UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RENE M. PALMA	:	
v.	:	CIV. NO. 3:00CV1128 (HBF)
PHARMEDICA COMMUNICATIONS, INC.	:	

RULING ON DEFENDANT‹S POST-TRIAL MOTIONS

On November 13-15, 2002, a jury trial was held on Rene Palma‹s claims against her former employer, Pharmedica Communications, Inc. Ms. Palma brought her case under the Family and Medical Leave Act ("FMLA"), alleging that her employment was unlawfully terminated in retaliation for her opposition to Pharmedica‹s leave policy.

At the end of plaintiff‹s case, defendant moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The Court reserved decision pending completion of the evidence. The Court continued to reserve on the defendant‹s motion after the evidence was completed and the case was sent to the jury.

On November 15, 2002, the jury returned its verdict, finding in favor of the plaintiff on her claim that her former employer retaliated against her in violation of the FMLA and awarding the plaintiff $140,000 in compensatory damages. The issues of liquidated damages and front pay were reserved for the Court to decide.

Defendant renewed its oral motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) after the verdict was returned.

Defendant filed motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) and 50(b) **[Doc. #89]** and, in the alternative, for a new trial under Fed. R. Civ. P. 59(a) **[Doc. #91-1]**, or for a remittitur pursuant to Fed. R. Civ. P. 59(e) **[Doc. #91-2]**.

BACKGROUND

The following facts are essentially undisputed.

On December 6, 1990, Pharmedica hired Ms. Palma as a bookkeeper/administrative assistant to the business manager of the accounting department in its New Haven office. [Def. Ex. 501]. In November 1995, Pharmedica promoted Ms. Palma to assistant accounting manager. [Def. Ex. 502]. Between December 1990 and November 1995, Ms. Palma received annual compensation raises ranging from 7 percent to 10.5 percent. [Pl. Ex. 1]. In 1997 and 1998, plaintiff received raises of 5.5 percent and 4.75 percent respectively.

On or about May 13, 1997, Ms. Palma requested leave to care for her parents, who were ill. At this time, Pharmedica had fewer than fifty employees and was not subject to the requirements of the FMLA. On May 16, 1997, Pharmedica permitted plaintiff to borrow paid vacation days from her 1998 vacation time and permitted her to take a

thirty day unpaid leave of absence. At the end of her unpaid leave, Palma was permitted to borrow an additional five paid vacation days from her 1998 vacation time. [Def. Ex. 513].

During Ms. Palma‹s tenure at Pharmedica she was never issued any written warnings regarding her work performance.

On or about September 23, 1998, Ms. Palma informed her supervisor Susan Cipollone that she needed gallbladder surgery. Her surgery was scheduled for Friday, November 20, 1998, prior to the week of the Thanksgiving holiday. Pharmedica permitted Ms. Palma to take November 24, 25 and 30 and December 1, 1998 as borrowed 1999 paid vacation days. [Def. Ex. 511]. On December 7, 1998, upon returning to work, Ms. Palma requested permission to work a half-day schedule. Plaintiff provided a doctor‹s note, dated December 2, 1998, advising a half-day schedule during recuperation. [Pl. Ex. 6]. Ms. Palma worked a half-day schedule from December 7 through 11, 1998. She returned to a full-time schedule on December 14, 1998.

Ms. Palma was bitten by a dog and was out of work on January 5 and 6, 1999. She returned to work on January 7, 1999, with a bandaged hand.

On January 22, 1999, Pete Stefanski, Manager of Budgeting, Purchasing and Planning, discussed the details of Pharmedica‹s reorganization with Ms. Palma and informed her that her employment was terminated.

In all other respects the parties disagree on the sufficiency of the evidence that Ms. Palma‹s employment was unlawfully terminated in retaliation for her opposition to Pharmedica‹s leave policy.

The Verdict

On November 15, 2002, the jury returned a verdict in favor of plaintiff. The jury found that plaintiff had proven by a preponderance of the evidence that: (1) Ms. Palma opposed a practice made unlawful by the FMLA; (2) Ms. Palma was subjected to an adverse employment action; and (3) a causal connection existed between her opposition to an unlawful practice at Pharmedica and the termination of her employment. The jury further found that Pharmedica did not prove by a preponderance of the evidence that it would have made the decision to terminate Ms. Palma‹s employment in the absence of any consideration of her FMLA protected activity. The jury awarded plaintiff back pay in the amount of $115,000 and lost benefits in the amount of $25,000. As part of its damages consideration, the jury found by a preponderance of the evidence that, when Pharmedica discharged Ms. Palma, it reasonably believed that its actions complied with the FMLA. [Doc. #101 at 220-21].

MOTION FOR JUDGMENT AS A MATTER OF LAW

Standard of Law

The standards for granting a Rule 50 motion are well

established. Judgment as a matter of law is only appropriate where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). The Court, in ruling on a Rule 50 motion, is "required to consider the evidence in the light most favorable to the party against whom the motion is made and to give that party the benefit of all reasonable inference that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." Smith v. Lightning Bolt Products, Inc., 861 F.2d 363, 367 (2d Cir. 1988); Galdieri-Ambrosini v. National Realty & Development Corp., 136 F.3d 276, 289 (2d Cir. 1998); Binder v. Long Island Lighting Co., 57 F.3d 193, 198-99 (2d Cir. 1995). In other words, a motion for judgment as a matter of law may be granted only when:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or
> (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [it].

Eagleston v. Guido, 41 F.3d 865, 875 (2d Cir. 1994) (citation omitted), cert. denied, 516 U.S. 808 (1995).

"The standard for granting a renewed motion for judgment as a matter of law under Rule 50(b) is precisely the same as the standard

for granting the pre-submission motion." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2537, p. 335-57 (1995). When an initial motion for judgment as a matter of law under Rule 50(a) is not granted, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Id. at §2522, p. 244-46.

Evidence Viewed In A Light Most Favorable to Plaintiff

Viewed in a light most favorable to plaintiff, the evidence at trial supports the jury‹s verdict as follows.

Rene Palma‹s Testimony

Ms. Palma testified that she received a raise "every single year" she was employed at Pharmedica. [Doc. #103, Tr. at 28]. In November 1995, plaintiff was promoted to Assistant Account Manager and received a pay increase. Id. at 29. Tom Guastella, Pharmedica‹s Business Manager, authored a memo announcing Palma‹s promotion that stated, in part, "Rene has over four years experience as an exemplary Pharmedica employee. Her strong determination to learn and succeed represents the true Pharmedica spirit as exemplified by teamwork, devotion to duty, and enthusiasm. These traits will truly serve Pharmedica well as we enter a new and exciting year in 1996. Please join me in congratulating Rene on her well deserved promotion." [Pl. Ex. 4]. Ms. Palma testified that Guastella did not insist that she take another accounting course prior to giving her the promotion.

