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

Salvatore Ziccarellli,	)	
	)	
Plaintiff	)	
	)	No. 17-cv-3179
-vs-	)	
	)	*(Judge Tharp)*
Sheriff of Cook County,	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S POST-TRIAL MOTION

The Seventh Circuit remanded this case for a jury to resolve the conflicting evidence about plaintiff's telephone conversation with Wylola Shinnawi, the Sheriff's FMLA coordinator for defendant Sheriff of Cook County.

The jury heard the conflicting testimony of plaintiff and Shinnawi about that telephone call, resolved the dispute in favor of plaintiff, and returned a verdict for plaintiff. In reviewing any post-trial motions, the Court must draw all reasonable inferences in plaintiff's favor and disregard all evidence favorable to defendant that the jury was not required to believe. *E.g.*, *May v. Chrysler Group, LLC*, 716 F.3d 963, 971 (7th Cir. 2013). Plaintiff discusses the evidence on liability and damages in Part I of this memorandum.

In considering defendant's motion for judgment as a matter of law, the Court, as it stated in *Myvett v. Heerdt*, 232 F. Supp. 3d 1005 (N.D. Ill. 2017), may not "make credibility determinations of weigh the evidence." *Id.* at 1015. Defendant acknowledges this standard but fails to acknowledge a fatal flaw in its post-

trial motion for judgment as a matter of law—the failure to state grounds in its pre-verdict motion.

A Rule 50(b) motion may only be granted "on grounds advanced in the pre-verdict motion." *Abellan v. Lavelo Property Mgmt., LLC*, 948 F.3d 820, 827 (7th Cir. 2020). Here, as plaintiff discusses in Part II below, defendant did not include any grounds for relief in its pre-verdict motion, thereby waiving its right to seek relief under Rule 50(b).

Plaintiff shows in Part III that the Court should reject defendant's arguments about credibility. Plaintiff responds in Part IV to defendant's request for a remittitur and shows that the Court should reject this request because there are at least two interpretations of the award that are consistent with the evidence.

I. Evidence at Trial

A. The FMLA Violation

On defendant's post-trial motion, the Court "construes the evidence strictly in favor of the party who prevailed before the jury and examines the evidence only to determine whether the jury's verdict could reasonably be based on that evidence." *Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012). The Court does not "make credibility determinations or weigh the evidence." *May v. Chrysler Group, LLC*, 716 F.3d 963, 971 (7th Cir. 2013). Plaintiff presents the trial evidence below pursuant to that standard.

Plaintiff Salvatore Ziccarelli was employed by the Sheriff of Cook County as a correctional officer from 1989 (Tr. 208:4-5) until September 20, 2016. (Tr.

210:15-18.) Ziccarelli explained that he stopped working for the Sheriff, "because I was going to get fired." (Tr. 212:6-7.)

Ziccarelli was suffering from PTSD while he worked for the Sheriff (Tr. 215:21-23); the Sheriff permitted Ziccarelli to take FMLA leave whenever he needed it, up to seven times a month. (Tr. 214:4-11.) Ziccarelli would receive his regular salary while on FMLA leave by using accumulated sick time. (Tr. 215:13-15.)

Ziccarelli's PTSD "got dramatic" in 2016. (Tr. 216:1-5.) His psychiatrist adjusted Ziccarelli's medication (Tr. 216:6-10) and told him that his condition would best be treated by hospitalization. (Tr. 217:4-6.)

After receiving this medical advice, Ziccarelli spoke by telephone with Wylola Shinnawi, the Sheriff's FMLA coordinator. (Tr. 217:12-16.) Ziccarelli called Shinnawi to find out how much additional FMLA time he could use. (Tr. 217:8-20.)

Ziccarelli told Shinnawi, "I'm seriously ill. My doctor wants me to take the rest of my FMLA." (Tr. 218:19-20.) He asked Shinnawi, "Please tell me how much time [I have left]." (Tr. 220:8-9.)

