UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' RENEWED RULE 50(b) MOTION, RULE 59 MOTION, AND, IN THE ALTERNATIVE, MOTION FOR REMITTITUR

Pursuant to Rule 50(b), Defendants, Thomas J. Dart in his official capacity as Sheriff of Cook County ("the Sheriff's Office") and Cook County as indemnitor, move this Court for the entry of judgment as a matter of law in Defendants' favor and against Plaintiff, Salvatore Ziccarelli, move to alter judgment or for a new trial under Rule 59, or seek remittitur of the damages award. In support of this Motion, Defendants state as follows.

BACKGROUND

Plaintiff Salvatore Ziccarelli filed this lawsuit after he resigned from his position as a correctional officer at the Sheriff's Office in 2016. The district court granted summary judgment on all claims in favor of Defendants, including Wylola Shinnawi. Plaintiff appealed the decision regarding Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.* retaliation and FMLA interference.[1] The Seventh Circuit affirmed summary judgment on Plaintiff's FMLA retaliation claim, finding "[a] reasonable person likely would have thought he had several options short of immediate

[1] This matter was previously before Judge Ronald A. Guzmán.

retirement under these facts, especially when Ziccarelli had not yet even applied for FMLA leave and any potential discipline remained remote." *Ziccarelli v. Dart*, 35 F.4th 1079, 1091 (7th Cir. 2022). However, it remanded the FMLA interference claim, concluding that "[e]vidence 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." *Id.* at 1090. In reversing summary judgment, the Seventh Circuit stated that it must "give Ziccarelli the benefit of conflicting evidence about the substance of his conversation with Shinnawi." *Id.*[2] Nothing here prevented Plaintiff from using his remaining FMLA time and the conversation between Plaintiff and Ms. Shinnawi should not constitute prejudice to a reasonable employee.

In remanding the matter, the Seventh Circuit noted:

> The 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. As skeptical as we might be about those efforts, we believe those issues need to be sorted out in the district court in the first instance.

Ziccarelli v. Dart, 35 F.4th 1079, 1090 (7th Cir. 2022).

I. Pretrial proceedings

Prior to trial, the parties filed motions *in limine* and proposed jury instructions. The parties disagreed about the standard of proving an FMLA interference claim and whether Plaintiff would have to prove discouragement based on an objective standard (*i.e.,* a reasonable person) or subjective standard (how Plaintiff himself felt). At the pre-trial conference, the Court ruled that the jury instructions would reflect that Plaintiff would have to prove that a reasonable person would have felt discouraged from taking additional FMLA leave after the conversation with Ms. Shinnawi. Specifically, the Court held:

[2] While this Court was bound by the Seventh Circuit's decision to remand the FMLA interference claim for a jury trial, for purposes of preserving this issue for appeal, Defendants maintain that the Seventh Circuit erred by holding that a plaintiff bringing an FMLA interference claim is not required to show an actual impairment or denial of these rights. The U.S. Supreme Court declined to issue a writ of certiorari. *Dart v. Ziccarelli*, 143 S. Ct. 309 (2022).

> I think the standard that applies here on the interference claim is an objective standard, what a reasonable person would have understood from this conversation and what a reasonable person would have done in reaction to this conversation.

2/28/2024 Tr. 13:21-25. As such, the Court held that the jury would be instructed as follows:

> In deciding whether Mr. Ziccarelli proved the fourth element of an FMLA interference claim, you must determine whether the Sheriff Office's actions would have discouraged a reasonable employee from taking FMLA leave and caused him to be prejudiced. This test uses an objective standard, based on how a reasonable employee might react, not Mr. Ziccarelli's subjective feelings.

See Discouragement and Interference Jury Instruction.

In discussing the objective standard, Plaintiff's counsel acknowledged that it was unreasonable for Plaintiff to resign:

> [I]t was crazy for him to quit. He should have gone to someone else. He should have appealed. He should have gone to a lawyer. He shouldn't just quit. That's what a crazy person does. That's not objectively sensible."
>
> ***
>
> [I]t was irrational for what Mr. Ziccarelli did. It was not objectively reasonable for him to quit based on what Ms. Shinnawi said.