[Doc. #103, Tr. at 28, 34].

In 1996, after Guastella left Pharmedica, Sue Cipollone was promoted to Account Manager and became plaintiff‹s supervisor. In January 1997, Cipollone gave plaintiff a written review of her 1996 job performance. Id. at 39. Cipollone wrote, "If I were away for a week-I would be very comfortable that our Dept[artment] would run smoothly and Rene‹s ability to handle it would prevail." [Pl. Ex. 12]. Palma received levels 3 ("Fully and Effectively Meets Position Standards"), 4 ("Exceeds Position Standards"), and 5 ("Outstanding") on her performance review. Id. Under the heading, "Obstacles to Performance" Cipollone stated "The only obstacle is lack of "formal" accounting background. Courses in accounting would enhance her knowledge." Id. Plaintiff testified that Cipollone did not require that she take additional accounting courses at that time. Id.

In May 1997, plaintiff took a nine week leave of absence to care for her parents. [Doc. #103, Tr. at 41-42]. Ms. Palma testified that she returned to Pharmedica in mid-June and received no criticism for taking leave. Id. at 42.

On or about September 24, 1998, Ms. Palma testified that she spoke to Cipollone about scheduling gallbladder surgery and asked if she could work half days while recuperating from the surgery. Palma also testified that she had several discussions with Pete Stefanski and Cipollone after her initial request was denied. Id. at 51, 52

(testifying she requested half days at least three times), 53 (testifying that, on the day before surgery, her request was again denied by Stefanski and Cipollone), 56 (testifying that she phoned Cipollone a few days after the surgery and her request was again denied). Palma testified that she agreed to postpone the surgery to accommodate Cipollone‹s vacation schedule and scheduled the surgery after October, a busy business month for Pharmedica. Id. at 185. Plaintiff testified that she spoke to Stefanski "about the half-day policy, that it had stated in the manual that if it was medically necessary that half-days would be allowed-half sick days would be allowed. And then he told me that there was a disclaimer in the front of the manual that said that any Pharmedica policy could be changed at any time by Pharmedica and so that policy was changed." Id. at 188. On December 2, 1998, plaintiff‹s doctor provided her with a disability certificate stating, "[t]his is to certify that the above patient was under my professional care from November 20, 1998 . . . Restrictions: light duty ½ days for approximately 2 weeks. No lifting more than 10 pds." [Pl. Ex. 6]. Plaintiff testified that she returned from her doctor‹s appointment and,

> I said to myself, "My doctor‹s telling me that I should take a half day - return half days. They are telling me - Pharmedica‹s telling me that I can‹t. This can‹t be right." So I remembered hearing about an FMLA law that Senator Dodd had authored and so I decided to call the Department of Labor for information and I did speak with a person there by the name

by the name of Donna O‹Leary.

[Doc. #103, Tr. at 57]. Plaintiff returned to work on December 7, 1998. She testified that, upon her return to work,

> I then went to Ms. Cipollone, I believe it was about 9:00 o‹clock in the morning, and I asked her if I could possibly work half-days for three days that week because I wasn‹t feeling well. I knew that by mid-day I would need to probably lay down or something because I just didn‹t have my strength back and I was still having some discomfort, and she told me that I could not do that. So I then produced this doctor‹s note from Dr. Ponn and I said to her . . . "I do have a doctor‹s note and my surgeon has suggested I work half-days - or has said I should work half-days." And so at that point she then told me, "You know what Pete [Stefanski] said, . . . Pete has said that you cannot do that, that it would set a precedent for the company."
>
> I did tell Ms. Cipollone . . . that I had called the Department of Labor and that I had contacted them to do some research because I didn‹t know for sure whether I could or not, and I felt that if my doctor had said that I could that that‹s important and that I should be allowed to. And so she was surprised. I remember her sitting back in her chair and she said she‹d have to speak to Mr. Stefanski about it.

Id. at 59. Plaintiff testified that, when she spoke to Stefanski, he indicated that he would need to call Pharmedica‹s corporate attorney to discuss the matter. Id. At around noon, Stefanski informed plaintiff that the Department of Labor was correct and that she was entitled to take half-days. Id. Plaintiff testified that Stefanski

seemed "irritated and bothered. . . he wasn‹t happy that this was taking place. And then I felt that my having called the Department of Labor had upset him." Id. at 59-60.

Plaintiff testified that, thereafter, Ms. Cipollone and Mr. Stefanski were "cool" toward her, "not as friendly." Id. at 62. She further stated that on January 18 or 19, 1999, she overheard a conversation between Timmerman and Stefanski, and heard Timmerman say "get rid of her." Id. at 63. On Friday, January 22, plaintiff‹s employment was terminated. Plaintiff testified that Stefanski said the reason was due to a reorganization in the company and that her position had been eliminated. Id. at 64. Stefanski offered no other reason for the termination. Id. He never mentioned anything about work performance, work hours, plaintiff‹s relationship with Cipollone or a failure to take accounting courses, only that the termination of the position was due to the reorganization. Id. at 64, 188. Plaintiff testified that she could not remember Cipollone speaking to her about arriving at work on time, Id. at 94, 185; she never received written criticism for copying checks, nor did Cipollone instruct plaintiff that she must take accounting classes. [Doc. #101, Tr. at 107-08]. Plaintiff added that she had not heard or read anything about reorganization prior to her dismissal and that she later learned she was the only person who lost her job as a result. Id. at 65.

Ann Flaherty‹s Testimony

Ann Flaherty, a Pharmedica Employee, testified that Sue Cipollone told her that plaintiff

> wanted to come back half-days and Susan told her she couldn‹t come back half-days and then [plaintiff] went to Larry, and she had a note from her doctor, and Larry also said, "No, we don‹t have half-days," and Susan said that [Palma] was making a good salary. She got good raises every year. She should not have complained and should not have questioned Larry because you just don‹t question Larry.
> . . . .
>
> I just remember [Cipollone] saying that Rene should not have questioned Larry that she had a good job, she was getting paid a lot of money, she got substantial raises every year, and she should not have complained or questioned Larry.

[Doc. #103, Tr. at 205-06].

Michele Olds‹ Testimony

Michele Olds, a part-time employee of Pharmedica, testified that, after Ms. Palma‹s employment was terminated, she had a conversation with Sue Cipollone. Olds testified that Cipollone said

> Rene had been let go . . . without getting into details. She didn‹t tell me a lot of details about it. It was basically questioning Larry‹s authority or-and also just that she had certain situations that Larry did not appreciate.
>
> . . . .
>
> She had basically said-there was-he had a lot of different rule[s], un-talked about rules.
>
> . . . .
>
> THE COURT: Now, the question is "What did she say to you? What did Ms. Cipollone say to you?
>
> THE WITNESS: That you did not question Larry‹s authority.

