

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 REPLY IN SUPPORT OF  
POST-TRIAL REQUEST FOR EQUITABLE RELIEF**

The jury found that the Sheriff's office had deterred plaintiff from taking FMLA leave and, following jury instructions that defendants have not challenged in a post-trial motion, awarded plaintiff damages in the amount of two hundred and forty thousand dollars. Plaintiff asks the Court to exercise its power under 29 U.S.C. § 2617(a)(1)(B) and award pension-based seniority benefits. (ECF No. 868.) Defendants oppose this request (ECF No. 870.) The Court should reject the defense arguments.

**I. Defendants Rehash Their Post-Trial Motion**

Defendants begin their memorandum by complaining that plaintiff did not present evidence at trial about the monetary value of his lost pension benefits. (ECF No. 870 at 1.) This is a non-sequitur because, as the Court acknowledged at the final pretrial conference, plaintiff is not seeking compensatory damages for loss of pension benefits. (Tr., March 11, 2024, 13:18.)

Plaintiff is now seeking, as equitable relief, the restoration of pension seniority for the four-year period implicit in the jury's general verdict in favor of plaintiff. This relief is solely within the province of the Court. 29 U.S.C. § 2617(a)(1)(B).

Defendants next assert that the Court, rather than the jury, should have determined plaintiff's damages. (ECF No. 870 at 2.) Congress rejected this approach in the FMLA when it defined "damages" to include "wages, salary, employment benefits, or other compensation," § 2617(a)(1)(A)(i)(l), separate from "equitable relief," which includes "employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1)(B).

Defendants waived their next argument, a request that the Court find that plaintiff would not have been able to return to work within "12 weeks" had he not been deterred from taking additional FMLA leave. (ECF No. 870 at 3.) Defendants could have asked the Court to submit this question to the jury in a special verdict, pursuant to Rule 49 of the Federal Rules of Civil Procedure. That rule "contemplates that a party waives the right to object to an omission of any issue of fact raised by the pleading or by the evidence unless the party demands the submission of this issue to the jury before the jury retires." *Carter v. Chicago Police Officers*, 165 F.3d 1071, 1080 (7th Cir. 1998).

The jury, in its general verdict in favor of plaintiff, rejected the defense argument that it should not award any damages because plaintiff would have been unable to work. Defendants argued in closing:

And the plaintiff is seeking wages for the time after he quit, when he testified he was unable to work, and where he's now receiving his pension. The plaintiff's ask of three years of back pay and his sick leave is like blaming Ms. Shinnawi for his decision to retire. Both are unreasonable.

(Tr. 316:6-11.) The general verdict in favor of plaintiff creates “the presumption that material fact issues have been resolved in favor of the prevailing party.” *Antrim Pharms. LLC v. Bio-Pharm, Inc.*, 950 F.3d 423, 428 (7th Cir. 2020) (cleaned up). As defendants concede (ECF No. 870 at 2) in their quotation from *Franzen v. Ellis Corp.*, 543 F.3d 420 (7th Cir. 2008), the award of backpay “necessarily includes a determination that the plaintiff was able to return to work.” *Id.* at 428.

Defendants make a terse argument that the jury verdict on the plaintiff’s single claim is “inconsistent.” (ECF No. 870 at 3.) Inconsistent with what? The case was presented to the jury as a single claim. For a jury to reach inconsistent verdicts, it would have to rule on at least two claims “where both counts turn on the very same issue of ultimate fact.” *Bravo-Fernandez v. United States*, 580 U.S. 5, 8 (2016).

Defendants also complain that the jury made “impermissible determinations.” (ECF No. 870 at 3.) Defendants do not identify these

“impermissible determinations” and the Court should reject this cursory, incomprehensible, and undeveloped argument. *Reardon v. Danley*, 74 F.4th 825, 827 (7th Cir. 2023). To the extent defendants are asking the court to hypothesize about the jury’s reasoning, any such inquiry is impermissible. *Tuf Racing Prod., Inc. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000). As the Seventh Circuit explained in response to a similar challenge to a jury’s verdict:

[T]he court looks only at the “bottom line,” to make sure it’s reasonable, and doesn’t worry about the mental process that led there. Since the jury is a collective body rather than a single mind, since it does not write up its findings as the judge does when he’s the finder of fact, and since the law protects jurors from being interrogated about their reasoning processes, it really isn’t feasible to insist upon a demonstration that the jury arrived at its reasonable bottom line by reasoning to it the way a professional judge would do, rather than by guesswork, intuition, or compromise.