2/28/2024 Tr. 10:9-12; 11:10-12.

Additionally, the parties disputed what damages could be awarded for an FMLA interference claim. Defendants argued that the Court should preclude evidence that Plaintiff is entitled to backpay because he resigned. Dkt. 840 at 3-4. Defendants further argued these amounts were speculative. *Id.* The Court denied Defendants' motion, though it noted it was skeptical of an award of backpay.

> I share the Seventh Circuit's skepticism that Mr. Ziccarelli's damages could include, you know, constructive discharge or whatever comes after that in terms of his inability to -- the loss of his job. I don't use that as a term of art. I don't think that -- I don't expect that there's going to be testimony that suggests that damages relating -- stemming from or arising in connection with or caused by his resignation will be appropriately considered to be direct damages. But I'm going to let the question I believe go to the jury, and we will see what the jury does with it, understanding that the Court then has the option, if I feel that the damage award is unjustified, to entertain a Rule 50 motion or remitter [sic] motion with respect to damages.

3/8/2024 Tr. 37:3-16.

II. Trial

A. Plaintiff's conversation with Ms. Shinnawi

This matter proceeded to a two-day jury trial on Plaintiff's FMLA interference claim. The Sheriff's Office's now-retired FMLA leave manager, Wylola Shinnawi, testified about the phone conversation as follows:

> Q. After he identified himself and told you his name and told you where he worked, could you tell us as best you can what you recall he said next.
>
> A. Well, I said, "How can I help you?" He said he would -- his physician is recommending eight weeks for him to be off work. And then I pulled him up in Time Tracker, and I saw he did not have enough FMLA hours for eight weeks. I said, "You can use the remainder of what you have left, and then you would have to use sick time."

3/11/24 Tr. 161:11-21.

Ms. Shinnawi testified that she told Mr. Ziccarelli that he had 176 hours [of FMLA time] remaining that he could use for a single period of FMLA leave and that Mr. Ziccarelli responded that he needed FMLA for the whole 8-week period. 3/11/24 Tr. 162:10-12, 23. She told him that she could not give him more time. 3/11/24 Tr. 163:1-3. She testified that Mr. Ziccarelli asked her what would happen if he took FMLA anyway and she said she explained to him that he would be marked "FMLA unapproved" and that payroll would forward the unapproved time to attendance review, a separate unit that makes decisions on discipline. 3/11/24 Tr. 187:25-188: 17. She testified that she and Mr. Ziccarelli went back and forth about the FMLA time remaining and that he would have to take sick time or apply for disability and seek approval from his supervisors. 3/11/24 Tr. 185:3-21.

Plaintiff testified that he had a two- or three-minute phone conversation with Ms. Shinnawi. 3/12/2024 Tr. 254:21-23. In that conversation, he told Ms. Shinnawi that he needed to take FMLA leave and that she told him that he could not take any more leave or he would be disciplined. 3/11/24

Tr. 218:17-219:3; 3/12/24 Tr. 256:2-6. He testified that he thought the word "discipline" would mean getting fired. 3/11/24 Tr. 220:14-19. He testified that the "threat [of discipline] caused [him] to have a nervous breakdown, basically." 3/11/24 Tr. 221:1-2.

Plaintiff conceded that the Sheriff's Office had approved his FMLA application in January 2016 and that, pursuant to policy, he could take up to 12 weeks of leave, which is 480 hours. 3/12/24 Tr. 265:1-10. At the time of his conversation with Ms. Shinnawi, Plaintiff knew he still had FMLA time remaining. 3/11/24 Tr. 217:19-20. He knew that he had taken FMLA leave prior to September 2016. 3/12/2024 Tr. 268:15-17. He knew that he did not have 8 weeks of FMLA leave remaining. 3/12/2024 Tr. 253:1-3. He testified that he wanted to complete his physician's orders and extinguish the FMLA time he had remaining and "go onto a permanent disability." 3/12/2024 Tr. 252:1-8. Importantly, Plaintiff acknowledged that *after this one telephone call, he took more FMLA time.* 3/12/2024 Tr. 256:2-6, JX5. Plaintiff conceded that he had never been disciplined for taking FMLA leave and that Ms. Shinnawi has never disciplined him nor was discipline under her purview. 3/12/2024 Tr. 256:7-10, 258:1-6. Additionally, while Plaintiff had other leave (vacation or sick time) time available at the time of his request, Ms. Shinnawi approves only FMLA leave and Plaintiff never asked his chain of command to approve other leave time after this one telephone call with Ms. Shinnawi. 3/12/2024 Tr. 257:2-16, 258:21-25.