[Doc. #103, Tr. at 228-29].

Pete Stefanski‹s Testimony

In recalling the sequence of events on December 7, Pete Stefanski testified that

> I think when [Ms. Palma] came in, she went to Susan Cipollone first and had identified that she had requested to work half-days. Then Rene came to me and said the same thing and my initial interpretation of the Family and Medical Leave Act was that it did not allow for half-day leaves. Pharmedica‹s policy was on vacation and personal time, that we did not have half-day increments. They were taken in full days.

[Doc. #101, Tr. at 25].

> Q. On December 7th and up until that time, what did you think intermittent leave meant?
> A. In regards to the Family and Medical Leave Act?
> Q. Yeah.
> A. My interpretation was intermittent was from time to time if someone would come back to work, they would be maybe in for a day or have to take a couple of days off periodically, coupled with - that was my interpretation of intermittent, not increments of a particular day.

Id. at 26. Only after Cipollone reported her conversation with the Department of Labor and after Stefanski consulted with Pharmedica‹s attorney did Stefanski understand that Palma was entitled to half-day unpaid leave per the Family and Medical Leave Act. Id. at 27.

In 1998, the employee manual was changed, permitting vacation and personal time in full-day increments and no partial day or half-day increments. Id. at 54. Stefanski testified that Larry Timmerman initiated the change. Id. at 55. Stefanski stated he spoke to Cipollone about Ms. Palma‹s half-day request "several" times. Id. at 56. During a meeting with Ms. Palma, Stefanski told plaintiff that the disclaimer in the manual overrode her request for half-days. Id. Stefanski agreed, when asked "So after having brought up this issue several times when you told her no, you can‹t work these half-days repeatedly, you realized that this wasn‹t correct, that she was finally allowed to work half-days in December; is that right?" Id. at 58.

Stefanski agreed that "it just so happened that [Timmerman] also made that decision [to reorganize] the same month that Ms. Palma called the DOL, isn‹t that right, in December of 1998?" [Doc. #101, Tr. at 59]. He also agreed that "Nothing was ever put in writing about this reorganization . . . before Ms. Palma was fired . . . ."[1] Id. Indeed, Stefanski agreed that Ms. Palma was the only employee to lose her job as a result of the reorganization. Id. at 41-42, 59. He also agreed that Ms. Palma‹s job duties continued to exist at Pharmedica. Id. at 60. Stefanski testified that David Lynch, hired after Rene Palma was dismissed from Pharmedica, held a higher position in the accounting department and did not assume any of Ms. Palma‹s job responsibilities. Id. at 43. Stefanski stated that the accounting department consisted of 4 people, including himself, in 1996. In 2001, when Stefanski left Pharmedica, the Accounting Department had nine or ten employees. He attributed the increase to the growth of the business. Id. at 49-50. Indeed, Ms. Nerkowski, Ms. Parnham and Ms. Gallnick, temporary employees hired after Ms. Palma‹s dismissal, eventually became full-time Pharmedica employees. Id. at 45-46, 50.

Stefanski testified that, in 1996-97, invoices in the accounting department were going out on time 98 percent of the time.

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[1]The only writing regarding the reorganization of the accounting department was issued three days after Ms. Palma‹s employment was terminated. [Doc. #101, Tr. at 59].

Id. at 50-51. This was one of Ms. Palma‹s job duties. Id. He also testified that, as late as the second half of 1998, he was assigning project reconciliation work to Ms. Palma. Id. at 51. Stefanski testified that he never once criticized plaintiff for doing the work too slowly. Id. at 51. Nor did he put any criticism in writing. Id. at 52.

Cindy Kane‹s Testimony

Cindy Kane, a receptionist at Pharmedica, testified that in her twelve years with Pharmedica she has received raises of "roughly three or four percent." [Doc. #102, Tr. at 11]. Ms. Kane wrote plaintiff a letter on February 5, 1999. Ms. Kane testified that it looked as though "they were struggling" in accounting after Ms. Palma‹s dismissal because they were short handed. Id. at 19, 24.

Ms. Cipollone recalled a conversation with Ms. Kane about a week after Ms. Palma was dismissed, during which Cipollone said "the whole situation was absurd." Id. at 171-72. Cipollone explained that it was absurd that, all of a sudden, using temporary employees was not working and she could not get qualified temporary employees from the temp agency. Id. at 197.

Sue Cipollone‹s Testimony

Sue Cipollone, Accounting Manager at Pharmedica, testified she became Ms. Palma‹s supervisor after Tom Guastella‹s employment was

terminated and only three weeks after she was hired.[2] [Doc. #102, Tr. at 64]. She testified that, in April 1996, she continued keeping a log begun by Guastella of Ms. Palma‹s work habits and times of arrival and departure. Id. at 66-69. Ms. Cipollone testified that she "let it ride. I did talk to her just generally about her being late. I thought we were going to work it out . . . I let it ride because I felt the change in the structure of the organizational chart with her now reporting to me was devastating to her, and I thought we could work it out and even though she lacked accounting skills, I felt I could help and teach her." Id. at 70-71.

Cipollone testified that, on December 7, 1998, upon her return from medical leave, Ms. Palma asked her to reconsider half-days. Id. at 117. Ms. Palma then provided Cipollone with a doctor‹s note, told her that she had spoken with a woman from the Department of Labor and provided Cipollone with the name and number to call. Id. She further testified,

> It was early. This must have transpired right at 9:05, 9:00 o‹clock. I said, well, I‹ll find out right away and I thanked her and I made the call to the Department of Labor and I was on

[2]Larry Timmerman testified that Sue Cipollone was plaintiff‹s supervisor and he assumed she was consulted regarding Pete Stefanski‹s recommendation to terminate plaintiff‹s employment. [Doc. #101, Tr. at 52, 87-88, 101]. Pete Stefanski testified that Sue Cipollone was plaintiff‹s "direct supervisor." [Doc. #101, Tr. at 6]. He stated that he conferred with Cipollone, when plaintiff was on medical leave to determine whether the department could function without Palma. [Doc. #101, Tr. at 21-22].

> quite a few minutes and found out, we were incorrect. We did make a mistake. We should have allowed the half-We should allow the half-days. I felt, after talking to the woman, we should be doing this and when I hung up, I did go in to see my supervisor and I relayed to him the conversation with my opinion. We have erred. She has come in today. She should begin half-days.

