COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2018-P-1427

RICHARD A. DaPRATO,

Plaintiff-Appellee

v.

MASSACHUSETTS WATER RESOURCES AUTHORITY,

Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
CIVIL ACTION NO. 2015-3687 D

BRIEF FOR THE DEFENDANT-APPELLANT MASSACHUSETTS WATER RESOURCES AUTHORITY

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I. STATEMENT OF THE ISSUES

1.) Whether the Superior Court erred by failing to properly instruct the jury according to the established "but for" causation standard applicable to retaliation claims under the FMLA, ADA and Ch. 151B, and by instructing the jury instead that Plaintiff had proven his retaliation claims if MWRA's reason for termination included, as a "negative factor," the fact that Plaintiff took FMLA leave or spent time recuperating at a particular location or in a particular manner;

2.) Whether the Superior Court's refusal to apply the "honest belief" doctrine constituted error and deprived MWRA of a crucial defense in this case;

3.) Whether the Superior Court erred in instructing the jury that it could not consider Plaintiff's surplus post-termination earnings as an offset to his front pay claim for future pension benefits; and

4.) Whether the Superior Court erred in failing to set aside the punitive and liquidated damages awards and erred in not remitting the emotional distress damages award where the evidence was insufficient as a matter of law.

II. STATEMENT OF THE CASE

A. Nature of the Case

Defendant-Appellant Massachusetts Water Resources Authority ("MWRA") appeals the Second Amended Judgment on Jury Verdict entered on June 22, 2018, by the Suffolk Superior Court (Wilkins, J.). (Add. 9; Add. 10).[1] Plaintiff-Appellee Richard A. DaPrato ("DaPrato" or "Plaintiff") brought suit alleging that MWRA terminated his employment in retaliation for his taking medical leave to have routine foot neuroma surgery and for expressing his intention to take medical leave in the future. MWRA denied these allegations and maintains that DaPrato's employment was rightfully terminated due to misrepresentations that he made surrounding his taking of medical leave.

B. Procedural History

On December 7, 2015, DaPrato filed suit asserting claims for handicap discrimination, failure to accommodate and retaliation under the Americans with Disabilities act ("ADA") and M.G.L. c. 151B ("Ch. 151B") and interference and retaliation under the

[1] Hereinafter, citations to the Addendum shall be designated by "Add." followed by the assigned Addendum number.

Family and Medical Leave Act ("FMLA").[2] (VI RA0021-0044).[3] The case was tried to a jury from January 5, 2018 to January 17, 2018 (Wilkins, J.). During trial, DaPrato withdrew his failure to accommodate, discrimination, and interference claims, leaving only his FMLA, ADA and Ch. 151B retaliation claims.

On January 18, 2018, the jury returned a verdict in DaPrato's favor in the amount of $1,235,162, which included $19,777 in back pay damages, $300,000 in front pay damages, $200,000 in emotional distress damages, and $715,385 in punitive damages. (Add. 8). On February 21, 2018, the Court adopted $188,666 of the jury's $300,000 front pay award and ordered FMLA liquidated damages in the amount of $416,886. (Add. 6; VI RA0017). The Court also ordered an award of attorneys' fees and costs in the amount of $575,690. (VI RA0017). On March 27, 2018, judgment entered in the amount of $2,079,700.50. (VI RA0017, 0341-0342).

Following the entry of judgment, MWRA timely served and filed a motion for judgment notwithstanding

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[2] For copies of pertinent sections of the ADA, Ch. 151B and FMLA, *see* Add. 1, 3, and 5.

[3] Hereinafter, citations to the Record Appendix shall be designated by "V" followed by the transcript volume number, followed by "RA" and the assigned page number.

the verdict (JNOV) or, in the alternative, for a new trial and remittitur. (VI RA0018, 0348-0377). On June 13, 2018, the Court entered remittitur as to the jury's front pay award, reducing that award to $188,666 in accordance with the Court's ruling under the FMLA. (VI RA0019, 0399-0414). The Court otherwise denied MWRA's motion. (*Id.*).

An amended judgment was entered on June 14, 2018, which was further amended on June 22, 2018 on account of clerical errors. (VI RA0415-0424) On June 23, 2018, MWRA timely filed its Notice of Appeal. (Add. 10).

III. STATEMENT OF THE FACTS

A. Background.

MWRA is a public authority established by Chapter 372 of the Acts of 1984 to provide wholesale water and sewer services to approximately 3.1 million people and more than 5,500 large industrial users in 61 metropolitan Boston communities. MWRA employs approximately 1,100 employees, most of whom are members of one of five separate collective bargaining units. Non-union managers, totaling around 60-70 employees, constitute only five percent of MWRA's workforce. MWRA relies on its non-union managers to not only oversee MWRA's day-to-day operations but also

to create an atmosphere of trust and transparency in accordance with MWRA's Code of Conduct, which requires honesty by all employees at all times. (VII RA0851, 0939-0944; VIII RA0259-0278).

Plaintiff was hired in 2004 as a Data Resources Manager in MWRA's MIS Department[4] and was a nonunion manager with no history of discipline. (VII RA0287, 1280-1281). As with many of his nonunion colleagues, Plaintiff had taken several leaves under the FMLA during his employment which were approved by MWRA without issue. (VII RA0742-0743, 1275-1276).

B. Plaintiff's Requests for Medical Leave.

In late December 2014, Plaintiff requested FMLA leave to have meniscus surgery on his left knee, which was approved by MWRA without issue. (VIII RA0033-0043). In connection with his request, Plaintiff spoke directly with MWRA's Human Resources ("HR") Benefits Manager, Andrea Murphy ("Murphy"), and informed her of his concern that he might run out of benefit time due to his knee surgery and need for foot surgery in 2015.

[4] "MIS" stands for "Management Information Services" which provides technology management assistance to MWRA personnel. Plaintiff's position in MIS was a desk job and only required a computer and a keyboard. (VII RA1042-1043, 1227, 1308).

(VII RA 0632). During the conversation, Murphy advised Plaintiff that he might be eligible for Salary Continuation, a discretionary benefit provided by MWRA to non-union managers who are unable to work due to a serious medical condition.[5] (VII RA0633, 0742, 0933-0934, 1232, 1244; VIII RA0946-1232).

On January 8, 2015, Plaintiff advised HR via e-mail that he had cancelled his meniscus surgery and would be having a neuroma on his right foot surgically removed on February 6, 2015 instead. (VIII RA0098-0099). His email stated that recovery from the neuroma removal would take approximately 6-8 weeks to March 27, 2015, with the last 3-4 weeks leaving him unable to drive because of a medical boot that he would be required to wear. (*Id.*) Plaintiff's e-mail also informed HR that he expected to have meniscus surgery at some point later that year, and another neuroma removal on his left foot. (*Id.*). The Director of HR, Karen Gay-Valente ("Gay-Valente"), responded

[5] The written Salary Continuation policy, which was not distributed to employees, did not require managers to exhaust vacation time before accessing the benefit. In 2006, the MWRA changed how the policy was implemented so that the benefit was only available once a manager exhausted all benefit time, including vacation time. (VII RA0682-0683, VIII RA0686).

sympathetically to Plaintiff's email by thanking him for the information, acknowledging that he was going through a lot, and encouraging him to work with Murphy to process his FMLA paperwork. (VIII RA0161).