Shinnawi told Ziccarelli, "Do not use any more [FMLA time] or you will be disciplined." (Tr. 219:2-3.) Ziccarelli knew that this meant he would be fired if he took more FMLA time. (Tr. 219:4-8.) As Ziccarelli explained, because of Shinnawi's statement, he did not take his remaining FMLA leave, which meant that he could not take disability leave to get the treatment his doctor has prescribed. (Tr. 253:20-

254:8.) Instead, Ziccarelli resigned (Tr. 211:2-3) on September 20, 2016 (Tr. 210:15-18) and began to receive pension benefits in January of 2018. (Tr. 232:12-18.)

On cross-examination, Ziccarelli stated that he had intended "to work until I was 60 or until 30 years were up." (Tr. 270:12.) Ziccarelli started to work for Sheriff in 1989 (Tr. 208:4-6); he had been on the job for 27 years when he left the Sheriff's employ in 2016. (Tr. 221:20-22.) Ziccarelli was 60 years of age at the time of trial. (Tr. 270:13-16.)

The defense vigorously cross-examined Ziccarelli. (Tr. 254-275.) In closing argument, defense counsel asked the jury to reject Ziccarelli's testimony and accept the contradictory testimony that had been offered by Shinnawi (Tr. 310-15), asserting that, "Ms. Shinnawi did not lie." (Tr. 315:11.) The jury disagreed and returned a verdict for plaintiff.

B. Damages

Plaintiff introduced into evidence as Exhibit 2, the Collective Bargaining Agreement that covered his employment from December 1, 2012 to November 30, 2017. (Tr. 225:21, Plaintiff's Exhibit 2; Tr. 247:15.) He also introduced an excerpt from the Agreement in effect from December 1, 2017 to November 30, 2022 as Exhibit 5 (Tr. 247:15) and an excerpt from the Agreement in effect from December 1, 2020 to November 30, 2024 as Exhibit 7. (Tr. 250:2.) Plaintiff attaches the relevant excerpt of Exhibit 2 and copies of Exhibit 5 and 7. These exhibits set out the salary plaintiff would have received had he continued to be employed by the Sheriff.

Plaintiff began to receive pension payments in January of 2018. (Tr. 232:15-16.) Plaintiff testified on direct examination that he received pension payments of $2,000 per month. (Tr. 239:9-10.) Defense counsel sought to convince the jury that plaintiff actually received $33,000 in 2022, but failed to introduce admissible evidence on this issue:

Defense Counsel:	Okay. And yesterday, you testified that you're collecting about $2,000 a month?
Plaintiff:	Correct.
Defense Counsel:	You're actually collecting more, correct?
Plaintiff:	Approximately $2,000 per month. Did you have a different figure? I don't have that with me right now.
Defense Counsel:	Your 2022 tax returns indicated you were earning about $33,000, correct, a year?
Plaintiff:	That's because I think I was working other jobs at the same time. Was that correct, or no, is that just pension. You should know the amount that I was getting from just the pension.
The Court:	Mr. Ziccarelli, if you recall the answer to the question, you can answer. If you don't recall, you should just simply say, I don't recall.
Plaintiff:	Sorry, Your Honor. I don't recall.
Defense Counsel:	Okay. If I showed you your tax return, would that refresh your recollection about how much your pension --
Plaintiff:	Sure. Yes, ma'am.
Defense Counsel:	Okay. If we – I just want to show it to Mr. Ziccarelli. It's Plaintiff's Exhibit 13, original 13, not the one that … Let me know when you see it.
Plaintiff:	I see it. I see the tax return, ma'am.
Defense Counsel:	So the Cook County Pension Fund – sorry – the Cook County Pension Fund paid you over $33,000 in 2022?
Plaintiff:	Okay. I see it now.
Defense Counsel:	I'll go up to the page. Okay. Is your memory refreshed?

Plaintiff: Is that with the taxes removed, am I correct, with taxes or no? What I received --

The Court: Folks, the only question pending is whether this refreshes your recollection, Mr. Ziccarelli, as to --

Plaintiff: Yes, it does. Yes, Your Honor, it does.

