

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.)

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

Defendants, Thomas J. Dart in his official capacity as Sheriff of Cook County (“the Sheriff’s Office”) and Cook County as indemnitor, submit this reply in support of their motion pursuant to Rule 50(b) for the entry of judgment as a matter of law in Defendants’ favor and against Plaintiff, their Rule 59 motion to alter judgment or for a new trial, or for remittitur of the damages award. In support, Defendants state as follows.

INTRODUCTION

The jury erred when it awarded Plaintiff \$240,000 in damages plus attorney's fees. During the pre-trial briefing, the parties disputed what damages could be awarded for an FMLA interference claim and 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 and stated that the Court expected the Defendants to file a Rule 50 motion regarding the issue. 3/8/2024 Tr. 37:3-16.

Defendants moved for directed finding as a matter of law under Rule 50(a) at the close of Plaintiff's case and the Court took the motion under advisement. 3/12/24 Tr. 277:17-23. Defendants renewed the motion after the verdict and the court again took the motion under advisement. 3/12/24 Tr. 335:5-15.

The Court should grant Defendants motion for judgment as a matter of law, order a new trial, or, in the alternative suggest a remittitur instead of a new trial because (1) Defendants preserved their rights under Rule 50; (2); no reasonable jury could have found that the Sheriff's Office interfered with Plaintiff's FMLA rights; (3) Plaintiff was not entitled to FMLA protections as a matter of law; and (4) the jury misapplied the law regarding FMLA interference when it awarded excessive damages.

ARGUMENT

I. Defendants presented their Rule 50(a) motion to the Court throughout the proceedings and did not forfeit their right to proceed with their Rule 50(b) motion.

Defendants stated the grounds for their pre-verdict motion throughout the proceedings and did not waive their rights to a Rule 50(a) motion. Although Plaintiff's counsel argued that Defendants did not preserve the motion because no grounds were stated, the Court correctly stated that Defendants properly submitted the Rule 50(a) motion before the matter was submitted to the jury for deliberation. 3/12/24 Tr. 335:19-336:5. The Court and all parties understood the legal and factual basis for the Defendants' motion. See *Laborers' Pension Fund v. A&C Envtl., Inc.*, 301 F.3d 768, 777-78 (7th Cir. 2002) (sufficiency requirements satisfied where the movant has made the grounds apparent in arguments before the district court and therefore opposing party was aware of the legal and factual bases for Rule 50(a) motion); *Urso v. United States*, 72 F.3d 59, 61 (7th Cir. 1995) (movant did not forfeit its argument for judgment as a matter of law even though it did not make argument on the pre-verdict motion because the same arguments had been presented to the district court).

At the pre-trial conference and before jury selection commenced, the Court heard and ruled on Defendants' argument that Plaintiff's unreasonable actions should prevent him from seeking wages he would have earned from the Sheriff's Office had he not retired and that as a matter of law and as law of this case, it was unreasonable for Plaintiff to resign from his employment. 3/8/24 Tr. 35:17-40:22, 3/11/24 Tr. 13:5-17; *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 also argued that the FMLA's protections should not apply as a matter of law because of Plaintiff's inability to return to the workplace within the statutory parameters of the FMLA. 2/28/24 Tr. 39:2-6.

As argued in the pre-trial briefing and addressed at length by the Court during the pretrial hearings, the damages Plaintiff alleged to have suffered must have directly resulted from the short conversation Plaintiff had with Wylola Shinnawi, the FMLA leave manager. These arguments were raised by Defendants throughout the proceedings and fully addressed by the Court and therefore, Defendants did not waive their arguments for judgment as a matter of law. *Laborers' Pension Fund v. A&C Envtl, Inc.*, 301 F.3d 768, 777-78 (7th Cir. 2002); *Ursu v. United States*, 72 F.3d 59, 61 (7th Cir. 1995). In fact, the Court itself stated the Rule 50(a) grounds succinctly in the pre-trial rulings "Depending on the evidence at trial, it is possible that the Court would -- put it this way: 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.” 3/8/24 Tr. 37:2-16. Defendants also argued that Plaintiff’s claim that he would have worked for an additional three years (or seven to eight more years) is highly speculative. 3/8/24 Tr. 37:19-38:3, 40:17-20.