C. Plaintiff's February 6th Medical Leave and Extended Medical Leave.

Plaintiff went out on approved FMLA leave for his neuroma surgery on February 6th as scheduled and without issue. (VIII RA0046). His initial FMLA certification stated that he would be out of work for 4-6 weeks with a return to work date of March 20th. (VIII RA0045-0052). By all accounts, Plaintiff's surgery was uneventful, and Plaintiff was recovering ahead of schedule. (VII RA 0497, 0501-0502). At some point around February 24, 2015, Plaintiff informed Murphy that he would need to extend his medical leave to March 27th and that he would run out of benefit time as a result. (VII RA0118, 0121). Plaintiff claimed that he still could not drive[6] or walk and that his podiatrist would not provide a return to work note until after his final follow up appointment scheduled

[6] Although Plaintiff conceded on cross-examination that he was already driving his car on a regular basis at that point in time, Plaintiff led his co-workers to believe that he was not yet capable of driving. (VII, RA0500-0501; VIII RA0118.).

for March 26, 2015.[7] (*Id.*). At that point, Plaintiff and Murphy discussed his eligibility for Salary Continuation, and on March 11, 2015, Plaintiff submitted his certification for extended FMLA leave which was again approved by HR without hesitation or issue in full compliance with the FMLA. (VII RA0392-0393; VIII RA0140-0144).

D. Plaintiff's Return to Work and Salary Continuation Mishap.

On or about March 30, 2015, Plaintiff returned from medical leave and was reinstated to his same position and with the same pay. (VII RA0426-0428, 1315, 0558-0559; VIII RA0150). Just before returning to work, on March 26th, Plaintiff informed HR that his paycheck for the prior week was only $31.65 and that he had not received any Salary Continuation. (VII RA0152). Immediately upon learning this, Gay-Valente and her staff worked diligently on a late Friday

[7] Just prior to his leave, Murphy confirmed for Plaintiff that he would need a note to return to work, so that MWRA could accommodate him if he had any restrictions. (VIII RA0107). Knowing this, Plaintiff scheduled his final podiatry appointment for March 27th, after his return from a vacation to Mexico. (VII RA0387). Plaintiff testified that he tried to return to work early. Murphy refuted this testimony, and Plaintiff never contacted his supervisor to return to work early pursuant to MWRA's FMLA Policy. (VII RA0387, 0741, 1312; VIII RA0297).

afternoon to expedite payment of Salary Continuation for Plaintiff's last two weeks of medical leave, which Plaintiff received in full in his next paycheck on April 2nd. (VII RA1246-1247, 1327; VIII RA0181-0182). On April 6th, Plaintiff sent the following email to Gay-Valente and Murray:

> Good news - my right foot surgery was extremely successful. I did exhaust my benefit time so it required me to use a couple weeks of Salary Continuation. There were some Salary Continuation surprises that were not explained to me regarding how the program works. I am in the process of planning my next surgery and hope to eliminate any surprises this time around. Is there an HR SOP that explains the details of using Salary Continuation? I did not find any information on the Pipeline. Any descriptive language would be very helpful. (VIII RA0164)

Gay-Valente forwarded the email to Murphy with the comment, "Is he serious," to which Murphy responded "OMG." (Id.). Both witnesses testified consistently that their reactions to the email were directed at Plaintiff's issues with the processing of his Salary Continuation after they had just worked expeditiously to get him paid the benefit. (VII RA0656-0657, 0741-0742, 1193-1195, 1198-1199, 1246-1247).

E. Plaintiff's Vacation and HR's Investigation.

Also on April 6th, Gay-Valente and Murphy learned from Plaintiff's direct supervisor Russell Murray that Plaintiff had been vacationing in Cancun, Mexico during the last weeks of his medical leave, the period for which he received paid Salary Continuation benefits. (VII RA0833, 0835-0838, 1044-1045, 1195-1196, 1199, 1245). Although Plaintiff had informed Murray of his vacation, Plaintiff never mentioned his vacation plans, which he had planned a year in advance, to anyone in HR. (VII RA1238, 1243, 1257). Upon learning this information, Gay-Valente began an investigation into Plaintiff's medical leave by collecting gate access records and video surveillance of MWRA's Chelsea facility for the time period that Plaintiff was on leave.[8] (VII RA1200-1201; VIII RA0005, Entry 1-29). The video showed that: (1) on March 9, 2015, Plaintiff drove to the Chelsea facility and entered the building using a crutch to assist him with

[8] MWRA allows its employees to park at its Chelsea facility when travelling out of Logan Airport to save them the cost of parking at the airport. (VII RA0949).

walking;[9] (2) during the early morning hours of March 12th, Plaintiff drove to the facility to meet a taxi at the security gate, at which time Plaintiff parked his car and returned to the taxi without any assistance or issue; and (3) on the evening of March 24, Plaintiff returned to the facility by taxi, where Plaintiff again retrieved his car without any assistance or issue. (VIII RA0005, Entry 1-29)(physical exhibit provided to Court).

Gay-Valente testified that she believed the video surveillance was contrary to the information Plaintiff had provided to HR in his January 8th email and to Murphy when he extended his leave; namely, that he could not drive or walk without assistance during his recovery. (VII RA1202-1203, 1260). Despite this fact, Gay-Valente jumped to no conclusions, rushed to no judgment, and reached no decisions as to whether

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[9] On March 9th, Plaintiff went to the Chelsea facility to drop keys off to the security desk for this purpose and also to attend a staff meeting. Plaintiff testified that MWRA's Director of Administration, Michele Gillen ("Gillen"), was present at the March 9th staff meeting and that he discussed his vacation plans with the group. (VII RA0407, 0417-0418). Gillen testified that while she recalled seeing Plaintiff at the meeting, she did not hear him mention vacation plans. Contrary to the Trial Court's findings, there was no testimony that Gay-Valente or Murphy were at that staff meeting. (VII RA1010-1011, 1313-1315).

Plaintiff should be disciplined. (VII RA1260). Instead, on April 8, 2015, a meeting of senior managers was convened to discuss what appeared to be *possible* misconduct by one of its managers. (VII RA1260-1261). This was consistent with MWRA's practices and procedures under such circumstances. (VII RA1046). During the meeting, Gay-Valente presented the surveillance video along with the information that Plaintiff had provided to HR about why he could not return to work.[10] (VII RA1260-1262, 0953).

At the conclusion of the meeting, the group of senior managers likewise jumped to no conclusions, rushed to no judgment, and reached no decisions as to whether Plaintiff should be disciplined. (VII RA0954-0956, 1047). Instead, Gay-Valente was instructed to interview Plaintiff about the circumstances surrounding his medical leave as part of a further

[10] Gay-Valente did not share Plaintiff's FMLA certifications which indicated that he would be transitioning from full weight bearing to partial weight bearing during the recovery period. (VII RA1048). Although the FMLA certifications did not explicitly list any driving restrictions, the information was not inconsistent with Plaintiff's representations to HR that he could not walk or drive. (Compare VIII RA0099 with VIII RA0045-0060).

investigation and in accordance with MWRA's standard practices and procedures. (VII RA1263, 0953-0956).

