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.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS IN LIMINE (ECF No. 840)

Plaintiff responds to defendants' eight motions in limine as follows, starting with the unopposed requests.

I. Unopposed Motions

Plaintiff does not object to defense motions in limine 5-8.

A. Defendants' Motion in Limine 5

Plaintiff will not offer any testimony nor make any argument that "Defendants discriminated against Plaintiff based on his age." This motion should be mutual, to prohibit defendant from seeking to elicit testimony from Plaintiff about age discrimination.

B. Defendants' Motion in Limine 6

Neither party should be permitted to call in their case-in-chief any witnesses, including experts, who have not previously been disclosed. The

Court should limit testimony to the scope of Rule 26 disclosures or to matters disclosed at deposition.

The Court should also preclude any testimony intended to rebut plaintiff's testimony that when he retired, he had about three months of accrued sick leave and that, because defendants interfered with his right to take FMLA leave, he has never been paid for this accrued time. Defendants discuss this testimony in their Motion in Limine 1, ECF No. 840 at 3-4.

Defendants have not disclosed any witness to rebut this expected testimony and the Court should prohibit any attempt by defendant to challenge the credibility of plaintiff's testimony on this issue other than through cross-examination.

C. Defendants' Motion in Limine 7

Plaintiff agrees that the jury should be instructed, and the parties should limit their argument, to whether the Sheriff, in his official capacity, is liable for any damages the jury might award. (As discussed below at 3-7, plaintiff does not agree with defendants' contention that his potential damages are limited to "remaining sick leave that Plaintiff could have used with his remaining FMLA time that he had remaining when he retired.")

D. Defendants' Motion in Limine 8

Plaintiff will not offer any testimony nor make any argument that "generally, the employees of the Cook County Sheriff's Office are incompetent."

Plaintiff does not oppose this motion based on his understanding that the motion bars evidence or argument that the employees of the Cook County Sheriff's office are, *in general*, incompetent. Plaintiff should be permitted to cross-examine Wylola Shinnawa about her response to plaintiff's inquiry about FMLA leave and her failure to advise plaintiff of the many alternatives available to him. *See infra* at 6. Plaintiff should also be permitted to argue to the jury that Shinnawa was incompetent in the way she responded to plaintiff's inquiry.

II. Contested Motions

The Court should deny defendants' motions in limine 1-4. Each of these motions seeks to exclude evidence that is material, relevant, and can be presented in an admissible form.

A. Contested Motion 1: The Court should overrule defendant's request to limit plaintiff's evidence and argument to lost accrued sick time

Plaintiff agrees with defendants that if the jury finds for plaintiff, it should award compensation for the "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." [1] (ECF No. 840 at 3.) But this is not the only type of damages that the jury may award. Plaintiff shows below that the Court should overrule defendants' request to preclude evidence of lost wages. (*Id.*)

1. The Court should leave to the jury resolution of this disputed question of fact

The parties agree that the Court of Appeals left open the question of whether plaintiff can seek damages for the "snowballing consequences" of his decision to retire. *Ziccarelli v. Dart*, 35 F.4th 1079, 1090 (7th Cir. 2022.) Plaintiff made his argument in the Seventh Circuit as part of his discussion of "prejudice," an element of an FMLA interference claim:

> For the FMLA to provide relief, an employee must be prejudiced by the FMLA violation. See 29 U.S.C. § 2917(a)(1) (detailing employer liability and damages available); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (citing various provisions of 29 U.S.C. § 2917(a)). Prejudice exists when an employee would have structured leave differently absent the discouragement. *See* 29 C.F.R. § 825.301(e); *Lutes*, 950 F.3d at 368. Zicarelli was prejudiced by Defendants' interference. By involuntarily retiring in order to seek medical treatment, Ziccarelli lost his salary, health insurance, and other benefits, and was unable to apply for permanent disability. *See* App. 38-39A, 185A-86A.

[1] Plaintiff inadvertently omitted these damages from his proposed form of verdict and attaches a revised instruction and form of verdict as Exhibit 1.

(*Ziccarellli v. Dart*, 19-3435, 7th Cir., Brief of Appellant at 13.) (Appendix cites are to plaintiff's pre-appeal deposition, ECF No. 31-3, at 7-8 and 10-14, and to plaintiff's interrogatory answers, ECF No. 31-3 at 164-65.)

Defendants did not engage this argument, relying on their assertion that prejudice required the employee "to show a denial of FMLA leave or establish a tangible job harm connected to a lawful FMLA request." (*Ziccarellli v. Dart*, 19-3435, 7th Cir., Brief of Appellee at 23.) The Seventh Circuit did not accept this argument. *Ziccarelli*, 35 F.4th at 1090.

