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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID F. JADWIN, D.O.,

Plaintiff,

v.

COUNTY OF KERN,

Defendants.

Civil Action No. 1:07-cv-00026 OWW DLB

PLAINTIFF'S MOTION FOR ADDITIONAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW
[F.R.C.P. 52(b)]

Trial: May 14, 2009

Complaint Filed: January 6, 2007

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Plaintiff hereby moves this Court pursuant to Fed. R. Civ. Proc. 52(b) for additional findings of fact and conclusions of law regarding Plaintiff's request for (i) liquidated damages under the Family and Medical Leave Act ("FMLA") and (ii) prejudgment interest. Plaintiff had made such request in the prayer of his Second Amended Complaint. (Doc. 241). Plaintiff's request was subsequently incorporated into the Pre-Trial Order (Doc. 328, 34:6-11, 41:14-18). The question of fact of "willfulness" under FMLA, forming the basis for liquidated damages, was submitted to the jury and jury verdicts in Plaintiff's favor were returned and subsequently entered by the Court.

Given that all liability issues have now been resolved in Plaintiff's favor and final judgment shall be entered presently, Plaintiff hereby respectfully moves the Court for an order awarding liquidated damages and prejudgment interest to Plaintiff for inclusion in the final judgment.

I. BACKGROUND

Plaintiff tried his claims for retaliation in violation of FMLA to a jury and prevailed on those, and all other, causes of actions. On June 8, 2009, the Court entered jury verdicts in favor of Plaintiff on all of Plaintiff's claims. Among other things, the jury found: (1) Defendant County of Kern ("County") retaliated against Plaintiff for engaging in certain activities in violation of the FMLA; (2) such retaliation was willful, (3) County retaliated against Plaintiff for taking medical leave under the FMLA; and (4) such retaliation was willful. The jury also found against the County on its defense that Plaintiff's employment contract was not renewed by reason of his conduct and alleged violation of the employer's rules and contract requirements and/or that Plaintiff's behavior was the cause of the nonrenewal of his contract.

In a subsequent bench trial, the Court found in Plaintiff's favor on his due process violation claim, but ruled that Plaintiff's request for injunctive relief based on his FMLA/CFRA interference claims lacked standing and were moot.

II. PROPOSED STATEMENTS OF FACT

1. Defendant County was at all relevant times aware of the prohibitions against retaliation contained in FMLA. This was established at trial by the testimony of numerous key officers of Kern Medical Center, as well as by deposition testimony excerpts that were read into the record.

2. Per the jury's verdicts, Defendant County retaliated against Plaintiff for engaging in

certain oppositional activities in violation of FMLA. See Doc. 384, p. 2.

3. Per the jury's verdicts, such retaliation was willful. See Doc. 384, p. 3.

4. Per the jury's verdicts, Defendant County retaliated against Plaintiff for taking medical leave under FMLA. See Doc. 384, p. 8.

5. Per the jury's verdicts, such retaliation was willful. See Doc. 384, p. 8.

6. Defendant County paid Plaintiff his base salary on a bi-weekly basis and his professional fees on a monthly basis. Plaintiff and Plaintiff's expert, Stephanie Rizzardi, testified to this at trial.

7. Plaintiff was wrongfully demoted on July 10, 2006, resulting in a $100,842 reduction in annual base salary effective immediately. Plaintiff and Plaintiff's expert, Stephanie Rizzardi, testified to this at trial. Defendant never put on evidence or expert witness testimony to the contrary.

8. Plaintiff was wrongfully placed on administrative leave from December 7, 2006 to October 4, 2007, resulting in a loss of professional fees that were proven at trial to be $134,897 per year. Plaintiff and Plaintiff's expert, Stephanie Rizzardi, testified to this at trial. Defendant never put on evidence or expert witness testimony to the contrary.

9. Plaintiff's contract was wrongfully not renewed on October 4, 2007, resulting in a total loss of compensation. Plaintiff and Plaintiff's expert, Stephanie Rizzardi, testified to this at trial. Defendant never put on evidence or expert witness testimony to the contrary. Moreover, Defendant abandoned any claim of mitigation in open court and on the record during trial.

III. PROPOSED CONCLUSIONS OF LAW

1. Defendant County's retaliations against Plaintiff, in violation of FMLA, for complaining internally about medical leave retaliation and filing a lawsuit containing claims based on FMLA, were "willful" within the meaning of FMLA, justifying an award of liquidated damages. Defendant County did not meet its "substantial" burden of proof to show that its violations of FMLA were in good faith and based on reasonable grounds, and therefore failed to overcome the "strong presumption" in favor of awarding liquidated damages under FMLA.