F. Plaintiff's Dishonesty.

That afternoon, Gay-Valente and Gillen met with Plaintiff unannounced to discuss the circumstances surrounding his medical leave. (VII RA 1047-1055). After laying out a specific timeline of events, Gay-Valente asked Plaintiff (1) whether he was on vacation during the time he received Salary Continuation and (2) whether he had driven to MWRA's Chelsea facility during the time in question. Plaintiff denied both questions several times before finally admitting the same.[11] (VII RA1047-1054, 1207, 1264-1267). Gillen and Gay-Valente described Plaintiff's demeanor during the interview as agitated, angry and belligerent. (VII RA1036, 1051-1055, 1210, 1267-1268). Both Gay-Valente and Gillen perceived Plaintiff's responses to their inquiries to be untruthful, and Gay-Valente immediately placed Plaintiff on paid administrative

[11] Plaintiff claimed that he drove to MWRA's Chelsea facility against doctor's orders. This statement prompted a "smart alecky" response by Gillen that Plaintiff was willing to disobey orders when it benefitted him but not his employer. (VII RA1209).

leave.[12] (VII RA1053-1056, 1267; VIII RA0171). Upon learning this, Plaintiff professed to be confused by the questions, apologized for any wrongdoing, and offered to repay the Salary Continuation. (VII RA1211).

G. MWRA's Decision to Terminate Plaintiff

Gay-Valente and Gillen relayed to the Executive Director and senior managers what had transpired at the interview. (VII RA0957-0958, 1213, 1269-1271). Based upon this information, the consensus among them was that Plaintiff should be terminated for his dishonesty. (VII RA0959-0964, 1056, 1214, 1271, 1274). On April 9, 2015, MWRA formally terminated Plaintiff's employment for (1) misrepresenting his medical condition, (2) improper receipt of Salary Continuation benefits, and (3) lying during the April 8, 2015 interview. (VII RA0974-0976, 0172-0173; VIII RA 0173).

[12] Gay-Valente brought a prepared letter with her to Plaintiff's interview in the event that she determined administrative leave to be appropriate. Gillen and Gay-Valente testified that this was consistent with MWRA standard practice. (VII RA1213, 1054-1055, 1268).

IV. SUMMARY OF THE ARGUMENT

The Superior Court committed prejudicial error when it failed to properly instruct on the "but for" causation standard and when it instructed the jury that it was required to find MWRA liable for retaliation under the FMLA, ADA and Ch. 151B if it determined that MWRA's reasons for terminating Plaintiff's employment "included as a negative factor, the fact that Mr. DaPrato took or requested leave or spent time recuperating at a particular location or in a particular manner." The Court's erroneous instruction not only applied a wrong causation standard, it entirely removed the fact finding function from the jury where MWRA's reasons for the termination related to Plaintiff's dishonesty about the circumstances surrounding his medical leave.

The Superior Court's failure to grant MWRA's directed verdict or JNOV motion was erroneous where the evidence, viewed in a light most favorable to Plaintiff and without weighing the credibility of the witnesses or considering the weight of the evidence, Bruce v. Town of Wellesley, 47 Mass. App. Ct. 800, 803 (1999), only supported that MWRA honestly believed Plaintiff was dishonest about his medical leave and

terminated him for that reason. Further, the Court's failure to instruct the jury as to the "honest belief" doctrine deprived MWRA of a crucial legal defense.

With respect to damages, the Court erred in failing to offset the front pay award to account for Plaintiff's surplus post-termination earnings, resulting in a windfall for the Plaintiff. Also, the front pay and emotional distress awards must be remitted and the punitive and liquidated damages must be vacated, because the evidence was wholly insufficient to support such awards.

V. ARGUMENT

A. The Trial Court's Failure to Properly Instruct the Jury as to Causation with Respect to Plaintiff's Retaliation Claims Constituted Prejudicial Error and Warrants a New Trial.

The jury was permitted, over MWRA's objections, to find liability using an incorrect causation standard. Specifically, the Court declined to instruct the jury that Plaintiff had the burden of proving that his taking of leave under the FMLA was the determinative factor in MWRA's decision to terminate his employment and that "but for" Plaintiff's taking of FMLA leave, MWRA would not have terminated him. Gourdeau v. City of Newton, 238 F. Supp. 3d 179 (D. Mass. 2017). Instead,

and notwithstanding the concerns expressed by counsel for both parties about the potential for error,[13] the Court gave an instruction that improperly combined the requested "but-for" causation standard with an opposing "negative factor" causation standard. In doing so, the Court failed to provide the jury with an accurate statement of the law, *see* Kiely v. Teradyne, Inc., 85 Mass. App. Ct. 431, 441 (2014), which was prejudicial to MWRA and constituted reversible error.

In Proposed Jury Instruction No. 17, MWRA requested, with Plaintiff's assent, that the Court instruct the jury that Plaintiff must prove that MWRA's desire to retaliate against him "was a determinative, or but for, factor in the decision by MWRA to terminate him."[14] (VI RA0111). In other words, that Plaintiff

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[13] *See* excerpts of charge conference at note 14, *infra*.

[14] Plaintiff's counsel, while acknowledging that a negative factor standard would be more favorable to his case, accepted the but for causation standard to avoid reversal of a favorable verdict on appeal:

> Mr. Mantell: …[W]e accept "but for" for both FMLA retaliation and handicap ADA.
>
> The Court: All right.
>
> Mr. Mantell: And the reason is that, you know, there's a split of authority … And we don't want to be reversed … Based on using the wrong causation standard.

must prove that "had he not taken FMLA leave, MWRA would not have terminated his employment" and that if the jury found MWRA terminated him "for reasons unrelated to any retaliatory animus," then "[Plaintiff] had not proven his case." (*Id.*)

The Court rejected both MWRA's Proposed Jury Instruction and Plaintiff's assent to the "but for" standard, insisting that a lesser "negative factor" causation standard could be harmonized with the "but for" causation standard, so that the two standards

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> The Court: So, here's what I propose … I'll say, "He must show that his taking leave or requesting leave in the future was a negative factor … in the sense that but for the retaliation, MWRA would not have" - would terminated him.
>
> Mr. Belfort: Our objection to that, your Honor, is that it's conflating the standards. We think - our position is that a "negative factor" standard is a lesser standard than a "but for" standard … The Esler case … all they're doing in that case is referencing the [negative factor] regulation. It's not the holding in the case, they're not using it to describe the causation standard. I think there's better law that I would submit to the Court on what the causation standard would be. Judge Young's decision in the Gadrow (phonetic) case.
>
> The Court: Well, I mean, you know, that's not controlling … I do believe I'm also bound by the dicta of the Supreme Judicial Court, even if it's not strictly a holding in the narrow sense of that word. (VII RA1136-1137).

would be applied synonymously. The Court's flawed reasoning was as follows:

> The Court: Right. But I'm saying, a "negative factor" in the sense that; and then I'm saying the – the "but for" causation. It can be a negative factor in a number of ways, and I am – - I am narrowing the ways in which the negative factor comes into play. Certainly, terminating him under the "but for" standard is considering that FMLA leave is a negative factor. It is such a negative factor that but for that factor, that he would not be terminated. (VII RA1138-1139).