Lutes v. United Trailers, Inc., 950 F.3d 359 (7th Cir. 2020) supports plaintiff's contention that "prejudice" is a question of fact for the jury. At issue in *Lutes* was the employee's claim of "'prejudice' arising out of an employer's failure to provide FMLA information." *Id.* at 368. The Court of Appeals held that the definition of "prejudice" in the FMLA was an open question in the Seventh Circuit, and discussed decisions from other circuits, and Department of Labor regulations. *Id.* The Court concluded as follows:

> Thus, if Phillips can show prejudice—in other words, that he would have structured his leave differently had he received the proper information, see [*Ragsdale v. Wolverine World Wide*, Inc., 535 U.S. 81, 90 (2002)]—his claim may survive summary judgment.

Lutes, 950 F.3d at 368.

Plaintiffs intends to show prejudice as defined by the Seventh Circuit in *Lutes*, i.e. that he would have structured his leave differently without the

interference with his FMLA rights. Under *Lutes*, the extent of damages for such prejudice is jury question.

On remand from the Seventh Circuit, defendants did not renew their motion for summary judgment on "prejudice." Instead, they now ask the Court to resolve this disputed question of material fact in advance of trial on conclusory arguments advanced in their motion in limine. (Motion in Limine 1, ECF No. 840 at 4-5.) The Court should not resolve this question on arguments of counsel and instead submit this contested issue of material fact to the jury.

Plaintiff intends to introduce evidence in addition to the "he said/she said" dispute with Wylola Shinnawa. Plaintiff will bring before the jury the provision of the Collective-Bargaining Agreement that authorizes extra FMLA leave when an employee "needs to tend to a serious medical condition of themselves." (Collective-Bargaining Agreement December 1, 2012 to November 30, 2017 at 75, attached as Exhibit 2.) Plaintiff will also introduce evidence that neither Shinnawa not any other Sheriff's employee counseled him about the possibility of taking FMLA leave for less than the 8 weeks recommended by Dr. Hangora and taking any additional required time off from work as paid sick leave. Plaintiff will also show that no Sheriff's employee counseled him about disability leave.

The Court should leave to the jury resolution of disputed questions of material fact and deny defendants' motion in limine 1.

2. Plaintiff should be permitted to testify about his damages

Defendants ask the Court to bar plaintiff from testifying about the damages required to make him whole because his testimony is "not relevant, highly speculative, undeveloped, and prejudicial." (ECF No. 840 at 4.) The Seventh Circuit rejected this argument decades ago when it held that expert testimony is not required to show damages for loss of earnings. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1249 (7th Cir. 1974). Plaintiff's testimony about the amount of his lost earnings is not "speculative" because the rate of compensation for Correctional Officers is a matter of public record that will be reflected in documents admitted into the evidence.

Defendants in the alternative ask the Court to conclude, as a matter of law, that plaintiff's claim for backpay is limited to the three-year period following his resignation when he was unable to work as a correctional officer. (ECF No. 140 at 3.) This argument has the burden of proof on the affirmative defense of failure to mitigate backward: Defendants are entitled to introduce evidence that plaintiff had, or should have had, mitigation earnings and ask the jury to deduct the amount of those earnings from the gross

amount of backpay plaintiff would have received. *See, e.g., EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 818 (7th Cir. 1990)

Defendants assert that the only damages to which plaintiff is entitled is compensation for the accrued sick pay (3 months) that he lost because he resigned. (Motion in Limine 7, ECF No. 840 at 9.)

Plaintiff recognizes that the Court may accept defendant's position and limit damages to the compensation he lost for accrued sick pay. Plaintiff suggests that the better course would be to reserve any such ruling until after the jury considers whether to award damages. This would allow this Court (and possibly the Court of Appeals) to rule on the underlying question of law with a complete factual record. The Court should therefore permit plaintiff to present evidence of his lost wages to allow the jury to resolve this factual question.

B. Contested Motion No. 2: The Court should not bar evidence or argument of "emotional distress and trauma"

Defendants base their motion in limine 2 on the mistaken premise that evidence of "emotional distress or trauma" is only relevant to emotional distress damages, which the parties agree are not available in this case. (Motion in Limine 2, ECF No. 840 at 2.) This is incorrect: Evidence of plaintiff's mental state is relevant to show that plaintiff was acting irrationally and had serious, bit curable, psychological problems when he retired. Plaintiff's

testimony about how he has recovered from these mental health issues is relevant to his credibility at trial. Finally, if the jury finds in favor of plaintiff, he will ask the Court to order his reinstatement. This discretionary judgment requires evidence in the record that plaintiff has recovered from his psychological problems.