Id. at 118. Cipollone testified that she conferred with Pete Stefanski to relay the conversation and to offer her opinion. Id. Cipollone stated that Stefanski followed up with the company‹s attorney and then told her that Ms. Palma could certainly take half-days for as long as was medically necessary. Id. At around 10:15 a.m., Cipollone stated she apologized "profusely" to Palma and told her they had made a mistake, and told plaintiff to take half-days "as necessary" and to take care of herself. Id.

On cross examination, Cipollone was asked,

> Q. Ms. Cipollone, you just testified that Ms. Palma was allegedly not a good employee; is that right?
> A. That‹s correct
> Q. But you also just testified that she wasn‹t terminated for being a bad employee; is that right?
> A. That‹s correct.
> Q. That-Your testimony is that she was only terminated because of the reorganization; is that right?
> A. That‹s correct.
> Q. And you never told her that she was being terminated for being a poor performer; is that right?
> A. That‹s right.
> Q. Or for working-coming in late?

A. That‹s correct.
Q. Or going home early allegedly?
A. Correct.
Q. Just reorganization; is that right?
A. That‹s correct.

[Doc. #102, Tr. at 140-41]. Ms. Cipollone agreed that the entire time she was keeping a log on plaintiff, she continued to give her pay raises. Id. at 144-45. When asked, "when Ms. Kane testified that she had been given three to four percent raises . . . does that mean that she was a poorly performing employee? " Ms. Cipollone responded, "No, it does not." Id. at 148. During her deposition in May 2001, Ms. Cipollone testified that a 5 percent raise was not a poor raise. Id. at 188.

Cipollone testified that it was her understanding that Stefanski interpreted the half-day policy to mean that no employee could take half-days for medical or personal reasons. Id. at 159. Cipollone estimated that Palma requested half-days about three times and Cipollone responded "Rene, we have gone over this and I have gone-have run it by Mr. Stefanski. I haven‹t gotten a change of answer. I‹m assuming it will remain the same." Id. at 164-65. Cipollone told Stefanski that Palma requested that Timmerman be consulted on her request for half-days. However, Cipollone testified she did not know whether Stefanski discussed the matter with Timmerman. Id. at 165.

Ms. Cipollone testified that Pharmedica utilized temporary

employees in New Haven as far back as 1996. Id. at 166.

> Q. So, is it fair to say that the concept of using temps was nothing new at Pharmedica?
> A. That‹s correct.
> Q. And that had been going on since 1996?
> A. Yes
> Q. And Ms. Palma‹s position could have been outsourced long before 1999; isn‹t that right?
> A. Yes.
> Q. Okay, but it never was; is that right?
> A. That‹s correct.

Id. Cipollone agreed that she never gave plaintiff any written warning that her performance was unacceptable. Id. at 170.

> Q. And in fact you were surprised when you found out that Ms. Palma was being let go; is that right?
> A. I was not part of the decision making, so I was surprised.
> Q. If she was such a poor employee, why were you surprised that she was being let go?
> A. I was just surprised that a decision had been made to out source
> Q. Without your knowledge?
> A. Perhaps without my knowledge.
> Q. Isn‹t it a fact, Ms. Cipollone, you never recommended that Ms. Palma be terminated; isn‹t that right?
> A. They never asked me for my opinion, correct.
> Q. But the fact is, you never made that recommendation, did you?
> A. No I never did.
> Q. And you were her supervisor?
> A. That‹s correct.
> Q. So, as far as you know, the decision to terminate Ms. Palma came from higher up; isn‹t that correct?
> A. Yes.
> Q. Do you know who terminated her employment?
> A. I do not know.

Id. at 170-71.

Cipollone testified that when Palma was on medical leave Stefanski spoke to her privately about whether the department could operate without Palma by utilizing temporary help. [Doc. #102, Tr. at 124-25]. She agreed it could work. Id.

Ms. Cipollone testified that Ms. Palma‹s job duties continued after her employment was terminated. Id. at 172. Her job title was eliminated, but all her job duties continued to be performed by temporary employees. Id. at 173. She testified that each temporary employee was making twelve to fifteen dollars an hour, Id. at 175; as compared to Ms. Palma‹s hourly wage of approximately $22 per hour. Id. at 176.

Richard Bavasso‹s Testimony

Richard Bavasso, Executive Vice-President and Chief Operating Officer at Pharmedica, testified that the business was experiencing 100 percent growth annually from 1989 through the present. [Doc. #102, Tr. at 209]. He described it as a "[v]ery successful company grappling with all the rapid growth issues." Id. He explained that Pharmedica‹s growth led the company to hire more employees "[t]o accommodate increased sales and to accommodate the operations necessary to execute the projects we were selling." Id. at 216.

Larry Timmerman‹s Testimony

Larry Timmerman testified that, in 1998, Pharmedica was growing very rapidly and he agreed with Pete Stefanski that a lot of work was

coming in and accounting was falling behind. [Doc. #101, Tr. at 95]. Timmerman agreed he was the person who recommended termination of plaintiff‹s employment and made the final decision to discharge Ms. Palma. Id. at 100. In 1998, the employee manual was changed, permitting vacation and personal time in full-day increments and no partial day or half-day increments. Id. at 54.[3]

Discussion

Defendant seeks judgment as a matter of law, arguing that plaintiff failed to present legally sufficient evidence to establish: (1) that a causal connection existed between her opposition to an unlawful practice at Pharmedica and the termination of her employment; and/or (2) that she opposed a practice made unlawful by the Family Medical Leave Act (FMLA). "An employer is prohibited from discriminating against employees . . . who have used FMLA leave." Bond v. Sterling, 77 F. Supp. 2d 300, 302 (N.D.N.Y. 1999) (quoting King v. Preferred Technical Group, 166 F.3d 887, 891 (7th Cir. 1999) (quoting 29 C.F.R. §825.220(c)). "Nor may employers 'use the taking of FMLA leave as a negative factor in employment decisions, such as hiring, promotions or disciplinary actions." ' Id. (quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 160 (1st

[3]Stefanski testified that Larry Timmerman initiated the change. Id. at 55.

Cir. 1998) (quoting 29 C.F.R. §825.220(c)). In cases where a plaintiff has alleged a retaliatory discharge claim under the FMLA, courts have borrowed the framework employed in cases brought under Title VII. See Mann v. Mass. Correa Elec., No. 00 Civ. 3559, 2002 WL 88915, at * 6 (S.D.N.Y. Jan. 23, 2002); Bond, 77 F. Supp. 2d at 303; Belgrave v. City of New York, No. 95 Civ. 1507, 1999 WL 692034, at * 2 n.38 (E.D.N.Y. Aug. 31, 1999) ("Although the Second Circuit has not decided the issue, other courts of appeals have held that FMLA retaliation claims are covered by the McDonnell Douglas analysis").