Consequently, the Court conflated the two causation standards which resulted in the following garbled FMLA jury instruction:

> So Mr. DaPrato's first claim is called FMLA retaliation. The law protects employees from retaliation or discrimination based on the exercise of their rights under the FMLA. An employer may not use the taking of FMLA leave as a negative factor in deciding to fire or terminate an employee. On the other hand, an employee may still be discharged for independent reasons during or after his taking of FMLA leave. These same rules apply to requests for future leave. (VII RA 1379-80)
>
> . . .
>
> That brings me to the fourth and final element that I'm going to talk [sic.] before damages. And that fourth element is a causal connection between the FML leave and Mr. DaPrato's termination. Mr. DaPrato must prove that more likely than not he was fired because of retaliation. He must show that his taking leave or requesting leave in the future was a negative factor in the MWRA's decision to terminate his employment in the

> sense that, but for the retaliation, MWRA would not have terminated him. If so, then he has met his burden of proof on the fourth element.
>
> On the other hand, he has not met this element if MWRA discharged him for independent reasons, even if that discharge occurred during or after his taking of FMLA leave. A reason counts as an independent reason only if it does not include as a negative factor the fact that Mr. DaPrato took or requested leave or spent time recuperating at a particular location or in a particular manner. (VII RA 1387-88) (Emphasis supplied.)

The Court then instructed the jury that the above causation principles applied to Plaintiff's ADA and Ch. 151B claims, and directed the jury to refer to the Court's discussion under FMLA, the recording of which would be available for the jury's assistance during deliberations. (VII RA1389). The Court's conflated causation instruction for Plaintiff's FMLA, ADA and Ch. 151B retaliation claims constituted reversible error.

i. *The Significance of the Erroneous Instruction.*

The primary difference between the "but-for" and "negative factor" causation standards is in the quantum of proof required to establish a causal connection between an employee's exercise of protected rights under the FMLA and an adverse employment decision. With a true "but-for" instruction, the jury must be

persuaded that the reason MWRA terminated Plaintiff was its motivation to retaliate against him because he exercised his rights under the FMLA. *See*, Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009) (discussion of terms that indicate a but-for causal relationship, such as "based on," "because of," "the reason that," "determinative influence on outcome.") In contrast, the "negative factor" standard presents a substantially lessened causation threshold, Gourdeau, 238 F.Supp.3d at 194, where Plaintiff need only prove that his use of FMLA leave and need for future leave was one "negative factor", regardless of how incremental, among other factors that MWRA considered when it decided to terminate Plaintiff's employment.

There is no parity whatsoever between the "but for" and "negative factor" causation standards and by conflating them the Court not only misstated the law, it created impermissible confusion concerning Plaintiff's burden of proof on a central issue in the case. *See*, Lipchitz v. Raytheon, 434 Mass. 493, 505-07 (2001)(causation standards must be articulated "clearly, adequately and correctly.") The Court then compounded its error in a very critical way by including the last sentence of the instruction, which

directed the jury that if it believed MWRA had considered Plaintiff's trip to Mexico as a negative factor in its decision to terminate him, then Plaintiff had proven causation. The Court erroneously relied upon dicta in Esler v. Reardon, 463 Mass. 775 (2016) for this additional instruction, which effectively foreclosed any consideration by MWRA of whether the circumstances surrounding Plaintiff's Mexico vacation were in any way inconsistent with his FMLA leave.[15] This misstep not only improperly applied the lesser "negative factor" standard, it all but required the jury to find liability where MWRA had terminated Plaintiff's employment due to its honest belief of Plaintiff's dishonesty surrounding his medical leave.

ii. "But-For" is the Correct FMLA Causation Standard.

At least three recent decisions of the Massachusetts federal courts have concluded that

[15] The Court's reliance on Esler was misplaced. (Add. 7). In Esler, the issue of causation was neither decided nor analyzed by the Court. Moreover, the dicta in Esler did not consider the precedential effect of Univ. of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013), which held that retaliation claims under Title VII must be proved according to traditional principles of but-for causation and which applies "with equal force in the FMLA context." DiBlasi v. Liberty Mutual, 2014 WL 1331056 *10, n. 20 (D. Mass. 2014), citing Nassar, 133 S.Ct. at 2525.

"retaliation claims brought under the FMLA must be proven according to a but-for standard" and that a contrary Department of Labor regulation (22 C.F.R. §825.220c)(Add. 4) setting forth a "negative factor" standard is not entitled to deference or consideration in accordance with Chevron USA, Inc. v. National Resources Defense Council, Inc. 467 U.S. 837 (1984). *See*, Gourdeau, 238 F. Supp. 3d at 179. *See, also*, Higgins v. Town of Concord, 322 F.Supp.3d 218, 228 (D. Mass. 2018)(citing Gourdeau); and DiBlasi, 2014 WL 1331056 at *14 ("An employee must show … a 'but-for' causal connection between protected conduct and adverse employment action.")

MWRA briefed the FMLA causation issue for the Court, with no opposition from Plaintiff, relying primarily on Gourdeau. In Gourdeau, Judge Young adopted the but-for causation standard after an in-depth statutory analysis that considered (1) FMLA's legislative history, with particular reference to the parallels between the retaliation provisions in the FMLA and in Title VII of the Civil Rights Act of 1964, as amended (Title VII)(Add. 2); (2) the plain language of the FMLA; (3) cases that uphold the "but-for" causation standard in other anti-discrimination

statutes,[16] and (4) public policy, which reflects the values intrinsic to Title VII and the FMLA. The basis for Judge Young's well-reasoned decision applies here, and for the reasons set forth in Gourdeau, there is no room to interpret the FMLA as requiring a lesser "negative factor" causation standard, as "but-for" is the appropriate standard for FMLA retaliation claims.

iii. The Court's Application of the Negative Factor Standard to Each of Plaintiff's Retaliation Claims Was Prejudicial.

The Court applied the same misguided principles to Plaintiff's ADA and Ch. 151B handicap retaliation claims by referring the jury back to its FMLA instructions, the recording of which was provided to the jury during its deliberations. (VII RA 1389) This application of the "negative factor" standard ran contrary to established precedent under Ch. 151B retaliation claims and constitutes clear error. See, Lipchitz, 434 Mass. at 505 citing Melynchencko v. 84 Lumber Co., 424 Mass. 285, 294 (1997), Trustees of Forbes Library v. Labor Relations Comm'n, 384 Mass. 559, 562-563 (1983) and others. The "negative factor"

[16] *See*, Nassar, 133 S.Ct. at 2517 (Title VII claims must be proven according to but-for causation.) *See also*, Gross, 557 U.S. at 167 (Disparate treatment claims under the ADEA require but-for causation.)

standard likewise is inapplicable to claims under the ADA. *See* Palmquist v. Shineski, 689 F.3d 66 (1st Cir. 2012); Lewis v. Humboldt Acquisition Corporation, 681 F.3d 312 (6th Cir. 2012). Given that $915,038 of the jury's award applied only to Plaintiff's Ch. 151B claims, the Court's misapplication of the negative factor causation standard had very real and significant consequences for MWRA.