Defense Counsel: Okay. I have nothing further.

(Tr. 274:8-275:25)

The only evidence about how much money plaintiff received from his pension is plaintiff's testimony that he received $2,000 per month. Defendant did not perfect its attempt to impeach plaintiff with his 2022 tax return and did not seek to admit into evidence the tax return.

C. The Jury Verdict

After asking if it could award a different amount of damages than plaintiff had requested (Tr. 326:13-16), the jury returned a verdict in the amount of "$240,000 plus attorneys' fees." (Tr. 333:12-13.) Plaintiff offers two explanations for the jury's award in Part V below.

II. Defendant Has Waived Its Right to Reconsideration of Plaintiff's Entitlement to Lost Wages

Before trial, the Court explained that it would let the jury consider plaintiff's claim for lost wages and revisit that issue "understanding that the Court then has the option, if I feel that the damage award is unjustified, to entertain a Rule 50 motion or remittitur motion with respect to damages." (Tr, 3/8/2024, 37:3-6.) Defendant now asks the Court to revisit that ruling on a Rule 50 motion. This motion, however, is procedurally barred.

The Court may only grant a Rule 50(b) motion "on grounds advanced in the preverdict motion." *Abellan v. Lavelo Prop. Mgmt., LLC*, 948 F.3d 820, 827 (7th Cir. 2020) (quoting the Advisory Committee Note to the 2006 Amendment to Rule 50).

Rule 50(a)(2) states that, "The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." FED. R. CIV. P. 50(a)(2). As the Seventh Circuit has explained, "if a party raises a new argument in its Rule 50(b) motion that was not presented in the Rule 50(a) motion, the non-moving party can properly object." *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010).

Plaintiff objects to defendant's Rule 50(b) motion because none of the arguments defendant now advances in its motion were presented to the Court in the pre-verdict motion. The defense in this case did not present any grounds in their pre-verdict motion.

Defendant made an oral motion for judgment as a matter of law at a sidebar before the formal close of plaintiff's case in chief:

The Court:	Does plaintiff have any further witnesses or evidence to present in its case?
Plaintiff's Counsel:	No, Your Honor. The defense … plaintiffs (sic) rest.
Defense Counsel:	Judge, before we finish. I want to file a motion for a judgment of directed finding. Do we do that in front of the jury or at sidebar?
The Court:	It's of record now. I'll take it under advisement.

(Tr. 277:17-23.)

Although the motion was of record, defendant did not provide any grounds for the motion either orally or in a written supplement. *See e.g., Nat'l Pasteurized Eggs, Inc. v. Michael Foods, Inc.*, No. 10-CV-646-WMC, 2013 WL 11320234, at *2 (W.D. Wis. Mar. 29, 2013) (arguments preserved when party made "placeholder" oral motion followed by written submission containing the arguments); *Fujitsu Ltd. v. Tellabs Operations, Inc.*, No. 08 C 3379, 2013 WL 268607, at *4 (N.D. Ill. Jan. 24, 2013) (same). Defendant's oral request for judgment as a matter of law "barely qualifies as a motion." *Boutros v. Avis Rent A Car System, LLC.*, 802 F.3d 918, 926 (7th Cir. 2015) (quoting the remarks of this Court in denying a Rule 59 motion.)

Both parties rested after testimony from defense witness Rosemarie Nolan. (Tr. 280-292.) The Court then gave preliminary instructions to the jury (Tr. 293:12-300:24) and took a brief break before closing arguments. (Tr. 301:3-4.)

After the Court allowed the parties to address the Court out of the presence of the jury (Tr. 301:10-302:4), counsel made their final arguments (Tr. 302:11-320:3) and the Court completed instructing the jury. (Tr. 320:5-324:17.) The Court then conducted a further colloquy with counsel. (Tr. 324:24-326:6.)

At no time before the jury began its deliberations did the defense supplement its oral motion with a written motion or otherwise explain the grounds for the pre-verdict motion for judgment as a matter of law. *Compare Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 659 (7th Cir. 2021) ("Wexford incorporated

its oral argument into its Rule 50(a) motion at the close of Howell's evidence, and into its Rule 50(a) motion at the close of all evidence.")

