

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S POST TRIAL MOTION

In response to Plaintiff's Post-Trial Motion [Dkt. No. 868], Defendants, Thomas J. Dart in his official capacity as Sheriff of Cook County ("the Sheriff's Office") and Cook County as indemnitor respond as follows:

INTRODUCTION

Defendants reaffirm their position that the jury did not follow the law, the evidence does not support the verdict, and therefore request that the Court enter judgment as a matter of law in their favor, order a new trial, or suggest a remittitur. Dkt. No. 867. For judicial economy, this Court should consider Defendant's post-trial motion first because resolving the motion in Defendants' favor will impact how this Court rules on Plaintiff's motion.

In his Motion seeking equitable relief, Plaintiff is essentially asking the Court to find that the damages award be considered backpay, and awarding benefits of four years of pension payments from the backpay. But at trial, Plaintiff did not present any evidence (expert or otherwise) regarding the lost value of his pension due to his decision to retire. The relief Plaintiff seeks poses significant problems including: (1) backpay is inappropriate if there is no evidence to support the calculation; (2) the jury was not presented evidence to support the calculation and could not have intended to increase

Plaintiff's pension payments; and (3) since pension credits are only obtainable through an award of backpay processed through payroll, to the extent this Court finds Plaintiff is entitled to additional pension credits, Plaintiff would need to repay any pension he received for the time he is now seeking backpay so that the Cook County Pension Fund (a separate entity) can correctly calculate the appropriate pension benefits.

I. An award of four years of backpay contradicts the law because the evidence shows Plaintiff would not have worked these years.

Defendants noted in its Motions *in Limine* that the Seventh Circuit has not decided whether a jury can award an equitable remedy of backpay for a violation of the FMLA. Dkt. 840 at 4, n. 2. Regardless, backpay is only appropriate if a plaintiff has evidence to support his calculation of backpay. *Stragapede v. City of Evanston*, 865 F.3d 861, 868 (7th Cir. 2017); see also *Nawara v. Cty. of Cook*, No. 17 C 2393, 2021 U.S. Dist. LEXIS 59509, *51 (N.D. Il March 29, 2021) (holding “the court cannot meaningfully calculate lost pay based on the sparse information provided by the current record and will direct submission of additional evidence on this issue”). Importantly, an award of backpay 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).

Plaintiff argues that this Court must accept the factual issue that he would have worked for an additional four years. Dkt. 868 at 3. Plaintiff is incorrect for two reasons. First, Plaintiff admits he was unable to return to work for at least three years following his voluntary resignation. 3/12/24 Tr. 273:11-274:1. Second, as a matter of law and as law of this case, it was unreasonable for Plaintiff to resign from his employment, thus creating his own non-payment circumstance. *Ziccarelli v. Dart*, 35 F.4th 1079, 1091 (7th Cir. 2022). This Court is not bound by a verdict unsupported by evidence. *Martin v. Milwaukee Cty.*, 904 F.3d 544, 550 (7th Cir. 2018). Here, Plaintiff produced no evidence, either prior to or during trial, to support his calculation of backpay: Plaintiff testified that he resigned,

3/11/24 Tr. 221:8-9, could not work for three years, 3/12/24 Tr. 273:11-274:1, and, even if healthy, would not have worked more than three additional years, 3/12/24 Tr. 270:10-24.

Further, 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 3 years after he resigned from the Sheriff's Office. 3/12/24 Tr. 273:11-274:1. This is well beyond the 12 weeks of protected leave. Since there is no support for an award of backpay, the Court should not award Plaintiff's request.

II. The inconsistency of the verdict makes it unclear whether the jury intended to increase Plaintiff's pension.

The Court instructed the jury that if it were to award 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). By awarding \$240,000, the jury picked a sum that is not tied to anything and the jury appears to have awarded damages based on sympathy when it exceeded the amount requested by Plaintiff. See 29 U.S.C. § 2617. Remarkably, the jury awarded attorney's fees when Plaintiff did not even request such relief. The jury made multiple impermissible determinations and this Court should not permit an award of back pay.

Plaintiff argues that the \$240,000 award should be construed as "roughly" four years of backpay. Dkt. 868 at 1. But it is not clear that the jury awarded this amount to then have the Court determine that Plaintiff's pension should be increased. Additionally, should backpay be awarded, the

Court would need to determine the **precise** dates for the backpay for processing. Given the evidence, or lack thereof, this is an impossible task.

III. The Cook County Pension Fund is a separate legal entity that the Sheriff's Office does not control.

Plaintiff seeks to add the Cook County Pension Fund as a defendant and argues that a restoration of pension benefits is required to make him whole. Dkt. 868 at 4. Plaintiff's citations to caselaw do not address the circumstance where, as is the case here, the employee retired and has received pension payments for the same period of time for which he is seeking backpay.

The Pension Fund is an entity with separate existence from the County and the Cook County Sheriff's Office, and its decisions to deny benefits to an employee can be challenged by the Illinois Attorney General, or appealed to Illinois courts pursuant to the Illinois Administrative Review Law. See 40 ILCS 5/1-115 (citing 735 ILCS 3-101, et seq.). Under the Pension Fund's rules and regulations, benefits for "service credits"—seniority benefits that go toward the officer's retirement—are calculated based on the employee's "work history," with employees receiving service credits for months they worked. See <https://www.cookcountypension.com/employees/how-service-is-calculated/> (last visited April 24, 2024) (summarizing relevant Pension Fund regulations). The Pension Fund expressly ties the accrual of service credits to pay. See *id.* ("Since payroll is bi-weekly, to receive service credit you must receive at least ½ a paycheck every pay period."); see also 40 ILCS § 5/9-220(a) (requiring Pension Fund to tie service credits to months worked).

Under the legal framework governing payment of service benefits to Cook County Sheriff officers, it is not possible for the Pension Fund to grant service benefits to an officer for months not worked absent a judicial finding that the officer is entitled to backpay for that time and an actual payment of same. The Pension Fund inextricably ties the accrual of service benefits to a paycheck, and will not award benefits absent a paycheck. Plaintiff acknowledges that a similar issue was considered in *Nawara v. Cnty. of Cook*, No. 17 C 2392, 2022 U.S. Dist. LEXIS 143980, *8 ("[plaintiff]

acknowledges that pension-based seniority requires the employee to receive ‘retroactive pay’”). Dkt. 868 at 4-5. Plaintiff did not present any evidence regarding pension benefits or calculations at trial and therefore, this Court should deny such relief as improper and unsupported by the evidence. *Navara*, 2021 U.S. Dist. LEXIS 59509, *51.

If this Court denies Defendants’ Post Trial Motion and determines that the jury award should be deemed backpay, the Court would need to (1) determine the **precise** dates that backpay should be awarded; (2) such a check would need to be processed through the Cook County Sheriff’s Office’s Payroll Department, taking all applicable payroll deductions; and (3) Plaintiff would need to repay to the Pension Fund any pension amount he received that overlapped with the backpay dates (he could not receive a pension if he was considered employed).

CONCLUSION

For the reasons stated above, Defendants request that the Court deny Plaintiff’s Post Trial Motion and grant any additional relief deemed appropriate.

Dated: May 7, 2024

Respectfully submitted,

KIMBERLY M. FOXX
State’s Attorney of Cook County

By: /s/ Kathleen Ori
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