Based upon the Court's erroneous causation instructions, the jury found MWRA liable for retaliation under the FMLA, ADA and Ch. 151B, an outcome that would have been different had MWRA's requested instructions been given. Since MWRA's perceived misuse of Plaintiff's medical leave was so intertwined with its reasons for the termination, a jury could only conclude that Plaintiff's taking of FMLA leave was at least a negative factor in MWRA's decision to terminate, even if it was not the determinative factor. The causation issue went to the "center of [MWRA's] case," and because the instruction taken as a whole was prejudicial, the verdict must be set aside on Plaintiff's FMLA, ADA and Ch. 151B retaliation claims. *See*, Blackstone v. Cashman, 448 Mass. 255, 270 (2007)(verdict may be set aside if error

in jury instructions was prejudicial); Lipchitz, 434 Mass. at 507 (instructions when considered as a whole constituted reversible error).

B. The Evidence Did Not Support a Finding of Liability Because MWRA Honestly Believed That Plaintiff Had Misused His Medical Leave.

The evidence fully supported that MWRA honestly believed Plaintiff had misrepresented his medical leave and that MWRA terminated his employment for that reason. Because MWRA's honest belief precluded a finding of pretext, the Court should have granted MWRA's directed verdict or JNOV motion. At the very least, the Court should have instructed the jury that it could not find MWRA liable for retaliation if it found that MWRA had terminated Plaintiff based upon its honest belief that Plaintiff had misused medical leave. The Court's failure to do so deprived MWRA of a crucial legal defense and warrants a new trial.

i. *MWRA Terminated Plaintiff Because He Misrepresented His Medical Leave*.

Plaintiff was terminated for his dishonesty surrounding the circumstances of his medical leave, and MWRA had every right to terminate Plaintiff for that reason, even if Plaintiff may not have done anything wrong in the eyes of the jury. Therefore, MWRA cannot

be liable for retaliation. The widely accepted "honest belief doctrine" provides that an employer is not liable under the FMLA if it discharges an employee based upon an honest belief that the employee has misused FMLA leave, even if the employer's belief was mistaken. *See*, Capps v. Mondelez Glob., LLC, 847 F.3d 144 (3d Cir. 2017) (honest belief that employee misused FMLA leave was a non-discriminatory basis for termination, regardless of whether it turned out to be true); Crouch v. Whirlpool Corp., 447 F.3d 984 (7th Cir. 2006)("an employer's honest suspicion that the employee was not using his medical leave for its intended purposes is enough to defeat the employee's FMLA claim."); Medley v. Polk, 260 F.3d 1201 (10th Cir. 2001)(employer who honestly but mistakenly believes employee is not using FMLA leave for its intended purpose does not violate FMLA); and others.

At least one Superior Court case has held that an employer's honest belief that an employee lied about or misused medical leave, even if that belief was wrong, cannot constitute pretext for discrimination. Brooks, v. Peabody & Arnold, LLP, 2006 WL 4453501 (Mass. Super. Court 2006)(Aff'd., on other grounds, 71 Mass. App. Ct. 46 (2008)) citing Kariotis v. Navistar Int'l,

Transcorp. Corp., 131 F.3d 672, 677 (7th Cir. 1997)("a reason that is honestly described but poorly founded is not a pretext as that term is used in the law of discrimination.") The holding in Brooks is consistent with other controlling precedent that an employer need only make a reasonably informed and considered decision before taking an adverse action. *See*, Sol v. Genzyme, 76 Mass. App. Ct. 1122, *3 (2010)(pedestrian investigations directed toward substantiation of assumed facts do not establish pretext).

There was insufficient evidence to support a finding of pretext for retaliation where the evidence only supported a genuine belief by MWRA that Plaintiff had been untruthful about his medical leave and his ability to work, even if his FMLA certification stated otherwise. The unrefuted evidence at trial was that in January 2015, Plaintiff provided written notification to MWRA that he could not work during the latter portion of his leave because he would be wearing a boot and would be unable to drive. (VIII RA0099). However, the video surveillance viewed by HR undeniably captured Plaintiff driving and walking during that time period, a fact which Plaintiff attempted to deny when confronted by HR. (VIII RA0005, Entry 1-29)(physical

copy provided). This information, standing alone, was sufficient for MWRA to believe Plaintiff had misused leave and was untruthful. *Id.*

Moreover, there were ample facts elicited at trial to substantiate MWRA's honest belief that Plaintiff had misrepresented his medical leave in order to collect Salary Continuation benefits while on vacation. Plaintiff scheduled his neuroma surgery shortly after he learned about the Salary Continuation program. He then advised HR that he would be out of the office through March 27th due to the surgery but omitted that he had long standing vacation plans for the last two weeks in March. (VII RA0686-0690; VIII RA0099). Plaintiff's FMLA certification subsequently only carried his medical leave through March 20th which was during his vacation. (VIII RA0045-0052). On February 24th, Plaintiff contacted Murphy to tell her that he needed to extend his FMLA leave through March 27th because he could not drive and because his podiatrist would not return him to work and that, consequently, he would run out of paid benefit time. (VII RA0691-0693). At that point, Plaintiff and Murphy discussed his eligibility for Salary Continuation. (*Id.*). During that conversation, Plaintiff yet again failed to inform

Murphy that the reason he required extended FMLA leave was because he had scheduled out his final podiatry appointment for *after* his return from vacation. *Id.* Plaintiff later denied even being on vacation or driving to MWRA's facility during the last weeks of his medical leave when he received Salary Continuation. These facts, taken together, provided MWRA with sufficient basis to believe that Plaintiff had been untruthful about the circumstances surrounding his medical leave.

ii. *Plaintiff Failed to Meet His Burden*

Plaintiff had the burden to prove that MWRA did not honestly believe in the accuracy of the reason given for termination and that its true reason was to cover up a discriminatory reason. Reyes-Feliciano v. Marshalls, 159 F. Supp. 3d. 297, 305 (D. Puerto Rico. 2016) citing Adamson v. Walgreens, 750 F.3d 73, 79 (1st Cir. 2014); Collazzo-Rosado v. University of Puerto Rico, 765 F.3d 86, 92 (1st Cir. 2014); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990). Plaintiff was therefore required to prove that MWRA's reasons for Plaintiff's termination "lacked reasonable support in the evidence or were wholly dis-believable." *See* Sol, 76 Mass. App. Ct. 1112 at *3

quoting Brooks v. Peabody & Arnold, LLP, 71 Mass. App. Ct. 46, 52 (2008).