Claims of retaliation are analyzed according to the burden-shifting framework laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Cosgrove v. Sears, Robuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993). The plaintiff must first establish a prima facie case of retaliation. If the plaintiff succeeds in making out a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nonretaliatory reason for the adverse employment action. If the defendant meets that burden, the plaintiff has the opportunity to demonstrate that the defendant's proffered reason was merely a pretext for retaliation. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998). A violation may be found if the adverse employment action was based in part on a retaliatory purpose, even if that was not the sole

motive. See Cosgrove, 9 F.3d at 1039; Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986); Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403, 410 (S.D.N.Y. 1996). "[W]hen a retaliation claim goes to the jury, the jury's task is simply to determine the ultimate question of whether the plaintiff met her burden of proving that the defendant was motivated by prohibited retaliation." Gordon v. New York City Board of Educ., 232 F.3d 111, 116 (2d Cir. 2000) (internal quotation and brackets omitted).

1. Causation

"First, plaintiff must establish a prima facie case of discrimination." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). To make out a prima facie case of retaliation, a plaintiff must show: (1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action. See Gordon, 232 F.3d at 113; Quinn, 159 F.3d at 769. To establish that an activity was protected, a plaintiff need only prove that she was acting under a good faith belief that the activity was of the kind covered by the statute. Cosgrove, 9 F.3d at 1039. "Proof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593

(2d Cir. 1988); see also Gordon, 232 F.3d at 117.

Defendant challenges the jury‹s finding on the fourth element. According to defendant, there was no causal connection between Sue Cipollone‹s alleged remarks[4] and plaintiff‹s termination, because Cipollone had no part in the decision to terminate plaintiff and her statement cannot, as a matter of law, support a claim for wrongful termination. Even if a decision-maker made the comments, defendant contends that no evidence connects the comments to the termination, and that the timing of Cipollone‹s statements does not create or support an inference of retaliatory termination. Defendant argues that plaintiff‹s subjective belief as to the reasons for her termination cannot support the verdict.

In addition, defendant contends that plaintiff did not present legally sufficient evidence to establish that she opposed a practice made unlawful by the FMLA.

It is not disputed that plaintiff availed herself of a right protected under the FMLA when she requested half-day leave in order

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[4]Defendant identified the "alleged remark" as follows.

> The plaintiff‹s witnesses Ann Flaherty and Michelle Olds testified that they heard Cipollone say "you don‹t mess with Larry," or "you don‹t question Larry," referring to Mr. Timmerman. This single statement is the principal evidentiary basis for the plaintiff‹s claim of retaliatory discharge.

[Doc. #90 at 15].

to recuperate from surgery, nor is it disputed that the defendant knew of the protected activity or that plaintiff was adversely affected by an employment decision--plaintiff‹s employment was terminated. The question then is whether plaintiff established a causal connection between the employee's protected activity and the adverse employment actions. Hodgens, 144 F.3d at 161.

The Court concludes that, viewing all the evidence in a light most favorable to plaintiff, she satisfied her burden of establishing a prima facie case of discrimination. Defendant can simply not meet the standard for the granting of a Rule 50 motion. See Eagleston v. Guido, 41 F.3d at 875.

The jury was entitled to believe the testimony of Ann Flaherty and Michele Olds that Cipollone attributed Ms. Palma‹s termination of employment to her having challenged Timmerman‹s half-day policy. Both Flaherty and Olds testified that Cipollone said Palma should not have questioned Timmerman. Defendant attempts to neutralize Flaherty‹s testimony by claiming that Cipollone was not involved in the decision making process. However, there is sufficient evidence in the record for the jury to find that Palma‹s direct supervisor, Cippolone, was aware of the reason for the decision even if she was not involved in the actual decision-making process. Plaintiff argues that Cipollone‹s remarks are direct evidence of a forbidden animus: retaliation. "If the jury believed [Flaherty and Old‹s] account[s], it could

reasonably have found a forbidden motive at work." Rose v. New York City Bd. of Educ., C.S.D. #13, 257 F.3d 156, 162 (2d Cir. 2001) (the employer‹s "alleged statements to [plaintiff] were not the stray remarks of a colleague but rather were comments made directly to her on more than one occasion by her immediate supervisor, who had enormous influence in the decision-making process."). The Court concurs in Judge Nevas‹ finding on summary judgment that Ann Flaherty‹s testimony regarding Cipollone‹s comment need not be disregarded as a stray remark and affirms this Court‹s ruling In Limine on the same issue. [Doc. #77 at 8-10].

The jury was entitled to infer that Timmerman was involved in the decision to fire Ms. Palma. Indeed, Stefanski testified that it was Timmerman‹s decision, though Timmerman denied it, after having previously admitted it before the Connecticut Commission on Human Rights and Opportunities. Timmerman testified that Cipollone was plaintiff‹s supervisor and he assumed she was involved in the decision to dismiss Palma. [Doc. #102, Tr. at 4; video Tr. at 96]. Clearly, the jury was entitled to believe Flaherty and Old‹s testimony and infer from all the evidence that retaliation was involved in the decision. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 135 (2000) (In reviewing all the evidence in the record on a Rule 50 motion, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make

credibility determinations or weigh the evidence.").

Moreover, there was testimony from Stefanski that Timmerman initiated the change to the 1998 employment manual prohibiting the taking of vacation and personal time in partial or half-day increments. [Doc. #101, Tr. at 54-55]. Stefanski testified that he spoke to Cipollone about Ms. Palma‹s half-day request "several" times, and that he told Ms. Palma that the disclaimer in the employee manual overrode her request for half-days. Id. Cipollone testified that she understood that Stefanski "interpreted" "Timmerman‹s half-day policy," but that she understood the policy came down from Timmerman. [Doc. #102, Tr. at 159-160]. Palma testified that she asked Cipollone to inform Timmerman of her request to work half-days and "she said that she would." [Doc. #103, Tr. at 52]. Timmerman agreed he was the person who recommended termination of plaintiff‹s employment and made the final decision to discharge Ms. Palma. [Doc. #101, Tr. at 100]. Significantly, Stefanski agreed that "it just so happened that [Timmerman] also made that decision [to reorganize] the same month that Ms. Palma called the [Department of Labor] . . . in December of 1998." Id. at 59]. There was no evidence that Palma challenged any other Pharmedica policy in 1998. The jury could reasonably infer from the evidence that there was a causal connection between Ms. Palma‹s challenge to Timmerman‹s half-day policy and her termination six weeks later.

> The lack of knowledge on the part of particular individual agents is admissible as some evidence of a lack of causal connection, countering plaintiff‹s circumstantial evidence of proximity or disparate treatment. A jury, however, can find retaliation even if the agent denies direct knowledge of a plaintiff‹s protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge.