Finally, Plaintiff did not avail himself of unpaid leave time provided for in the collective bargaining agreement and Plaintiff testified that his union (and not Ms. Shinnawi) should have given him this information. 3/12/2024 Tr. 261:14-263:11. After his phone call with Ms. Shinnawi, Plaintiff spoke to his union and the union representative told him that they could not do anything until the Sheriff's Office fired him. 3/11/24 Tr. 220:13-221:9. He did not speak to anyone else at the Sheriff's Office. 3/12/2024 Tr. 252:10-14. Within a week of his phone conversation with Ms. Shinnawi and after taking additional FMLA leave following his conversation with Shinnawi, Plaintiff resigned from

the Sheriff's Office on September 20, 2016. 3/11/2024 Tr. 218:5-14, 232:12-18, JX5. Plaintiff testified that instead of endangering others' lives and [his own], he resigned. 3/11/24 Tr. 221:8-9. Plaintiff has been receiving a pension. 3/12/2024 Tr. 274:5-275:13; JX6. When he resigned, Plaintiff had 176 hours of FMLA time remaining. JX1, JX5.

B. Plaintiff's testimony regarding damages

Plaintiff testified that when he resigned, the Sheriff's Office paid him for his remaining vacation and comp[ensatory] time. 3/12/24 Tr. 255:15-19. Plaintiff agreed that the Sheriff's Office was not required to pay him for his remaining sick time. 3/12/24 Tr. 255:20-22. Plaintiff's counsel introduced collective bargaining agreements regarding the pay scale for correctional officers from 2016-2023. Plaintiff speculated as to what he would have earned for the following **seven years** had he not resigned, based on the collective bargaining agreements. 3/12/24 Tr. 245:22-251:21. Plaintiff testified that he would have worked for an additional three years or maybe seven to eight years, until he reached 30 years of service or the age of 60. 3/12/24 Tr. 270:10-24. Yet he also testified that from 2016, his medical conditions (the reason he was seeking FMLA time) prevented him from seeking other employment for three years after his resignation. 3/12/24 Tr. 273:11-274:1. He further testified that he intended to take permanent disability leave. 3/12/2024 Tr. 252:1-8.

After Plaintiff rested his case, counsel for Defendants moved for directed finding pursuant to Rule 50(a), which this Court took under advisement. 3/12/24 Tr. 277:17-21.

C. Closing arguments

During closing arguments, counsel for Plaintiff asked the jury to award his remaining sick leave pay in the amount of $15,210.89 and three years of backpay, to be offset by his $33,000 yearly pension, seeking a backpay total of $136,503. 3/12/24 Tr. 308:2-16, 309:1-13. After deliberations, the jury found that the Sheriff's Office interfered with Plaintiff's FMLA rights and awarded $240,000 plus attorney's fees—more than Plaintiff sought. See Dkt. 856. Counsel for Defendants acknowledge

that the FMLA contemplates an award of attorney's fees. However, Plaintiff made no such request and the jury should not have awarded attorney's fees.