At trial, Plaintiff offered no meaningful evidence to meet his burden of proof. Reyes-Feliciano, 159 F. Supp. 3d. at 297. While Plaintiff attempted to paint a picture of an inherently flawed investigation conducted by HR personnel who were "outraged" by Plaintiff's request for medical leave, the evidence simply did not substantiate that MWRA's termination of Plaintiff was pretextual.

a. *Perceived flaws in MWRA investigation are not grounds for establishing pretext.*

MWRA's investigation into Plaintiff's misconduct could not be considered evidence of pretext. Even if a fact finder determined that MWRA's investigation was inadequate or flawed - it was not - those inadequacies or flaws could not be considered evidence of pretext. *See*, Sol, 76 Mass. App. Ct. 1122 at *3; Gordon v. EarthLink, Inc., 2017 WL 3203385 *6, *8-10 (D. Mass. July 27, 2017)(crucial inquiry is whether employer believed plaintiff engaged in misconduct, not the competency of the investigation).

Gay-Valente testified that her investigation did not deviate in any significant way from her standard practice and was premised upon her understanding that

Plaintiff could not work because he could not drive and would be on crutches. Her review of the surveillance video – which showed otherwise - understandably raised questions in her mind as to Plaintiff's need for medical leave. Moreover, Plaintiff's dishonesty during the April 8th interview solidified her belief that Plaintiff was untruthful about his medical leave.[17]

For the same reasons, MWRA's failure to conduct an Independent Medical Exam or medical record review cannot be considered evidence of pretext, even if MWRA's failure to do so was determined to be an investigative shortcoming. *Id.* In any event, a review of such information would not have resolved Plaintiff's answers to Gay-Valente's questions during the April 8th interview, and MWRA's senior managers did not need to be physicians to understand that Plaintiff's professed inability to drive or bear weight squarely contradicted his activities on the video surveillance.

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[17] In assessing the veracity of Plaintiff's answers to her questions, it was not incumbent upon Gay-Valente to contemplate that Plaintiff might have been nervous, unprepared or confused by her questions during the April 8th interview. (Add. 2 pp. 12-13). Such an imposition would place undue burden upon employers during investigations into employee misconduct and should not be required as a matter of public policy.

b. *Gay-Valente's decision to place Plaintiff on administrative leave was consistent with her past practice and could not objectively suggest pretext.*

The fact that Gay-Valente prepared a letter placing Plaintiff on paid administrative leave prior to the April 8th interview also cannot be considered evidence of pretext. Gay-Valente testified that it was her standard practice to bring a pre-typed letter with her to interviews of employees suspected of misconduct in the event the interview warrants further investigation or discipline. She also testified that Plaintiff's interview was no different and that based upon his responses during the interview, she placed him on administrative leave with pay until a determination was made as to his future employability at MWRA. Plaintiff produced no evidence to refute her testimony.

c. *HR's reaction to Plaintiff's April 6th email does not reflect hostility towards Plaintiff for requesting further medical leave.*

Gay-Valente's and Murphy's reaction to Plaintiff's April 6th email could only be interpreted as that of annoyance towards Plaintiff's comments concerning Salary Continuation, which was consistent with their trial testimony. Both Gay-Valente and Murphy testified that they were well aware of

Plaintiff's plans for additional surgeries at the time they received his email and, therefore, their respective responses to the April 6th email could not be reasonably interpreted as shock or outrage to the prospects of Plaintiff taking future leave for needed surgery. (VII RA0741, 1245-46).

d. *The reasons stated in Plaintiff's termination letter were not inconsistent, nor evidence of pretext.*

MWRA's April 9, 2015, letter to Plaintiff indicated that MWRA was terminating his employment based upon his misrepresentation of his medical condition, his acceptance of Salary Continuation to which he was not entitled, and his failure to be truthful about these topics during the April 8th interview. (VIII RA 0173). There was nothing inconsistent about the reasons stated in the termination letter that would give rise to an inference of pretext. Likewise, the fact that MWRA did not require Plaintiff to repay the Salary Continuation is irrelevant in considering pretext. *See*, Gordon, 2017 WL 3203385 at *8-10.

iii. The Trial Court Should Have Granted MWRA's Directed Verdict or JNOV Motion or, in the Alternative, Ordered a New Trial.

As outlined above, MWRA articulated a legitimate, non-discriminatory reason for the termination, i.e., its honest belief that Plaintiff had lied. It was therefore error for the Court to deny MWRA's directed verdict and JNOV motion, especially given the factual findings reached by the Court in its memorandum of decision as to FMLA liquidated damages. Because Plaintiff's prima facie case was not proved through evidence at trial, the verdict and judgment on Plaintiff's retaliation claims should be set aside.

At the very least, MWRA was entitled to an instruction that if MWRA honestly believed Plaintiff misused or was dishonest about his leave, then no liability could attach. *See*, Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 13 (1st Cir. 2012) (upholding jury instruction that "an employer is not liable for retaliation under the FMLA where it has an honest, good faith belief for termination, even if it turns out that the employer was mistaken in that belief."). The requested honest belief instruction would have, at least, mitigated the Court's incorrect and confusing "negative factor" jury instruction.

C. The Trial Court Erred in Instructing the Jury That It Was Not to Consider Plaintiff's Surplus Income as an Offset to Future Pension Losses.

The evidence established that Plaintiff earned $97,867 more in income from the time of his April 2015 termination to the time of trial than he would have earned had he remained at MWRA. (VII RA0796). Yet, the Court erroneously prohibited the jury from considering Plaintiff's surplus post-termination earnings as an offset to his claimed lost pension benefits in determining an award of front pay.[18] It was error of the Court to do so.

Because Plaintiff earned more from his employment after his termination than he did at MWRA, he did not claim lost wages. The only element of front pay damages Plaintiff sought to recover was lost pension benefits, calculated at $351,869. (VII RA0782-0785). This amount represents the difference between the

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[18] The Trial Court instructed the jury, over MWRA's objection, that it "should [not] offset lost pension benefits with any future salary," and that "front pay damages compensate for the loss of [Plaintiff's] pension rights, which he owned, independent of any salary from any other source." (VII RA1393). The Court declined to instruct the jury, as requested by MWRA, that it must deduct from Plaintiff's lost pension benefits income that he earned after termination in excess of what he would have received from MWRA had his employment not been terminated. (VI RA0116-117).

pension benefits Plaintiff would have received over the course of his lifetime had he remained employed by MWRA until age 66 and lived to age 84, and the pension benefits he actually has and will continue to receive as a result of his termination in April, 2015. *Id.*

In a post-trial ruling, the Court correctly reduced the jury's front pay award to $188,666 to account for the pension contributions Plaintiff would have been required to make had he remained employed at MWRA through age 66 ($60,000), and the amount of pension benefits Plaintiff will receive before his anticipated retirement date in 2019 at age 66 ($103,203).[19] (Add. 6). As requested by the MWRA, the Court should have further reduced this front pay amount by $97,867 to reflect surplus earnings which Plaintiff would not have earned had he remained

[19] The Trial Court reserved the issue of FMLA front pay for its determination, and adopted its own front pay award of $188,666. The award accounted for the pension contributions Plaintiff would have been required to make had he remained employed at MWRA through age 66 ($60,000) and the amount of pension benefits Plaintiff will receive before his anticipated retirement date in 2019 at age 66 ($103,203). The Court then reduced the jury's award of front pay on the ADA and Ch. 151B claims to $188,666 to mirror its award of front pay under the FMLA. For practical purposes, there is a single award of front pay in the amount of $188,666.

employed at MWRA, and by not doing so, Plaintiff received a windfall.