*Id.*

Defendants presented this case to the jury as a credibility dispute between plaintiff and Ms. Shinnawi, asserting that to find for plaintiff, the jury must find that “Shinnawi lied when she testified on the stand.” (Tr. 313:18-19.) The jury found for plaintiff, as was its right when faced with conflicting testimony. “[I]t is the province of a jury to assess the credibility of the competing spins on the facts.” *Downing v. Abbott Lab.*, No. 15 C 05921, 2019 WL 4213229, at \*12 (N.D. Ill. Sept. 5, 2019), *aff’d*, 48 F.4th 793 (7th Cir. 2022). In

this case, the jury fulfilled its duty “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

## **II. Defendants Are Not Entitled to a Double Credit for the Pension Payment Plaintiff Received**

Defendants ask the Court to require plaintiff, as a condition to any award of pension seniority, to “repay to the Pension Fund any pension amount he received that overlapped with the backpay dates.” (ECF No. 870 at 5.) Defendants, rather than plaintiff, should be required to make any repayments.

The Court ruled on the first day of trial that the Sheriff was entitled to a credit against damages due plaintiff for the pension benefits that plaintiff had received. (Tr. 13:18-14: 4.) Plaintiff abided by this ruling, explaining to the jury in closing argument that plaintiff was entitled to “the salary minus the pension” (Tr. 309:12) and reiterating in rebuttal that plaintiff was “not asking you to double pay him for the pension benefits that he received those three years.” (Tr. 319:9-10.) Defendant did not argue to the contrary, and the general verdict requires that the Court conclude that the jury award includes a credit to defendants for the pension payments that plaintiff received.

If, as a condition of retroactive pension seniority, the Pension Board is entitled to recoup the payments it made to plaintiff, the reimbursement should be made by defendants who have already received a credit for those payments. The Court should not reach this issue until the Pension Board is joined as a defendant, as plaintiff explains below.

### **III. There Is No Legal Impediment to the Award of Pension Seniority**

Defendants acknowledge that the Cook County Pension Fund is an entity separate from the Sheriff and from Cook County. (ECF No. 870 at 4.) Nonetheless, defendants argue that “it is not possible for the Pension Board to grant” retroactive pension seniority to plaintiff. (ECF No. 870 at 4.) Defendants seek to rely (ECF No. 870 at 4-5) on *Nawara v. County of Cook*, 17 C 2393, 2022 WL 3161838 (N.D. Ill. July 29, 2022), *appeal pending* 7th Cir., No. 22-1393, but as plaintiff has pointed out (ECF No. 868 ¶ 14), the plaintiff in *Nawara* conceded this issue. Plaintiff does not concede the issue here.

The district court rejected the “impossibility” argument in *Vega v. Chicago Park Dist.*, 605 F. Supp. 3d 1086 (N.D. Ill. 2022). That case arose from a claim of discrimination against the Chicago Park District. As summarized by the Seventh Circuit in *Vega v. Chicago Park District*, 954 F.3d 996 (7th Cir. 2020), a jury found in favor of the plaintiff on her claim under 42 U.S.C. § 1983 as well as on her Title VII claim. The district court overturned

the verdict on the § 1983 claim and remitted the Title VII damages to the statutory maximum of \$300,000. *Id.* at 1004. The district judge then granted equitable relief that included backpay and benefits.<sup>1</sup> *Id.*

After the Seventh Circuit affirmed the grant of equitable relief, the district court considered the plaintiff's complaint that the Park District had not restored her pension benefits. *Vega v. Chicago Park District*, 605 F. Supp. 1086 (N.D. Ill. 2022). The Park District asserted that “there was nothing [it] could do” to restore pension seniority. *Id.* at 1094. The district court held a hearing on the issue and accepted testimony that pensions are funded by employee contribution and contributions paid by the Park District. *Id.* at 1094, 1099. After rejecting the Park District's argument that “the pension fund is a separate entity, and CPD cannot be held responsible for what the pension fund does or does not do,” *id.* at 1099, the district court ordered the Park District to pay to the pension fund the employee and employer contributions required to provide the lost pension seniority. *Id.* at 1101.

The Court should follow a similar procedure, allowing plaintiff to add the Cook County Pension Fund as an additional defendant, and then set the

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<sup>1</sup> The equitable relief under Title VII includes back pay, benefits, and a tax-component award. 954 F.3d at 1002. “Wages, salary, employment benefits, or other compensation” under the FMLA are awarded by the jury. 29 U.S.C. § 2617(a)(1)(A)(i)(l).

matter for a hearing on the mechanics of restoring plaintiff to the pension seniority he lost because of defendants' violation of the FMLA.

#### **IV. CONCLUSION**

For the reasons above stated and those previously advanced, the Court should declare that plaintiff is entitled to receive retroactive seniority, join the Cook County Pension Fund as a defendant, and set the matter for a hearing on the steps required to implement the grant of retroactive pension seniority.

Respectfully submitted,

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