Gordon v. New York City Bd. of Educ., 232 F.3d 111, 117 (2d. Cir. 2000)(emphasis in original, citation omitted).

In addition, defendant contends that plaintiff did not present legally sufficient evidence to establish that she opposed a practice made unlawful by the FMLA. However, the record clearly establishes that plaintiff repeatedly requested half-day leave from Cippolone and Stefanski and then contacted the DOL to ascertain her rights under the FMLA. She then informed Cippolone and Stefanski of her rights under the FMLA. The Court finds the record contains legally sufficient evidence to establish that plaintiff opposed a practice made unlawful under the FMLA.

Accordingly, plaintiff introduced sufficient evidence for a jury to conclude that a causal connection existed between the termination of her employment and protected activity.

2. Pretext

Once a prima facie case is established, the burden shifts to

the defendant to produce evidence that plaintiff‹s employment was terminated for a legitimate, nondiscriminatory reason. Reeves, 530 U.S. at 142 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1993). "This burden is one of production, not persuasion; it can involve no credibility assessment." Id. (citation omitted). Here, plaintiff does not contend that defendant failed to meet its burden of producing a nondiscriminatory reason for discharging plaintiff. Ultimately the "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." Id. at 143 (citation omitted).

"Where a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendants proffered motives as pretextual, a jury must be instructed, if requested, to apply the Price Waterhouse burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff‹s claims of pretext." Rose, 257 F.3d at 162. Here the jury was provided with a burden-shifting instruction [Doc. #101, Tr. at 207], and a jury interrogatory.[5] [Jury Inter. 4].

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[5]Jury interrogatory 4 asked:
Did Pharmedica prove by a preponderance of the evidence that it would have made the decision to terminate Ms. Palma‹s employment in the absence of any consideration of her FMLA protected activity?
The jury answered "no."

Defendant does not challenge the Court‹s instruction or jury interrogatory.

Despite the fact that defendant proffered nonretaliatory justifications for its actions, the jury was entitled to weigh the evidence, credit the plaintiff‹s evidence, and find that Pharmedica‹s explanation for its actions were pretextual.

In support of the verdict, plaintiff relies on the following evidence and testimony.

Timing

It is well established that an inference of retaliation is properly drawn where an adverse employment action closely follows protected activity. Davis v. State University of New York, 802 F.2d 638, 642 (2d Cir. 1986) (citing Grant v. Bethelhem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980)). Here, the record reflects that plaintiff‹s successful challenges to the half-day policy, and her contact with the Department of Labor on or before December 7, 1998, were closely followed by her dismissal on January 22, 1999, approximately six weeks later. The jury was instructed that "[closeness in time between plaintiff‹s protected activity and her discharge is circumstantial evidence of causal connection, but timing alone does not establish discriminatory intent." [Doc. #101, Tr. at 204]. Further, Stefanski agreed, on cross examination, that "it just

so happened that [Timmerman] also made that decision [to reorganize] the same month that Ms. Palma called the DOL, isn‹t that right, in December 1998?" [Doc. #101, Tr. at 59].

Timmerman‹s Testimony

Plaintiff next points to Timmerman‹s inconsistent testimony as central to the jury‹s credibility determination, justifying an inference in favor of plaintiff. At trial Timmerman testified he did not fire Palma. [Doc. #101, Tr. at 99]. Before the Connecticut Commission on Human Rights and Opportunities, Timmerman admitted under oath that he made the "final decision" to fire plaintiff and made the recommendation to fire her. Id. at 100]. Plaintiff argues, and the Court agrees, that "[t]he jury was therefore entitled to disbelieve his entire testimony . . . and infer that he was not telling the truth." [Doc. #105 at 20]. There was also affirmative evidence that Timmerman was the decision-maker, in Stefanski‹s testimony.[6]

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[6]Stefanski was asked,

> Q: And your testimony also has been it was Mr. Timmerman‹s decision to fire Ms. Palma, is that right?
> A: It was his final decision.
>
> Q: Okay, and it just so happened that he also made that decision the same month that Ms. Palma called the DOL, isn‹t that right, in December of 1998?
> A: Yes, that‹s correct.

[Doc. #101 at 58-59].

Reorganization and Outsourcing

Stefanski agreed that the only Pharmedica employee to lose her job in the reorganization was plaintiff. [Doc. #101, Tr. at 59]. He testified that all of plaintiff‹s job duties were reassigned to temporary employees, some of whom were eventually hired as full-time Pharmedica employees. Id. at 45-46, 50. Even though Palma‹s job was eliminated, the accounting department continued to grow and work loads increased. Stefanski testified that, from 1999 through 2001, the accounting department grew from 4 employees to 9 or 10 employees. He attributed the increase in staffing to the phenomenal growth in business at Pharmedica. Id. at 49-50. Indeed, there was no prior writing indicating that Pharmedica was undergoing a "reorganization" until after Palma was fired and the company announced the hiring of David Lynch. Def. Ex. 519. It is undisputed that David Lynch did not assume any of plaintiff‹s job responsibilities.

Stefanski stated that the plan to hire temporary employees as a strategy for the reorganization of the accounting department was not new. He had not considered outsourcing Ms. Palma‹s job responsibilities in 1996 or 1997. He testified that the first temporary employee, Michele Olds, was hired to assume the increased work load. [Doc. #101, Tr. at 46-47]. Richard Bavasso testified that, from 1998 to the present, Pharmedica, a "[v]ery successful company grappling with all the rapid growth issues," had seen 100% growth per

year. [Doc. #102, Tr. at 209]. A jury could reasonably have inferred that Pharmedica did not have an efficiency problem but rather a serious lack of manpower during this growth period. Stefanski testified that, by March 2001, Ms. Parnham, Ms. Gallnick and Ms. Nerkowski were hired as full-time Pharmedica employees in the accounting department. Id. at 50. Clearly, defendant‹s stated "reorganization" strategy conflicted with the evidence that Pharmedica‹s growth was outstripping its employees‹ ability to keep up with the workload. But see Sherman v. AI/FOCS, Inc., 113 F. Supp. 2d 65, 71 (D. Mass. 2000) (undisputed testimony that company was in a financial "free fall" was a legitimate reason for choosing to eliminate a position, however the company "must still establish a defensible basis for selecting plaintiff as the person to terminate.").

Viewing the evidence in a light most favorable to plaintiff, the jury was entitled to weigh the credibility of the witnesses and to infer that defendant‹s claim of reorganization of the accounting department was pretextual, and that the termination was motivated by retaliation. See Windham v. Time Warner, Inc., 275 F.3d 179, 188-189 (2d Cir. 2001); Carlton v. Mystic Transp., Inc., 202 F.3d 129,136 (2d Cir. 2000) (citing Oxman v. WLS-TV, 846 F.2d 448, 453 (7th Cir. 1988) ("Unlike the typical discharge case, an employer who terminates employees pursuant to a [reduction in force] rarely replaces the

employees it let go.")).