It is well established that an award of front pay is intended to compensate a plaintiff for his or her loss, not generate a windfall for the plaintiff. *See*, e.g. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 102 (2009)(noting that case law equates front pay with compensation for the loss of future earnings and benefits); Handrahan v. Red Roof Inns, Inc., 48 Mass. App. Ct. 901 (1999); Trainor v. HEI Hosp., LLC, 699 F.3d 19, 31 (1st Cir. 2012). As with all compensatory remedies, an award of front pay cannot make the plaintiff more than whole. Conway v. Electro Switch Corp., 402 Mass. 385, 388 (1988). In considering front pay damages, "the court is not supposed to catapult [the plaintiff] into a better position than he would have enjoyed in the absence of discrimination." Denton v. Boilermakers Local 29, 673 F.Supp. 37, 51 (D.Mass.1987) (quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 234 (1982).

If Plaintiff is entitled to recover his full pension benefits without any offset for his surplus earnings, he will impermissibly receive more money than he lost as a result of the termination (i.e., a

windfall). This additional income is a consequence of Plaintiff's termination and must be considered along with other consequences- *i.e.*, lost pension benefits - in determining a front pay award. Failure to include this offset in determining a damages award affords Plaintiff a double recovery, and is contrary to the fundamental purpose of compensatory damages.

The Court's treatment of Plaintiff's wages and pension benefits as separate silos also deprives MWRA of the benefit of mitigation. An award of front pay is subject to an employee's duty to mitigate. Haddad, 455 Mass. at 102. As the Supreme Judicial Court recognized in Haddad, in awarding front pay damages, the fact finder must consider, among other things, "the amount of earnings that the plaintiff would probably have received from another employer until his retirement, which would reduce any front pay award." *Id.* The court in Haddad did not identify any category of a front pay award, such as lost pension benefits, that would be exempt from offset. Likewise, there is no decisional law elsewhere that distinguishes pension losses as a separate category of front pay damages not subject to offset by other sources of income or benefits. *See* Aguinaga v. United Food & Commercial Workers Int'l

Union, 58 F.3d 513, 520 (10th Cir. 1995)(district court erred by denying the carryover of setoffs from one category of damages, such as pension benefits, to another category of damages, such as earnings.).[20]

By instructing the jury not to consider Plaintiff's surplus income as an offset to lost pension benefits, the Court created artificial categories of damages, with pension benefits in one category, and wages in another. This construct undercuts the underlying purpose of a front pay award, which is to make the plaintiff whole and restore the economic status quo. Consistent with this purpose, determination of loss for the purposes of calculating front pay damages does not end with a consideration of Plaintiff's pension alone. It must also consider that Plaintiff obtained subsequent employment, at a greater salary following his termination from MWRA.

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[20] *See also*, Blum v. Witco Chem. Corp., 829 F.2d 367, 373 (3d Cir. 1987)(holding that lost pension benefits are recoverable as front pay, but cautioning that "such benefits may not be available where an award would make a plaintiff *more* than whole, such as where a plaintiff has found subsequent employment at a greatly increased salary that would offset any loss of pension benefits…").

Lastly, the requested reduction of Plaintiff's front pay award to account for surplus earnings does not generate a windfall for MWRA. An employee's right to pension benefits is acquired through years of service combined with individual financial contributions. Plaintiff has no contractual or statutory right to pension benefits beyond what he actually has (and will) receive in view of his separation from employment with MWRA in April, 2015. (VII RA 1334-1335) Therefore, reducing Plaintiff's front pay award to account for surplus income does not allow MWRA to retain pension funds that it otherwise owed to Plaintiff. Rather, it results in an award of compensatory damages that more accurately reflects Plaintiff's overall economic loss.

D. The Jury's Punitive Damages Award Should Be Vacated or Remitted and its Liquidated Damages Award Should Be Vacated.

This Court should vacate the entire punitive damages award because evidence of the type of egregious conduct required to obtain such an award was markedly absent in this case.

Massachusetts law is clear that an award of punitive damages under Ch. 151B requires a heightened finding beyond mere liability or scienter and is

appropriately reserved for conduct that is determined to be "outrageous" due to a defendant's "evil motive" or "reckless indifference to the rights of others." Haddad, 455 Mass. at 107-08; Kiely v. Teradyne, Inc., 85 Mass. App. Ct. 431, 435-436 (2014). Punitive damages should only be awarded where deterrence is necessary or "where the defendant's behavior is so egregious that it warrants public condemnation and punishment." Haddad, 45 Mass. at 107-108.

Punitive damages are reserved for exceptionally outrageous or egregious conduct that is of a quasi-criminal nature. "A finding of retaliation alone is not sufficient." Kiely, 85 Mass. App. Ct. at 435-436; Haddad 455 Mass. at 110 ("intentional discrimination alone is not sufficient"). Rather, a higher degree of culpability beyond mere liability and beyond a knowing violation of the statute is absolutely required. *Id.*

There is no angle from which the jury could have viewed the evidence as supporting the theory that MWRA purposefully retaliated against the Plaintiff, or acted with an evil motive, or displayed callous disregard for his rights, and therefore the Ch. 151B retaliation claim cannot be predicated upon malicious and purposeful retaliation. *Id.* By all accounts, MWRA was

supportive of Plaintiff's medical leaves and had expressed a sincere desire to help him through payment of Salary Continuation when it appeared that he faced financial hardship due to his inability to work. MWRA only began an investigation into Plaintiff's medical leave after it obtained information that was inconsistent with his representations to HR. MWRA had every right to review surveillance records once it learned that Plaintiff was on vacation during his leave, and MWRA had every reason to believe that Plaintiff's conduct on the surveillance video contradicted his professed inability to drive or walk unassisted. Regardless, it was only after Plaintiff lied to Gay-Valente and Gillen about basic facts surrounding his medical leave that MWRA ultimately decided to terminate him. That final decision was both rational and deliberative, involving not only consideration by senior management, but assistance from MWRA's legal counsel and its Affirmative Action Officer to ensure that MWRA complied with the law.