Defendant first sought to renew its motion for judgment as a matter of law after the jury reached it verdict, but before the jury returned to the courtroom:

Defense Counsel: Do I need to renew my motion for directed verdict?
The Court: That's done before the matter is submitted to the jury
Defense Counsel: Okay, I did that already.
The Court: You did that.
Defense Counsel: Yes.

(Tr. 332:17-22.)

After the jury returned its verdict, defendant "renew[ed] our motion for a directed verdict — or motion notwithstanding the verdict." (Tr. 335:5-6.) Plaintiff's counsel stated, "So there's no surprise, we will contend that the motion was not property preserved, but we'll present that in argument." (Tr. 335:19-21.)

Counsel correctly recalled the record: After making its oral motion, defendant did not supplement that motion with a written motion or with any explication of its grounds for judgment as a matter of law.

Defendant's failure to state any grounds for its preverdict motion for judgment as a matter of law waived any request for judgment as a matter of law. As in *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633 (7th Cir. 2003), when the record shows that a party failed to make "an oral or written motion" for pre-verdict judgment as matter of law on a particular issue, the Court lacks the power to grant relief on this issue. *Id.* at 638. The Seventh Circuit reached the same result in *Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP*, 773 F.3d 853, 856 (7th Cir.

2014). Defendant has thereby waived its right to ask the Court to revisit its pre-trial ruling on the availability of lost wages.[1]

III. The Court Should Not Reweigh the Evidence

Defendant seeks a new trial by arguing that no reasonable jury could find interference with plaintiff's right to take FMLA leave. (ECF No. 867 at 12-13.) The Court should reject this impermissible invitation to reweigh the evidence. Moreover, the request that the Court reject the jury's finding disregards the conclusion of the Seventh Circuit in this case that resolving the dispute between plaintiff and Shinnawi "is a job for the trier of fact." *Ziccarelli v. Dart*, 35 F.4th 1079, 1089 (7th Cir. 2022.)

The jury did not believe Shinnawi when she testified that she had told plaintiff that he had to submit a new FMLA application to take leave in consecutive days. (Tr. 147:23-148:1; Tr. 156:13-15.) This statement was not credible because Shinnawi had not offered this explanation at her deposition. Shinnawi was unable to credibly explain this omission, stating that she had never been asked this question at her deposition. (Tr. 149:4-24.)

The jury heard Shinnawi dispute plaintiff's testimony by claiming that she told plaintiff that his health provider had to fill out a new form for continuous FMLA leave. (Tr. 156:16-23.) But the jury also heard Shinnawi admit that she did not tell plaintiff how to obtain that form. (Tr. 156:10-12.) Again, there is no basis to overturn the jury's credibility determination.

[1] Defendant has not waived its right to request a remittitur. See Part IV below.

Defendant concedes that the Court must credit plaintiff's testimony that Shinnawi told him he would be disciplined if he took more FMLA leave.[2] (ECF No. 867 at 13.) Defendant thoroughly cross-examined plaintiff about his telephone call with Shinnawi. (Tr. 254:16-258:6.) Defendant also argued to the jury that Shinnawi did not discourage plaintiff from taking his remaining FMLA leave (Tr. 313:8-9) and framed the case as turning on credibility:

> Who do you believe? A retired FMLA manager who processed thousands of FMLA requests and counseled thousands of employees about how to take the FMLA leave and who had nothing to gain from lying? Or an employee who is seeking three years of back pay, who said yesterday, I was afraid I could not take any more leave, that's what he said yesterday, but then today said, Well, I might have taken a little more FMLA leave before I resigned.

(Tr. 314:3-10.)

The jury decided this question of "who do you believe" and found in favor of plaintiff. It was uniquely within the province of the jury to accept or reject plaintiff's testimony. The Court should therefore reject defendant's request to overrule the jury's credibility determination.