2. Defendant County's retaliations against Plaintiff, in violation of FMLA, for taking medical leave were "willful" within the meaning of FMLA, justifying an award of liquidated damages. Defendant County did not meet its "substantial" burden of proof to show that its violations of FMLA

were in good faith and based on reasonable grounds, and therefore failed to overcome the "strong presumption" in favor of awarding liquidated damages under FMLA.

3. Plaintiff is entitled as a matter of law to prejudgment interest from the date the right to recover vested.

4. Plaintiff is entitled to recovery of liquidated damages under FMLA in an amount equal to Plaintiff's economic damages plus pre-judgment interest at the prevailing California rate of 10%.

IV. LEGAL BRIEF

A. There Is a Strong Presumption in Favor of Liquidated Damages under FMLA

An employer who violates FMLA is liable for liquidated damages equal to the amount of actual damages and interest *unless* it can prove that its violations were not "willful", i.e., that it undertook in good faith the conduct that violated the Act and that it had "reasonable grounds for believing that [its action] was not a violation" of the Act. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. Ariz. 2001) (citations and footnotes omitted). See also 29 U.S.C. § 2617 (a)(1)(A)(iii).[1]

Double damages are the "norm," and single damages the exception. *See Reich v. Southern New England Telecomm. Corp.* (2nd Cir. 1997) 121 F3d 58, 71. As the court stated in *Arban v. West Publ'g Corp.*: "Although in the final analysis, we review a district court's decision on liquidated damages for abuse of discretion, that discretion must be exercised consistently with the *strong presumption* under the

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[1] 29 USC § 2617 of the FMLA states in pertinent part:

(a) Civil action by employees.

(1) Liability. Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected--

(A) for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 105 [29 USCS § 2615] proves to the satisfaction of the court that the act or omission which violated section 105 [29 USCS § 2615] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 105 [29 USCS § 2615], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and

(B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

statute *in favor of doubling*." 345 F.3d 390, 408 (6th Cir. Mich. 2003) (emphasis added).

B. Liquidated Damages Are Not a Windfall

Liquidated damages under FMLA are not a windfall to the plaintiff. Rather, they reflect a congressional judgment that employees should be compensated for the intangible damages that occur when wages are wrongfully withheld from them.

In *Jordan v. United States Postal Serv*., the court stated:

> In *Renfro v. City of Emporia, Kan.*, an FLSA case, we held that "the purpose for the award of liquidated damages is the reality that the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." 948 F.2d 1529, 1540 (10th Cir. 1991) (internal citations and quotations omitted). We conclude that liquidated damages under the FMLA serve the same purpose. We agree with the Second Circuit that "liquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA." 379 F.3d 1196, 1202 (10th Cir. Okla. 2004).

The *Jordan* court further stated:

> The district court expressed concern about awarding a judgment that amounted to a "windfall" to Appellant if Appellee had to pay liquidated damages in addition to the pre-trial back pay. But the non-discretionary calculation of damages under the FMLA should not be considered a "windfall," but rather a congressional judgment, enforced by the courts, designed to compensate employees for the obscure damages that occur when one wrongfully loses wages, even if only temporarily.
> *Jordan v. United States Postal Serv*., 379 F.3d 1196, 1202 (10th Cir. Okla. 2004)

C. Defendant Failed to Even Assert, Let Alone Prove, a Good Faith Defense to Liquidated Damages

It is not the employee's burden to disprove employer's good faith; rather, the employer has the substantial burden of asserting and proving its good faith. *Nero v. Industrial Molding Corp.* (1999, 5th Cir. Tex) 167 F.3d 921. Moreover, a good faith defense to an award of liquidated damages should be analyzed utilizing case law that interprets the liquidated damages provision of the Fair Labor Standards Act (29 USCS §§ 201 et seq.), rather than case law analyzing the qualified defense of good faith conduct applicable to public officials in 42 U.S.C.S. § 1983 actions. *Morris v. VCW, Inc.* (W.D. Mo 1996) 1996 WL 40544.

An employer that was aware of its FLSA (and by analogy, FMLA) obligations, but acted in reckless disregard thereof, will have difficulty "mount(ing) a serious argument" that it has nonetheless acted in good faith. *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1083 (8th Cir. Ark. 2000). As for an

employer who was *not* aware of its FMLA obligations, retaliation against an employee in violation of FMLA would be "reckless". *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1256 (2d Cir. N.Y. 1987) ("In reaching this conclusion, we agree with *Powell v. Rockwell Int'l Corp.*, 788 F.2d 279 (5th Cir. 1986), which held that even if an employer "did not 'know' that firing an employee in retaliation for filing an ADEA claim was illegal, then that action was certainly 'reckless.'") (citation omitted).