LEGAL STANDARDS

I. Rule 50 Motion for a Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure allows a district court to enter judgment against a party who has been fully heard on an issue during a jury trial if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a) (motion for judgment as a matter of law), (b) (renewed motion for judgment as a matter of law). While a jury's verdict is entitled to great respect, a court must still perform its duty to grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 250 (4th Cir. 2020) (granting judgment as a matter of law on the plaintiff's FMLA retaliation claim under Rule 50(a)). "Judgment as a matter of law is appropriate if there is no legally sufficient evidentiary basis for a reasonable jury to find for a party on an issue." *Hall v. Forest River, Inc.*, 536 F.3d 615, 619 (7th Cir. 2008); *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 924-25 (7th Cir. 2000). A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a)(2). Drawing reasonable inferences from the evidence, the question for the Court is whether the evidence as a whole is "sufficient to allow a reasonable jury to find in favor of [the nonmoving party]." *Hall*, 536 F.3d at 619. Inferences based on speculation and conjecture do not warrant consideration of the issue by the jury. See *McClure v. Cywinski*, 686 F.2d 541, 544 (7th Cir. 1982).

"If the court does not grant a motion for judgment as a matter of law under Rule 50(a) . . . the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). In ruling on the renewed motion, the court can order a new trial or direct the entry of judgment as a matter of law. *Id.* When considering

a renewed motion for a judgment as a matter of law, the court does not assess the credibility or weigh the evidence and construes the evidence in favor of the party who prevailed at trial. *Thorne v. Member Select Ins.* Co., 882 F.3d 642, 644 (7th Cir. 2018). "But a verdict supported by no evidence or a mere scintilla of evidence will not stand." *Martin v. Milwaukee Cty.*, 904 F.3d 544, 550 (7th Cir. 2018) (citing *Thorne*, 882 F. 3d at 644).

II. Rule 59 Motion for a New Trial or To Alter or Amend Judgment

Rule 59(a) provides that the court "may, on motion, grant a new trial on all or some of the issues." Fed. R. Civ. P. 59(a)(1). "The Supreme Court has long recognized that a district court can grant a motion for a new trial if the verdict was against the manifest weight of the evidence." *Mejia v. Cook Cty., Ill.*, 650 F.3d 631, 633 (7th Cir. 2011) (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996)). Unlike a Rule 50(a) motion, the court may weigh the evidence, assess the credibility of the witnesses and the comparative strength of the facts admitted at trial. *Mejia*, 650 F.3d at 633. If the district court determines that the verdict is against the manifest weight of the evidence, then a new trial is appropriate. *Id.* The decision whether to grant or deny a Rule 59(e) motion to alter or amend the judgment is entrusted to the sound judgment of the district court and will only be reversed for an abuse of discretion. *In re Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

III. Remittitur

While there is deference to a jury's assessment of damages, the jury's award must be reasonable to be sustained. *Spina v. Forest Pres. Dist.*, 207 F. Supp. 2d 764, 771 (N.D. Ill. 2002). In considering damages, the Seventh Circuit has held that three factors guide its analysis: "whether (1) the award is monstrously excessive; (2) there is no rational connection between the award and the evidence, indicating that it is merely a product of the jury's fevered imaginings or personal vendettas; and (3) whether the award is roughly comparable to awards made in similar cases." *Adams v. City of Chi.*, 798

F.3d 539, 543 (7th Cir. 2015). As a general rule, if the court determines that a damages award is excessive, remittitur, not a new trial, is the appropriate remedy. *Spina*, 207 F. Supp. 2d at 771.

ARGUMENT

I. Damages Are Not Appropriate Because No Reasonable Jury Could Find That Plaintiff's Actions Were Reasonable or Tied to Sheriff's Office's Conduct.

Plaintiff's unreasonable actions should have prevented him from seeking wages he would have earned from the Sheriff's Office had he not retired. As a matter of law and as law of this case, it was unreasonable for Plaintiff to resign from his employment. *Ziccarelli v. Dart*, 35 F.4th 1079, 1091 (7th Cir. 2022) ("A reasonable person likely would have thought he had several options short of immediate retirement under these facts, especially when Ziccarelli had not yet even applied for FMLA leave and any potential discipline remained remote."). Defendants moved *in limine* to exclude evidence of backpay. Dkt. 840 no. 1. The Court denied Defendants' Motion and allowed testimony regarding earnings. 3/8/24 Tr. 36:23-40:20.

