2008 U.S. Dist. LEXIS 52607, *2 (C.D. Ill. July 8, 2008). In contrast to that doctor, Dr. Hangora had an ongoing doctor/patient relationship with Plaintiff. Plaintiff has not argued that Dr. Hangora is unable to testify in-person. Indeed, there is no indication that Plaintiff subpoenaed Dr. Hangora or that Dr. Hangora has requested this accommodation. If Dr. Hangora

testifies at trial, it should be in-person. This Court should deny Plaintiff's motion. *See SEC v. Yang*, 2014 U.S. Dist. LEXIS 42580, *17 (N.D. Ill. March 30, 2014) (where the court concluded the defendant failed to demonstrate "good cause" for remote testimony).

2. The Sheriff's Office's Written Policies, Including Its FMLA Policy and Unauthorized Absence Policy, Are Relevant.

Plaintiff, a 27-year veteran of the Sheriff's Office, seeks to preclude Sheriff's Office's written policies, including its FMLA policy and Unauthorized Absence policy. This Court should deny Plaintiff's motion because these policies are relevant. *First*, Plaintiff had taken FMLA leave in the past (and the Sheriff's Office approved Plaintiff's request). But before Plaintiff could take FMLA leave, the Sheriff's Office's policy sets forth how to apply for FMLA leave and how to provide notice of the request for leave. Thus, because Plaintiff had taken FMLA leave on the past and because he had worked for the Sheriff's Office for so many years, it is reasonable to argue that Plaintiff had knowledge of how to apply for FMLA and how much FMLA leave he could take during twelve months. *Second*, the Sheriff's Office has an Unauthorized Absence policy that explains that the Attendance Review Unit (and not Ms. Shinnawi) processes and tracks attendance infractions and the recommended progressive discipline for such occurrences.

These policies are relevant because they demonstrate (1) how to request FMLA leave and (2) what happens if an employee is in unauthorized status—and how a reasonable employee would interpret the conversation with Ms. Shinnawi. This Court should allow them into evidence.

3. Plaintiff's Prior FMLA Requests Are Relevant.

Plaintiff seeks to exclude documents demonstrating Plaintiff applied for FMLA leave in 2006, 2008, 2011, 2012, 2013, and 2014 arguing these documents are not relevant to his 2016 FMLA request. Plaintiff is wrong: these past requests are relevant. This Court should permit Defendants to cross-examine Plaintiff on his past experience applying for (and being approved for) FMLA leave at the Sheriff's Office. Plaintiff knew how to apply for FMLA leave and had never been disciplined for

taking FMLA leave in the past. Information regarding his prior FMLA requests is relevant to how a reasonable employee would interpret the conversation with Ms. Shinnawi.

4. Plaintiff's Conduct Must Be Viewed From An Objective Standard.

Plaintiff's final motion *in limine* demonstrates the parties' differing view of this case. Essentially, Plaintiff is arguing that his decision to *retire* should be viewed from a subjective standard, *i.e.* how Plaintiff felt. This is problematic for two reasons. *First*, the issue is not why Plaintiff retired: the constructive discharge claim is no longer at issue. At issue is whether Ms. Shinnawi interfered or otherwise discouraged Plaintiff from taking additional FMLA leave. *Second*, the appropriate standard to analyze the conversation is from an objective standard, *i.e.* reasonable person standard. *See Preddie v. Bartholomew Consol. Sch. Corp*., 799 F.3d 806, 818 (7th Cir. 2015) ("[The critical question is whether the employer's actions would discourage a *reasonable employee* from taking FMLA leave") (emphasis added). The court in *Preddie* reversed and remanded a summary judgment decision, finding that "a jury reasonably could find that [the principal's] discussions with [the plaintiff] were meant to convey the message that, if he missed additional time related to his son's condition, there would be adverse consequences." Similarly, to prevail, it is Plaintiff's burden to establish that a reasonable employee would believe Ms. Shinnawi told him that he could not take any additional FMLA leave *and* that she had the ability to impose adverse consequences on him for taking additional FMLA leave. Defendants maintain Plaintiff will be unable to meet this burden.

Plaintiff argues that the Seventh Circuit used the "reasonable employee" standard for the constructive discharge claim but not the FMLA interference claim. [Dkt 843 at 4]. Plaintiff is mistaken. Citing *Preddie,* the Seventh Circuit held "[a] reasonable jury could believe Ziccarelli's account and find that the Sheriff's Office (through Shinnawi) interfered with his remaining FMLA leave hours for 2016 by threatening to discipline him for using them." *Ziccarelli v. Dart*, 35 F.4th 1079, 1090 (7th Cir. 2022). Defendants concede that the "reasonable employee" standard is a footnote in *Preddie*, but

Plaintiff cites to no caselaw where a subjective standard is used, and Defendants maintain that such a standard would be untenable for an employer. Moreover, courts apply a reasonable employee standard in other employment cases. *Burlington Northern Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006) (reasonable employee would have been deterred from making or supporting an investigation of discrimination in Title VII discrimination case); *Freelain v. Village of Oak Park*, 888 F.3d 895, 902 (7th Cir. 2018) (using the reasonable employee standard in FMLA and Americans with Disabilities Act retaliation claims). The objective standard is the appropriate test, and this Court should permit Defendants' Proposed Instruction No. 5.

CONCLUSION

Defendants request the Court enter an order denying Plaintiff's motions *in limine* and grant any additional relief it deems appropriate.

Respectfully submitted,

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State's Attorney of Cook County

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