IV. The Court Should Deny the Request for a Remittitur

In challenging the jury's award, defendant seeks a new trial or, in the alternative, a remittitur. (ECF No. 867 at 11-12.) The Court must "accord substantial

[2] The Seventh Circuit held in this case that "[t]hreatening to discipline an employee for seeking or using FMLA leave to which he is entitled clearly qualifies as interference with FMLA rights." *Ziccarelli v. Dart*, 35 F.4th 1079, 1090 (7th Cir. 2022.)

deference to the jury's assessment of damages," *Ramsey v. Am. Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir.1985), and deny both requests.

First, as explained above, the parties presented this case to the jury as a credibility dispute: "Who do you believe?" (Tr. 314:3.) The jury believed plaintiff.

Second, there is "no rule prohibiting a jury from awarding more in damages than a plaintiff requests." *Gracia v. SigmaTron International, Inc.*, 842 F.3d 10-10, 1025 (7th Cir. 2016). Nor is there any rule prohibiting a jury from stating its wish that the Court award attorneys' fees. The jury calculated damages to compensate plaintiff for his injuries and wanted to be sure that plaintiff would receive the full amount of the award, without any deduction for attorneys' fees. Notably, the jury's suggestion that the Court award attorney fees is consistent with the FMLA. 29 U.S.C. § 2617.

Finally, the Court should deny the request for remittitur. When considering a request for remittitur, the Court considers three facts:

> 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 Chicago, 798 F.3d 539, 543 (7th Cir. 2015).

The Court should reject defendant's arguments that the jury's award was "monstrously excessive" and not related to the evidence (ECF No. 867 at 11.) Plaintiff offers the following two reasonable interpretations of the jury's award.

The first is that the jury awarded plaintiff damages for lost salary for the four-year period of 2017 through 2020.

The jury had before it evidence (in the collective bargaining agreements) of plaintiff's base annual salary for 2017 and each year thereafter. Although plaintiff testified that he received pension benefits of $2,000 a month starting in 2018, the jury might have accepted the higher amount proposed by defense counsel in the unperfected impeachment. See *ante* at 5-6.

Plaintiff stated in closing argument that the Sheriff was entitled to a $33,000 credit in 2017 for pension payments. (Tr. 309:10-13.) The jury correctly rejected this misstatement, which is contrary to plaintiff's testimony that he did not begin to receive pension benefits until 2018. (Tr. 232:15-16.)

The jury was entitled to reject 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.

Year	Base Salary	Less Pen-sion	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**

A second explanation is that the jury awarded backpay for three years, subject to a pension credit of $22,000 for 2018 and 2019, and also awarded plaintiff the $15,210.89 requested for lost sick pay. (Tr. 308:1-16.)

These calculations are summarized in the table below:

Year	Base Salary	Less Pen-sion	Back Pay
2017	77,981		$77,981
2018	79,541	22,000	$57,541
2019	92,469	22,000	$70,469
Lost Sick Pay			$15,211
Total			**$221,202**

Either reconstruction of the jury's analysis of damages provides a rational basis for the jury's award of $240,000.

The Court should reject defendant's argument that plaintiff's damages cannot include lost wages. (ECF No. 867 at 12.) Before trial, defendant argued that damages should be limited to payment for unused sick leave. (ECF No. 840 at 9.) Defendant now argues that "the damages award must be limited to the FMLA leave Plaintiff could have taken but did not." (ECF No. 867 at 12.) Defendant does not explain its new position.

The Court should reject both arguments because the jury had before it evidence that Shinnawi's conduct caused plaintiff to resign from the Sheriff's office. This evidence was not speculative, and the Court must assume that the jury followed the instruction to award plaintiff "as damages any loss of wages and benefits that was directly caused by the Sheriff's Office interference with his ability to take FMLA leave."[3] (Tr. 300:11-17.)

[3] Defendant does not raise any challenge to the jury instructions in its post-trial motion.

V. Conclusion

The Court should therefore deny defendant's post-trial motion.

Respectfully submitted,

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