Moreover, the following findings of the Trial Court in considering liquidated damages under the FMLA fully support that the issue of punitive damages should have never been considered by a jury: (1) MWRA "did not

consciously and intentionally violate the FMLA, even after April 6th;" (2)"… Ms. Gay-Valente and all other MWRA officials consciously believed that they were complying with the FMLA;"(3) "Ms. Gay-Valente and Ms. Gillen … reported their sincere perceptions of the interview with Mr. DaPrato. The senior managers accepted the information they received in good faith;" and (4) "Mr. Laskey, and other senior managers, honestly believed that DaPrato had lied to Ms. Gay-Valente and Ms. Gillen." (Add. 6). While the Court ultimately found MWRA liable for liquidated damages under the FMLA, it acknowledged that MWRA's conduct demonstrated good faith to comply with the law. *Id.* Based upon the Court's own findings concerning MWRA's good faith under the FMLA, it should have never sent the question of punitive damages to the jury, as the evidence clearly did not support that MWRA acted with an "evil motive" or "reckless indifference to Plaintiff's rights" under Ch. 151B. Plaintiff's claim under Ch. 151B, no matter how it is viewed, does not rise to the level of outrageousness and egregiousness that is required for punitive damages. Even if the jury could have concluded that MWRA violated the letter of Ch. 151B, the only conduct at issue is MWRA's decision

to terminate Plaintiff - nothing more. There was no evidence to suggest that MWRA acted maliciously or orchestrated a cover up to conceal its alleged retaliation or that it took steps to prolong the issues, or other aggravating factors beyond the purported retaliation itself, that would permit a jury to consider punitive damages. *See*, Kiely, 85 Mass. App. Ct. at 436-439.[21]

In the alternative, the jury's punitive damages award should be remitted substantially to account for the lack of any evidence to support a substantial punitive damages award, especially where Plaintiff was awarded liquidated damages under the FMLA. Dollar v. Smithway Motor Xpress, Inc., 710 F.3d 798, 811 (8th Cir. 2013); *see also* Johnson v. Honda of Am. Mfg., 221 F. Supp. 2d 853, 858 (S.D. Ohio 2002) ("even without punitive damages, the FMLA's provision for liquidated damages operates to punish the defendant"). The award of $715,038 in punitive damages in addition to the

[21] The award of punitive damages should also be vacated as a matter of public policy, since it is clear that MWRA did not consciously retaliate against the Plaintiff but rather tried in earnest to apply tenets of the law and, therefore, its conduct does not warrant public condemnation and punishment. Haddad, 455 Mass. at 107-108.

$208,443 in FMLA liquidated damages, is excessive given the evidence at trial and unreasonably punishes MWRA twice for the essentially same alleged conduct.

With respect to the award of FMLA liquidated damages, for the reasons stated in Section B of the Argument, supra, the evidence did not support a finding of liability under the FMLA and, therefore, the Court's award of FMLA liquidated damages was improper. As the record reflects, there was ample evidence that MWRA had reasonable grounds for believing that its conduct was not in violation of the FMLA.[22] The FMLA liquidated damages award should also be vacated.[23]

E. The Jury's Award of $200,000 in Emotional Distress Damages Requires Remittitur.

The jury's award of $200,000 in emotional distress damages was also excessive and completely

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[22] The standard for FMLA liquidated damages is whether "to the satisfaction of the court" (i) the employer's FMLA violation was "in good faith" and (ii) the employer had "reasonable grounds for believing that the act or omission was not in violation" of the FMLA. 29 U.S.C. § 2617(a)(1). (Add. 1). The Court found that MWRA satisfied the first, but not second, prong of this standard.

[23] The Trial Court's findings on MWRA's JNOV and new trial motion cannot be reconciled with its findings regarding MWRA's conduct as to liquidated damages under the FMLA.

unfounded given the uncontroverted evidence at trial. *See*, Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997)(error of law to uphold damage awards that are "greatly disproportionate to the injury proven or represented a miscarriage of justice").

Plaintiff claimed to have suffered from debilitating anxiety and ocular migraines due to the termination. (VII RA 0438) Immediately after the termination, Plaintiff was able to study for and pass an extremely difficult, 400-question Project Management Professional certification exam despite his alleged debilitating condition. (VII RA0281-0282, 0488, 0605-0606). Both Plaintiff and his wife testified that Plaintiff's anxiety subsided within a couple of months of his termination when he was hired by Biogen as an IT consultant. (VII RA0439-0440, 0605). Plaintiff's wife testified that thereafter she did not think Plaintiff suffered from anxiety on a daily basis "at all" and that he was able to socialize with his friends on a regular basis. (VII RA0605). Plaintiff's alleged anxiety was, at best, short lived and minimal.

Moreover, Plaintiff did not see his primary care physician for anxiety until five months after his discharge from MWRA, which was two months after his new

job at Biogen and well after his anxiety had subsided. (VII RA0468; VIII RA0248-0249). Plaintiff's medical records show that he declined to see a therapist, was not prescribed any medication, and did not pursue any follow up treatment. (VIII RA0256-0258).[24] Additionally, Plaintiff's annual depression screening listed his anxiety as "0". (VIII RA0252-0254).

While Plaintiff testified that the termination affected his blood pressure and weight, his medical records show that both were fluctuating well before and after his discharge from MWRA and were managed through diet and exercise, (VIII RA0215-0232, 0242-0254, 0256-0258) and there was no testimony from any medical provider to support any aspect of Plaintiff's emotional distress claim.

Finally, Plaintiff testified he has suffered from stress since his termination due to the uncertainty of consulting work. (VII RA0439-0440). However, Plaintiff has been consistently employed as an IT consultant in the private sector earning substantially more than his salary at MWRA, and Plaintiff has had competing job

[24] Plaintiff testified that he had previously treated unrelated anxiety in 2013 with medication and therapy but found meditation to be more effective. (VII RA0362, 0441)

offers and has been able to choose jobs that were closer to home. (VII RA0452-0458, 0607-0608). He has been able to take family vacations to both Jamaica and Martha's Vineyard and is overall "pretty happy in his consulting jobs." (VII RA0540, 0607).

In short, Plaintiff's emotional response to his discharge was neither debilitating nor enduring. Although an emotional distress award under Ch. 151B can be sustained without physical injury or psychiatric consultation, the amount of the award must be based on the injury proven, and absence of physical injury or psychiatric consultation is a highly probative indicator that the award is excessive and should be remitted. Labonte, 424 Mass. at 824.

Even where a Ch. 151B plaintiff has sought therapeutic or medical help of some sort, which Plaintiff did not, courts have not hesitated to reduce the emotional distress damages award. *See Id.* at 855-56 (remittitur of $500,000 award even though plaintiff sought counseling for "real and significant" emotional distress); Powers v. H.B. Smith Company, Inc., 42 Mass. App. Ct. 657, 665 (1997) (remittitur of $400,000 award affirmed even though plaintiff sought counseling); Harvard Vanguard Medical Associates, Inc.

v. MCAD, 76 Mass. App. Ct. 1126 (2010)(remittitur of $350,000 award affirmed despite physician's testimony that plaintiff suffered severe insomnia, anorexia, and loss of self-esteem despite medication).

The minimal evidence Plaintiff presented at trial was entirely insufficient to support the jury's $200,000 damages award, which amount the jury simply adopted from Plaintiff's counsel during closing arguments. The result was a jury award that was made without thought or basis, was disproportional to Plaintiff's injury, and was impermissibly punitive. Labonte, 424 Mass. at 824. Under these circumstances, remittitur of the jury's award is not only appropriate, it is required.

CONCLUSION

For the reasons stated above, the Court should vacate the judgment entered against defendant-appellant Massachusetts Water Resources Authority, or vacate or remit the punitive damages award, vacate the liquidated damages award and remit the emotional distress award, or remand the matter for a new trial.

Respectfully submitted,

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Dated: November 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached *Brief for the Defendant-Appellant Massachusetts Water Resources Authority* were served upon counsel for Plaintiff-Appellee by electronic filing, electronic mail, and regular mail this 19th day of November, 2018.

Meghan L. McNamara

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(K) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Meghan L. McNamara, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Signed By

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