Job Performance

The Court cannot find, as a matter of law, that defendant‹s evidence about plaintiff‹s job performance precluded the jury from finding that retaliation played a role in the decision to terminate her employment. During her employment at Pharmedica, plaintiff never received a negative performance evaluation or written warning, nor is there any writing whatsoever criticizing her job performance, indicating that, as a reason for her firing, poor job performance was an afterthought. She received raises every year. Objective evidence indicates that plaintiff was performing her job adequately.

Reviewing the record in the light most favorable to plaintiff, and drawing inference in her favor as I must, the Court finds that adequate evidence supporting the jury‹s verdict. Accordingly, defendant‹s Motion for Judgment as a Matter of Law **[undocketed, Doc. #89]** is **DENIED**.

MOTION FOR A NEW TRIAL

Pharmedica is not entitled to a new trial under Rule 50(b) or Rule 59. For the reasons set forth above, defendant is not entitled

to judgment as a matter of law under Rule 50(b).[7] Although the standard to be applied to a motion for a new trial under Rule 59 based on alleged insufficiency of the evidence is less stringent than on a rule 50 motion for judgment as a matter of law, see e.g. Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970 (2d Cir. 1987), Pharmedica does not satisfy that standard.

Rule 59(a) provides that "[a] new trial may be granted to all or any of the parties on all or part of the issues (a) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." In ruling on a Rule 59 motion, a court makes the same type of inquiry as on a motion for judgment as a matter of law, but imposes a less stringent standard. See Katara, 835 F.2d at 970; Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127, 132 (2d Cir. 1986). "A trial court should grant a new trial motion if it is convinced that the jury has reached a seriously

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[7]Rule 50(b) provides that, in a ruling on a renewed motion for judgment as a matter of law where a verdict was returned, a court may: "(A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law . . . ." Fed. R. Civ. P. 50(b)(1). While Rule 50(b) permits a court to order a new trial rather than enter judgment, it is a discretionary remedy available to the court where the moving party would be entitled to judgment as a matter of law and the court "believes that the defect in the nonmoving party‹s proof might be remedied on a second trial." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2538, p 357-389 (1995). Here, Pharmedica is not entitled to judgment as a matter of law under Rule 50(b) and, therefore, there is no predicate for a new trial under Rule 50(b).

erroneous result or the verdict is a miscarriage of justice." United States v. Landau, 155 F.3d 93, 104 (2d Cir. 1998); Katara, 835 F.2d at 970; see also Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992); Newmont Mines, 784 F.2d at 132. "[A] new trial motion is addressed to the discretion of the trial court, with ample deference to the trial court‹s exercise of discretion . . . . Further, in ruling on a new trial motion, the court need not view the evidence in the light most favorable to the verdict winner." 12 James Wm. Moore, Moore‹s Federal Practice §50.05[5], at 59-21 (3d Ed. 2003). "A new trial may be granted, therefore, when the jury‹s verdict is against the weight of the evidence." DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 133 (2d Cir. 1998)(citations omitted). A court may weigh conflicting evidence and need not view such evidence in the light most favorable to the nonmoving party. See Song v. Ives Lab., Inc., 957 F.2d 1041, 1047 (2d Cir. 1992). A court's disagreement with the jury's verdict alone, however, is insufficient reason to grant a motion for a new trial. Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983).

As set forth above, the evidence at trial amply supported the jury‹s findings, and there is no basis to conclude that the jury reached a seriously erroneous result or that its verdict was a miscarriage of justice. Therefore, the defendant‹s motion for a new trial under Rule 50(b) or Rule 59(a) **[Doc. #91-1]** is **DENIED.**

MOTION FOR REMITTITUR

Pharmedica next moves pursuant to Rule 59 for a new trial on the issue of compensatory damages or, in the alternative, remittitur. "If a district court finds that a verdict is excessive, it may order a new trial, a new trial limited to damages, or under the practice of remittitur, may condition a denial of a motion for new trial on the plaintiff‹s accepting damages in a reduced amount." Tingley Sys., Inc. v. Norse Sys., Inc., 49 F.3d 93, 96 (2d Cir. 1995)(citation omitted); Kirsch v. Fleet Street, Ltd., 148 F.3d 165 (2d Cir. 1998).

"It is well settled that calculation of damages is the province of the jury." Lee v. Cross, 39 F. Supp. 2d 170, 172 (D. Conn. 1999) (quoting Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir. 1990)).

> Where there is no particular discernable error, the Second Circuit has generally held that a jury‹s damage award may not be set aside as excessive unless "the award is so high as to shock the judicial conscience and constitute a denial of justice." O‹Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir. 1988)(citations and internal quotation marks omitted). Where the court has identified a specific error, however, the court may set aside the resulting award even if its amount does not "shock the conscience." Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 165 (2d Cir. 1998). "In either circumstance, the district court‹s evaluation that damages are excessive is reviewed for abuse of discretion." Id. (citations omitted).

Lee, 39 F. Supp. 2d at 172

In this case, the jury awarded plaintiff $115,000 in back pay

and $25,000 in lost benefits for a total compensatory award of $140,000. [Doc. #101, Tr. at 221].

Salary History

Ms. Palma was hired on December 8, 1990 at an annual salary of $28,000. At the time of her departure at Pharmedica on January 22, 1999, she was making $46,000 per year. She received annual pay increases as follows: 10.5 percent in December 1991; 7 percent in December 1992; 8 percent in January 1994; 7 percent in January 1995; 9.2 percent in November 1995; 5.5 percent in February 1997; and 4.75 percent in January 1998. [Pl. Ex. 1]. In September 1998, plaintiff began working at Yale, as an administrative assistant, at an annual salary of approximately $26,000. From June 22, 2001 through September 16, 2001, plaintiff was on an unpaid leave of absence from Yale. [Doc. #103, Tr. at 169-70]. Plaintiff began working as a purchasing director at Guilford Savings Bank on September 17, 2001, at an annual salary of approximately $24,300. Id. at 170-71. She is currently employed at Guilford Savings Bank, as an executive secretary. [Doc. #101, Tr. at 112].

Rene Palma‹s Testimony

Ms. Palma testified on cross examination that she "applied to places and asked about accounting positions. Some were administrative assistant, but there were some that also included accounting." Doc. #103, Tr. at 136. She explained, "[b]ecause there

were more [administrative assistant positions] advertised in the newspaper and it was easier to find those than accounting positions I found." Id. She testified that she planned to work at Pharmedica until she retired at age sixty five. [Doc #101, Tr. at 110].