In order to be awarded damages, Plaintiff had to prove by a preponderance of evidence that any loss of wages and benefits *was directly caused by* the Sheriff's Office. See Damages Jury Instruction; *Hickey v. Protective Life Corp.,* 988 F.3d 380, 387 (7th Cir. 2021) (granting summary judgment where the court found no prejudice from an FMLA violation and concluding no damages were appropriate where the plaintiff suffered no compensable damages at the time he was terminated). While the Seventh Circuit expressed its skepticism about "snowballing consequences" and left the damages issue to the Court to sort out, the *Ziccarelli* ruling did not open the door for Plaintiff to circumvent its holding on constructive discharge and seek all damages from his decision to resign which created snowballing effects—the statute only allows damages directly caused by FMLA interference and makes no reference to awarding equitable relief.[3] Plaintiff presented his resignation as a constructive

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

discharge claim, specifically Plaintiff sought damages for his salary after he resigned and testified that he resigned because otherwise, he would have endangered his own and others' lives. 3/11/24 Tr. 221:8-9. Plaintiff requested, argued for, and ultimately received damages for a constructive discharge claim, without labeling it as such by using his FMLA interference theory to circumvent a barred claim. Because Plaintiff unreasonably made his own decision to resign, the Sheriff's Office could not have, and did not cause damages.

Moreover, Plaintiff's claim that he would have worked for an additional three years (or seven to eight more years) is highly speculative and contradicts Plaintiff's testimony that he planned to seek a permanent disability leave. Speculation and conjecture are not, of course, a proper basis for an award of damages. *Healy v. CTP, Inc.*, No. 92 C 1727, 1994 U.S. Dist. LEXIS 13662, *9 (N.D. Ill. 1994) (holding that the plaintiff could not seek commissions on sales she would have completed if she stayed in its employ because these damages are inherently speculative). Over Defendants' objection, the Court permitted Plaintiff to speculate as to what he would have earned had he worked for *seven more years* by testifying about the wages provided for in various collective bargaining agreements. See PX 1, 2, 3. On cross examination, Plaintiff admitted his medical conditions prevented him from working for the first three years after he resigned—which is the same period for which his attorneys sought backpay in closing argument. 3/12/24 Tr. 309:1-13. Allowing Plaintiff to testify about seven years of back wages caused confusion and prejudiced Defendants by inflating speculative and legally unsupported recovery. If the Court orders a new trial, Defendants respectfully request that the Court revisit Defendants' motion *in limine*.

During deliberation, the jury asked a question about damages. Specifically, the jury asked whether they had to award the amount of damages sought and this Court instructed the jury that they were the ones to decide damages. 3/12/24 Tr. 326:9-16, 331:25-332:7. The Court declined to include Defendants' suggestion to remind the jury that any damages must only be wages and benefits tied

directly to the Sheriff's Office's conduct. 3/12/24 Tr. 329:8-330:23. The jury did not follow the Court's instructions limiting damages to wages and benefits *directly tied* to the Sheriff's Office's conduct—the jury appears to have awarded damages based on sympathy when they exceeded the amount requested by Plaintiff. See 29 U.S.C. § 2617. The FMLA does not provide for emotional distress or punitive damages. *Trahanas v. Northwestern Univ.*, 64 F.4th 842, 858 (7th Cir. 2023) ("[Unlike Title VII and the ADA, 'FMLA damages don't include emotional distress and punitive damages.'"). The jury even awarded attorney's fees, relief that Plaintiff did not seek and a damages component not included in the jury instructions or verdict form.

