

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

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

PLAINTIFF'S POST-TRIAL REQUEST FOR EQUITABLE RELIEF

Pursuant to 29 U.S.C. § 2617(a)(1)(B), plaintiff, by counsel, requests that the Court direct the Sheriff to take the steps necessary to grant plaintiff four years of pension seniority, including making any necessary financial contributions, and join the Cook County Pension Fund as a defendant insofar as joinder is required to grant relief.

1. Plaintiff alleged in this case that defendant's FMLA coordinator, Wylola Shinnawi, had deterred him from taking FMLA leave, causing him to resign prematurely. The jury resolved the conflicting evidence in favor of plaintiff and awarded him two hundred and forty thousand dollars as damages for lost wages and benefits. This sum roughly equates to four years backpay, as plaintiff explains below.

2. In addition to the damages awarded by the jury, the FMLA authorizes the Court to award "such equitable relief as may be appropriate,

including employment, reinstatement, and promotion.” 29 U.S.C. § 2617(a)(1)(B). *See Simon v. Coop. Educ. Serv. Agency* #5, 46 F.4th 602, 607-608 (7th Cir. 2022).

3. In this case, the “equitable relief as may be appropriate” includes pension-based seniority benefits. Plaintiff testified at trial that if he had not resigned to avoid being fired, he would not have retired until he had worked at least another three years and possibly longer.

4. The jury verdict is the starting point to analyze plaintiff’s request for equitable relief. This is because “[a] jury award of back pay necessarily includes a determination that the plaintiff was able to return to work.” *Franzen v. Ellis Corp.*, 543 F.3d 420, 428 (7th Cir. 2008). The jury verdict also includes consideration of “when the employee would have returned to work after taking leave.” *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002).

5. A reasonable interpretation of the size of the jury’s award is that the jury awarded plaintiff damages for lost back pay for the four year period of 2017 through 2020. The jury had before it evidence (in the collective bargaining agreements) of the base annual salary for 2017 and plaintiff agreed to a credit of \$33,000 for each year he received pension benefits, i.e., 2018, 2019, and 2020:

Year	Base Salary	Less Pension	Back Pay
2017	77,981		\$77,981
2018	79,541	33,000	\$46,541
2019	92,469	33,000	\$59,469
2020	92,469	33,000	\$59,469
Total			\$243,460

6. Plaintiff argued in closing that the Sheriff was entitled to a \$33,000 credit in 2017. The jury correctly rejected this argument, which is inconsistent with plaintiff's testimony that he did not begin to receive pension benefits until 2018. The jury also rejected counsel's request for only three years of backpay, exercising its discretion to find that plaintiff would have worked for four years if he had not been deterred from taking FMLA leave.

7. The jury verdict is a "direct estoppel" that bars the court from re-visiting "factual issues already necessarily determined by a jury." *Franzen v. Ellis Corp.*, 543 F.3d 420, 428 (7th Cir. 2008).

8. As the district court explained in a Title VII case in a similar posture, "The Court must accept the jury's factual findings." *Davis v. City of Springfield*, Nos. 04-3168, 07-3096, 2009 WL 4065049 at *3 (C.D. Ill. Nov. 20, 2009).

9. As explained above, one of those factual issues is that plaintiff would have worked an additional four years.

10. It is well settled that restoration of pension benefits is required to make a plaintiff whole. *E.g., Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1212 (7th Cir. 1989).

11. The district court applied this rule in *Ortega v. Chicago Bd. of Educ.*, 280 F. Supp. 3d 1072 (N.D. Ill. 2017), where the jury found a violation of the Americans with Disabilities Act. In that case, the court granted lost pension benefits as equitable relief by awarding the plaintiff the present value of the pension benefits she would have received absent the discrimination. *Id.* at 1117.

12. Similarly, in *Vega v. Chicago Park Dist.*, 605 F. Supp. 3d 1086 (N.D. Ill. 2022), the district court held that its order on equitable relief required the employer to make sufficient pension contributions to restore the plaintiff's pension payments. *Id.* at 1098.

13. These cases demonstrate that restoration of plaintiff's pension benefits is the appropriate relief. The Court should therefore direct the Sheriff to grant plaintiff four years of pension seniority and to compensate plaintiff for the addition pension benefits he would have received in 2021, 2022, 2023, and the portion of 2024 before his seniority was restored.

14. In *Nawara v. County of Cook*, 17 C 2393, 2022 WL 3161838 (N.D. Ill. July 29, 2022), *appeal pending* 7th Cir., No. 22-1393, the Sheriff

asserted that he lacked the power to grant retroactive pension seniority. *Id.* at *5 & n.6. The plaintiff in *Nawara* conceded this issue and the district court did not rule on the Sheriff's argument.

15. Plaintiff expects the Sheriff to make the same argument in this case, i.e., that the Cook County Pension Fund alone has the power to award retroactive pension seniority. If the Sheriff raises that argument, the Court should follow settled law and add the Fund as an additional defendant.

16. The Seventh Circuit approved this procedure in an analogous case, *Du Shane v. Conlisk*, 583 F.2d 965, 967 (7th Cir. 1978). There, a district court had ordered the City of Chicago to reinstate a suspended police officer with full "seniority and other conditions of employment at the time of suspension." *Id.* at 966. The City claimed that it was unable to restore lost promotional opportunities "because the Civil Service Commission is responsible for the preparation of promotional lists." *Id.* The district judge accepted this assertion and refused to join the Commission as a party. *Id.* The Seventh Circuit reversed, holding: "The district court thus had the requisite power to bring the Civil Service Commission into the present action for purposes of granting complete relief to plaintiff." *Id.* at 967.

17. *Du Shane*, while decided nearly 50 years ago, is still good law. *See, e.g., Armour v. Monsanto Co.*, 995 F. Supp. 2d 1273, 1283 (N.D. Ala. 2014),

aff'd on other grounds sub nom Tolbert v. Monsanto Co., 625 F. App'x 982, (11th Cir. 2015); *In re Neurontin Mktg. & Sales Pracs. Litig.*, 810 F. Supp. 2d 366, 370 (D. Mass. 2011).

18. Accordingly, to the extent the Cook County Pension Fund is a necessary party for the relief requested, the Court should follow *Du Shane* and add the Fund as a defendant.

WHEREFORE plaintiff requests that the Court direct the Sheriff to grant plaintiff four years of pension seniority and whatsoever other relief as may be required to effectuate this relief, including joining the Cook County Pension Fund as a defendant.

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