Defendants preserved their rights to proceed with a Rule 50(a) and 50(b) motion and the Court should find that there was no legally sufficient evidentiary basis for the jury to find in Plaintiff’s favor.

II. No Reasonable Jury Could Find That The Sheriff’s Office Interfered With Plaintiff’s FMLA rights.

Contrary to Plaintiff’s contention, Defendants do not ask this Court to reweigh the evidence or to make credibility determinations. Defendants ask this Court to apply the law to the evidence presented at trial. Specifically, 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).

Without regard to credibility determinations, 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. Nothing that Ms. Shinnawi said indicated that he would be fired, and Plaintiff took an unreasonable view of the conversation with Ms. Shinnawi. He speculated that 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 and therefore, the jury misconstrued the law regarding direct damages.

As argued in Defendants’ motion, Plaintiff testified that *he took more FMLA time after* this telephone call. 3/12/24 Tr. 256:2-6. Nothing prevented Plaintiff from taking his remaining FMLA leave, and he suffered no prejudice from his conversation with 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). Under these facts, no reasonable employee would have been discouraged from taking additional FMLA leave, and the jury misapplied the law. See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). 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.

In his response, Plaintiff does not address the argument that Plaintiff's FMLA interference claim should never have reached the jury because Plaintiff could not return to work within the parameters of FMLA. "Failure to respond to an argument results in waiver." *Roppo v. Travelers Cos.*, 100 F. Supp. 3d 636, 645 (N.D. Ill. 2015), citing *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010); *United States v. Farris*, 532 F.3d 615, 619 (7th Cir. 2008).

As such, because Plaintiff does not dispute that he could not return to work within the proscribed time provided by the FMLA, the FMLA does not apply and this Court should enter judgment in favor of the Sheriff's Office pursuant to Rule 50(b).

IV. Defendants Should Be Granted a New Trial or Remittitur.

Plaintiff's attempt to explain the jury's excessive verdict in the amount of \$240,000 plus attorney's fees demonstrates that the award bears no rational connection to the evidence. The amount is more than three years of backpay and does not reflect that, as a matter of law, any backpay award should be reduced by Plaintiff's pension income. Under the FMLA, Plaintiff can only recover direct damages due to the interference and the law does not allow for compensatory damages based on emotional distress or punitive damages.

Plaintiff argues that the jury awarded backpay for four years, instead of three. Dkt. 871 at 13. Alternatively, Plaintiff argues that the jury awarded backpay for the three years, plus sick pay. Dkt. 871

at 14. The round figure of \$240,000 does not comport to any presented evidence. Neither reconstruction proposed by Plaintiff explains the jury's inexplicable award of attorney's fees. Based on the jury's improper award of attorney's fees, the jury did not follow the Court's instructions and award damages directly caused by any FMLA interference. The jurors went beyond the instructions and did not follow the law.

As explained above, an award of backpay damages could not reasonably result from Plaintiff's conversation with Ms. Shinnawi and the Court should correct the jury's erroneous application of the law. Plaintiff's efforts to blame his decision to resign on the Sheriff's Office cannot snowball into a constructive discharge claim and blame lost wages on Defendants. By failing to respond to the constructive discharge argument in his response brief, Plaintiff waived any argument to the contrary.

United States v. Farris, 532 F.3d 615, 619 (7th Cir. 2008).

The jury misinterpreted the law because it did not directly tie the damages to Plaintiff's 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 the 176 FMLA hours he had remaining for 2016 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).

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 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 to work within the remaining amount of his FMLA leave.

Dated: May 22, 2024

Respectfully submitted,
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