Even though Plaintiff was unable to show that he reasonably suffered damages directly from the Sheriff's Office's conduct, the jury awarded a monstrously excessive amount of $240,000 plus attorney fees. This awarded more than Plaintiff's counsel asked for in closing arguments and bears no rational connection to the evidence. This amount is *more than* three years of backpay. This amount does not reflect Plaintiff's attorney's admission that his backpay should be reduced by his pension as a matter of law. "Unquestionably, a new trial, and not remittitur, is required when an award is the result of passion and prejudice, because the prejudice may have infected the verdict itself." *Dresser Indus., Inc., Waukesha Engine Div. v. Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992). "Judges and juries must not be casual with other people's money." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1229 (7th Cir. 1995) (remitting compensatory damages award in FLSA suit from $21,000 to $10,500). As such, this Court should grant a new trial. *See Arroyo v. Volvo Grp. N. Am., LLC*, 2019 U.S. Dist. LEXIS 168213, *51 (N.D. Ill. 2019) (granting the motion for a new trial finding, "it is the fact that the award of compensatory damages is not supported by any evidence" that warranted the relief).

Plaintiff failed to prove that he suffered damages tied to the Sheriff's Office's conduct because he resigned and nothing but his own decision to retire prevented him from taking his remaining FMLA time. As of September 20, 2016, Plaintiff had 176 hours of FMLA time remaining and paid sick leave

available which was not paid when he resigned pursuant to the CBA. If the Court finds that the jury properly followed its instructions and Plaintiff proved interference, the damages award must be limited to the FMLA leave Plaintiff could have taken but did not. As stated in *Hickey*, 988 F.3d at 388 (quoting *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 89 (2002)):

> To prevail under the cause of action set out in § 2617, an employee must prove, as a threshold matter, that the employer violated § 2615 by interfering with, restraining, or denying his or her exercise of FMLA rights. Even then, § 2617 provides no relief unless the employee has been prejudiced by the violation: The 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), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.

Plaintiff's efforts to blame his decision to resign on the Sheriff's Office cannot snowball into a constructive discharge claim. The jury misinterpreted the law because it did not directly tie the damages to his conversation with Ms. Shinnawi. Thus, if the Court were to find that the Sheriff's Office interfered with Plaintiff's ability to take his remaining FMLA time and therefore should be compensated using his sick time, the Court could suggest a remittitur of 176 hours multiplied by his hourly rate at the time of his resignation: $34.72. This totals $6,110.72. If Plaintiff does not accept the remittitur, the Court should grant a new trial pursuant to Rule 59(a).

II. No Reasonable Jury Could Find That the Sheriff's Office Interfered with Plaintiff's FMLA rights.

For Plaintiff to prevail on his FMLA interference claim, he had to prove by a preponderance of the evidence that the Sheriff's Office discouraged him from taking leave, which required him to prove that the Sheriff's Office's actions would have discouraged a reasonable employee from taking FMLA leave *and caused him to be prejudiced.* See Discouragement and Interference Jury Instruction; *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 818 n.35 (7th Cir. 2015). This test uses an objective standard, based on how a reasonable employee might react, not Plaintiff's subjective feelings.

See Discouragement and Interference Jury Instruction; *Freelain v. Vill. of Oak Park,* 888 F.3d 895, 898 (7th Cir. 2018).

Here, Plaintiff testified that Ms. Shinnawi told him he could not take any more FMLA leave and that he would be disciplined if he took more leave. 3/11/24 Tr. 218:17-219:3. He did **not** testify that she told him he would be fired, instead he testified that Ms. Shinnawi told him: "You had took serious amount of time, Mr. Ziccarelli; do not use any more time or you will be disciplined. Those were the words that were said, ma'am." 3/12/24 Tr. 256:2-6. Even giving this account of the conversation full credibility, nothing that Ms. Shinnawi said indicated that he would be fired and Plaintiff took an unreasonable view of the conversation with Ms. Shinnawi. He admitted that he **assumed** that he thought the word "discipline" would mean getting fired. 3/11/24 Tr. 220:14-19. A reasonable employee would not be discouraged by Ms. Shinnawi's statements.