Here, the County never even asserted a good faith defense. The defense is nowhere stated in its Answer to the Second Amended Complaint (Doc. 246), nor in the Pre-Trial Order (Doc. 328).

Even had the County thought to assert such a defense, it would have been to no avail. The Ninth Circuit has made clear that an employer cannot use an employee's medical leave against him: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." *Bachelder v. America West Airlines, Inc*. (9th Cir. 2001) 259 F3d 1112, 1122 (emphasis in original). Yet, the evidence at trial incontrovertibly showed, and the jury found, that that is exactly what the County did.

Moreover, the evidence at trial showed that the County knew its obligations under FMLA. Peter Bryan, CEO of Kern Medical Center ("KMC"), Renita Nunn, KMC's director of human resources, David Culberson, Interim CEO of KMC, Irwin Harris, KMC's chief medical officer, and numerous other witnesses all testified in open court that they knew retaliation against an employee in violation of FMLA was wrong. In deposition, the County itself admitted this:

> Q. Okay. If an employee takes a medical leave, it's wrong to punish that employee for taking a medical leave under the CFRA and FMLA. Correct?
> A. That's correct.
> Deposition of County through Renita Nunn, 95:13-16

Yet, the County made a contradictory statement in deposition, which Plaintiff's counsel read into the record at trial, that medical leave retaliation would not necessarily be wrong:

> Q. Do you think people -- do you think it's wrong for an employer to punish an employee for taking medical leave for a legitimate reason?
> A. Maybe. It would depend on the circumstances.
> Deposition of County through Philip Dutt, Vol. 2, 243:7-11

Throughout the relevant time period, the County had the advice of counsel who, presumably, were competent as to FMLA. Numerous witnesses testified at trial to the presence of attorneys from the County Counsel's office at each of the meetings where retaliatory decisions were made against Plaintiff. These attorneys included Margo Raison, "labor counsel" in the County Counsel's office, *see* Doc. 398, Finding of Fact No. 17 at p. 9:4-8, and Karen Barnes, Chief Deputy County Counsel for the County, *see* Doc. 398, Findings of Fact No. 9 at p. 7:8-12, and No. 17 at p. 9:4-8.

In short, the County never even thought to allege, nor can it now claim, that its numerous violations of FMLA were in good faith and based on reasonable grounds. The evidence at trial established that the County knew of FMLA's prohibition on retaliation. Given the bright-line rule against FMLA retaliation established by the Ninth Circuit in *Bachelder*, the County's repeated violations could not have been anything but "willful". The County has utterly failed in acknowledging, let alone meeting, its "substantial" burden of proof to show both good faith and reasonable grounds. The "strong" presumption in favor of awarding liquidated damages is not overcome.

D. The Court is Bound by the Jury's Finding of "Willfulness"

"When legal and equitable issues to be decided in the same case depend on common determinations of fact, such questions of fact are submitted to the jury, and the court in resolving the equitable issues is then bound by the jury's findings on them." *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. Okla. 2002).

Where a jury finds an employer has engaged in retaliation in violation of FMLA, such finding is irreconcilable with a finding that the violation was "nonwillful". *Rose v. Hearst Magazines Div.*, 814 F.2d 491, 493 (7th Cir. 1987) (where employee filed ADEA claim, jury finding of retaliation is irreconcilable with finding that violation was "nonwillful"). In *Arban v. West Publ'g Corp.*, the court of appeal considered a district court's disregard of a jury finding that the defendant employer's decision to fire the plaintiff was a result of his medical leave and not his misconduct. There, the district court made its own contrary finding and denied an award of liquidated damages. The *Arban* court determined that this was "error" and that the trial court had engaged in an abuse of discretion. 345 F.3d 390, 408 (6th Cir. Mich. 2003).

In the instant case, the jury found that the County's actions against Plaintiff were a result of his

medical leaves and oppositional complaints and not any alleged misconduct by Plaintiff. That alone would compel a finding of "willfulness" under FMLA.

However, here, the question of fact of whether the County had "willfully" violated FMLA was itself submitted to the jury. The jury unanimously found that the County's violations of FMLA were indeed "willful". The Court is bound by this finding of fact by the jury.

E. Plaintiff is Entitled to Prejudgment Interest as a Matter of Law

An award of prejudgment interest is necessary to fully compensate Plaintiff for the prejudgment loss of use of money. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995) ("[M]oney has a time value, and prejudgment interest is therefore necessary in the ordinary case to compensate a plaintiff fully for a loss suffered at time t and not compensated until t + 1 . . . .") (internal quotation marks omitted).