3. Plaintiff's mental state when he retired

The mandate of the Court of Appeals requires plaintiff to persuade the jury that the Sheriff, through his employee, "interfered with, restrained, or denied FMLA benefits to which he was entitled." *Dart*, 35 F.4th 1079, 1089 (7th Cir. 2022).[2] The mandate also precludes plaintiff from trying to persuade the jury that he acted reasonably "when he [gave up and walked] away from his job, benefits, and treatment plan entirely based on one conversation." *Id.* at 1090.

Plaintiff intends to testify about the psychological problems that he was experiencing before and immediately after he spoke with the Sheriff's FMLA coordinator. Plaintiff also intends to show how those psychological issues resulted in his admittedly irrational decision to retire.

[2] Plaintiff is dropping Shinnawi as a defendant and agrees that Cook County, while a necessary defendant under *Carver v. Sheriff of LaSalle County* 243 F.3d 379, 381 (7th Cir. 2001), should not be identified as a defendant in the jury instructions.

To meet his burden of proof, plaintiff intends to present evidence from Dr. Danish Hangora, the psychiatrist who advised plaintiff to take 8 weeks off from work to attend a day treatment program. Defendant opposes testimony from Dr. Hangora because the Sheriff was not "aware that Plaintiff was experiencing any mental health issue" (Motion in Limine 2, ECF No. 840 at 6) and because it would be "highly prejudicial" for the jury to learn about this. (*Id.* at 6-7.) These objections are meritless.

First, the evidence shows that the Office of the Sheriff was aware the plaintiff was experiencing mental issues: The documentation for FMLA leave that plaintiff submitted to the Sheriff on December 23, 2015 showed that plaintiff was suffering from "PTSD and anxiety requiring time off from work due to Anxiety and flashbacks, lack of concentration." (Joint Exhibit 4 at 5, attached as Exhibit 3.)

Second, the Federal Rules of Evidence do not, of course, preclude evidence because it is "prejudicial." Rule 403 requires unfair prejudice.

4. Evidence of plaintiff's recovery is relevant to his credibility

Plaintiff intends to testify about how he recovered from his psychological problems and that he would have sought to return to work as a correctional officer as soon as his issues resolved. Plaintiff will also testify that he was financially unable to pay for professional help and that it took about

three years for his problems to resolve through a program of self-help and religious insights.

Evidence that plaintiff has resolved his psychological issues and is ready to return to work is relevant to his credibility as well as to his request for reinstatement. A finder of fact is entitled to consider plaintiff's psychological status in deciding how much weight to give to his testimony. *Chappell v. Rhoads*, No. 2:20-CV-00686-MPB-MG, 2023 WL 6349414, at *4 (S.D. Ind. Sept. 29, 2023); *Williams v. Rednour*, No. 10-CV-999, 2013 WL 3337787, at *8 (N.D. Ill. July 2, 2013) (acknowledging that state appellate court "correctly acknowledged" that mental health history is relevant to credibility), *Cf. Anderson v. Village of Glenview*, No. 17-CV-05761, 2018 WL 6192171, at *19 (N.D. Ill. Nov. 28, 2018), *aff'd*, 821 Fed. Appx. 625 (7th Cir. 2020) (acknowledging claim that derogatory comments about mental health could impact credibility).

The Court should therefore reject defendant's request in Motion in Limine 2 to preclude this evidence.

C. Contested Defense Motions 3 and 4

Defendants ask the Court to exclude testimony that is relevant to plaintiff's theory of the case because the evidence may also support "damages that are not compensable under the FMLA" (Motion in Limine 3, ECF No. 840 at 7) or are related to "alleged retaliation/purported constructive

discharge." (Motion in Limine 4, ECF No. 840 at 7.) The classic solution for such a problem is a limiting instruction.

Evidence that plaintiff was homeless after he retired (Motion in Limine 4, ECF No. 840 at 7) is relevant to any mitigation defense, is probative of plaintiff's mental state when he retired, and is strong evidence of the irrationality of plaintiff's decision to resign. Plaintiff will not argue that he is entitled to damages for homelessness. The Court should deny defense motion in limine 3. Again, the Court could cure any unfair prejudice with a limiting instructions.

Plaintiff will also not introduce any evidence of retaliation and will not argue that the facts surrounding his irrational decision to resign were a constructive discharge. (Motion in Limine 4, ECF Noi. 840 at 7-8.)

Respectfully submitted,

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 830399
Joel A. Flaxman
200 S Michigan Ave Ste 201
Chicago, IL 60604-2430
(312) 427-3200
knf@kenlaw.com
attorneys for plaintiff