Plaintiff was not prejudiced from taking his remaining FMLA leave and in fact, Plaintiff testified that *he took more FMLA time* after this telephone call. 3/12/24 Tr. 256:2-6. Plaintiff conceded that he had never been disciplined for taking FMLA leave, and that Ms. Shinnawi has never disciplined him nor would discipline be under her purview. 3/12/2024 Tr. 256:7-10, 258:1-6. Nothing prevented Plaintiff from taking his remaining FMLA leave and he suffered no prejudice from his conversation from Ms. Shinnawi. *See Fairmont Tool, Inc. v. Opyoke*, 247 W. Va. 305, 313 (granting W. Va. Civ. P. 50(b) motion for judgment as a matter of law because Plaintiff failed to show prejudice from technical violation of FMLA where he failed to present evidence that he lost compensation or benefits, or how he would have structured his leave had the employer advised him of his rights under the FMLA). Plaintiff took additional FMLA time after his telephone call with Ms. Shinnawi without adverse consequences. No reasonable employee would have been discouraged from taking additional FMLA leave. This Court should enter judgment against Plaintiff pursuant to Rule 50(b) or, alternatively, order a new trial under Rule 59.

III. Plaintiff Was Not Entitled to FMLA Protections.

Plaintiff's FMLA interference claim should never have reached the jury because Plaintiff could not return to work within the parameters of FMLA. The FMLA provides employees with 12 unpaid weeks of leave per 12-month period during which the employee's job must remain protected. 29 U.S.C. § 2612(a)(1)(D). But if an employee is unable to return to work after 12 weeks, the FMLA does not apply, and the employer is no longer under an obligation to restore the employee to the original job position. *Knighten v. Advocate Aurora Health, Inc.*, 2021 U.S. Dist. LEXIS 179129, *5 (N.D. Ill. 2021). In *Knighten*, the district court held that the plaintiff pled herself out of court by admitting that she could not return to work almost 3 months after the 12 weeks of protected leave had ended. *Id.* Similarly, here Plaintiff testified that his medical conditions prevented him from returning to employment for *three years* after he resigned from the Sheriff's Office. 3/12/24 Tr. 273:11-274:1. He testified that he did not intend to return to the Sheriff's Office after exhausting his FMLA and wanted to follow his physician's instructions and seek permanent disability leave. 3/12/2024 Tr. 252:1-8. This goes well beyond the 12 weeks of protected leave. Accordingly, the FMLA does not apply and Plaintiff has no claim to FMLA protections.

Plaintiff's argument that the conduct of the Sheriff's Office prevented him from obtaining the treatment he needed, which prevented his timely ability to return, is without merit. First, Plaintiff resigned from his position. After Plaintiff chose to resign, the Sheriff's Office fulfilled its obligations to a former employee, including providing information about obtaining health insurance. 3/12/24 Tr. 255:2-22, see also JX6. Second, the Seventh Circuit held that it was unreasonable for Plaintiff to resign from his employment based on one short conversation. *Ziccarelli*, 35 F.4th at 1091 ("A reasonable person likely would have thought he had several options short of immediate retirement under these facts, especially when Ziccarelli had not yet even applied for FMLA leave and any potential discipline remained remote."). Third, it is highly speculative whether Plaintiff could have returned in

just over a month had he received the suggested treatment. Fourth, even if he could have returned, he likely would not have done so because he planned to exhaust his FMLA leave and then seek permanent disability leave. Plaintiff should not be permitted to blame his former employer for the choice he made.

As such, because Plaintiff could not return to work within the proscribed time provided by the FMLA, nor did he intend to return at the end of an FMLA leave, the FMLA does not apply and this Court should enter judgment in favor of the Sheriff's Office pursuant to Rule 50(b).

CONCLUSION

For the foregoing reasons, Defendants request that this Court grant judgment as a matter of law on Plaintiff's claim, order a new trial, or, in the alternative order suggest a remittitur instead of a new trial because (1) no reasonable jury could find that the Sheriff's Office interfered with his FMLA rights, (2) no reasonable jury could award $240,000 based on the evidence presented, and (3) the FMLA does not apply because Plaintiff could not return within in the amount of FMLA leave he had remaining.

Dated: April 9, 2024

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

By: /s/ Nazia Hasan
Kathleen C. Ori
Nazia Hasan
Assistant State's Attorneys
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-4635/3618
kathleen.ori@cookcountysao.org
nazia.hasan@cookcountysao.org