Awarding both liquidated damages and prejudgment interest would not be an impermissible double recovery. The Ninth Circuit stated in *Criswell v. Western Airlines, Inc.*:

> The ADEA authorizes courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the act. 29 U.S.C. § 626(b). In *Kelly v. American Standard*, 640 F.2d 974 (9th Cir. 1981), this court recognized that liquidated damages and prejudgment interest serve different functions in making ADEA plaintiffs whole."
> (9th Cir. 1983) 709 F2d 544, 556–557

Moreover, it is well settled that state law regarding prejudgment interest is deemed substantive and is controlling as to supplemental state law claims under the *Erie* doctrine. The *Erie* doctrine requires federal courts in diversity actions – and when deciding supplemental state law claims in federal question cases – to apply state law as the "rule of decision". *Erie Railroad Co. v. Tompkins* (1938) 304 US 64, 78. *See* 28 USC § 1652. Prejudgment interest is deemed substantive, not procedural. *See Koehler v. Pulvers*, 614 F. Supp. 829, 850 (S.D. Cal. 1985) (applying state interest rate to pendent state law claims); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1522-23 (9th Cir. 1985) ("In diversity cases, state law governs the award of prejudgment and postjudgment interest"); *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 774 (1st Cir. 1994) ("prejudgment interest is substantive law"); *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 692 (2d Cir. N.Y. 1983) ("Because the applicability of state law depends on the nature of the issue before the federal court and not on the basis for its jurisdiction, state law applies to questions of prejudgment interest on the pendent claims in an action predicated upon violations of the federal securities laws"); *Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d Cir. 1998) (state law applies to calculation of prejudgment interest on supplemental state

law claims); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1333 (7th Cir. 1992) (per curiam) ("[F]ederal courts look to state law to determine the availability of (and rules for computing) prejudgment interest."); *Webco Indus., Inc. v. Thermatool Corp*., 278 F.3d 1120, 1134 (10th Cir. 2002) ("Prejudgment interest in a diversity action is thus a substantive matter governed by state law.").

Under California Civil Code § 3287(a), if a plaintiff's recoverable damages are "certain or capable of being made certain by calculation," the plaintiff is entitled as a matter of law to prejudgment interest from the date the right to recover vested. In the case of an action to recover backpay, interest is recoverable on each salary or pension payment from the date it was due. *Currie v. Workers' Comp. Appeals Bd*. (2001) 24 Cal.4th 1109, 1115.

In the instant case:

1. Defendant County paid Plaintiff on a bi-weekly basis.

2. Plaintiff was wrongfully demoted on July 10, 2006, resulting in a $100,842 reduction in annual base salary effective immediately.

3. Plaintiff was wrongfully placed on administrative leave on December 7, 2006, resulting in a loss of professional fees that were proven at trial to be $134,897 per year.

4. Plaintiff's contract was wrongfully not renewed on October 4, 2007, resulting in a total loss of compensation. Defendant abandoned any claim of mitigation in open court during trial.

Plaintiff respectfully requests prejudgment interest at the prevailing California rate of 10% on each of the above, calculated on a bi-weekly or monthly basis, as appropriate, and from the date each payment was due.

V. CONCLUSION

FMLA liquidated damages are "strongly" presumed unless the employer can meet its "substantial" burden of proof to show its violations of FMLA were in good faith and based on reasonable grounds. Here, the County never even thought to allege this defense. In any case, the County could not have met its burden of proof. The evidence at trial overwhelmingly showed that the County was aware of its obligations not to retaliate under FMLA, and that the County had the advice of competent counsel, including a labor attorney, at each decision point regarding Plaintiff. Ultimately, the jury found that the County had retaliated against Plaintiff in violation of FMLA. Such a finding of

retaliation is "irreconcilable" with a finding that such violation is "nonwillful".

Moreover, the jury made express findings of fact that the County had committed these violations of FMLA "willfully". It would be an abuse of discretion and error for this Court to disregard the jury's express findings and deny Plaintiff the award of liquidated damages that is compelled thereby.

An award of liquidated damages does not preclude an award of prejudgment interest. It is not a double recovery. Given prejudgment interest is a substantive matter and state law controls under the *Erie* doctrine, Plaintiff is entitled to prejudgment interest.

Plaintiff respectfully requests that this Court order entry of judgment for Plaintiff for FMLA liquidated damages in the amount of Plaintiff's economic damages of $505,457.00, plus pre-judgment interest at the prevailing California rate of 10%, calculated from the date each payment was due.

RESPECTFULLY SUBMITTED on August 10, 2009.

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