Sheldon Wishnick‹s Testimony

Sheldon Wishnick, plaintiff‹s consulting actuary, testified regarding her lost wages from the date of her termination, January 22, 1999, through trial on November 15, 2002. He estimated plaintiff‹s lost wages due to her termination of employment to be approximately $100,000 in wages and approximately $25,000 in benefits, with a lump sum tax adjustment of approximately $21,000, for a total of $146,000. [Doc. #102, Tr. at 45-47]. Wishnick testified that a deduction of $6,000 was warranted to account for Palma‹s unpaid leave of absence when she was employed at Yale. Id. at 49-50. He stated the lost income would total $140,000 if that amount were deducted. Id. at 50. This amount was awarded by the jury.

In projecting plaintiff‹s losses forward, Mr. Wishnick testified that he considered mitigation or offsetting income since the termination of her employment, such as several part-time jobs, unemployment compensation, and change in her full-time employer and reduced the total accordingly when calculating lost future income to determine compensatory damages. Id. at 47-48. An interest adjustment

and cost of living increase of approximately 4.5 percent were also made. Id. at 48, 50. "So, the calculation is basically the potential income minus the mitigating income plus the interest adjustment." Id. at 48. Wishnick testified that he reviewed W-2 statements and a benefit statement from Yale University and "the actual value of those benefits." Id. at 48. In performing his calculations, Mr. Wishnick testified that he "implicitly assumed that [Ms. Palma] took the best and most appropriate job that was available to her and her subsequent employers." Id. at 53.

Discussion

Defendant seeks a new trial on damages or, in the alternative, a remittitur arguing discernable error because plaintiff "admitted she did not seek equivalent employment, therefore, the jury could not have reasonably found that the plaintiff mitigated her damages." [Doc. #92 at 32]. Thus, defendant argues, it did not need to prove that suitable employment existed. Id. "Even if there is no discernable error," defendant argues, "the award is intrinsically excessive." Id. at 34.

1. Mitigation

"[A] prevailing plaintiff in a Title VII case must attempt to mitigate her damages by using "reasonable diligence in finding other suitable employment." Dailey v. Societe Generale, 108 F.3d 451, 455-56 (2d Cir. 1997) (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 231

(1982); see 42 U.S.C. §2000e-5(g)(1)). "[T]he claimant's burden is not onerous, and does not require him to be successful in mitigation." Id. at 456 (quoting Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir.1983).

"While it is the plaintiff's duty to mitigate, it is the defendant who has the evidentiary burden of demonstrating at trial that a plaintiff has failed to satisfy this duty. This may be done by establishing (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." Id. (citing Clarke v. Frank, 960 F.2d 1146, 1152 (2d Cir.1992)). In the present case, Pharmedica asserts that Palma breached her duty to mitigate by failing to satisfy the second element of this test. However, defendant offered no evidence at trial to show that other suitable jobs were available for which plaintiff failed to apply. Indeed, defendant offered very little argument regarding mitigation, concluding that "[a]s plaintiff testified that she did not seek out accounting positions, but rather administrative assistant positions, the jury did not properly determine if the plaintiff had mitigated her damages." [Doc. #92 at 34].

Ms. Palma testified on cross examination that she "applied to places and asked about accounting positions. Some were administrative assistant, but there were some that also included accounting." Doc. #103, Tr. at 136. She explained, "[b]ecause there

were more [administrative assistant positions] advertised in the newspaper and it was easier to find those than accounting positions I found." Id. It is undisputed that plaintiff was not an accountant or C.P.A. She testified that she obtained a two-year degree in art and design and took only one accounting course at Guilford Adult Education while employed at Pharmedica. [Doc. #103, Tr. at 75-76]. Sue Cippolone testified that "90 percent" of plaintiff‹s job duties were "heavy data entry into accounts payable, accounts receivable." [Doc. #102 at 174-75]. Palma testified that she performed duties in her current job at Guilford Savings "comparable" to duties that she performed at Pharmedica. [Doc. #103, Tr. at 171-72]. The jury was entitled to credit plaintiff‹s testimony regarding her efforts to mitigate.[8] "[A] Title VII plaintiff does not have to endure extreme hardship to meet her mitigation obligations. Rather the obligation is one of reasonable diligence in finding other suitable employment," Dailey, 108 F.3d at 456, "which need not be comparable to their previous positions." Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 53 (2d Cir. 1998) (citations and quotation marks omitted). In short,

[8]Plaintiff testified that, after her discharge from Pharmedica, she "started looking through the classified ads right away," she attended a workshop on resume writing. She applied to Unilever, Genisons Pharmaceutical, The Institute of Diabetes Discovery and performed temporary work for Enthon in West Haven, Connecticut. After working as a temporary employee at Yale for three months, Ms. Palma was offered a full-time position. Plaintiff was employed by Yale for two years. [Doc. #103, Tr. at 66-69].

there was evidence from which a reasonable juror could have concluded that plaintiff satisfied her statutory obligation to mitigate her damages. On this record, defendant did not sustain its evidentiary burden of demonstrating at trial that plaintiff failed to satisfy her duty to mitigate. Id.

2. "Shock the Conscience"

"A backpay award for discriminatory discharge is intended to restore the employee to the status quo [she] would have enjoyed if the discriminatory discharge had not taken place." Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 166 (2d Cir. 1998) (citing McMahon v. Libbey-Owens-Ford Co., 870 F.2d 1073, 1079 (6th Cir. 1989) (quotation marks omitted). Plaintiff correctly argues that the damages the jury awarded were based on the testimony of Ms. Palma‹s expert, Sheldon Wishnick. "There was nothing excessive about it based on that testimony. Since the verdict was well with the bounds of reasonableness, it should not be disturbed." [Doc. #106 at 29]. The Court can find no error on this record, nor does the jury‹s award of $140,000 in compensatory damages "shock the conscience" or "constitute a denial of justice" warranting a new trial or order of remittitur.

CONCLUSION

For the foregoing reasons, defendant‹s oral Motion for Judgment as a Matter of Law **[undocketed]** brought at the conclusion of plaintiff‹s case and Motion for Judgment as a Matter of Law **[Doc. #89]** are **DENIED.**

Defendant‹s Motion for New Trial **[Doc. #91-1]** is **DENIED.**

Defendant‹s Motion for Remittitur **[Doc. #91-2]** is **DENIED**

This is not a recommended ruling. The parties consented to proceed before a United States Magistrate Judge [Doc. #49] on September 30, 2002, with appeal to the Court of Appeals.

SO ORDERED at Bridgeport this ___ day of September 2003.

_____
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE