No. _____

In The
Supreme Court of the United States

ROBERT P. HILLMANN,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Three district court judges in the Northern District of Illinois, presided over this case for ten years. All three district court judges denied Respondent's motions for judgment as a matter of law and held that a jury should decide the issues. On appeal after the second full trial on the merits, the Seventh Circuit disagreed and held the claims never should have been tried. Alternatively, the Court of Appeals stated the case should not have been submitted to the jury. The City, however, only argued on appeal that the evidence was insufficient to support the verdict.

1. Does a Court of Appeals have jurisdiction to reach back and decide whether a case should have been tried after there has been a full trial on the merits, if the question presented involves a pure legal conclusion, as four circuits have clearly held, or must all defenses raised in the Rule 50 motions be evaluated in light of the character and quality of the trial evidence, as other circuits have held?

2. Whether a Court of Appeals' review of denial of judgment as a matter of law after a full trial on the merits can ignore direct and circumstantial evidence, as well as the reasonable inferences drawn from the evidence, that supported the jury's verdict?

LIST OF PARTIES

The petitioner is Robert P. Hillmann, The respondent is the City of Chicago.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 834 F.3d 787. App. 1a. The October 17, 2016 order of the Court of Appeals, denying rehearing and rehearing en banc, is not reported. App. 148a-149a. The opinion of the district court, dated March 31, 2014, is reported at 14 F.Supp.3d 1152. App. 17a. The district court's opinion on rehearing, dated September 4, 2014, is reported at 66 F.Supp.3d 1109. App. 108a. The district court's opinion, dated September 26, 2007, is unpublished but available at 2007 WL 2827806. App. 134a.

JURISDICTION

The decision of the Court of Appeals was entered on August 23, 2016. A timely petition for rehearing and rehearing en banc was denied on October 17, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1291 - Final decisions of district courts:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District

> Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

INTRODUCTION

This case involves the important question raised by Justice Thomas in the concurring opinion in *Ortiz v. Jordan*, 562 U.S. 180, 193 (2011) on whether a Court of Appeals lacks jurisdiction to decide whether a case should have been tried after a full trial on the merits. A jury found Petitioner, Robert Hillmann, was fired in retaliation because he exercised his rights under the Illinois Workers' Compensation Act ("IWCA"). The United States Court of Appeals for the Seventh Circuit reversed, and held the claim never "should have been tried" because "this required proof that the relevant decision-maker knew about his workers' compensation claim." App. 2a-3a. The Seventh Circuit never stated which Federal Rule of Civil Procedure authorized the court to enter judgment as a matter of law in favor of the City or what standard of review applied to the claim it reversed[1].

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[1] During oral argument Judge Sykes, the author of the opinion, stated: "If the final decision-maker didn't know, then there's no case and it should have been kicked on summary judgment." *See* Oral Argument at 41:02-41:09, Hillmann, (Nos. 14-3438 & 14-3494), available at www.ca7.uscourts.gov.

The district court denied the City's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 because under this standard "'the question is simply whether the evidence as a whole, when combined with all reasonable inferences permissibly drawn from that evidence, is sufficient to allow a reasonable jury to find in favor'" of the prevailing party. App. 75a-76 (citations omitted). The district court denied the City's Rule 50 motions because the "overwhelming trial evidence and documentary evidence" supported the jury's finding that Hillmann was "targeted for retaliatory treatment" after he requested medical treatment for the work-related injury and filed a workers' compensation claim. *Id.* 74a. At stake is whether, under federal law, defenses must be evaluated in light of the full trial record after a jury verdict, with all reasonable inferences being drawn in favor of the non-movant, or whether the full trial record can be ignored because the legal arguments have no bearing on the sufficiency of the trial evidence.

Petitioner worked for the City of Chicago for nearly three decades before he was fired. App. 3a. Hillmann's title at the time his position was eliminated in the Reduction in Force ("RIF") was chief timekeeper. *Id.* The City admitted on appeal the trial evidence supported a finding that Deputy Commissioner Murphy, who created the RIF list, that eliminated Hillmann's position, and who participated in the team decision[2] regarding the

[2] At trial, John Sullivan, the Managing Deputy Commissioner, stated the RIF "decision was a team decision reached *between the commissioner, the deputy commissioners* and himself.

RIF, knew Hillmann exercised his rights under the IWCA and bore him animus because of it. App. 62a; *see also* City Appellate brief at 37-8. During oral argument Judge Sykes seemed to agree: "I thought there was a dispute of fact about who was the decision-maker here and there's plenty of evidence that Murphy the Supervisor, he's the Deputy in the Bureau, and Hennessy the Labor Department representative, had discriminatory or retaliatory animus because they knew about the Worker's Comp and there's evidence of their activities to punish the Plaintiff and they were responsible for placing him on the RIF list …." *See* Oral Argument at 10:13 - 10:48 (Nos. 14-3438 & 14-3494).

STATEMENT OF THE CASE

A. Background Facts

On July 1, 2000, Hillmann was denied for the first time in his a career a merit pay increase. App. 4a. The City kept Hillmann in the dark about this merit pay denial and never produced any evidence during discovery or at trial to justify this pay denial. App. 81a. This pay denial came on the heels of Hillmann's report to his supervisor and the personnel liaison that he was having difficulty performing new repetitive job duties assigned by Bart Vittori because of the permanent injury to his arm. App. 23a. Hillmann's supervisor informed him there was nothing he could do because he no longer had authority in the Department. *Id*. "At that point, [Hillmann] believed it was the [personnel liaison's] job to notify Vittori about his restrictions." *Id*.

Sanchez had the final say, according to Sullivan. R. 579 (Trial tr. at 706).

Nothing was done about Hillmann's request, so he continued to perform the new job duties. *Id.*

On August 7, 2000, Hillmann reported a work-related injury to the personnel liaison because his arm was completely swollen from the new job duties. R. 576 (Trial tr. at 74). The personnel liaison, testified that Hillmann's injury was obvious; he could see he had an injury of some type to his arm. App. 23a-24a. On August 24, 2000, the personnel liaison denied Hillmann access to medical treatment after he spoke with Catharine Hennessy, the Department's labor lawyer. *Id.* 24a, 28a, 45a, 80a. Hillmann filed a workers' compensation claim with the Illinois Industrial Commission, in order to get medical treatment for his injury. *Id.* 28a. "On September 1, 2000, the day [Hillmann] filed his workers' compensation claim," he was "effectively demoted" and "transferred to the Construction Division to answer phones." *Id.* 79a-80a.

"A month later, [Hillmann] was transferred to the garage of the Transportation Division to answer phones." *Id.* at 80a. "Hennessey [sic] testified she authorized those transfers and she had no idea that [Hillmann] had filed a workers' compensation claim." *Id.* 80a. Yet, the personnel liaison testified he called Hennessy to request medical treatment for Hillmann and that he forwarded a letter to her on September 11, 2000, from Hillmann's physician, Dr. Gonzales, indicating Hillmann had a work-related injury and needed medical treatment. *Id.* 30a, 80a. The district court noted the labor lawyer "was antagonistic on the stand" and that the jury no doubt "significantly discounted her testimony." *Id.* 80a. On October 1, 2000, Hillmann was denied another merit pay increase. *Id.* 5a. The City never informed

Hillmann about this pay denial or provided any justification of why he was denied this merit pay increase. *Id*. 48a.

On December 21, 2000, Hennessy sent Hillmann a letter referencing an earlier note from Dr. Gonzales, indicating Hillmann had a work-related injury, that he needed medical treatment and should refrain from working. App. 31a, 81a. The labor lawyer's letter "did not advise Plaintiff to apply for disability or authorize him to seek medical treatment for his injury; [instead she] advised him to apply for a leave of absence." *Id*. 81a. When the personnel liaison hand-delivered the letter to Hillmann he told him "not to report back to work." *Id*. Accordingly, days before Christmas, Hillmann was told he could not report for work, and still he had no medical treatment for his work injury. *Id*. 56a, 81a.

The district court noted that the City "continued to refuse to authorize payment for any medical treatment or acknowledge that [Hillmann's] injury was work-related despite being informed by Dr. Arnold, [the City's agent], that the condition was work-related … and receiving multiple requests for follow-up treatment by both Dr. Arnold and Dr. Gonzales." App. 79a. The Law Department also informed the City in a memorandum that the City doctor determined Hillmann "had a work-related injury and that he needed to be placed on duty disability and accommodated when Dr. Arnold released him to return to work." *Id*. 79a. The memo discussed that Hillmann's physician requested specific medical treatment. *Id*. 49a, 79a. Hillmann "never received that treatment, [instead] someone wrote phony on the memo"; even though the memo

clearly indicated the City doctor had determined the injury was work-related. *Id*. 49a, 79a.

On March 2, 2001, this memorandum from the Law Department, was faxed to multiple locations, including the Department where Commissioner Sanchez, Sullivan, Murphy, and the labor lawyer worked. *Id*. 49a-50a, 81a; *see also* Appellee's Court of Appeals Appendix (CA7) App 14-15. On the same day the memo was faxed Hillmann was returned to work and assigned to the auto pound. *Id*. 80a. The district court noted this "transfer was a demotion: Plaintiff went from a supervisory position in which he was responsible for overseeing the payroll operations … to a position in which he checked receipts as people left the auto pound." *Id.* Deputy Commissioner Murphy authorized the transfer, as an alleged accommodation. *Id*. 39a-40a, 45a.

After the transfer to the auto pound Hillmann was denied four more merit pay increases. App. 45a-48a. Seven months after the phony memo was faxed, and seven months after Murphy authorized Hillmann's transfer to the auto pound, Murphy denied Hillmann a merit pay raise, on October 1, 2001. *Id*. 43a- 45a. Murphy never spoke with the supervisor responsible for oversight of the auto pound, about Hillmann's job performance. *Id.* 43a. Murphy's memorandum justifying the pay denial stated he saw no reason to pay Hillmann more money because he was not performing the duties of his title. *Id.* 45a. While Murphy sent this memorandum justifying the pay denial to Commissioner Sanchez, Managing Deputy Commissioner Sullivan, and the Department's labor lawyer, he never sent this rating to Hillmann or informed Petitioner about the pay denial. *Id*.

Thereafter, Hillmann was denied merit pay increases by the supervisor responsible for the auto pound. Hillmann allegedly had unexcused absences from work because if Hillmann had used sick or vacation time he would not have been denied a merit pay increase. R. 581 (Trial tr. at 1025). Hillmann was paid $7000.00 after he was fired for unused time. *Id*. at 1025-6. Three months before Hillmann was fired he was sent a memorandum indicating all his attendance records had been reviewed since he was transferred to the auto pound and the records confirmed Hillmann had requested to use sick time for the time he was absent. App. 42a; *see also* CA7 App 21. The memo stated Hillmann was prohibited from using sick time without a doctor's note. *Id*. Thus, the City required Hillmann to produce doctors' notes to use sick time, while it repeatedly ignored "multiple requests for follow-up treatment by both Dr. Arnold [the City's agent] and Dr. Gonzales." App. 79a.

"None of these merit pay increase denials or negative performance evaluations were sent to Plaintiff." App. 48a. No City witness could explain why a work history dated months after Hillmann was fired did not contain one pay denial, while another work history dated three years after the firing contained 6 merit pay denials. R. 581 (Trial tr. at 1027-29); CA7 App 1-3; 11-13. The director of personnel admitted that documents "were falsified to justify employment decisions in the Department … between the years of 1998 and 2004." R. 580 (Trial tr. at 834-35). The district court specifically noted that the evidence at trial painted a clear picture that Hillmann was denied merit pay increases because he exercised his rights under the WCA. App. 82a.

Evidence at trial varied on the number of positions allegedly eliminated in the RIF; the numbers varied from 50 to 200. App. 57a. Murphy created the RIF list that included Hillmann's position in the RIF. *Id*. 62a. Murphy was part of the "management team" that decided which positions to eliminate in the RIF. R. Doc. 579 (Trial tr. at 704, 706). The management team included Commissioner Sanchez, Deputy Commissioners and Managing Deputy Commissioner Sullivan. *Id*. Sullivan claimed that while he was part of the team decision, Sanchez had the ultimate say. App. 59a.

Evidence at trial varied on who had the final say regarding the RIF. Hennessy admitted she heard John Sullivan was the final decision-maker for selecting which positions to be eliminated in the RIF. R. 579 (Trial tr. at 627). RIF documents indicated that Sullivan was the contact for the RIF, not Commissioner Sanchez. App. 58a. Sanchez did not sign the RIF notice sent to Hillmann. Rather, the labor lawyer signed Sanchez's name to the RIF notice she sent to Hillmann; Hennessy claimed she was instructed by the director of personnel to mail out the RIF notification letters. R. 570 (Trial tr. at 627).

The City claimed at trial that all titles in timekeeping, including chief timekeeper, were eliminated because the automated timekeeping system, Kronos, rendered all timekeeping positions obsolete. App. 61a. The director of personnel admitted that employees who held the title supervising timekeeper were transferred just prior to the RIF. *Id*. One timekeeper, who performed the duties under the title of laborer, was not included in the RIF. *Id*. 62a. Murphy stated he "included the

chief timekeeping position [in the RIF] because no one had been performing" the job. *Id*. 38a. "From 1999 until at least 2004, the Department had an employee, whose official title was Assistant Commissioner, who was in charge of payroll and timekeeping." *Id*. 38a. Evidence also indicated the duties of supervising timekeeper continued to be performed after the RIF. *Id*. at 61a-62a, 82a. "[D]espite the Department's need for the very tasks Plaintiff had been performing" Hillmann's position was eliminated and the duties continued to be performed after the RIF. *Id*. 82a. The City still employed chief timekeepers in at least five other departments after the city-wide RIF, even though Kronos was used throughout the City at that time and allegedly rendered the duties obsolete. R. 579 (Tr. at 661-63). The district court noted that Murphy, along with the labor lawyer, were repeatedly impeached at trial. App. 97a.

B. Procedural Background

Mr. Hillmann filed suit against the City of Chicago in state court, alleging that his termination violated Illinois law and the Americans with Disabilities Act ("ADA"). The City removed the case to federal court and the case was assigned to Judge Wayne Andersen.

In 2007, the City moved for summary judgment on the Illinois retaliatory discharge claim asserting that the decision to eliminate Hillmann's position in the RIF was a discretionary act barred by the Illinois Tort Immunity Act. App.146a. Retaliatory discharge claims require the employee to establish that they engaged in protected activity, that the employer discharged them and a causal

relationship between the two. *See Michael v. Precision Alliance Group*, LLC, 21 N.E.3d 1183, 1188 (Ill. 2014). "When deciding the element of causation, the ultimate issue is *the employer's motive* in discharging the employee." *Id.* at 1189 (emphasis added). During discovery, witnesses (John Sullivan and the personnel director) asserted their Fifth Amendment privilege. App. 8a. Judge Andersen denied the City's motion for summary judgment on the state law retaliatory discharge claim because he found fact issues existed on whether the decision to eliminate Hillmann's position was ministerial under the collective bargaining agreement rather than discretionary. App. 146a-147a. Judge Andersen also denied the City's motion for summary judgment because material issues of fact existed regarding causation, motive, whether the City's stated reason for eliminating the position was pretext, and whether the City fraudulently concealed merit pay denials. App. 142a. Judge Andersen retired and the case was re-assigned to Judge William Hibbler who presided over the first trial. R. Doc. 247.

During the first trial, Judge Hibbler granted the City's motion to bar John Sullivan and the director of personnel from testifying because they asserted their Fifth Amendment privilege. App. 8a. The district court also granted the City's motion to exclude all references and inferences from their assertion of the Fifth Amendment. *Id.* Judge Hibbler denied the City's motion for judgment as a matter of law, (R. 351, (Trial I tr. at 854- 872)), after noting that John Sullivan, who had asserted his Fifth Amendment privilege, was the person who fired Hillmann. R. 350 (Trial I tr.at 666); R 353 (Trial I tr.

at 1005). The first trial resulted in a verdict for the City on the state law claim. App. 9a. Judge Hibbler died before ruling on the ADA retaliation claim, which had been simultaneously tried as a bench trial. *Id.*

The case was then re-assigned to Chief Judge Ruben Castillo who granted a new trial on all claims because he determined, the first trial judge erred in granting the City's motions to bar two former City witnesses' (John Sullivan and the director of personnel) testimony and all evidence and inferences from their assertion of the Fifth Amendment. App. 9a. During the second trial, the director of personnel, who had been barred from testifying in the first trial, based upon the City's motion *in limine*, admitted that timekeepers were transferred to avoid the RIF and that documents were falsified to justify employment decisions in the Department. App. 8a; R. Doc. 580 (Trial tr. 829, 834-35). Hillmann prevailed on the Illinois retaliatory discharge claim in the second trial and Chief Judge Castillo adopted the jury's advisory verdict on the ADA retaliation claim and ruled in favor of the City on that count. App. 2a, 72a.

Regarding the claim at issue here – Mr. Hillmann's Illinois retaliatory discharge claim – the district court found that the overwhelming testimony and documentary evidence at trial strongly supported the verdict. App. 49a, 132a-133a. The district court also specifically noted that the City's stated reason for eliminating the title of chief timekeeper, that Kronos rendered the position obsolete, was undermined by evidence that the "Department employed individuals to supervise and edit payroll and timekeeping in the Kronos system

until at least 2004. *Id.* The district court rejected the City's claim in its Rule 50(b) motion that it was entitled to judgment as a matter of law on the basis that Commissioner Sanchez was the final decision-maker and Hillmann had no evidence that Sanchez knew he exercised his rights because Hillmann was not required to present direct "evidence that the RIF decision-maker knew about Hillmann's workers' compensation claim and requests for medical treatment" in order to prevail. *Id.* 76-77a (citations omitted). Finally, the district court stated that the defamatory phony memorandum discussing Hillmann's work-related injury strongly supported the verdict. *Id.* 49a. The Seventh Circuit agreed that Chief Judge Castillo reasonably questioned the first judge's Fifth Amendment rulings, but that it did not matter because the claim never "should have been tried" because at a "minimum this required proof that the relevant decision-maker knew about his workers' compensation claim." App. 2a-3a.

REASONS TO GRANT THE WRIT

I. This Court should grant certiorari because there is a split in the circuits on whether a Court of Appeals has jurisdiction to decide whether a case should have been tried after a full trial on the merits and whether all defenses must be evaluated in light of the quality and character of evidence presented at trial.

This case involves the important question raised by Justice Thomas in the concurring opinion

in *Ortiz v. Jordan*, 562 U.S. 180, 193 (2011) on whether a Court of Appeals lacks jurisdiction to decide whether a case should have been tried after a jury verdict. At stake is whether, under federal law, defenses must be evaluated in light of the full record at trial after a jury verdict, with all reasonable inferences being drawn in favor of the non-movant, or whether the trial record can be ignored because the legal arguments have no bearing on the sufficiency of the trial evidence.

"The jurisdiction of a Court of Appeals under 28 U.S.C. § 1291 extends only to 'appeals from … final decisions of district courts'", and generally orders denying summary judgment are not considered final orders. *Ortiz,* 562 U.S. at 188. In *Ortiz*, this Court stated it need not address the question of whether a Court of Appeals may consider whether a case should have been tried after a full trial on the merits, based on a defense involving a pure question of law, because the appeal in question did not involve pure questions of law. *Id.* at 187-88. Pure questions of law typically do not involve contests "about what occurred, or why an action was taken." *Id.* at 189. Because Ortiz's deliberate indifference claim involved issues about whether officials' were adequately *informed* about the first assault, rather than "disputes about the substance and clarity of pre-existing law", this Court did not resolve the issue of whether an exception to the general jurisdictional rule existed for pure questions of law. *Id.* at 191.

The circuits were split before this Court's ruling in *Ortiz*, and remain split on the question of whether a Court of Appeals lacks jurisdiction to consider whether a case should have been tried,

after a jury verdict, if the issue presented involves a pure question of law. The following circuits hold the question of whether a case should have been tried is not reviewable after a final judgment regardless of whether the issue is factual or purely legal. *See e.g.*, *Ji v. Bose Corp*, 626 F.3d 116, 127-28 (1st Cir. 2010) (whether a case should have been tried is merely a judge's determination that genuine issues of material fact exist, "[i]t is not a judgment"; a disappointed party must restate defenses in Rule 50 motions and propriety of denial of JMOL is then reviewed on appeal, there is no exception for legal defenses); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1236 (4th Cir. 1995) (Fourth Circuit refused under any circumstances to review whether a case should have been tried after a full trial on the merits because the denial of summary judgment is based on an undeveloped record and even when the pretrial and trial testimony is the same "a judgment after a full trial is superior to a pretrial decision because the factfinder's verdict depends on credibility assessments that a pretrial paper record simply cannot allow"); *Blessing Marine Services v. Jeffboat L.L.C.*, 771 F.3d 894, 897-8 (5th Cir. 2014) (Fifth Circuit held it lacked jurisdiction to review whether case should have been tried based on purely legal conclusions and would only have jurisdiction "if the party restated its objection in a Rule 50 motion"); *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012) (review of denial of summary judgment not appealable, absent Rule 50 motions, because it is interlocutory; litigants must renew summary judgment arguments in Rule 50 motions to preserve those arguments for appeal); *In re Carlson*, 464

Fed.Appx. 845, 849 (11th Cir.2012) (court will not go back to summary judgment because the full record developed at trial supersedes the record existing at the time of summary judgment).

In this case, the City never argued in its Rule 50 motions that it was entitled to judgment as a matter of law based on the legal arguments it raised at summary judgment. *See* R. Doc. 490, 491, 508, 510. Nor did the City's briefing in the Court of Appeals challenge the district court's denial of summary judgment. Instead, the City's Rule 50(a) motion argued that there was insufficient evidence at trial to show that *a decision-maker in the RIF knew* Hillmann exercised his rights under the IWCA. R. Doc. 491 at 14-15. The City's closing statement to the jury mirrored this exact argument. R. Doc. 581 (Trial tr. at 1141-42). In most circumstances, "issues not sufficiently argued in briefs are considered waived and normally will not be addressed on appeal." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2nd Cir. 1998). Despite this general rule, the Seventh Circuit *sua sponte* held this case never should have gone to trial. App. 2a.

In reversing the jury verdict in favor of Hillmann, the Seventh Circuit never set out what Federal Rule of Civil Procedure or standard of review applied. It did state that the case never should have been tried, seemingly relying upon cases in the circuits that hold a Court of Appeals may ignore the jurisdictional bar and trial record and determine whether a case should have been tried, when the defense is based purely on a legal conclusion. *See e.g., Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761-62 (7th Cir. 2015) (party not required to renew all of its legal arguments raised at

summary judgment in its Rule 50 motions because the legal arguments at summary judgment had "no bearing on the sufficiency of the trial evidence"); *Stampf v. Long Island R.R. Co.*, 761 F.3d 192, 201 n. 2 (2nd Cir. 2014) (exception exits and court may review legal defense after a full trial on the merits when the district court's error was purely one of law, but court noted appellate issue did not involve pure legal error); *Mincy v. McConnell*, 523 Fed. Appx. 898, 900 (3rd Cir. 2013) (Third Circuit acknowledged that an order denying summary judgment is not reviewable after a full trial on the merits because the trial record supersedes the record existing at time of summary judgment motion but "an exception to this rule allows for appeal, even after a judgment is entered, when dispositive legal questions are raised"); *Hill v. Homewood Residential, Inc.*, 799 F.3d 544, 550 (6th Cir. 2015) (court can only review whether summary judgment should have been entered after a full trial on the merits when the denial of summary judgment involves pure question of law); *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) (Ninth Circuit will only review summary judgment after a full trial on the merits when the error of law, "if not made, would have required the district court to grant the motion"); *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012) (D.C. Circuit held it has jurisdiction to hear legal arguments and Rule 50 motion is not necessary to preserve purely legal claim rejected at summary judgment).

There is, however, dissention intra-circuit on whether a Court of Appeals may review the case at the summary judgment stage after a full trial on the

merits[3]. For example, in *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 824 (7th Cir. 2016), a panel of the Seventh Circuit held:

> denial of summary judgment is an *interlocutory matter* subsumed by a final judgment. "Once a jury has rendered its verdict, 'the full record developed in court supersedes the record existing at the time of the summary- judgment motion.' *Ortiz*, 562 at 184, see also *Lawson*, 791 F.3d at 761 ('summary judgment relies on evidentiary predictions which are unnecessary once a jury has found the actual facts.') *After trial, the summary judgment denial is ancient history and not subject to appeal.*

(Emphasis added). In *Empress Casino Joliet Corp*, the Seventh Circuit refused to review whether the case should have been tried based on purely legal issues because the court held the "*controversial exception for purely legal issues does not apply here*." (Emphasis added). It is no surprise the court in

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[3] *See Ayers v. City of Cleveland*, 773 F.3d 161, 167 (6th Cir. 2014) (even if denial of qualified immunity involved pure question of law, time to appeal interlocutory denial of summary judgment long passed; therefore, the official must raise legal arguments in Rule 50 motions and question becomes whether the evidence presented at trial is sufficient to overcome the defense); *Owatonna Clinic- Mayo Health System v. Medical Protective*, 639 F.3d 806, 810 (8th Cir. 2011) (acknowledging intra-circuit split, but holding it was unnecessary to resolve conflict).

Empress Casino Joliet Corp., called this a controversial exception, because the concurring opinion in *Ortiz* stated that a Court of Appeals lacks jurisdiction to determine whether the case should have been tried, and the fact "the Court of Appeals considered the pretrial or full record is beside the point." *Ortiz*, at 193. In *Elusta v. Rubio*, 418 Fed.Appx. 552, 553 (7th Cir. 2011), another panel of the Seventh Circuit rejected an appellant's argument that because he was entitled to judgment as a matter of law *the case never should have been tried*. The Seventh Circuit in *Elusta* concluded the argument was foreclosed by *Ortiz*, because once there has been a trial, the Court of Appeals may not reach back and decide whether the case should have been tried; *the defense must* be "evaluated in light of the character and quality of the evidence received in court." *Id.* at 554, quoting *Ortiz*, 131 S.Ct. at 889.

This Court should grant certiorari to resolve the split in the circuits. The better approach is that after a full trial on the merits, Courts of Appeals lack jurisdiction to determine if the case should have been tried and all defenses must be "evaluated in light of the character and quality of the evidence received in court." *See Id.* at 889. Following the better rule, courts and attorneys would not be stuck in a quagmire of determining whether the issue was purely factual, legal or some combination of the two. *See Chesapeake Paper Prods.*, 51 F.3d at 1236; *see also Feld*, 688 F.3d at 783 (noting whether the issue is based on law or fact or some combination of the two can be vexing). Here, the Court of Appeals held because Hillmann allegedly presented no evidence that the relevant decision-maker knew he filed a WCA claim, the case never should have been tried.

But issues regarding knowledge, whether a person was informed and motive are quintessentially fact questions. *See Ortiz*, 562 U.S. at 190-91; *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) ("motivation is itself a factual question."); *Michael v. Precision Alliance Group, LLC*, 952 N.E.2d 682, 690 (Ill. App.2011) (whether supervisors knew an employee engaged in protected activity was a fact question and proof often relies on circumstantial evidence).

Similarly, while the issue of whether Illinois law requires proof that "the relevant decision-maker" knew or merely requires proof of the employer's knowledge that the employee exercised a protected right in order to avoid summary judgment is arguably a question of law[4], whether in fact a decision-maker or the employer knew the employee exercised a protected a right is inherently a question

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[4] The Seventh Circuit held that "a claim for retaliatory discharge requires - at a minimum- that *the relevant decision-maker knew* that the employee intended to file or had filed a workers' compensation claim." App. 13a. The word "decision-maker," or the phrase "*relevant decision-maker*," does not appear in any Supreme Court of Illinois decision discussing retaliatory discharge. The single Illinois appellate court case the Seventh Circuit relied upon for the proposition that proof of the relevant decision-maker's knowledge is essential to the claim held the tort requires evidence "that *those responsible* for plaintiff's termination" knew he intended to file a workers' compensation. *See Marin v. American Meat Packing Co*., 562 N.E.2d 282, 286 (Ill. App.1990) (emphasis added). Deputy Commissioner Murphy was one of "*those responsible*" for Hillmann's termination because he created the RIF list which eliminated Hillmann's position and was part of the team decision. Indeed, even in the City's closing statement, it argued Hillmann had only had to prove that *a decision-maker knew*. R. Doc. 581 (Trial tr. at 1141).

of fact. *See Ortiz*, 562 U.S. at 191-92. And this Court has held that proof of motive or knowledge can be established through circumstantial evidence. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003); *Farmer v. Brennan*, 511 U.S. 825, 826 (1994) ("Whether an official had the requisite knowledge is a question of fact subject to demonstration in the usual ways").

This case illustrates the superiority of requiring all arguments, legal and factual, to be raised in Rule 50 motions and to be analyzed in terms of the evidence presented at trial. As noted by courts, summary judgment is a mere prediction of where the evidence will go. *See Empress Casino Joliet Corp,* 831 F.3d at 824. It is also a prediction of where legal arguments will go. In this case, the City argued in its Rule 50(a) motion that the evidence was *insufficient to submit to the jury* because Hillmann allegedly had no evidence that "*a decision maker in the RIF knew"* he exercised his rights under the IWCA. R. Doc. 491 at 14-15. The Seventh Circuit, however, held the case *never should have gone to trial* because Hillmann presented no evidence that *the relevant* decision-maker knew he exercised his rights. App. 2a-3a. While the Court of Appeals' opinion appears innocuous, it is fatally infirm because it is not supported by the factual record or legal arguments raised by the City at summary judgment.

Had the Seventh Circuit simply analyzed the arguments raised by the City on appeal and in their Rule 50 motions, in light of the evidence presented at trial, the court would not have ruled that the claim never should have been tried. Because the defense raised by the City at summary judgment

was not included in the City's Rule 50 motions or on appeal, the issue was not briefed on appeal by the parties. Had the issue been raised and briefed, the Court of Appeals would have been informed by Hillmann that the City's argument at summary judgment that it was entitled to judgment as a matter of law on the Illinois retaliatory claim was based on immunity under the Illinois Tort Immunity Act, *not* because there was *no* evidence that the relevant decision-maker had knowledge Hillmann exercised his rights. *See* App. 146a; *see also* R. Doc. 156, 158, 159. Moreover, the Court of Appeals would have been informed by Petitioner that in the City's motion for summary judgment it identified John Sullivan, as the person who recommended and decided to eliminate Hillmann's position of chief timekeeper in the RIF. R. Doc. 159-8 ¶ 78, 84. And Sullivan had asserted his Fifth Amendment privilege during discovery in this case, which the district court was allowed to consider in ruling on the motion for summary judgment. App. 8a. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

This case illustrates why the denial of summary judgment is an interlocutory ruling that is merely a prediction of where the evidence and legal arguments will go and why it is not a final and appealable ruling. Accordingly, the better rule is to require all arguments, including legal defenses, to be included in Rule 50 motions, which must be reviewed in light of the evidence presented at trial. That way the Court of Appeals has the benefit of briefing from the parties. Moreover, a Court of Appeals would not err and hold *sua sponte* that the case never should have gone to trial on a point not raised by the moving party at summary judgment or

supported by the pre-trial record. This case also illustrates that legal defenses can still be raised and reviewed on appeal, if included in Rule 50 motions, but that it is better to evaluate defenses based on the trial record.

II. This Court should grant certiorari because the Seventh Circuit failed to follow long standing unanimous precedent from this Court that circumstantial evidence is sufficient to prove retaliation and that on appeal the trial evidence is construed strictly in favor of the party who prevailed before the jury.

Alternatively, the Seventh Circuit concluded that because Commissioner Sanchez was the relevant final decision-maker and *he did not know*[5] that Hillmann had filed a workers' compensation claim, App. 8a, "this claim should not have been submitted to one jury[6], let alone two." *Id*. 14a. Also, the City's Rule 50(a) motion asserted the Illinois retaliatory discharge claim should not have been submitted to the jury because Hillmann allegedly failed to show that *a decision-maker* in the RIF" *knew* he exercised

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[5] Sanchez was never deposed, never testified in either trial, and the City never proffered an affidavit from Sanchez in this case. The City also moved *in limine* to bar his testimony as irrelevant and a waste of time in the first trial. R. Doc. 258-5 at 5-6, 11-12.

[6] The City never argued on appeal that the case should *not* have been submitted to the jury. Instead it argued the evidence did not support the verdict because Hillmann failed to establish Sanchez's knowledge. *See* City Brief at 34-36.

protected rights. R. Doc. 491 at 14-15. Moreover, the City's closing argument to the jury mirrored its Rule 50(a) motion. *See* R. Doc. 581 (Trial tr. at 1141).

When reviewing a motion for judgment as a matter of law, after a trial, a Court of Appeals should review *all* evidence in the record; "however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000). Weighing the evidence, credibility determinations and drawing all reasonable inferences from the record resides in the province of the jury, not the judges who review a cold record on appeal. *Id*. Even though a Court of Appeals should review the entire record, it must ignore all evidence favorable to the moving party that the jury is not required to believe. *Id.*

Applying this standard, it is clear the Seventh Circuit did not review the entire trial record because it ignored strong circumstantial evidence and reasonable inferences that could be drawn from the evidence. The ruling is also premised on the erroneous conclusion that the jury was required to believe the City's defenses: 1) that Commissioner Sanchez was the final decision-maker, and 2) Kronos rendered the job of chief timekeeper obsolete. The two reasons the Seventh Circuit stated entitled the City to judgment as a matter of law, that Sanchez was the relevant decision-maker and Kronos rendered the duties of chief timekeeper obsolete were in fact controverted issues throughout this case, and the jury did not have to believe the proffered defenses. This is particularly true because the City argued in the closing to the jury Hillmann

only had to prove "that someone who was *a decision-maker* in his termination knew he filed a workers' compensation claim." R. 581 (Trial tr. at 1141-42).

When an employer asserts it made a decision based on a reason that does not make sense, the jury may infer that employer's proffered reason for the adverse job action is pretext for unlawful discrimination. *Young. United Parcel Systems, Inc.*, 135 S.Ct. 1338, 1356 (2015) (Alito, J., concurring); *Michael*, 21 N.E.3d at 1189 (if an employer provides a basis for the employee's dismissal, that does not automatically defeat a retaliatory discharge claim, because the trier of fact is not required to believe the proffered defense). Here, the City claimed it eliminated all titles in timekeeping because Kronos rendered the duties obsolete. App. 61a. But the jury heard an assistant commissioner's position was not eliminated even though he continued to perform timekeeping duties and oversaw the payroll after the RIF. *Id*. 62a. Whereas Hillmann's position was eliminated even though Murphy claimed Hillmann was transferred to the auto pound as accommodation and Hillmann was performing no timekeeping duties checking receipts at the gate. *Id*. 39a-40a, 62a. If Kronos rendered the duties of chief timekeeper obsolete why would the City retain employees who performed timekeeping duties and fire the person who was performing *no* timekeeping duties? App. 82a. Because the evidence at trial undermined whether the City's defense for eliminating Hillmann's position was true or made any sense, the jury was free to disbelieve it and instead find it was pretext for retaliation. *See* App. 82. A reasonable jury could also infer that if Sanchez was the decision-maker, he knew Kronos did not

render timekeeping duties obsolete because his assistant commissioner continued to oversee payroll and timekeeping until at least 2004. *See id.*

The evidence was also contested on whether Sanchez was the final decision-maker. While some witnesses testified that Sanchez was the final authority on which positions would be eliminated in the RIF, Hennessy admitted she heard John Sullivan was the final decision-maker regarding which positions to eliminate in the RIF. R. Doc. 579 (Trial tr. at 627). RIF documents indicated Sullivan, not Sanchez, was the Department contact for the RIF. App. 58a. Commissioner Sanchez did not sign the RIF notification letter sent to Hillmann, rather Hennessy, the labor lawyer, signed his name claiming she was instructed by the director of personnel to mail out RIF notices[7]. The district court noted that Hennessy was a hostile witness who was repeatedly impeached and that the jury no doubt seriously discounted her testimony. App. 80a. The Seventh Circuit's opinion, however, never addressed any of the above evidence.

Moreover, even if the evidence that Sanchez was the relevant decision-maker was not controverted at trial, evidence from interested witnesses does not have to be believed by the jury. *Reeves*, 530 U.S. at 151. In *Reeves*, this Court noted that the jury did *not* have to believe testimony that Sanderson fired Reeves, because although Sanderson testified that she fired petitioner because he had falsified timekeeping records, one witness testified "employees were afraid of Chestnut" and he

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[7] Instructions to mail something is not an order from the Commissioner to sign his name. R. 570 (Trial tr. at 627).

"exercised absolute power" within the company. *Id.* at 152. Here, the jury did not have to believe City witnesses that Sanchez was the final authority when they heard competing evidence that Sullivan was the final authority regarding which positions to eliminate in the RIF.

As this Court noted in *Reeves*, a jury "can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. 530 U.S. at 147. Such an inference follows the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Id.* The City claimed it was entitled to judgment as a matter of law because Hillmann failed to present evidence that *a decision-maker knew* he exercised a right under the IWCA. R. Doc. 491 at 14-15. Because evidence of who the decision-maker was a disputed material fact, and varied according to witnesses, the jury could reasonably infer witnesses dissembled to cover up a retaliatory purpose. *Id. See also Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422-23 (7th Cir.1992) (jury can infer pretext from inconsistencies regarding who made the decision to terminate an employee). Given that the City admitted on appeal the evidence supported a finding that Deputy Commissioner Murphy knew Hillmann exercised his rights under the IWCA and bore him animus because of it, this bias created a question of fact for the jury to determine whether Hillmann was fired because of his protected activity[8]. The jury could also

[8] Because Murphy was *a decision-maker* or one of *those responsible* for the team decision regarding the RIF and the

reasonably infer that witnesses dissembled to cover-up who was the true relevant wrongdoer. *See* City Appellate brief at 37-8.

In addition to creating a jury question as to the falsity of Respondent's explanation for eliminating the chief timekeeper position, and who the decision-maker was, Hillmann also introduced circumstantial evidence that the real reason he was terminated was motivated by animus based on his exercise of rights under the IWCA. Hillmann was denied all medical treatment from the date of injury until he was fired, even though the City's agent, Dr. Arnold, determined the injury was work-related and recommended that he follow-up with treatment with his private medical doctor. App. 34a-36a, 56a. Additionally, Hennessy denied Hillmann access to medical treatment for his work-related injury. *Id*. 28a, 45a, 80a. As the district court correctly noted, interference with an employee's right to medical treatment is relevant to the issue of retaliatory

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City admitted Murphy bore Hillmann animus because he filed a WCA claim, Hillmann established "a causal relationship" between his protected activities and his discharge. The Seventh Circuit, however, held Hillmann was required to prove something more than but-for to prevail on the claim. App. 12a-13a. The Supreme Court of Illinois has held an employee only has to establish "a causal relationship" between their exercise of rights and the termination. *Michael*, 21 N.E.3d at 1189. As the district court correctly noted, Illinois courts have routinely rejected arguments that but-for analysis applies to retaliatory discharge claims and juries are instructed that to prevail, an employee has to establish that their protected activity was *a* proximate cause of the termination because these claims are analyzed using traditional tort analysis. *See* App. 77a-78a. *See also Holland v. Schwan's Home Service, Inc*., 992 N.E.2d 43, 75-6 (Ill.App.2013).

intent. App. 90a. *See also Marin,* 562 N.E.2d at 286. The Seventh Circuit opinion, however, is completely silent regarding the denial of all medical treatment which is circumstantial evidence of retaliatory intent.

The district court noted that immediately after Hillmann exercised his rights under the IWCA he was demoted several times and kept in the dark about all pay denials and performance evaluations and that these adverse job actions came on the heels of Petitioner's exercise of rights. App. 76a-83a. For example, after Hillmann filed his WCA claim and requested medical treatment he went from an office job where he was responsible for overseeing the integrity of the payroll and supervising employees to assisting the guard at the auto pound where he worked outside year round and checked receipts. *Id*. 81a. The fact that the demotions or pay denials are not cognizable because Illinois only recognizes the tort when a discharge has occurred does not diminish the circumstantial value of this evidence in proving retaliatory intent. *See Suchocki v. Staples the Office Superstore East, Inc*., 2015 WL 8013365 at * 5 (N.D.Ill.). Discipline, demotions, pay denials and other adverse job actions, short of discharge, does not mean the adverse job actions are irrelevant to the retaliatory discharge claim. *Id.* "In fact, quite the opposite is true: unusual activity, suspicious timing, and ambiguous statements from management surrounding these types of non-termination events can serve as circumstantial evidence that *an employer's proffered* reason for the employee's eventual termination was pretextual and her discharge retaliatory." *Id*., citing *Hugo v. Tomaszewski*, 155 Ill. App. 3d 906, 910, 508 N.E.2d 1139, 1141

(1987) ('A plaintiff in a [retaliatory discharge case] will often be required to rely heavily upon circumstantial evidence of the employer's intent....'). *See also Reinneck v. Taco Bell Corp.*, 696 N.E.2d 839, 846 (Ill.App.1998) (court held the factfinder could have determined the employee was discharged because of her exercise of rights based on circumstantial evidence). The Seventh Circuit opinion, however, is silent about the demotions or the fact that Hillmann was never informed about any of the merit pay denials or negative evaluations.

This Court, however, has noted the power of circumstantial evidence. "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citation omitted). In this case, the jury heard that after the City's agent, Dr. Arnold, determined Hillmann's injury was work-related and that he instructed Hillmann to follow-up medical treatment with his own private medical doctor, someone faxed a memorandum discussing the work-related injury and the request for medical treatment into the Department where Hillmann work. App. 49a. Someone also wrote the word "Phony" on the memo. *Id.* 79a. The district court noted this defamatory memo strongly supported the jury's verdict. *Id.* 49a; *see also Netzel v. United Parcel Services, Inc.*, 537 N.E.2d 1348, 1351 (Ill.App.1989) (employer's claim that plaintiff's prolonged medical treatment was fake was evidence of retaliatory intent); *Harding v. Rosewell*, 22 F.Supp.2d 806, 816 (N.D. Ill. 1998) (employer's assertion that plaintiff's workers'

compensation was fake was defamatory *per se* and evidence of retaliatory intent). This evidence strongly supported the jury's finding that Hillmann was discharged for exercising his rights under the IWCA, and it was stronger, more satisfying than a witness telling the jury about retaliatory animus, because it proved the animus. Yet, the Seventh Circuit never discussed this memo or the fact that the same day it was faxed into the Department where Sanchez, Sullivan, Murphy and Hennessy worked was the exact day Hillmann was transferred to the auto pound as an alleged accommodation for his work-related injury and his duties were to assist the guard at the gate checking receipts.

Finally, even if the jury agreed Sanchez was the relevant decision-maker with respect to which positions to eliminate in the RIF, it could have reasonably inferred that Sanchez *knew* Hillmann exercised his rights under the IWCA. The defamatory phony memo was faxed into the Department where Sanchez, Sullivan, Hennessy and Murphy worked and Hillmann was demoted on the same day. The memo specifically referenced that Hillmann's doctor requested medical treatment for an injury the City doctor determined was work-related. The memo also mentioned that the author spoke with Deputy Commissioner Murphy, who allegedly recommended to Sanchez to eliminate Hillmann's position in the RIF. CA7 15. Certainly, a reasonable jury could infer that because Murphy informed Sanchez and others in the Department about a merit pay increase he denied Hillmann, he also informed Sanchez about Hillmann's workers' compensation claim and requests for medical treatment. App. 45a; *see also* CA7 App.20. This

inference is reasonable, given that Murphy was part of the management team regarding which positions to eliminate in the RIF and because the City admitted Murphy bore Hillmann animus because he exercised his rights under the IWCA. To assume, this incendiary memo was not discussed, including by the person who bore Hillmann animus because he exercised his rights under the WCA, when it was faxed multiple times and present in three separate departments in the City, ignores common sense. *See* App. 27a- 28a; R. 576 (Trial tr. at 56-7); CA7 App.14-15.

This Court should grant certiorari because the Seventh Circuit failed to follow longstanding unanimous precedent from this Court that pretext is itself circumstantial evidence of retaliation. *See Desert Palace, Inc.*, 539 U.S. at 99-100; *Reeves*, 530 U.S. at 147. The Seventh Circuit also circumvented precedent from this Court that on reviewing the denial of a Rule 50 motion for judgment as a matter of law after a full trial on the merits, a Court of Appeals should analyze the entire record, but it must ignore all evidence favorable to the moving party that the jury is not required to believe because the court determined the claim never should have been tried. *See Reeves*, 530 U.S. at 151.

While the underlying claim in this case involves a state tort, the jury verdict in Hillmann's favor was reversed because the Seventh Circuit failed to follow precedent from this Court and failed to follow the standard of review applied on the denial of a Rule 50 motion. Only a ruling from this Court can resolve the split in the circuits on whether Courts of Appeals have jurisdiction to determine if a case should have tried after a full trial on the merits

and whether defenses must be evaluated in light of the entire trial record. Moreover, only this Court can correct the Seventh Circuit's failure to apply the correct standard of review on the denial of a Rule 50 motion. The Supreme Court of Illinois can never resolve a split in the circuits, correct a federal court's failure to apply Federal Rules of Civil Procedure or failure to adhere to the proper standard of review after judgment is entered on a jury verdict.

CONCLUSION

This case presents the important question of whether defenses must be evaluated in light of the full trial record after a jury verdict and whether Courts of Appeals have jurisdiction to decide if a case should have been tried after a jury verdict. The Courts of Appeals have taken different positions on this issue; therefore review by this Court is warranted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 14-3438 & 14-3494

ROBERT P. HILLMANN,

Plaintiff-Appellee/
Cross-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellant/
Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 6671 — Rubén Castillo, *Chief Judge*.

ARGUED SEPTEMBER 17, 2015 — DECIDED AUGUST 23, 2016

Before FLAUM, MANION, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. For nearly three decades, Robert Hillmann worked for the City of Chicago in its Department of Streets and Sanitation. In July 2002 the City eliminated his position in a citywide reduction in force ("RIF").

Two years later he sued the City alleging that he was targeted for inclusion in the RIF because he asserted his rights under the Illinois Workers' Compensation Act ("IWCA"), 820 ILL. COMP. STAT. 305/1 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*

This long-running case twice proceeded to trial. In the first trial, a jury found for the City on the IWCA retaliatory- discharge claim. For reasons not entirely clear to us, the ADA claim was tried to the court at the same time. But the judge died before issuing a decision, and a successor judge ordered a new trial on both claims based on an evidentiary error. The second trial yielded a split result. The jury found in Hillmann's favor on the IWCA claim and returned a seven-figure damages verdict. The judge found for the City on the ADA claim.

Both sides appealed. The City contends that the judge's new-trial order was improper and asks us to reinstate the first jury's verdict. Alternatively, the City argues that the IWCA claim fails as a matter of law because Hillmann produced no evidence of causation. As a fallback argument, the City seeks a new trial limited to damages. Hillmann's cross-appeal asks us to reverse the judge's bench decision rejecting his ADA claim.

We decline the City's invitation to second-guess the successor judge's decision to order a new trial. The first judge had excused two of the City's managerial employees from testifying based on their invocation of the Fifth Amendment; the second judge reasonably questioned the breadth of that ruling. Regardless, we agree with the City on the merits: *Neither* of these claims should have

been tried. To prevail on his claim that he was discharged for exercising his rights under the IWCA, Hillmann needed to prove causation. At a minimum this required proof that the relevant decision-maker knew about his workers' compensation claim. But no evidence suggests that the RIF decision-maker knew about Hillmann's claim. The ADA claim likewise fails for lack of proof of causation. Hillmann has no evidence that the City withheld merit raises or targeted him for the RIF based on his request for an ADA accommodation. The City is entitled to judgment across the board.

I. Background

Hillmann began working for the City of Chicago's Parks District in 1973. About five years later he moved to a job as a truck driver in the City's Department of Streets and Sanitation. In 1984 he developed cervical radiculopathy, a work-related injury that caused pain, weakness, limited mobility, and loss of sensation in his right arm. In 1995 he entered into an accommodation agreement with the City that allowed him to avoid repetitive work with his injured right arm. As part of this agreement, Hillmann was reassigned to the position of chief timekeeper in the Bureau of Electricity, a division of the Streets and Sanitation Department. He never performed all of the timekeeping duties required by the job description, but he performed the essential functions and did other tasks as directed by his supervisor.

Hillmann's supervisor during this time was Deputy Commissioner Jim Heffernan. In May 2000 Heffernan was reassigned to a different post and Bart Vittori was temporarily assigned to run the

Bureau. Vittori gave Hillmann additional duties that required repetitive use of his injured right arm, but Hillmann did not immediately inform Vittori of his physical restrictions. Instead, he went to Heffernan and Hugh Donlan, the Bureau's personnel liaison to the Department. Heffernan told Hillmann that he was no longer in charge and couldn't help. For the next two months, Hillmann performed the additional tasks Vittori assigned to him, exacerbating his condition.

On July 1, for the first time in his career, Hillmann did not receive a merit raise. On August 8 Hillmann finally went to Vittori and told him that he could not physically perform the additional duties he was assigned. In response Vittori reassigned a supervising timekeeper to other responsibilities and assigned the supervisor's duties to Hillmann. About ten days passed before this shift of responsibilities could be accomplished, however, so Hillmann reported for work but performed no tasks.

On August 15 Hillmann's attorney sent a letter to Barbara Smith in the City's Corporation Counsel's office requesting that Hillmann's 1995 accommodation agreement be honored. The next day Smith discussed the matter with Catharine Hennessey, the Department's labor-relations liaison. In response Hennessey instructed Donlan to write a new job description for Hillmann. The first paragraph of the description covered the duties Hillmann had performed as chief timekeeper; the second paragraph covered the reassigned duties of a supervising timekeeper. This paragraph also anticipated the Department's planned implementation of the Kronos

computerized payroll system. Hillmann testified that the second paragraph of his new job description included tasks that he could not physically perform.

On August 16 Brian Murphy replaced Heffernan as Deputy Commissioner. In that role Murphy was responsible for supervising all Bureau of Electricity employees. Murphy's direct supervisor was John Sullivan, the Managing Deputy Commissioner of the Department of Streets and Sanitation.

On August 23 Hennessey instructed Hillmann to report for a fitness-for-duty medical examination to reassess the question of his accommodation. During this time, Hillmann also saw his own physician, who noted that his condition had worsened. On September 1 Hillmann was transferred to the Construction Division of the Bureau of Electricity where he was assigned to answer phones. That same day Hillmann filed a workers' compensation claim with the Illinois Industrial Commission. On October 1 another merit raise was denied. On October 7 he was again transferred within the Bureau, this time to the Transportation Division, where he was assigned to answer phones.

Throughout the late summer and fall, Hillmann continued to see his treating physician and was examined by medical professionals in connection with his workers' compensation claim. On December 21 Hillmann received a letter signed by Hennessey and delivered by Donlan acknowledging his inability to perform the tasks in his new job description and advising him that "the most viable option for you is to apply for a Leave of

Absence[] and to return to work when your physical condition allows you to perform the duties of your job title." The letter also suggested that Hillmann could "request a Work Evaluation from the Department of Personnel to determine if your physical restrictions will allow you to perform in some other capacity in another job title." Hillmann testified that when Donlan gave him the letter, he advised him not to report to work. Hillmann stopped reporting for work but did not apply for a leave of absence.

For the next two months, Hillmann underwent further medical evaluations in connection with his workers' compensation claim. In January 2001 he was referred to Dr. Damon Arnold, director of occupational health at Mercy Works, an agency the City consults with on workers' compensation matters. On February 26, 2001, Dr. Arnold issued a "discharge sheet" clearing Hillmann to perform sedentary work with limited use of his right upper arm—in other words, a desk job with minor office work. The discharge sheet was sent to Jack Drumgould, the Department's Assistant Commissioner in charge of personnel. Drumgould wrote the following on the discharge sheet: "Cannot accommodate with restrictions" but "CAN accommodate in Bureau of Traffic Services with restrictions as of 3–02–01."

Cleared to return to work, Hillmann reported to Drumgould and was "detailed" to the Bureau of Traffic Services. A "detail" is just a temporary work assignment; Hillmann remained an employee of the Bureau of Electricity with the title of chief timekeeper. When Hillmann showed up for work in the Bureau of Traffic Services, he

was directed to the auto pound where he was verbally assigned minor, menial duties. In this assignment he racked up a pattern of tardiness and absenteeism due to sick leave. In the late spring he applied for and was granted a transfer from the 8 a.m.-to-3 p.m. shift to the noon-to-8 p.m. shift. He was denied merit raises in January 2002, March 2002, and May 2002.

In 2002 the City faced a serious budget shortfall necessitating a citywide RIF. Each department was given a target for reducing its workforce, and department heads were directed to identify which positions to include in the RIF and submit a list to the Office of Budget and Management. Sullivan was the Department's main contact for its RIF list, but Al Sanchez, the Streets and Sanitation Commissioner, made the final decision about which departmental positions would be included.

Murphy prepared a preliminary list of positions he thought could be eliminated from the Bureau of Electricity without damaging the delivery of services. He included the chief timekeeper and supervising timekeeper positions because no one was then performing those functions and the Department was completing its transition to Kronos, a computerized payroll system, making these positions obsolete. Jack Kenney, the Department's Deputy Commissioner of Administration, reviewed Murphy's preliminary list and agreed with the recommendation to include the timekeeping positions in the RIF. Kenney approved the list and sent it up the chain of command. Sullivan, in turn, reviewed the list and recommended that Sanchez approve it. Sanchez,

the final authority, reviewed and approved the list and sent it to the Office of Budget and Management. Sanchez did not know that Hillmann had filed a workers' compensation claim.

On July 1, 2002, Hillmann received a letter from Sanchez notifying him that he was being placed on administrative leave until further notice and that his chief timekeeper's position would be eliminated effective July 31, 2002, as a part of the citywide RIF.

A. The First Trial

In 2004 Hillmann filed suit in state court alleging that the City violated his rights under the First Amendment, the ADA, and state law. The City removed the case to federal court, and Judge William J. Hibbler was assigned to preside. A long period of discovery and motions litigation followed. Judge Hibbler eventually allowed two claims to move forward to trial: (1) Hillmann's claim that he was discharged in retaliation for exercising his rights under the IWCA, and (2) his claim that he was denied merit raises and discharged because of his request for an ADA accommodation.

During discovery, Sullivan and Drumgould invoked their Fifth Amendment privilege and refused to testify in deposition, citing potential criminal exposure in connection with a political-patronage scandal involving the Department of Streets and Sanitation. The City moved in limine to preclude their testimony and any reference to their Fifth Amendment invocation at trial. Judge Hibbler held a hearing on the motion, with counsel for the two witnesses present to address the claim of privilege. After hearing from all parties, Judge Hibbler granted the City's motion, excused the two

witnesses from testifying, and ruled that the issue could not be raised in front of the jury.

The City also moved in limine to exclude Hillmann's pension-damages expert, arguing that his testimony was irrelevant because Hillmann was not entitled to pension damages. In the alternative the City sought to exclude the expert's testimony as unreliable and based on improper calculations. Judge Hibbler granted this motion as well but offered no reasons.

The case proceeded to trial in June 2011. The judge submitted the IWCA retaliatory-discharge claim to the jury, which returned a verdict for the City. The jury was not asked to decide the ADA claim (we're not sure why), so that part of the case was converted to a court trial and Judge Hibbler took the matter under advisement. He died before issuing a decision.

B. The Second Trial

Chief Judge Rubén Castillo assumed responsibility for the case after Judge Hibbler's death. Hillmann moved for a new trial, arguing that it was error to excuse Sullivan and Drumgould from testifying based on their blanket assertions of the Fifth Amendment privilege. Chief Judge Castillo agreed and granted the motion. He also revisited and reversed Judge Hibbler's decision to exclude the testimony of Hillmann's pension-damages expert.

The two claims were retried in April 2013. Sullivan and Drumgould testified, as did Hillmann's pension-damages expert. This time the jury returned a verdict for Hillmann on the IWCA retaliatory-discharge claim and awarded $2 million in damages. Chief Judge Castillo submitted the

ADA claim to the jury for an advisory verdict; the jury found for the City on this claim.

Posttrial proceedings followed. The City moved for judgment as a matter of law or a new trial on the IWCA retaliatory-discharge claim. On the ADA claim, the City urged the court to accept the jury's advisory verdict and enter findings and conclusions rejecting Hillmann's claim. Hillmann moved for judgment in his favor on both claims.

Chief Judge Castillo split the difference. He denied the City's motion for judgment as a matter of law on the IWCA claim. He did, however, reduce the damages award to $1.6 million. On the ADA claim, the judge accepted the jury's advisory no-liability verdict and entered detailed findings and conclusions of his own. He denied Hillmann's motion for judgment on the ADA claim.

The resulting judgment left something for both sides to appeal. And they did, raising multiple claims of error.

II. Analysis

A. IWCA Retaliatory-Discharge Claim

The City's opening salvo is a challenge to Chief Judge Castillo's decision to order a new trial. The district court has the discretion to "grant a new trial on all or some of the issues—and to any party," FED. R. CIV. P. 59(a), and a new trial should be granted if a prejudicial error occurred, *Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 480 (7th Cir. 2000). We usually review an order granting a new trial for abuse of discretion, but normally the same judge presides at trial and also decides the posttrial motion. *McClain v. Owens–Corning Fiberglas Corp.*, 139 F.3d 1124, 1126 (7th Cir. 1998). Here, Chief Judge Castillo

ordered a new trial after the original trial judge died. His ruling, moreover, was based on a legal determination concerning the Fifth Amendment privilege. In these circumstances de novo review applies. *See Bankcard Am.*, 203 F.3d at 481.

Chief Judge Castillo concluded that a new trial was warranted because Judge Hibbler should not have wholly excused Sullivan and Drumgould from testifying based on blanket assertions of their Fifth Amendment privilege against self-incrimination. That ruling correctly understands how the privilege works in this situation; in a civil case, the jury is permitted to hear evidence of a witness's invocation of the privilege and may draw an adverse inference from it. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify … ."); *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, No. 15-2526, 2016 WL 4097439, at *14 (Aug. 2, 2016) ("The Fifth Amendment allows adverse inference instructions against parties in civil actions."); *Evans v. City of Chicago*, 513 F.3d 735, 745 (7th Cir. 2008); *Harris v. City of Chicago*, 266 F.3d 750, 755 (7th Cir. 2001); *United States v. Awerkamp*, 497 F.2d 832, 836 (7th Cir. 1974).

The City suggests that the error was harmless and therefore not a good reason to order a new trial. As a remedy, the City asks us to reinstate the verdict of the first jury, which found in the City's favor on the IWCA retaliatory-discharge claim. We don't need to decide whether the chief judge correctly construed this legal error as serious enough to justify a new trial. The

undisputed evidence shows that this claim should not have gone to a jury at all.

A claim for retaliatory-discharge is not authorized by the IWCA itself. Rather, "[t]he Illinois Supreme Court has recognized a common-law cause of action for retaliatory discharge where an employee is terminated because of his actual or anticipated exercise of workers' compensation rights." *Beatty v. Olin Corp.*, 693 F.3d 750, 753 (7th Cir. 2012). The cause of action is "a 'narrow' and 'limited' exception to the at-will employment doctrine," and the state high court has been "disinclined to expand" it. *Id.* (quoting *Zimmerman v. Buchheit of Spart, Inc.*, 645 N.E.2d 877, 881 (Ill. 1994)).

To prevail on his claim that he was fired in retaliation for exercising his rights under the IWCA, Hillmann had to prove three elements: (1) he was employed by the City at the time of his injury; (2) he exercised a right granted by the IWCA; and (3) his discharge was causally related to the exercise of his rights under the IWCA. *Grabs v. Safeway, Inc.*, 917 N.E.2d 122, 126 (Ill. App. Ct. 2009). Hillmann's case, like many others, turns on the element of causation. The ultimate question in the causation inquiry "is the employer's motive in discharging the employee." *Clemons v. Mech. Devices Co.*, 704 N.E.2d 403, 406 (Ill. 1998). It's not enough for the plaintiff to establish that his workplace injury and initiation of a workers' compensation claim set in motion a chain of events that ended in his discharge. *Phillips v. Cont'l Tire The Americas, LLC*, 743 F.3d 475, 478 (7th Cir. 2014); *Casanova v. Am. Airlines, Inc.*, 616 F.3d 695, 698 (7th Cir. 2010). That is, but-for causation

is necessary but not sufficient to prove the causation element of a retaliatory-discharge claim. *Phillips*, 743 F.3d at 478; *Casanova*, 616 F.3d at 697.

Accordingly, under Illinois law a claim for retaliatory discharge requires—at a minimum—that the relevant decision-maker knew that the employee intended to file or had filed a workers' compensation claim. *Beatty*, 693 F.3d at 753; *Hunt v. Davita, Inc.*, 680 F.3d 775, 779 (7th Cir. 2012); *Hiatt v. Rockwell Int'l Corp.*, 26 F.3d 761, 769 n.7 (7th Cir. 1994) ("Evidence that those responsible for an employee's termination knew he intended to file, or, as in this case, had filed, a workers' compensation claim is essential to a retaliatory discharge action under Illinois law." (citing *Marin v. Am. Meat Packing Co.*, 562 N.E.2d 282, 286 (Ill. App. Ct. 1990))).

In Hillmann's case the relevant decision-maker was Sanchez, who as Commissioner of Streets and Sanitation made the final decision about which positions within his department would be eliminated in the RIF. No evidence suggests that Sanchez knew that Hillmann had filed a workers' compensation claim. Hillmann hammers away on the evidence that Murphy and Hennessey were aware of his injury and gave him less prestigious and more physically rigorous assignments that seemed designed to aggravate his injury rather than to accommodate it. But they were not the RIF decision-makers. Illinois courts haven't recognized

a cat's paw theory of liability in this context,[1] and that theory is hard to reconcile with the cases holding that the causation element requires evidence that the relevant decision-maker knew about the plaintiff's workers' compensation claim. In any event, Hillmann hasn't litigated his case on a cat's paw theory, so we have no reason to consider the question here.

Because Commissioner Sanchez made the final decision to include the timekeeper positions in the RIF and no evidence suggests that he knew about Hillmann's workers' compensation claim, the IWCA retaliatory-discharge claim fails as a matter of law. It should not have been submitted to one jury, let alone two. This conclusion makes it unnecessary for us to consider the City's more limited argument for a new trial on the issue of damages.

B. The ADA Claim

Hillmann's cross-appeal seeks review of the judge's decision rejecting his ADA claim. We will not disturb findings of fact made after a bench trial unless they're clearly erroneous. FED. R. CIV. P. 52(a). Conclusions of law are reviewed de novo. *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004).

Hillmann alleged that he was denied merit-pay increases and targeted for inclusion in the RIF because he requested an ADA accommodation when his workplace injury worsened in the summer of 2000. Here again, the sticking point is causation. To prevail on this claim, Hillmann had to prove

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[1] One recent opinion of the Illinois Appellate Court considered the cat's paw theory of liability but concluded that the facts did not support it. *See Cippola v. Village of Oak Lawn*, 26 N.E.3d 432, 444 (Ill. App. Ct. 2015).

that his request for an accommodation was the but-for cause of the merit-pay denials and his inclusion in the RIF. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013). "[T]he ADA renders employers liable for employment decisions made 'because of' a person's disability, … [which] require[s] a showing of but-for causation." *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010). Put differently, Hillmann needed to prove that the City would not have taken these adverse employment actions "but for his actual or perceived disability; proof of mixed motives will not suffice." *Id.*

Chief Judge Castillo accepted the jury's advisory verdict on this claim but also entered detailed findings and conclusions to support his decision. He first found that Hillmann's request for an accommodation did not cause the July 1, 2000 merit-pay denial because Hillmann waited until August 8 to notify Vittori—his supervisor from May to August 16—that he could not perform the extra duties Vittori had assigned. The subsequent merit-pay denials, the judge found, resulted either from the City's confusing practice of "detailing" employees to other departments or Hillmann's excessive tardiness and absenteeism. Finally, the judge found that there was "no nexus" between Hillmann's request for an accommodation and the inclusion of his timekeeper's position in the RIF.

These findings are well supported by the record. The judge noted that Hillmann produced no evidence from which to infer that any of the merit-pay denials were retaliatory or that the City's reasons for including his position in the RIF were pretextual. The RIF was necessitated by a budget

shortfall and entailed 300–400 jobs. Hillmann was not singled out; *all* timekeeping positions in the Bureau of Electricity were included on the RIF list. The evidence established that no one was performing these functions anyway, and the implementation of the Kronos computerized payroll system made these positions obsolete. The judge's decision easily survives clear-error review.

To sum up, Hillmann lacked evidence to prove the element of causation on *either* claim, so the City was entitled to judgment as a matter of law on both. Accordingly, we REVERSE in part and REMAND with instructions to enter judgment for the City on the IWCA retaliatory-discharge claim. In all other respects, the judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ROBERT P. HILLMANN,	)	
	)	
Plaintiff,	)	
	)	No. 04 C 6671
v.	)	
	)	Chief Judge Rubén
CITY OF CHICAGO,	)	Castillo
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Robert P. Hillmann filed this action against his former employer, the City of Chicago, alleging that his termination was illegal on various grounds. Plaintiff originally brought five claims in this case, alleging breach of contract, discrimination in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq*., retaliation in violation of the ADA, political hiring and firing decisions in violation of the First Amendment of the United States Constitution, and retaliation and denial of medical benefits in violation of the Illinois Workers' Compensation Act (the "IWCA"), 820 Ill. Comp. Stat. 305/1 *et seq*. (R. 125, Third Am. Compl.) On September 26, 2007, Judge Wayne R. Andersen granted Defendant's motion for summary judgment as to the breach of contract claim, the First Amendment claim, and the denial of medical benefits portion of the IWCA claim. (R. 188, Mem. Op. and Order.) Upon Judge

Andersen's retirement, this case was reassigned to Judge William J. Hibbler, (R. 247, Exec. Comm. Order), who presided over the seven-day jury trial on Plaintiff's remaining claims in June 2011, (R. 311, Min. Entry). Judge Hibbler unfortunately and prematurely passed away before he issued findings of fact and conclusions of law or a ruling on the equitable ADA retaliation claim, and the case was reassigned to this Court. (R. 338, Exec. Comm. Order.) This Court granted Plaintiff's motion for a new trial, (R. 362, Pl.'s Mot.; R. 376, Min. Entry), which took place over seven days in April 2013, (R. 483, Min. Entry; R. 484, Min. Entry; R. 488, Min. Entry; R. 489, Min. Entry; R. 492, Min. Entry; R. 493, Min. Entry; R. 501, Min. Entry). The jury trial was simultaneously a bench trial on Plaintiff's ADA retaliation claim, and the Court used the jury in an advisory capacity as to that claim. (*See* R. 420, Min. Entry.) On April 17, 2013, the jury returned a verdict in favor of Defendant on Plaintiff's ADA discrimination claim, ADA failure to accommodate claim, and ADA retaliation claim. (R. 500, Verdict.) The jury returned a verdict in favor of Plaintiff on his claim of retaliatory discharge under the Illinois Workers' Compensation Act and assessed damages of two million dollars. (*Id.*)

Presently before the Court are: (1) Plaintiff's motion to vacate the advisory jury verdict as to Plaintiff's ADA retaliation claim (R. 503); (2) Defendant's renewed motion for judgment as a matter of law (R. 508); (3) Defendant's motion to reinstate the original jury verdict or, alternatively, for a new trial (R. 511); (4) Defendant's motion for remitter or, alternatively, for an evidentiary hearing as to damages (R. 515); and (5) Defendant's

motion for the Court to issue findings of fact and conclusions of law in its favor on Plaintiff's ADA retaliation claim (R. 521). The Court begins by setting forth its findings of fact and conclusions of law as to Plaintiff's ADA retaliation claim. The basis of Plaintiff's claim of retaliation in violation of the ADA is his allegation that after each request for a reasonable accommodation for his disability, which he made "in person or through legal counsel," Defendant retaliated against him by denying merit pay increases, transferring him or creating new job duties that further injured him, and ultimately terminating him. (R. 125, Third Am. Compl. ¶ 68.)

Pursuant to Federal Rule of Civil Procedure 52, this Court hereby enters the following written Findings of Fact and Conclusions of Law, which are based upon consideration of all the admissible evidence as well as this Court's own assessment of the credibility of the trial witnesses. To the extent, if any, that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact. The Court's Conclusions of Law are limited to Plaintiff's claim of retaliation in violation of the ADA. For the sake of efficiency, however, the Court includes in its Findings of Fact facts that are pertinent to the remaining post-trial motions, which are discussed below.

FINDINGS OF FACT

This Court concludes that Plaintiff established through both direct and circumstantial evidence, as well as reasonable inferences drawn

therefrom, the following facts by a preponderance of the evidence:

I. General Background

1. Plaintiff began working for the Chicago Park District in June 1973 as a park attendant. (Trial Tr. at 31:2-7.) He worked as a park attendant for approximately five and a half years and then took a job as a truck driver with the Chicago Department of Streets and Sanitation ("the Department"). (Trial Tr. at 31:10-14.)

2. In or around November 1984, Plaintiff developed cervical radiculopathy. (Trial Tr. at 32:5-8.) Cervical radiculopathy is the interference of normal nerve function that results from pinched or compressed nerves. (Trial Tr. at 121:1-10.) This interference can cause pain, weakness, limited mobility, and the loss of sensation in a person's arm. (Trial Tr. at 121:5-14.) Cervical radiculopathy is typically a permanent condition. (Trial Tr. at 121:15-21.) Plaintiff's condition caused pain and swelling in his neck and right arm. (Trial Tr. at 32:12-14.)

3. In 1995, Plaintiff sought an accommodation from the City to allow him to avoid repetitive work with his right arm because of his condition. (Trial Tr. at 201:20-23.) As part of the ensuing 1995 Agreement between Plaintiff and the City, Plaintiff was promoted to the role of Chief Timekeeper and assigned to the Bureau of Electricity (the "BOE"), a division of the Department of Streets and Sanitation. (Trial Tr. at 52:17-20, 224:19-24, 225:8-13, 226:16-21.)

4. Dr. Michael F. Gonzales, Plaintiff's treating physician, began treating Plaintiff for cervical radiculopathy in the mid-1980s. (Trial Tr.

at 120:12-15.) Dr. Gonzales specializes in physical medicine and rehabilitation and pain medicine. (Trial Tr. at 117:18-118:2.) Between the 1995 Agreement and the year 2000, Dr. Gonzales saw Plaintiff for unrelated reasons but did not treat Plaintiff's cervical radiculopathy because it was stable and did not need treatment during that time period. (Trial Tr. at 124:1-7, 156:2.) In 2000, Dr. Gonzales observed "a significant change in [Plaintiff's] condition" that required further treatment. (Trial Tr. at 124:15- 125:5.) Specifically, Plaintiff's right arm, shoulder, and hand were swelling and causing him pain. (Trial Tr. at 124:24-125:2.) Dr. Gonzales observed Plaintiffs condition worsening between 2000 and when he stopped seeing Plaintiff in 2002 or 2003. (Trial Tr. at 155:23-156:4.)

II. Transition of Duties in the BOE

5. In his role as Chief Timekeeper of the BOE, Plaintiff reported to Deputy Commissioner Jim Heffernan from 1995 until May 2000. (Trial Tr. at 226:16-21, 232:22-233:5.) Plaintiff's understanding of the 1995 Agreement was that he would not be performing all of the duties of a Chief Timekeeper. (Trial Tr. at 227:19-22.) The Chief Timekeeper job description listed, as examples of duties:

> Directs, coordinates and reviews departmental timekeeping functions to ensure accurate and proper reporting of information, directs and supervises a large group of clerical personnel engaged in various timekeeping and payroll administration activities; examines reports and records to verify

> the execution of proper timekeeping methods; assigns and supervises a group of Supervising Timekeepers who check employees' presence an [sic] the job; represents the department at various meetings and conferences pertaining to the performance of various timekeeping and payroll activities; reviews time verification reports and payroll sheets for accuracy and to ensure proper processing; resolves complaints pertaining to timekeeping or payroll methods or procedures; maintains records and prepares various monthly progress and status reports.

(Def.'s Ex. 3.) Plaintiff performed some of the Chief Timekeeper duties, such as preparing overtime reports, supervising a group of supervising timekeepers below him, and directing clerical personnel. (Trial Tr. at 230:12-231:11, 236:11-15.) He also prepared memoranda to Heffernan to inform him when employees were claiming excessive overtime pay. (Trial Tr. at 54:16-56:12.)

6. Additionally, Plaintiff performed duties Heffernan directly assigned to him, including conducting research, attending meetings, and writing reports associated with the project to implement the City's emergency telephone 911 system, timekeeping duties, and independent research projects Heffernan assigned. (Trial Tr. at 231:20-232:9, 233:15-235:16.)

7. In May of 2000, Heffernan was removed as the authority figure in the BOE and Bart Vittori assumed responsibility for the

administration of the BOE. (Trial Tr. at 58:4-7, 243:17-25.) On August 16, 2000, Brian Murphy succeeded Heffernan as the Deputy Commissioner of the BOE. (Trial Tr. at 844:16-845:6.) In that position, Murphy supervised and managed employees in the BOE, and he was supervised by John Sullivan. (Trial Tr. at 845:7- 14.)

A. Aggravation of Plaintiff's injury

8. Vittori assigned Plaintiff job duties that involved handwriting and data entry and required repetitive use of his right arm. (Trial Tr. at 58:24-59:6, 244:15-17, 245:1-6.) Plaintiff did not immediately inform Vittori that he had any work restrictions. (Trial Tr. at 249:3-8, 250:2-4.) In late June of 2000, Plaintiff informed Heffernan and Hugh Donlan, the BOE's personnel liaison to the Department, that he was having problems performing the duties Vittori assigned. (Trial Tr. at 61:23-62:12, 250:8-10.) Heffernan told Plaintiff that he had been relieved of his authority and could not do anything to help him. (Trial Tr. at 61:23-25.) At that point, Plaintiff believed that it was Donlan's job to notify Vittori about his restrictions. (Trial Tr. at 250:25-251:1.) Nevertheless, Plaintiff performed the tasks Vittori assigned for over two months without telling Vittori that he was having problems. (Trial Tr. at 250:11-17.)

9. The swelling of Plaintiff's hand and arm worsened over those two months because of the additional data entry and writing tasks he was assigned, and on August 7, 2000, his arm was so swollen that he could not even hold a pen, let alone perform his job duties. (Trial Tr. at 262:20-263:11, 271:4-6.)

10. On August 8, 2000, Plaintiff informed

Vittori about his injury and told Vittori that he could not continue to perform the tasks Vittori had assigned him. (Trial Tr. at 262:5-9.) In response, Vittori told Plaintiff that Cliff Stevens, a supervising timekeeper in the BOE, was being transferred, and Vittori assigned Plaintiff to take over his duties. (Trial Tr. at 262:10-12, 630:24-631:4.) At that time, there were three other supervising timekeepers in the BOE. (Trial Tr. at 635:24-636:7.)

11. After Plaintiff was asked to assume Stevens's job duties, he told Donlan that he would not be able to perform all of those duties due to medical restrictions. (Trial Tr. at 636:14- 20.) Plaintiff's injury was obvious at that point, and Donlan testified that he "could physically see that" Plaintiff had "an injury of some type." (Trial Tr. at 636:21-24.)

12. Stevens remained in the BOE until around August 18, 2000. (Trial Tr. at 267:25-268:2.) Thus, beginning on August 8th, when Plaintiff told Vittori he could no longer perform his assigned duties, he reported to work but did not perform any work duties. (Trial Tr. at 268:12-269:1.)

13. On August 15, 2000, Plaintiff's counsel sent a letter to Barbara Smith in the City's Corporation Counsel's office. (Pl.'s Ex. 49.) The letter informed Smith that Plaintiff had been assigned additional duties that he was unable to perform and requested that the City continue to accommodate Plaintiff's medical restrictions pursuant to the 1995 Agreement. (*Id.*)

14. The following day, Smith had a conversation with Catharine Hennessey about Plaintiff's 1995 Agreement. (Trial Tr. at 567:6-568:4; Pl.'s Ex. 76.) Beginning in 1998, Hennessey worked for the Department as the labor relations liaison. (Trial Tr. at 520:7-15.) In that role, she was responsible for, among other things, accommodating injured employees by attempting to find them positions that they could perform with their medical restrictions. (Trial Tr. at 522:16-523:16, 827:1-7.) Hennessey knew that Plaintiff needed to be accommodated and specifically that he needed to avoid repetitive motions with his right hand. (Trial Tr. at 569:4-7; Pl.'s Ex. 76.)

15. Hennessey asked Donlan to write a job description for Plaintiff, which he did on August 18th. (Trial Tr. at 638:9-16, 639:1-11; Pl.'s Ex. 106.) The first paragraph of the memorandum described Plaintiff's duties at the time as Chief Timekeeper. (Trial Tr. at 639:12- 18.) The second paragraph of the memorandum described new duties that Plaintiff would be responsible for effective August 18, 2000, when he took over Stevens's responsibilities. (Trial Tr. at 639:19-22; Pl.'s Ex. 106.) The new duties assigned to Plaintiff essentially described the job of a supervising timekeeper after the implementation of the Kronos timekeeping system. (Trial Tr. at 266:11-20, 639:23-640:3, 645:25-646:7.) They included:

> maintaining a 240-employee payroll; receiving and entering 30-35 edits per day in the Kronos system; performing a mass edit in Kronos for 90 employees who work in the field; entering exceptions into the Kronos

> system; entering daily activity onto time rolls; maintaining 300 Cards; and, maintaining the Employee File Maintenance Module for said payroll.

(Def.'s Ex. 1.) Plaintiff testified that the first paragraph "pretty much" described what he had been doing all along, but the second paragraph assigned him the job of a supervising timekeeper in addition to his Chief Timekeeper tasks and consisted of tasks he could not physically perform. (Trial Tr. at 264:19-267:1.)

B. Medical evaluations and Plaintiff's workers' compensation claim

16. On or about August 23, 2000, Plaintiff received an order, signed by Hennessey, to report to Dr. Barry Lake Fischer for a fitness-for-duty evaluation. (Trial Tr. at 275:1-9; Pl.'s Ex. 77.) Dr. Fischer concentrated his practice on occupational medicine—primarily pre-employment examinations and evaluation of work-related injuries. (Trial Tr. at 420:20-22.) When a patient was referred to Dr. Fischer for a fitness-for-duty evaluation, he would first be interviewed by a medical technician to get the relevant history, and then he would meet with Dr. Fischer to go over that information. (Trial Tr. at 421:18-422:2.) Dr. Fischer would then "perform a focused examination on a particular part of the body that was involved in this clinical situation." (Trial Tr. at 422:2-4.) To properly perform a fitness-for-duty evaluation, Dr. Fischer has to refer to a job description provided by the employer to determine if the patient is physically qualified to perform that job. (Trial Tr. at 422:5-17.) If Dr. Fischer found a condition that inhibited a patient's ability to perform his or her job, Dr. Fischer would

recommend certain accommodations. (Trial Tr. at 422:18-23.)

17. Dr. Fischer diagnosed Plaintiff with probable degenerative disc disease "with clinical evidence of right cervical radiculopathy." (Pl.'s Ex. 42.) Dr. Fischer found that Plaintiff had some atrophy in his arm, which indicated that Plaintiff had had cervical radiculopathy for some time. (Trial Tr. at 429:14-430:10; Pl.'s Ex. 42.)

18. Dr. Fischer was supplied with a job description so he could determine whether Plaintiff could or could not perform the job of Chief Timekeeper. (Trial Tr. at 426:18-25, 582:2- 6.) Dr. Fischer determined that Plaintiff was qualified for his position as Chief Timekeeper with restrictions: limited use of his right arm in data input and lifting. (Trial Tr. at 426:10-15; Pl.'s Ex. 40.) Dr. Fischer faxed the results of the evaluation to Hennessey. (Trial Tr. at 425:20-22, Pl.'s Ex. 40.) Dr. Fischer also wrote a letter to Russell Baggett in the City's Personnel Department outlining the results of his evaluation in detail. (Trial Tr. at 428:9-429:4; Pl.'s Ex. 42.) Finally, Dr. Fischer recommended that Plaintiff be treated by his personal physician and that he receive an MRI of his cervical spine to determine whether or not he was a candidate for corrective surgery. (Trial Tr. at 427:16-18, 430:11-18.)

19. Dr. Fischer was shown the August 18th memorandum for the first time at trial. (Trial Tr. at 432:19-21.) Dr. Fischer testified that the second paragraph, which described the new duties, was not in the job description he was given to reference when he evaluated Plaintiff for fitness for duty. (Trial Tr. at 432:22-25.) Dr. Fischer further

testified that Plaintiff "would have difficulty doing those things." (Trial Tr. at 433:8.)

20. Also on August 23, 2000, Plaintiff had an appointment with Dr. Gonzales. (Trial Tr. at 280:23-15.) Dr. Gonzales wrote a note that Plaintiff had "a work related injury involving his neck and right upper limb. He is to refrain from working until further notice due to his work related injury." (Pl.'s Ex. 41.) Plaintiff did not provide the note to anyone at the Department because he feared being put on unpaid leave. (Trial Tr. at 289:8-16.)

21. City employees who are injured request a "blue card," which allows the employee to see a City doctor at Mercy Works. (Trial Tr. at 723:15-17.) Without a blue card, an employee cannot go to Mercy Works. (Trial Tr. at 723:18-20.) City policy is that, without exception, a supervisor should give an employee who reports an injury at work a blue card. (Trial Tr. at 724:9-15, 726:1-2.) However, blue cards were not to be given out unless the injury occurred on duty or if the City "needed to find out from the City doctor if it was an injury on duty." (Trial Tr. at 725:19-22.)

22. On August 24, 2000, Plaintiff went to Donlan's office and requested a blue card. (Trial Tr. at 287:9-11.) Donlan called Hennessey; after the call, Donlan told Plaintiff that he could not give him a blue card. (Trial Tr. at 288:2-6.)

23. On September 1, 2000, Plaintiff filed a workers' compensation proceeding with the Illinois Industrial Commission to try to get medical treatment for his injury. (Trial Tr. at 88:21-25.)

24. On that same day, September 1, 2000, Plaintiff was transferred within the BOE to the Construction Division. (Trial Tr. at 89:1-8, 272:13-

18.) He was assigned to answer phones. (Trial Tr. at 290:12-15.) Plaintiff had to use his left hand to answer phones. (Trial Tr. at 290:18- 19.)

25. The Committee on Finance is a group comprised of City employees that oversees workers' compensation claims. (Trial Tr. at 442:2-9.) Dr. Gonzales was in the practice of sending bills to the Committee on Finance when he treated City employees who reported work- related injuries, such as Plaintiff. (Trial Tr. at 125:6-17.) Dr. Gonzales testified that normally, the Committee on Finance would mail him correspondence "either accepting responsibility for the injury and paying it, or denying responsibility for the injury." (Trial Tr. at 126:6-16.) He further testified that he sent Plaintiff's bills to the Committee on Finance and advised the Committee that Plaintiff's condition was work-related. (Trial Tr. at 127:3-8.)

26. On September 7, 2000, Dr. Gonzales sent a letter to the Committee on Finance stating that Plaintiff was "under [Dr. Gonzales's] care for treatment of injury sustained at work. The injury is a repetitive strain injury of the right upper limb." (Pl.'s Ex. 39; Trial Tr. at 129:5- 130:11.) Dr. Gonzales's letter went on to explain what appropriate treatment of the condition would include and stated that it was "important that [Plaintiff's] treatment not be delayed. Significant delay in treatment will increase the likelihood that his condition will become refractory to treatment." (Pl.'s Ex. 39.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

27. On or around September 11, 2000, Donlan forwarded to Hennessey the note from Dr. Gonzales indicating that Plaintiff had a work injury and needed medical treatment. (Trial Tr. at 641:15-642:11.)

28. On or around October 7, 2000, Plaintiff was transferred within the BOE to the Transportation Division to answer phones. (Trial Tr. at 91:8-9, 92:4-9.) He answered phones in the Transportation Division until December 21, 2000. (Trial Tr. at 92:23-93:2, 290:20-22.) During that time, his workers' compensation claim was pending and he was unable to get medical treatment for his injury. (Trial Tr. at 93:3-8.)

29. On December 18, 2000, Dr. Gonzales wrote another letter stating: "[Plaintiff] is impaired by injury sustained at work. This injury affects his neck and right upper limb. I am requesting that he refrain from working until further notice due to his work related injury." (Pl.'s Ex. 43; Trial Tr. at 131:18-132:5.) Dr. Gonzales testified that Plaintiff's condition "was clearly worse, and he was getting worse as a result of the things that he was being asked to do at work." (Trial Tr. at 132:15-19.)

30. Dr. Gonzales never received a letter from the Committee on Finance "either accepting responsibility or denying responsibility or communicating in any other way regarding [Plaintiff]." (Trial Tr. at 127:9-14.) Dr. Gonzales testified that if he had received a letter from the Committee on Finance denying liability, he could have submitted Plaintiff's bills to his health insurance company so Plaintiff could get the medical care he needed. (Trial Tr. at 174:19- 175:7.) However, Dr. Gonzales's contract with Plaintiffs

insurance provider barred him from filing claims for injuries that were work-related unless his employer denied liability. (Trial Tr. at 173:23-174:18.)

31. On December 21, 2000, Donlan hand-delivered to Plaintiff a letter signed by Hennessey. (Trial Tr. at 294:6-16; Def.'s Ex. 2.) The letter states that the Department received letters from Dr. Gonzales dated August 23, 2000, and December 18, 2000, advising that Plaintiff was to refrain from working until further notice. (Def.'s Ex. 2.) The letter went on to state, in relevant part:

> Furthermore, in various conversations, you have stated that you are unable to perform the duties required of your job title as Chief Timekeeper.
>
> However, as you are aware, the duties and responsibilities of a Chief Timekeeper have changed in recent years. I have attached a current copy of your job description. With the present conditions in mind, we must inform you that the most viable option for you is to apply for a Leave of Absence, and to return to work when your physical condition allows you to perform the duties of your job title.
>
> You may also request a Work Evaluation from the Department of Personnel to determine if your physical restrictions will allow you to perform in some other capacity in another job title.

(Def.'s Ex. 2.) Plaintiff testified that when Donlan

handed him the letter, Donlan told him not to report back to work. (Trial Tr. at 297:22-23.)

32. Plaintiff did not apply for a leave of absence because he had already filed a workers' compensation claim with the Illinois Industrial Commission. (Trial Tr. at 299:3-10; *see* Pl.'s Ex. 115.) Upon receiving the letter, however, Plaintiff stopped going to work. (Trial Tr. at 301:12-16.)

III. Plaintiff's Medical Evaluations

33. On January 24, 2001, Plaintiff received a letter dated January 23, 2001, from Robert J. Serafin, the Director of Workers' Compensation in the City's Committee on Finance. (Trial Tr. at 102:4-12; Pl.'s Ex. 15.) The letter informed Plaintiff that an MRI scan of his cervical spine and an EMG test of his upper extremities had been scheduled for him at Mercy Hospital on January 26, 2001. (Pl.'s Ex. 15.) The referral form for the MRI indicated that Plaintiff was referred by Dr. Damon Arnold. (*Id.*)

34. Dr. Arnold was the director of the occupational health network at Mercy Works. (Trial Tr. at 440:18-24.) In that role, he oversaw the operations, supervised other physicians, and treated patients. (Trial Tr. at 441:14-19.) He also acted as the liaison to the Committee on Finance and consulted on workers' compensation claims. (Trial Tr. at 442:2-9.) Mercy Works treated patients that were injured at work and performed routine physicals and drug screens. (Trial Tr. at 441:3-7.) The City was a major client of Mercy Works. (Trial Tr. at 441:8-13.)

35. Plaintiff had never seen Dr. Arnold when he received the referral. (Trial Tr. at 103:5-12.)

36. Between January 24th and January 26th, Plaintiff received another letter from the office of Serafin, which was dated January 24, 2001. (Trial Tr. at 102:9-21, Pl.'s Ex. 16.) This letter advised Plaintiff that the Committee on Finance denied liability for medical care payments because it found his injury to be unrelated to his employment. (Trial Tr. at 748:25-749:3; Pl.'s Ex. 16.) Serafin testified that, to the best of his knowledge, the claim was denied because there was no accident report on file. (Trial Tr. at 795:3-7.)

37. When an employee is injured, he should request his supervisor to fill out an accident report, or a First Report of Injury. (Trial Tr. at 786:24-787:6.) When a supervisor learns of an injury on the job, he is supposed to fill out a First Report of Injury. (Trial Tr. at 729:15-24.) It is then the supervisor's responsibility to send the First Report of Injury to the Committee on Finance. (Trial Tr. at 788:19-22.) Upon receipt of the Report, the Committee on Finance starts a file. (Trial Tr. at 789:1-6.) An employee's workers' compensation file is maintained by the Workers' Compensation Division of the Committee on Finance. (Trial Tr. at 784:19-21.)

38. Alternatively, an employee can "file an adjustment of claim" with the Illinois Industrial Commission, and the Committee on Finance starts a file upon notification of that report. (Trial Tr. at 789:7-16.) Without the accident report, however, the Committee on Finance cannot process the claim and pay disability because it does not have the details of the injury, such as the date, time, description, and supervisor sign-off. (Trial Tr. at 789:17-790:3.) Thus, even if the Committee on

Finance receives a Mercy Works discharge sheet indicating that an employee has a work-related injury, the Committee does not pay disability benefits until it receives a completed accident report. (Trial Tr. at 7-15.)

39. If the Committee on Finance does not receive a First Report of Injury for an individual, there is a form to be filled out to provide information about the injury and indicate that no First Report of Injury was filed. (Trial Tr. at 757:20-25.) When Serafin filled out that form with regards to Plaintiff, he marked Plaintiff as disabled and noted that his neck and right arm were injured. (Trial Tr. at 758:1-759:1.)

40. Serafin testified that denial letters like the one Plaintiff received were not final determinations, but could be reviewed later, as evidenced by the fact that Plaintiff was eventually paid temporary total disability. (Trial Tr. at 795:25-796:8.)

41. On January 26th, Plaintiff reported for his MRI scan with his referral from Dr. Arnold. (Trial Tr. at 104:6-11.) When it was discovered that Plaintiff had never seen Dr. Arnold and was ordered to get the scan by Serafin, Plaintiff was told that Serafin was not a doctor and he needed to see Dr. Arnold before the MRI scan could be performed. (Trial Tr. at 104:15-21, 105:1-5.) Plaintiff then made an appointment to see Dr. Arnold at Mercy Works on or around January 29th. (Trial Tr. at 104:22-25.)

42. Dr. Arnold examined Plaintiff for the first time on January 29, 2001. (Trial Tr. at 444:9-17.) Based on the examination and Plaintiff's medical history, Dr. Arnold concluded that Plaintiff

had a work-related condition: radiculopathy of the upper extremity. (Trial Tr. at 444:15-445:4; Pl.'s Ex. 18.) Dr. Arnold ordered an MRI scan of Plaintiff's cervical spine for the following day, January 30th, and requested Plaintiff to return for a reevaluation on February 5th. (Pl.'s Ex. 18.) Dr. Arnold testified that the reason he ordered the diagnostic studies, the MRI scan and the electromyelogram, was to determine whether serious surgical intervention was required. (Trial Tr. at 466:1-12.)

43. The MRI scan revealed various osteophytes and a herniated disc, and it indicated multilevel disc disease. (Pl.'s Ex. 17.) Dr. Arnold testified that the results of the MRI scan supported his conclusions as to Plaintiff's cervical radiculopathy. (Trial Tr. at 447:9-11.) The significance of the MRI results was the indication "that there was something anatomical"—specifically, degeneration and disk herniation. (Trial Tr. at 466:20-24.) Additionally, the electromyelogram revealed a delay in the nerve transmission between Plaintiff's shoulder and neck. (Trial Tr. at 466:24-467:11.) Dr. Arnold testified that the delay "could explain the feeling of radiculopathy, of having pain in the extremity." (Trial Tr. at 467:11-12.) Accordingly, Dr. Arnold referred Plaintiff to a neurosurgeon to determine the best course of treatment. (Trial Tr. at 471:4-14; Pl.'s Ex. 22; Pl.'s Ex. 23.)

44. On February 5th, Dr. Arnold noted that Plaintiff was still off duty due to a work-related condition and requested Plaintiff to return for a reevaluation on February 12, 2001. (Trial Tr. at 449:1-8; Pl.'s Ex. 19.)

45. On February 12th, Dr. Arnold noted that Plaintiff was still off duty due to a work-related condition and requested that Plaintiff follow up with his treating physician, Dr. Gonzales. (Trial Tr. at 451:20-24; Pl.'s Ex. 20.)

46. Finally, on a February 26th work status discharge sheet, Dr. Arnold discharged Plaintiff from his care. (Pl.'s Ex. 21.) Dr. Arnold was under the impression that Plaintiff would be working in an office setting. (Trial Tr. at 453:19-21.) Dr. Arnold indicated that Plaintiff could now perform sedentary work with limited use of his right upper extremity. (Trial Tr. at 452:19-453:2, 454:5-16; Pl.'s Ex. 21.) Dr. Arnold clarified that he meant that Plaintiff could work "a desk job," "sitting down and . . . doing things like minor office work." (Trial Tr. at 454:24-455:3.)

47. On subsequent work status discharge sheets from June 20, 2001, (Pl.'s Ex. 22), and July 9, 2001, (Pl.'s Ex. 23), Dr. Arnold similarly recommended that Plaintiff could perform "sedentary work as previously" with limited use of his right arm. Dr. Arnold testified that all the forms he filled out were sent to the Workers' Compensation division of the Committee on Finance so the Committee could determine whether the visit "should be processed as a workers' compensation claim or denied." (Trial Tr. at 457:18-458:11.)

48. In 2001, Jack Drumgould was the assistant commissioner in charge of personnel in the Department. (Trial Tr. at 821:21-822:8.) Drumgould received Mercy Works work status discharge sheets for all six bureaus within the Department. (Trial Tr. at 823:14-23.) Drumgould

testified that the standard procedure he followed when he received a discharge sheet was to contact a deputy or personnel liaison to meet with the duty-disabled employee to determine whether there existed a position within their bureau that could accommodate the employee. (Trial Tr. at 823:14-23.) Drumgould testified that after a bureau accepted an employee with his restrictions, Drumgould would send a copy of the Mercy Works discharge sheet to the Committee on Finance so it would remove the individual from duty disability or workers' compensation. (Trial Tr. at 824:23-825:1.) He would then send a copy to his staff so they could complete the paperwork necessary to restore the individual to the Department's payroll. (Trial Tr. at 825:1-4.)

49. Drumgould received Dr. Arnold's February 26, 2001 discharge sheet indicating that Plaintiff could perform sedentary work with certain restrictions. (Trial Tr. at 822:14-823:6.) Drumgould wrote on the sheet, "Cannot accommodate with restrictions" and signed and dated it on February 26, 2001. (Trial Tr. at 823:2-9; Pl.'s Ex. 89.) Drumgould stated that at that time, "there was no bureau or no position that could accommodate" Plaintiff's restrictions. (Trial Tr. at 823:12-13.) Drumgould also wrote on Plaintiff's discharge sheet, "CAN accommodate in Bureau of Traffic Services with restrictions as of 3-02-01." (Trial Tr. at 824:5-9; Pl.'s Ex. 89.)

IV. Plaintiff's Detail to the Bureau of Traffic Services

50. Plaintiff returned to work and was "detailed" to the Bureau of Traffic Services ("Traffic Services"); a detail is a temporary assignment and

means that Plaintiff was still being paid from the BOE's budget and still held the title of Chief Timekeeper, but was being utilized by a different bureau in the Department. (Trial Tr. at 886:22-887:5.) The expectation was that once Plaintiff was again able to perform the Chief Timekeeper duties, he would return to the BOE assuming that the function was still needed. (Trial Tr. at 887:6-10.)

51. It was not uncommon for employees in the City, and particularly in the Department, to perform duties outside the scope of their job title. (Trial Tr. at 896:15-19.) They held one official job title and were paid as though they were in that position, but they performed the tasks of a different title. (Trial Tr. at 410:15-21.) John Sullivan, the Managing Deputy Commissioner at the Department who oversaw all of the bureaus in the Department and supervised each bureau's deputy commissioner, (Trial Tr. at 697:4-15), testified that the Department of Personnel would need to be involved in order to change an official job description. (Trial Tr. at 703:8-11.) He testified, however, that the official job descriptions were "very old and outdated" and that "probably 50 percent of the people in the City work out of their job descriptions." (Trial Tr. at 702:20-23.)

A. Plaintiff's assignment to Traffic Services

52. Hennessey's predecessor as the labor relations liaison for the Department was William Bresnahan. (Trial Tr. at 521:21-23.) In 1998, Bresnahan became Deputy Commissioner of the Bureau of Traffic Services. (Trial Tr. at 975:24-976:14.)

53. In 2001, Bresnahan faced an issue in

his duty as Deputy Commissioner of Traffic Services. (Trial Tr. at 977:11.) The City had hired an outside security company for the automobile pound because some City employees had been assaulted and battered by individuals who came to pick up their cars. (Trial Tr. at 1020:16-22.) At the end of some of the security detail's shifts, there was "a discrepancy in the number of the cars that were supposed to be in the auto pound and the number of inventories" that were actually present. (Trial Tr. at 977:11-17.) Bresnahan believed "the security guards were letting cars go." (Trial Tr. at 977:18-19.) To combat the suspected theft, Bresnahan assigned several people to double check the receipts to ensure that the proper car was released to the proper individual. (Trial Tr. at 977:20-23.) He requested from the Department commissioner's office an employee that could be permanently assigned to that task. (Trial Tr. at 977:24-978:2.)

54. Bresnahan testified that someone from the commissioner's office—potentially Drumgould—called him to inform him that an employee who had some restrictions would be able to perform the function he requested. (Trial Tr. at 979:6-13.) Drumgould testified that he was not involved in the decision to assign Plaintiff to the auto pound and he did not discuss the decision with Bresnahan. (Trial Tr. at 825:21-826:9.) Sullivan testified that he was not involved in the decision to transfer Plaintiff to Traffic Services, but rather that Hennessey informed him that Plaintiff's transfer was "a deal she had worked out between the deputy commissioners in those two bureaus." (Trial Tr. at 701:6-17.) Murphy testified that he approved the transfer of Plaintiff to Traffic

Services, but he did not make that decision. (Trial Tr. at 846:3-8.) Regardless of who made the decision to detail Plaintiff to Traffic Services, once he was there, Bresnahan made the decision to assign Plaintiff to the auto pound. (Trial Tr. at 1014:3-7.)

55. Bresnahan was aware of and actually signed the agreement that made accommodations for Plaintiff's medical restrictions in his Chief Timekeeper role. (Trial Tr. at 1010:8-23.) Bresnahan knew about Plaintiff's work restrictions when Plaintiff was assigned to Traffic Services. (Trial Tr. at 979:14-980:1.) Specifically, Bresnahan received from Drumgould the Mercy Works discharge sheet from February 26th indicating that Plaintiff required sedentary work and limited use of his right arm, and on which Drumgould had written that Traffic Services could accommodate Plaintiff with restrictions as of March 2nd. (Trial Tr. at 980:16-19; Pl.'s Ex. 89.) Bresnahan considered the restrictions when he determined that Plaintiff would be assigned to double check the receipts. (Trial Tr. at 981:3-15.)

56. On March 1, 2001, Plaintiff received a phone call requesting him to report to Room 701, the administrative offices of the Department, the following day. (Trial Tr. at 303:1- 14.) Plaintiff reported to Room 701 on March 2nd and Jack Drumgould assigned him to Traffic Services. (Trial Tr. at 303:1-19.) Plaintiff then went to the administrative office of Traffic Services and told them who he was. (Trial Tr. at 304:11-14.)

57. Bresnahan did not meet Plaintiff when he began working at Traffic Services, but he testified that the Chief Auto Pound Supervisor,

John Rachmaciej, along with the supervisors of the auto pound, Joe Madison and Joe Perone, did meet Plaintiff. (Trial Tr. at 982:25-983:12.) Bresnahan instructed Rachmaciej to inform Plaintiff of his duties, and Bresnahan testified that Rachmaciej did. (Trial Tr. at 983:13-18.) Plaintiff recalled seeing Rachmaciej at Traffic Services on March 2nd, but he did not recall whether he talked to Rachmaciej that day. (Trial Tr. at 304:22-25.) He testified that he did not discuss his duties with anyone at the Traffic Services office. (Trial Tr. at 305:3-11.)

58. Plaintiff testified that someone in a City uniform told him he was being assigned to the central auto pound, on lower Wacker Drive, and then led him there, the man in a City vehicle and Plaintiff in his car. (Trial Tr. at 305:16-306:7.) The man then led Plaintiff to a gate and told him that he would be stationed there. (Trial Tr. at 305:20-23.) The man pulled the gate open, closed it, told Plaintiff "it's all greased up for you," and walked away. (Trial Tr. at 306:15-25.) Plaintiff understood this to mean that his job duty was to open and close the gate. (Trial Tr. at 306:12-307:4, 311:16-25.) Plaintiff also monitored the security guard to make sure he was not stealing cars. (Trial Tr. at 334:23-335:6.) The man did not identify himself or tell Plaintiff who his supervisors were, and Plaintiff did not ask. (Trial Tr. at 306:6-11.) Plaintiff did not ask anyone for clarification or tell anyone about his work restrictions. (Trial Tr. at 307:3-8.)

59. Because of his injury, Plaintiff opened the gate with his left arm. (Trial Tr. at 310:21-25.) Plaintiff testified that he performed this duty for two weeks before his left arm "started going

downhill," and he "had to just slowly stop doing it." (Trial Tr. at 334:17-19.)

60. During the time he was opening and closing the gate, Plaintiff frequently used sick leave because his pain upon waking required him to take strong prescription painkillers, which precluded him from driving to work for "an hour or two" until some of the effect wore off. (Trial Tr. at 215:13-216:4.) Accordingly, Plaintiff requested that his 7:00 a.m. to 3:00 p.m. shift be changed to the later shift from noon to 8:00 p.m. (Trial Tr. at 342:18-22.) On March 25, 2002, Plaintiff received a memorandum from Denise Lanton, the Acting Director of Administration, regarding his use of sick time. (Def.'s Ex. 13; Trial Tr. at 339:13-18.) The memorandum stated that Plaintiff had been "consistently tardy" and had requested to apply his sick time to the time period he was tardy. (Def.'s Ex. 13.) The memorandum stated that "Auto Pound Supervisor Jorge Vargas requested that [Plaintiff] provide him with medical documentation of [Plaintiff's] illness on the dates [Plaintiff was] tardy in order to consider whether [Plaintiff's] tardiness qualifie[d] for sick leave," but that Plaintiff had failed to do so and his attendance record reflected "a pattern of unexcused excessive tardiness." (Def.'s Ex. 13.) After Plaintiff received the March 25th memorandum, his shift change request was approved and he worked the noon-to-8:00 shift until he was laid off in July 2002. (Trial Tr. at 343:3-10.)

61. Plaintiff had no supervisor, and the supervisors at the pound expressly told him that they were not his supervisors. (Trial Tr. at 307:7-23.) Bresnahan testified that when Plaintiff came

to work at the auto pound in March, he had no job description; instead, his duties were verbally assigned to him, supposedly by Rachmaciej, when he began working in the position. (Trial Tr. at 1012:9-1013:2.)

B. Plaintiff's performance evaluations and pay raise denials

62. When an employee was entitled to a 5% pay raise that came with a step increase, his supervisor rated his performance on a salary advancement form. (Trial Tr. at 830:24- 831:19.) Employees were rated as "excellent," "good," "fair," or "poor." (Trial Tr. at 831:9-11.) If an employee was rated "excellent" or "good," he received the pay increase; if he was rated "fair" or "poor," the increase was denied. (Trial Tr. at 831:11-14.) If employees were denied the merit pay increase, a written explanation of the reason for the denial was required. (Trial Tr. at 831:15-19.) Those forms were placed in the employee's personnel file in the Department's personnel division. (Trial Tr. at 831:20-832:1.)

63. As Deputy Commissioner of the BOE, Murphy did not supervise Plaintiff once he was transferred to Traffic Services, nor did he check up on Plaintiff with Bresnahan while Plaintiff was working at Traffic Services. (Trial Tr. at 861: 13-19.) Nevertheless, in September 2001, when Plaintiff was detailed to Traffic Services, Drumgould sent Murphy a memorandum requesting Murphy's input on Plaintiff's salary advancement—whether or not Plaintiff should receive a merit pay increase. (Trial Tr. at 861:20-862:11.) Murphy recommended that Plaintiff's merit pay increase be denied. (Trial Tr. at 862:19-

24.)

64. On the review form, which Murphy signed on October 1, 2001, he checked the box for "unsatisfactory" rating, indicating that Plaintiff's performance was "so unacceptable that administrative action must be taken." (Trial Tr. at 863:17-864:21.) Murphy stated that the form was asking whether Plaintiff should receive a pay increase "based upon great work in his title of Chief Timekeeper; and he was performing no work in the title of Chief Timekeeper, so I couldn't give him a merit raise. I just didn't feel that was right." (Trial Tr. at 864:24-865:3.) Murphy testified that when he evaluated his employees, he based it upon their current ability to perform their job duties, and Plaintiff was not performing the Chief Timekeeper job duties. (Trial Tr. at 866:16-22.) Murphy stated: "[Plaintiff] had said that he couldn't do those functions, so I don't know whether he had the ability or not; but I know he wasn't performing those functions." (Trial Tr. at 867:25-868:2.) Murphy testified that he thought "it would be unacceptable to give him more money for a job that he was not performing." (Trial Tr. at 868:24-869:1.)

65. Murphy testified that the "administrative action" the form refers to usually meant increased training or counseling to figure out why an employee was not performing at a "good" or "excellent" level and help him increase his proficiency. (Trial Tr. at 869:12-24.) Murphy did not talk to Plaintiff about his job performance or attempt to determine whether he needed additional training to do his job as Chief Timekeeper because Plaintiff was no longer working for the BOE. (Trial Tr. at 869:25-870:4.)

66. When a deputy commissioner gives an employee an "unsatisfactory" rating, he is asked to explain the reason. (Trial Tr. at 870:15-18.) Murphy wrote a memorandum explaining that since his appointment to the BOE in August 2000, Plaintiff had been of no value. (Trial Tr. at 872:11-19.) Murphy also stated: "[Plaintiff] cannot perform the functions of his title and has complained when given any other menial task to complete," which he clarified meant answering the phones. (Trial Tr. at 875:23-876:6.) Murphy then stated that Plaintiff had been detailed to another bureau to try to accommodate him and that the BOE had not needed to replace him. (Trial Tr. at 876:7-14.) Murphy sent his memorandum to Al Sanchez, the Commissioner of the Department; Sullivan, the Managing Deputy Commissioner of the Department; Jack Kenney, the Deputy Commissioner of Administrative Services; and Hennessey, the Department's legal counsel. (Trial Tr. at 870:15-871:6.) He sent the rating only to Drumgould. (Trial Tr. at 871:15-21.) Murphy did not send the rating to Plaintiff because Plaintiff was no longer working for Murphy, nor did he send it to Bresnahan, Plaintiff's current supervisor. (Trial Tr. at 871:19- 10.)

67. On December 20, 2001, Drumgould sent Bresnahan a memorandum informing him that Plaintiff was eligible for a merit pay increase on January 1, 2002, and requesting a rating of Plaintiff's performance as to whether Plaintiff deserved the increase. (Trial Tr. at 992:1-6; Def.'s Ex. 9.)

68. Bresnahan did not personally supervise Plaintiff's work. (Trial Tr. at 987:14-16.) As the Deputy Commissioner, however, Bresnahan made the final decision as to whether to award merit pay increases to employees in Traffic Services. (Trial Tr. at 989:9-13.) He based those decisions on recommendations by employees' supervisors, who had day-to-day contact with the employees. (Trial Tr. at 989:14-15, 994:1-9.)

69. On December 26, 2001, Rachmaciej, the Chief Auto Pound Supervisor, sent Bresnahan a memorandum about Plaintiff's salary advancement. (Trial Tr. at 990:25-991:7; Def.'s Ex. 8.) The memorandum recommended a rating of "marginal" for Plaintiff's performance of his duties and stated that he performed his duties "below an acceptable level do [sic] to excessive absenteeism." (Trial Tr. at 990:4-7; Def.'s Ex. 8.) The memorandum concluded by recommending that Plaintiff's "salary advancement increase should be denied until his work attendance improves." (Def.'s Ex. 8.)

70. On December 28, 2001, Bresnahan returned Drumgould's December 20th memorandum indicating a "marginal" rating for Plaintiff, which resulted in the denial of Plaintiff's merit pay increase. (Trial Tr. at 993:16-25; Def.'s Ex. 9.) Bresnahan testified that he assumed the evaluation was intended to cover the time period from March 2001, when Plaintiff started working at Traffic Services, until the current date. (Trial Tr. at 993:8-15.) Bresnahan relied on Rachmaciej's December 26th memorandum when evaluating Plaintiff. (Trial Tr. at 994:11-14.)

71. When an individual was denied a merit pay increase, he was given another opportunity, approximately two months later, to receive the increase if he had improved upon the deficiency that prevented him from receiving it in the first place. (Trial Tr. at 995:16-996:1.)

72. On February 22, 2002, Bresnahan received another memorandum from Drumgould informing him that Plaintiff was eligible for a merit pay increase and requesting his rating. (Trial Tr. at 1006:14-22; Def.'s Ex. 10.)

73. Annette Phillips was an assistant general superintendent in Traffic Services. (Trial Tr. at 996:2-4.) Her responsibilities involved overseeing the administrative functions of the auto pound. (Trial Tr. at 997:11-16.) On February 25, 2002, she sent Bresnahan a memorandum about Plaintiff's salary advancement. (Trial Tr. at 1005:17-20; Def.'s Ex. 11.) It stated: "At this time a merit increase is not acceptable for [Plaintiff]. [Plaintiff] is assigned to the exit gate at Central Auto Pound for (4) four hours a day. [Plaintiff] has an attendance problem which needs improving." (Def.'s Ex. 11.)

74. On February 23, 2002, Bresnahan returned Drumgould's February 22nd memorandum, again indicating a "marginal" rating for Plaintiff. (Trial Tr. at 1007:9-14; Def.'s Ex. 10.) Bresnahan testified that he relied on Phillips's February 25th memorandum when evaluating Plaintiff. (Trial Tr. at 1006:23-25.)

75. On May 3, 2002, Bresnahan received another memorandum from Drumgould informing him that Plaintiff was eligible for a merit pay increase and requesting his rating. (Trial Tr. at

998:14-22; Def.'s Ex. 14.)

76. On May 6, 2002, Phillips sent Bresnahan a memorandum about Plaintiff's salary advancement. (Trial Tr. at 996:7-11; Def.'s Ex. 15.) It stated: "[Plaintiff] still has not improved on his attendance, which is four (4) hours a day watching the gate at Central Auto pound . [sic] Based on these factor [sic] it is my recommendation that [Plaintiff] should not be given a increase [sic] in salary at this time..[sic]" (Def.'s Ex. 15.) From her memorandum, Bresnahan understood that Phillips was recommending that Plaintiff be denied a raise because of his attendance. (Trial Tr. at 996:25-997:5.)

77. On May 6, 2002, Bresnahan returned the memorandum to Drumgould indicating a rating of "unsatisfactory," the lowest possible rating, for Plaintiff. (Trial Tr. at 999:3-11; Def.'s Ex. 14.) The reason Bresnahan gave Plaintiff an "unsatisfactory" ranking was because Plaintiff was given an opportunity to improve on his attendance issue and failed to do so. (Trial Tr. at 999:9-18.) Bresnahan relied on Phillips's memorandum to rate Plaintiff's performance. (Trial Tr. at 999:19-22.)

78. None of these merit pay increase denials or negative performance evaluations were sent to Plaintiff. (Trial Tr. at 1025:6-8.) Plaintiff was assigned to Traffic Services from March 2, 2001, until July 2002, when his position was eliminated in the Reduction in Force, and he did not receive any written performance evaluations during that time. (Trial Tr. at 987:6-13, 988:2-5.)

79. Bresnahan never had any discussions with Plaintiff about his attendance problems. (Trial Tr. at 1003:1-3.) Bresnahan did not know how

frequently Plaintiff was absent, just that it was "enough to bring it to the attention of his supervisors." (Trial Tr. at 1024:18-25.) Plaintiff never approached Bresnahan to complain about any issues he was having at Traffic Services. (Trial Tr. at 1003:4-7.)

C. Defendant's denial of treatment and of liability for Plaintiff's injury

80. On February 15, 2001, Mark Schechter from the City's Law Department wrote a memorandum to Serafin regarding Plaintiff's workers' compensation claim (the "Schechter Memo"). (Trial Tr. at 765:13-23; Pl.'s Ex. 55.) It went into the Committee on Finance's workers' compensation file for Plaintiff. (Trial Tr. at 766:2-4.) The top of the Schechter Memo has handwriting next to the header. (Pl.'s Ex. 55; Trial Tr. at 767:25-768:2.) The handwriting appears to say "Phony." (Pl.'s Ex. 55.) Serafin testified that he did not write "phony" on the Memo and he did not know who did. (Trial Tr. at 768:12-23.) Murphy testified that he did not write "phony" on the Schechter Memo. (Trial Tr. at 850:6-8.) No viable explanation was offered by the Defendant as to how the word "phony" was written on Plaintiff's Exhibit 55. The Court concludes that Plaintiff's Exhibit 55 strongly supports the jury's actual and advisory verdicts in this case.

81. The Schechter Memo attached Plaintiff's medical records and stated: "Dr. Arnold indicated that [Plaintiff] is off duty due to a work-related condition." (Pl.'s Ex. 55.) The Memo further stated that Plaintiff's "attorney stated that [Plaintiff's] job duties recently changed, requiring repetitive use of his right hand, causing pain and

swelling." (Pl.'s Ex. 55.) The Schechter Memo also instructed Serafin to have Dr. Arnold reevaluate Plaintiff to see if he could perform phone answering duties with his left hand and consider whether the nerve block injections that Dr. Gonzales recommended on September 7, 2000, were appropriate. (Pl.'s Ex. 55; Trial Tr. at 774:25-775:9.) Finally, the Schechter Memo recommends that Plaintiff be placed on temporary disability from February 5th until Dr. Arnold released him to return to work. (Pl.'s Ex. 55; Trial Tr. at 776:4-12.)

82. The Schechter Memo was faxed to the BOE on March 2, 2001. (Trial Tr. at 777:17-779:9, 857:3-7; Pl.'s Ex. 56.) Serafin testified that he did not fax the Schechter Memo to the BOE and he did not know who did. (Trial Tr. at 779:11-15.)

83. On March 9, 2001, Drumgould sent a memorandum to Serafin stating that "as of Friday, March 2, 2001, [Plaintiff] has been accommodated within his restrictions and returned to work. [Plaintiff] has been assigned to the Bureau of Traffic Services." (Pl.'s Ex. 84.) Thus, Plaintiff was detailed to Traffic Services the same day the Schechter Memo was faxed to the BOE. (Trial Tr. at 859:6-20; Pl.'s Ex. 56; Pl.'s Ex. 84.)

84. Dr. Gonzales saw Plaintiff on March 15, 2001. (Trial Tr. at 134:20-135:8.) On March 15, 2001, Dr. Gonzales wrote another letter that he sent to the Committee on Finance and to Dr. Arnold. (Trial Tr. at 134:5-13.) The letter reiterated that Plaintiff's cervical radiculopathy was work-related and that Mercy Works (acting on behalf of the City) had recommended that he perform sedentary work with limited use of his right arm. (Trial Tr. at 134:22-135:1; Pl.'s Ex. 24.) The letter

then stated: "His present work requires him to open & close the large gate at the police pound. This is significantly exacerbating his cervical radiculopathy and causing it to spread to his left upper limb. I strongly disagree with his present work duties." (Pl.'s Ex. 24.) Dr. Gonzales testified that "the delay in treatment and the lack of appropriate treatment was making his condition worse." (Trial Tr. at 136:15-16.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

85. Dr. Gonzales told Plaintiff not to open and close the gate on March 15th, but Plaintiff continued to do so, which exacerbated his arm injury. (Trial Tr. at 336:19-337:5.)

86. On April 3, 2001, Dr. Gonzales sent another letter to the Committee on Finance. (Trial Tr. at 138:8-12.) It stated that Plaintiff was "getting worse as a result of ongoing aggravation of his work related cervical radiculopathy. Due to his deterioration I am recommending that he cease working at this time. He is to be re-evaluated in two weeks." (Pl.'s Ex. 25.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

87. At some point, it came to Bresnahan's attention that Plaintiff was opening and closing the gate, and he told Rachmaciej "to put it in writing that [Plaintiff] was not to open and close the gate, that that was the security guard's job." (Trial Tr. at 984:2-8.) Bresnahan testified that, to the best of his knowledge, none of his supervising staff instructed any of the employees that Plaintiff was to open and close the gate. (Trial Tr. at 984:21-24.) On April 24, 2001, at Bresnahan's direction, Rachmaciej wrote a

memorandum to Plaintiff informing him of his job assignment. (Trial Tr. at 985:7-20; Def.'s Ex. 6.)

88. On April 24, 2001, Plaintiff received a memorandum from Rachmaciej clarifying his job assignment. (Trial Tr. at 335:12-18; Def.'s Ex. 6.) The memorandum instructs Plaintiff that his job duties include:

> To verify the vehicle identification number and or plates number of vehicles leaving the auto pound. 2) To help direct customers into the release trailer or to their vehicle after payment has been made[.]As you were previously instructed Under [sic] no circumstances are you to open or close the gate.

(Def.'s Ex. 6.) Plaintiff acknowledged in writing that he received the memorandum on April 24th and additionally wrote, "I was told not to open gate on or about March 15, 2001." (*Id.*; Trial Tr. at 985:24-986:1.) Plaintiff continued his detail at the auto pound and performed the duties outlined in the April 24th memorandum until he was laid off. (Trial Tr. at 337:13-20.)

89. Additionally on April 24th, Bresnahan wrote a memorandum to Serafin about Plaintiff's duties. (Trial Tr. at 1015:24-1; Def.'s Ex. 7.) The memorandum says:

> Be advised that [Plaintiff] was specifically instructed *not* to open and close the gate at Central Auto Pound. [Plaintiff] is to check the paper work that the guard checks to insure the proper vehicle is leaving the auto pound. NO city employee is to open or

> close the gate. On several occasions in the past week I was at Central Auto Pound and observed the security guard open and close the gate. [Plaintiff] did not touch the gate and is never suppose [sic] to touch the gate.

(Def.'s Ex. 7.) Bresnahan testified that he sent the memorandum as a result of someone, he could not remember who, asking him to make sure that Plaintiff was acting within his job restrictions. (Trial Tr. at 1017:15-20.)

90. On May 14, 2001, Dr. Gonzales wrote another letter stating that Plaintiff was still under his care "for treatment of his work-related injury" and outlining the treatments he needed. (Trial Tr. at 141:15-24; Pl.'s Ex. 26.) This note was stamped as received by Traffic Services on May 18, 2001. (Trial Tr. at 1022:12-22, 1023:8-19; Pl.'s Ex. 91.) Accordingly, someone in Traffic Services was aware on May 18th that Plaintiff was under the care of a doctor for a work- related injury. (Trial Tr. at 1023:21-1024:4.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

91. On August 1, 2001, Dr. Gonzales sent a note to the Committee on Finance and Dr. Arnold stating that Plaintiff remained in Dr. Gonzales's care and needed physical therapy. (Trial Tr. at 143:2-10; Pl.'s Ex. 27.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

92. On February 20, 2002, Dr. Gonzales sent a note to the Committee on Finance stating that Plaintiff had to miss a half a day of work due to the severity of his pain from his radiculopathy

and the sedating effects of the pain medication Dr. Gonzales had prescribed. (Trial Tr. at 143:21-144:5; Pl.'s Ex. 28.) Dr. Gonzales also sent to the Committee on Finance an order for physical therapy for Plaintiff's radiculopathy, three times a week for four weeks. (Trial Tr. at 144:11-23; Pl.'s Ex. 29.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

93. On July 17, 2002, Plaintiff had a visit at Dr. Gonzales's office. (Trial Tr. at 145:16-17.) Dr. Gonzales testified that Plaintiff's condition was worsening because he was not receiving needed medical care. (Trial Tr. at 147:14-19.) Dr. Gonzales noted that Plaintiff continued to experience weakness and severe pain in his right arm, which were made worse by activity. (Pl.'s Ex. 30.) Dr. Gonzales noted additional atrophy, discoloration, and swelling of his right arm and hand. (*Id.*) Dr. Gonzales indicated that the City had "refused to authorize payment for [Plaintiff's] medical care related to his work injury" and that Plaintiff would contact him when there was "some indication that his employer [will] pay for treatment." (Pl.'s Ex. 30.)

94. On July 17, 2002, Dr. Gonzales sent another note to the Committee on Finance verifying that Plaintiff was still under his care and still needed medical treatment. (Trial Tr. at 148:17-24; Pl.'s Ex. 31.) He sent a similar note on November 22, 2002. (Trial Tr. at 154:20- 155:3; Pl.'s Ex. 47.) Dr. Gonzales never received a response from the Committee on Finance. (Trial Tr. at 138:18-23.)

95. On September 4, 2002, Dr. Gonzales found that Plaintiff's condition was worsening. (Trial Tr. at 152:22-24.) That prompted him to write a detailed summary of Plaintiff's condition and the treatment and diagnostic testing he needed. (Trial Tr. at 150:14-24; Pl.'s Ex. 45.) The letter concluded: "Plaintiff's condition is permanent, but I expect that treatment will benefit him. I also expect that treatment will result in some functional improvement. At present, and until there is some therapeutic success, he remains totally disabled from gainful employment. His incapacity for work is directly the result of the work related injury in question." (Pl.'s Ex. 45.)

96. On December 23, 2002, Dr. Gonzales again ordered an MRI of Plaintiff's cervical spine. (Trial Tr. at 155:9-14; Pl.'s Ex. 48.)

97. Plaintiff never received a blue card. (Trial Tr. at 93:16-25, 729:6-9.) His workers' compensation file included no First Report of Injury. (Trial Tr. at 730:4-9, 795:3-7.) Plaintiff's personnel file did include notice that he filed a claim with the Illinois Industrial Commission on September 1, 2000. (Trial Tr. at 732:1-5.) It also included Dr. Gonzales's letter from September 7, 2000. (Trial Tr. at 732:25-734:2; Pl.'s Ex. 80.) Upon the receipt of these two documents, Committee on Finance procedures instruct that the Committee has three options: to begin to pay disability payment, to provide a written explanation for its refusal to pay disability, or to conduct an investigation into the underlying occurrence. (Trial Tr. at 738:12-739:2.)

98. Serafin and the Committee on Finance continued to deny that Plaintiff's injury was work-

related until after Plaintiff was terminated. (Trial Tr. at 781:6-783:7.)

99. The nerve block injections were never authorized, nor were any of the treatments Dr. Gonzales requested. (Trial Tr. at 777:5-16.) In fact, no medical treatment was ever authorized for Plaintiff. (Trial Tr. at 752:8-16.)

V. The 2002 Reduction in Force

100. In July 2002, a citywide reduction in force ("RIF") occurred because the revenues were "falling significantly short" of what had been projected and budgeted for 2002. (Trial Tr. at 684:21-22, 685:5-8.)

101. On July 1, 2002, Plaintiff received a letter from Commissioner Sanchez advising him that he was "being placed on paid administrative leave until further notice." (Pl.'s Ex. 34; Trial Tr. at 209:7-13.) He also received a packet notifying him that his position was terminated as part of the RIF and that as of July 31, 2002, he would be laid off. (Def.'s Ex. 21; Trial Tr. at 216:21-217:9.)

102. From 1989 through 2010, Peter Peso worked in the City's Office of Budget and Management (the "OBM"), and he was appointed to the position of Manager of Compensation Control in 1993. (Trial Tr. at 484:20-24, 493:25-494:5.) In that role, he was responsible for making sure that City employees were paid according to their salaries and contracts and managing filled and vacant positions. (Trial Tr. at 485:1-8.)

103. Peso managed a spreadsheet of positions that were eliminated during the 2002 RIF. (Trial Tr. at 486:3-10; Def.'s Ex. 26.) The spreadsheet was populated from RIF documents the various departments submitted to the OBM.

(Trial Tr. at 486:14-22.)

104. Peso testified that approximately 50 positions in the Department were eliminated in the RIF, (Trial Tr. at 489:4-7), but Drumgould testified that testified that approximately 200 employees from the Department were terminated in the 2002 RIF, (Trial Tr. at 828:15-19). It is clear, however, that the Department eliminated all of its timekeeping positions in the 2002 RIF. (Trial Tr. at 498:21-25.) Fifteen supervising timekeeping positions and one Chief Timekeeper position were eliminated from the Department. (Trial Tr. at 498:12-20; Def.'s Ex. 26.)

105. After departments' proposed layoffs were approved by the budget director, the forms were sent to the Department of Personnel to determine who would be subject to layoff. (Trial Tr. at 494:22-495:14.) This determination involved examining the titles, bargaining units, and seniority for the employees on the list, as well as the various contracts and City personnel rules. (Trial Tr. at 495:16-22.) "Bumping rights" were typically part of a contract or City personnel rules. (Trial Tr. at 495:23-25.) When a position is eliminated, if the person in that position is more senior than other employees in the department, she can avoid a layoff by exercising a right to "bump" the more junior employee out of his position. (Trial Tr. at 496:1-9.)

106. During the relevant time period, Russell Carlson was the First Deputy Budget Director in the OBM. (Trial Tr. at 684:6-12.) His duties in that position involved formulating or supervising the formulation of the City's budget each year and monitoring the City's expenditures

and revenues. (Trial Tr. at 684:13-17.) Carlson testified that the positions that were eliminated in the 2002 RIF were supposed to remain unfilled at least through 2003. (Trial Tr. at 685:14-19.) Carlson testified that 300 to 400 or more positions were eliminated citywide in the 2002 RIF. (Trial Tr. at 694:20-24.) The OBM determined targeted dollar amounts each department needed to cut, and the department heads were free to decide what criteria to use in selecting positions to eliminate. (Trial Tr. at 685:20-686:9.) Peso was in charge of keeping track of the lists of positions the department heads decided to cut. (Trial Tr. at 686:10-14.)

107. At the time, John Sullivan was the Managing Deputy Commissioner of the Department and he was the Department's contact on its RIF form. (Trial Tr. at 688:1-4; Pl.'s Ex. 97.) On June 19, 2002, Carlson sent Sullivan a memorandum with an attached spreadsheet explaining the OBM's determination of the number of positions the Department would need to lay off. (Trial Tr. at 688:5-689:22; Pl.'s Ex. 13.)

108. The OBM's review of the lists the department heads sent back of positions they intended to cut was primarily mathematical, to make sure they met the dollar amount they were requested to meet, and to ensure that the departments were not eliminating vital positions. (Trial Tr. at 693:8-20.)

109. Sullivan testified: "The budget office gave the department a set dollar amount of personnel savings that they had to achieve during that budget season. Each bureau within the department was then passed along their budget

ceiling with the amount of cuts they had to come up with. Each bureau, which is run by a deputy commissioner, submitted to the commissioner's office a list of people that they proposed to be included in the layoff. Those lists were reviewed with the commissioner, probably Jack Kenney who was the Deputy Commissioner of Administrative Services, and the bureau, the deputies of the bureaus, and ultimately a final list was submitted to the Office of Budget and Management." (Trial Tr. at 704:8-19.) Sullivan testified that he was involved in the Department's determination of what positions to eliminate, but Commissioner Sanchez had the final say on the list that the Department submitted to the OBM. (Trial Tr. at 704:20-23.)

110. Jack Kenney was the Deputy Commissioner of the Bureau of Administration, which is within the Department of Streets and Sanitation. (Trial Tr. at 895:15-19, 897:8-14.) As the Deputy Commissioner, Kenney was responsible for the entire Bureau of Administration, which included the Personnel, Contacts, Payroll, and Finance divisions. (Trial Tr. at 897:22-24.) One of his duties was to prepare and submit the budget to the OBM for approval. (Trial Tr. at 898:6-11.)

A. The transition to Kronos

111. In January 2000, the Department converted to electronic timekeeping through the Kronos system. (Trial Tr. at 634:10-15.)

112. In January 2001, Gualberto Lopez became the Coordinator of Special Projects for the City. (Trial Tr. at 657:5-14.) In that position, he oversaw payroll for the Department. (Trial Tr. at 657:16-20.) Lopez testified that when Kronos

became widely implemented, the City no longer had a need for supervising timekeepers. (Trial Tr. at 679:3-680:2.) Lopez testified that there were currently no supervising timekeepers within the Department, and that after the July 2002 RIF, there were no chief timekeepers employed in the Department or, to his knowledge, in the City. (Trial Tr. at 681:23-682:14.)

113. Up until and through most of 2001, supervising timekeepers were assigned to the various bureaus within the Department. (Trial Tr. at 901:1-7.) In late 2001, the Department began to centralize its timekeeping and payroll functions so that all the supervising timekeepers worked for the Department as a whole rather than for individual bureaus. (Trial Tr. at 901:10- 14.)

114. When the Department began to use Kronos, it was done haphazardly and was not effective as the Department's sole timekeeping system. (Trial Tr. at 903:1-9.) In March or February of 2002, there was a push within the Department to fully implement and utilize Kronos to its full timekeeping capacity. (Trial Tr. at 903:21-904:2.) Instead of having supervising timekeepers collect the manually filled out timesheets and enter them and any edits into the payroll ledger, the timesheets were going to be done in Kronos and automatically submitted to the payroll, with employees' individual supervisors submitting any necessary edits. (Trial Tr. at 902:12-19, 904:10-15.) Thus, the supervising timekeepers were moved to a centralized location. (Trial Tr. at 904:16-20.) The Department was one of the three pilot departments to fully implement Kronos and "totally eliminate manual payroll." (Trial Tr. at 905:16-906:2.)

115. Kenney testified that the comptroller suggested that the full implementation of Kronos would eliminate the need for the timekeeping function and, because "the discussion of a reduction in force was already on the table," recommended that the Department eliminate the timekeeping positions as one piece of its RIF. (Trial Tr. at 910:4-8.) Kenney thus recommended to Sullivan that all of the timekeeping positions, including the chief timekeeper position, be eliminated in the RIF. (Trial Tr. at 910:18-911:3, 912:12-17.) Commissioner Sanchez approved that recommendation. (Trial Tr. at 911:4-6.)

116. Kenney testified that because of Kronos, all the job titles that fell within the timekeeping function were eliminated, regardless of what the duties were at the time. (Trial Tr. at 913:2-7.) After the RIF, there were no chief or supervising timekeeping positions remaining in the Department. (Trial Tr. at 913:14-21.)

117. Some employees who held the title of supervising timekeeper were transferred immediately prior to the RIF. (Trial Tr. at 829:2-5.)

118. By July 2002, the Department had fully implemented Kronos. (Trial Tr. at 911:7- 12.) Any remaining timekeepers were preparing and entering edits, a task which was to be reassigned to the on-site supervisors. (Trial Tr. at 911:7-19.)

119. After Kronos was implemented, there was still a need for oversight of the payroll function. (Trial Tr. at 915:4-7.) That responsibility fell to field payroll auditors—supervisors in the field who made sure the time of the employees they supervised was entered properly. (Trial Tr. at 915:17-24.) Kenney testified, however, that all of

the functions for timekeeping were necessary at least until the end of 2002. (Trial Tr. at 918:10-14.)

120. At some point, Stevens returned to the BOE to perform the timekeeping and payroll tasks that had been assigned to Plaintiff. (Trial Tr. at 650:20-25.) However, since he performed the supervising timekeeper tasks under the job title of laborer, his position was not eliminated in the 2002 RIF. (Trial Tr. at 653:1-12.)

121. From 1999 until at least 2004, the Department had an employee, whose official title was Assistant Commissioner, who was in charge of payroll and timekeeping. (Trial Tr. at 830:11-17.)

122. Murphy prepared a list of positions he thought could be eliminated from the BOE without negatively impacting the bureau. (Trial Tr. at 877:14-16, 878:22-879:2.) He included the chief timekeeping position because no one had been performing it and the BOE had not been negatively impacted. (Trial Tr. at 878:19-879:17.) Additionally, the BOE had no supervising timekeepers since Plaintiff's transfer. (Trial Tr. at 884:7-11.) The Department was transitioning to Kronos, which reduced the number of timekeeping positions that were necessary, and was centralizing the remaining timekeeping functions as a Department timekeeping unit rather than multiple bureau timekeeping units. (Trial Tr. at 883:19-23.) Murphy did not make the final decision as to the Department's RIF list, however. (Trial Tr. at 881:24-882:2.)

123. Bresnahan was not involved in the decision to include Plaintiff in the July 2002 RIF. (Trial Tr. at 1003:19-25.) Plaintiff's position as Chief Timekeeper was not in Traffic Services'

budget, and Bresnahan did not know Plaintiff's position was going to be eliminated until the day of the RIF. (Trial Tr. at 1004:1-11.)

VI. Plaintiff's Pension Loss

124. Professor Larry DeBrock testified as an expert witness. He was an economics professor and the dean of the college of business at the University of Illinois. (Trial Tr. at 357:16-18, 358:22-24.) Professor DeBrock performed an analysis of Plaintiff's pension loss. (Trial Tr. at 359:20-22.) He considered life expectancy and the schedule of Plaintiff's monthly benefits from the pension board, along with a projection of Plaintiff's future earnings if he had kept working. (Trial Tr. at 361:14-362:22, 363:15-364:6.) He did not consider Plaintiff's health condition or specific life expectancy, only the statistical average life expectancy for a man Plaintiff's age. (Trial Tr. at 378:1-13.) He did not review the Illinois Pension Code to determine if he was calculating the pension in accordance with the applicable laws. (Trial Tr. at 374:11- 14.)

125. Professor DeBrock testified that if Plaintiff had retired on his fiftieth birthday, the present value of his lost pension benefits would be approximately $1.3 million. (Trial Tr. at 366:8-15.) If Plaintiff retired on his fifty-fifth birthday, the present value of his lost pension benefits would be around $1.2 million. (Trial Tr. at 366:16-19.)

126. Professor DeBrock relied on Plaintiff's continuous service date—February 11, 1974, when Plaintiff began working for the City—to make his calculations. (Trial Tr. at 376:1- 8.) He testified that he relied on that date because that was the date listed on the report the pension fund prepared

for Plaintiff. (Trial Tr. at 376:23-25.) He also assumed that Plaintiff would continue to work after his July 31, 2002 termination. (Trial Tr. at 379:17-24.)

127. DeBrock testified that if Plaintiff had withdrawn money from his pension, that would change DeBrock's pension loss calculations. (Trial Tr. at 377:7-10.)

128. Jane Tessaro also testified about Plaintiff's pension loss. Tessaro was the manager of the benefits department at the Municipal Employees Annuity and Benefit Fund of Chicago, the pension fund for some City workers. (Trial Tr. at 1041:6-21.) Because the municipal pension fund is different from the Chicago Park District pension fund, Plaintiff did not start contributing to the municipal pension fund until December 1981. (Trial Tr. at 1042:5-14.) Thus, when Plaintiff was terminated, he had 21 years of pension credit in the fund, which would have enabled him to start collecting benefits at age 55. (Trial Tr. at 1043:10-16.) To collect a pension at 50, an employee needed to have at least 30 years of service credit. (Trial Tr. at 1043:20-23.)

129. In September 2005, Plaintiff withdrew all of his contributions in the pension fund—$87,192.95. (Trial Tr. at 1044:1-4.) He testified that he needed the money to pay bills after he was terminated. (Trial Tr. at 220:2-7.) Once an employee receives a refund of his pension contributions, he forfeits all future benefits from the pension fund. (Trial Tr. at 1044:5- 9.)

130. A City employee's continuous service date is used for purposes of salary, advancement, and vacation; it does not indicate when an

employee began contributing to the pension. (Trial Tr. at 1045:1-9.)

131. Tessaro testified that any calculation of benefits that did not take the Pension Code into consideration would not be correct because the Pension Code describes "the formula to use in calculating a benefit, what types of benefits are pensionable, how to calculate service credit, how to calculate final average salary." (Trial Tr. at 1046:8-16.)

132. Tessaro testified that, given Plaintiff's termination on July 31, 2002, if Plaintiff had not withdrawn money from his account, he would have received $2,091.00 a month beginning at age 55. (Trial Tr. at 1046:17-23.) If he had not been terminated and had instead continued to work at his same salary until age 55, he would have received a pension of $3,507 per month beginning at age 55. (Trial Tr. at 1046:24-1047:5.)

CONCLUSIONS OF LAW

I. Legal Standards

1. The ADA prohibits an employer from retaliating against an employee for requesting an accommodation. 42 U.S.C. § 1220(a).

2. The jury's verdict that Defendant did not discriminate against Plaintiff under the ADA does not foreclose Plaintiff's ADA retaliation claim. "The Act prohibits an employer from retaliating against an employee who has raised an ADA claim, whether or not that employee ultimately succeeds on the merits of that claim." *Squibb v. Mem'l Med. Ctr.*, 497 F.3d 775, 786 (7th Cir. 2007) (citing *Cassimy v. Bd. of Educ. of Rockford Pub. Schs.*, 461 F.3d 932, 938 (7th Cir. 2006)). Rather, "it is good faith and reasonableness, not the fact of

discrimination, that is the critical inquiry" in determining whether an employer retaliated based on an employee's protected actions under the ADA. *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1096 (7th Cir. 1998) (quoting *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982)).

3. The retaliation provisions of the "principal federal employment discrimination statutes are materially identical." *Twisdale v. Snow*, 325 F.3d 950, 952 (7th Cir. 2003) (citing Title VII, 42 U.S.C. § 2000e-3(a); the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); the Rehabilitation Act, 29 U.S.C. § 794(d); and the ADA, 42 U.S.C. § 12203(a)). Therefore, the framework for the analysis of retaliation claims is the same under these statutes. *Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 758 n.16 (7th Cir. 2006). "[C]ourts look to Title VII retaliation cases for guidance in deciding retaliation cases under the ADA." *Casna v. City of Loves Park*, 574 F.3d 420, 427 (7th Cir. 2009).

II. Whether the City Retaliated Against Plaintiff in Violation of the ADA

4. Plaintiff argues that Defendant retaliated against him because he requested ADA accommodations by denying his pay increases and terminating him. (R. 125, Third Am. Compl. ¶ 68.) Plaintiff seeks damages for the pay denials and the lost pension benefits. (*Id.* at 15.) To succeed on his retaliation claim, Plaintiff must prove by a preponderance of the evidence that he requested an accommodation, and that his request was the but-for cause of his pay increase denials or his termination. *See Univ. of Tex. Sw. Med. Ctr. v.*

Nassar, 133 S. Ct. 2517, 2528 (2013).

5. Plaintiff engaged in a protected activity under the ADA when he requested accommodations for his injury. "[A]n informal complaint may constitute protected activity for purposes of retaliation claims." *Casna*, 574 F.3d at 427. Plaintiff repeatedly complained to his supervisors that he was having problems performing his newly assigned tasks due to his injury. (Trial Tr. at 61:23-62:12, 250:8-10, 636:14-24.) Additionally, Plaintiff's counsel sent Defendant a letter requesting accommodations. (Pl.'s Ex. 49.) Finally, Dr. Arnold, Dr. Fischer, and Dr. Gonzales repeatedly informed Defendant that Plaintiff required an accommodation—namely, limited use of his right arm. (Pl.'s Ex. 21, 22, 23, 24, 42, 78.) These communications should have conveyed to Defendant that Plaintiff required accommodation under the ADA. *See Casna*, 574 F.3d at 427; *Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 195 (7th Cir. 1994). Accordingly, Plaintiff has proved by a preponderance of the evidence that he engaged in a protected activity under the ADA.

6. Plaintiff's pay increase denials were materially adverse employment actions. Defendant urges this Court to conclude that the merit pay increases Plaintiff was eligible for were bonuses to which Plaintiff was not entitled, and thus that the denials of the increases did not constitute adverse employment actions. (R. 521, Def.'s Proposed Findings at 8.) The denial of a raise qualifies as an adverse employment action, but the denial of a bonus does not. *Farrell v. Butler Univ.*, 421 F.3d 609, 614 (7th Cir. 2005) (citing *Hunt v. City of Markham*, 219 F.3d 649, 654 (7th Cir. 2000); *Miller*

v. Am. Family Mut. Ins. Co., 203 F.3d 997, 1006 (7th Cir. 2000)). The Seventh Circuit has distinguished between the two: "Bonuses generally are sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer. Raises are the norm for workers who perform satisfactorily." *Hunt*, 219 F.3d at 654. "[T]he denial of a bonus is inherently ambiguous, as well as less damaging to the employee because he didn't count (or at least should not have counted) on it," while "[t]he denial of a raise is more likely to reflect invidious motivation." *Id.*

7. The evidence in the record establishes that the merit pay increases Plaintiff was denied were more akin to raises than to bonuses. Murphy referred to a merit pay increase as "a salary advancement" and "a merit raise." (Trial Tr. at 862:4, 865:2.) Bresnahan referred to it as "a merit salary increase." (Trial Tr. at 992:3.) Salary advancement opportunities came up routinely for some employees, every two to three years. (Trial Tr. at 862:15-18, 988:16-20.) Although a supervisor was not required to give an eligible employee a merit pay increase, (Trial Tr. at 888:13-16), a written explanation was required for a denial, (Trial Tr. at 632:24-633:2). Bresnahan testified that a merit pay increase was a pay raise that an employee was entitled to if he deserved it. (Trial Tr. at 988:6-11.) He differentiated between a cost-of-living increase and a merit pay increase. (Trial Tr. at 989:5-8.) Finally, the merit pay increases were not one-time rewards for good service; rather, they were permanent salary increases. (Trial Tr. at 993:1-7.) Accordingly, the Court concludes that the merit pay increases were raises rather than

bonuses, and thus the denials of merit pay increases constituted materially adverse employment actions.

8. It is undisputed that Plaintiff's termination constituted a materially adverse employment action. *See Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1116 (7th Cir. 2009). Thus the only issue in dispute is whether Plaintiff's requests for accommodation were the but-for cause of his pay increase denials or his termination.

9. Plaintiffs in retaliation cases rarely have a direct admission by their employers of retaliatory motive, so causation is typically established through "a convincing mosaic of circumstantial evidence that would support the inference that a retaliatory animus was at work." *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1180 (7th Cir. 2013) (internal citations and quotation marks omitted) (quoting *Smith v. Bray*, 681 F.3d 888, 901 (7th Cir. 2012)). The types of circumstantial evidence that are frequently used include "suspicious timing, ambiguous statements oral or written, and other bits and pieces from which an inference of retaliatory intent might be drawn," as well as "evidence that the employer offered a pretextual reason for an adverse employment action." *Id.* (internal citations and quotation marks omitted) (quoting *Bray*, 681 F.3d at 901).

10. Plaintiff argues that the "suspiciously short period of time" between Plaintiff's July 1, 2000 pay increase denial and his notifying his superiors that he needed accommodation provides the causal link between the two. (R. 528, Pl.'s Proposed Findings & Conclusions at 29.) However,

Plaintiff testified that he did not tell Vittori that he needed accommodation until August 8th. (Trial Tr. at 262:5-9.) In late June, Plaintiff did alert Heffernan and Donlan that he was having problems performing the duties Vittori assigned, (Trial Tr. at 61:23-62:12, 250:8-10), but he did not request an accommodation, (Trial Tr. at 251:12-18). Plaintiff testified that he had a good relationship with Donlan and Donlan had no animus towards him. (Trial Tr. at 254:12- 20.) The Court finds no evidence in the trial record that indicates that Plaintiff requested an accommodation before his July 1, 2000 pay increase denial, or that Donlan informed anyone about Plaintiff's statement that he was struggling with his new duties. Plaintiff contends that Defendant's failure to produce any documentation to justify the pay denial "is compelling evidence that the City denied these pay increases in retaliation for Plaintiff exercising his rights under the ADA," but Plaintiff has failed to prove that at the time of the first denial, Plaintiff *had* exercised his rights under the ADA. The Court thus cannot conclude that Plaintiff's July 1, 2000 pay increase denial was caused by his request for accommodation.

11. Plaintiff fails to provide the Court any reasoning on which it might base a conclusion that any of the subsequent pay denials were retaliatory. In fact, the Court finds that the subsequent pay denials were also unrelated to Plaintiff's requests for accommodation. Instead, they were based upon the City's confusing practice of detailing employees to various positions in other divisions within their department but maintaining their same official assignments. That practice led to Plaintiff's

performance while he was detailed to Traffic Services being evaluated by Brian Murphy, the Deputy Commissioner of the BOE, because Plaintiff was identified within the Department as a Chief Timekeeper in the BOE. On October 1, 2001, Murphy indicated that Plaintiff's performance as a Chief Timekeeper was not worthy of a pay increase—because Plaintiff was in fact not acting as Chief Timekeeper at the time. (Trial Tr. at 863-869.) The Court finds that Murphy's evaluation, while perhaps unfair, was not a pretext for retaliation, and the subsequent denial of a raise was not motivated by the City's desire to retaliate against Plaintiff for requesting accommodation.

12. Plaintiff's January 1, 2002 pay denial was based on an evaluation by the Chief Auto Pound Supervisor, Rachmaciej. That evaluation recommended that Plaintiff's raise be denied "until his work attendance improve[d]" because of his "excessive absenteeism." (Trial Tr. at 990-991; Def.'s Ex. 8.) Similarly, Plaintiff's February 2002 and May 2002 pay denials were based on his attendance. (Trial Tr. at 996-999, 1005-1007; Def.'s Exs. 11, 15.) Plaintiff failed to offer any evidence by which the Court might infer that those denials were pretextual, nor does he refute that he was frequently tardy or absent. Thus, Plaintiff's pay increase denials based on his absenteeism do not indicate retaliation against his request for accommodation. *See, e.g.*, *Squibb*, 497 F.3d at 787 ("[the employer's] act of disciplining Ms. Squibb for multiple absences in this position also does not provide any evidence that it harbored a retaliatory motive"). The Court concludes that Plaintiff's requests for accommodation were not the but-for

cause of his pay increase denials.

13. Plaintiff further contends that his change in job duties evinces retaliatory intent, and that Hennessy authorized the changes in Plaintiff's job duties after discovering that he needed accommodations. (R. 528, Pl.'s Proposed Findings & Conclusions at 30.) In fact, the evidence in the record shows that Plaintiff's job duties changed in May of 2000 when Vittori became Plaintiff's supervisor. (Trial Tr. at 58:4-59:6, 243:17-244:17.) Plaintiff had never performed all the duties of the Chief Timekeeper. When Plaintiff's injury became more prohibitive than it had been, Hennessy requested a written description of the Chief Timekeeper duties so she could determine how best to accommodate him.

14. Finally, Plaintiff provides no reason for this Court to find that he was terminated in retaliation for his request for accommodation. In fact, Plaintiff was terminated more than a year after he was accommodated in Traffic Services. Plaintiff fails to point to any requests for accommodation he made, other than the request to work the late shift rather than the early shift, after his transfer to Traffic Services. The Court finds no nexus between his termination and his requests for accommodations under the ADA.

15. Thus, the Court adopts the jury's advisory determination that Plaintiff failed to satisfy his burden to prove by a preponderance of the evidence that his requests for accommodations were the but-for cause of either his termination or his pay-increase denials. This outcome is not inconsistent with the jury's verdict for Plaintiff on his state law retaliatory discharge claim. The jury

was instructed that to succeed on his ADA retaliation claim, Plaintiff must "prove by a preponderance of the evidence that Defendant terminated him and/or denied him merit pay increases because he requested an accommodation." (R. 498, Jury Instructions at 27.) The instruction for Plaintiff's Illinois Workers' Compensation Act claim stated that to prove retaliatory discharge, Plaintiff had to prove that he "was terminated because he requested medical treatment for his work related injury and/or because he filed a Worker's Compensation Claim with the Illinois Industrial Commission;" that he sustained damages as a result of his termination; and that his request for medical treatment and/or filing of a Worker's Compensation Claim was a proximate cause of his termination and the resulting damages. (R. 498, Jury Instructions at 30.) The difference between Plaintiff's ADA retaliation claim and his state law retaliatory discharge claim is the protected right. A claim under either requires proof of exercise of a protected right. 42 U.S.C. § 12203(a) (it is unlawful to discriminate against an individual who has exercised a right protected by the ADA); *Groark v. Thorleif Larsen & Son, Inc.*, 596 N.E.2d 78, 81 (Ill. App. Ct. 1st Dist. 1992) (a state law retaliatory discharge claim requires "the plaintiff's exercise of a right granted by the Workers' Compensation Act").

16. The jury clearly determined that Defendant terminated Plaintiff in retaliation for requesting medical treatment and/or filing a workers' compensation claim, not for requesting an accommodation. Simply put, the objective timeline analysis does not support a finding that Plaintiff's

multiple accommodation requests, which Defendant attempted to comply with, were the source of Defendant's animus toward Plaintiff. On the other hand, as the jury properly concluded, the overwhelming trial testimony and documentary evidence supports a finding that Plaintiff was targeted for retaliatory treatment after September of 2000 because Defendant reached the unfounded conclusion that Plaintiff's medical treatment requests and workers' compensation claim were fraudulent or "phony." Plaintiff's multiple ADA accommodation requests prior to September of 2000 did not result in illegal retaliation. On the other hand, after Plaintiff's workers' compensation claim was filed in September 2000, there was an immediate retaliation by Defendant which resulted in the transfer of Plaintiff to a series of adverse job assignments and the inevitable causal dismissal of Plaintiff. The jury properly concluded that Plaintiff's treatment and Defendant's attempted accommodation of Plaintiff prior to September 2000 shows a lack of discriminatory animus under the ADA.

17. Because Plaintiff failed to prove by a preponderance of the evidence that his requests for accommodation under the ADA provided the but-for cause of his termination or his pay raise denials, the Court finds for Defendant on Plaintiff's claim of retaliation in violation of the ADA.

PLAINTIFF'S MOTION TO VACATE

Plaintiff moves the Court to vacate a portion of the Court's April 19, 2013 Order that granted judgment in favor of Defendant on his ADA retaliation claim "without disturbing any other portion of the Judgment and entry of the Order."

(R. 503, Pl.'s Mot. Vacate.) Plaintiff reminds the Court that the parties and the Court agreed that his ADA retaliation claim was submitted to the jury on an advisory basis only. (*Id.* ¶ 2.) Plaintiff sought to submit to the Court additional evidence on the ADA retaliation claim that was not submitted to the jury. (*Id.* ¶ 4.) The Court denied this request on June 5, 2013, and entered and continued the remainder of the motion until the Court ruled on the remaining post-trial motions. (R. 526, Min. Entry.) For the reasons stated above in its Findings of Fact and Conclusions of Law, the Court now DENIES Plaintiff's motion to vacate the advisory jury verdict on the ADA retaliation claim.

DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

At the close of evidence, Defendant moved for judgment as a matter of law on each of Plaintiff's claims. (R. 490, Def.'s Mot. J.) The Court denied the motion without prejudice to its renewal after the jury verdict. (R. 494, Min. Entry; Trial Tr. at 1155:13-1156:6.) On May 15, 2013, pursuant to Federal Rule of Civil Procedure 50(b), Defendant filed its renewed motion for judgment on Plaintiff's state law retaliatory discharge claim. (R. 508, Def.'s Renewed Mot. J.)

Rule 50 authorizes a court to enter judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). Under this standard, "the question is simply whether the evidence as a whole, when combined with all reasonable inferences permissibly drawn from that evidence, is sufficient to allow a reasonable jury to find in favor" of Defendant. *Hall*

v. Forest River, Inc., 536 F.3d 615, 619 (7th Cir. 2008) (citing *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007)). In making this determination, the Court may not reweigh the evidence, draw its own inferences, or substitute its own determinations regarding the credibility of the witnesses for those made by the jury. *Gower v. Vercler*, 377 F.3d 661, 666 (7th Cir. 2004). Instead, the Court should "reverse the verdict only if no rational jury could have found for the prevailing party." *E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 835 (7th Cir. 2013) (citing *Bogan v. City of Chi.*, 644 F.3d 563, 572 (7th Cir. 2011)).

"To state a cause of action for retaliatory discharge, plaintiffs must show that: (1) they were employees of defendants before or at the time of the injury; (2) they exercised some right granted by the Act; and (3) their discharge was causally related to the exercise of their rights under the Act." *Grabs v. Safeway, Inc.*, 917 N.E.2d 122, 126 (Ill. App. Ct. 1st Dist. 2009) (internal citations omitted) (citing 820 Ill. Comp. Stat. 305/1 *et seq.*; *Clark v. Owens-Brockway Glass Container, Inc.*, 697 N.E.2d 743, 746 (Ill. App. Ct. 5th Dist. 1998)). It is undisputed that Plaintiff was employed by Defendant before he was terminated and that he exercised rights protected by the IWCA by filing a workers' compensation claim. Defendant argues, however, that Plaintiff failed to establish the third element of his retaliatory discharge claim—that his discharge was causally related to the exercise of his rights under the IWCA. (R. 510, Def.'s Mem. J. at 3.) Specifically, Defendant argues that Plaintiff failed to prove that Commissioner Sanchez, who made the final decisions as to the RIF, knew that

Plaintiff had exercised his rights under the IWCA, (*id.* at 4-8), and that the Chief Timekeeper position would not have been eliminated but for Plaintiff's statutorily protected activities, (*id.* at 8-13). Consequently, Defendant argues that the jury's verdict in Plaintiff's favor on his retaliatory discharge claim is unsupported by the evidence presented at trial and requests judgment as a matter of law. (*Id.* at 13-14.)

Both of the reasons Defendant provides as to why the Court should grant it judgment as a matter of law are flawed. First, Plaintiff was not required to expressly demonstrate that the RIF decision-maker knew about Plaintiff's workers' compensation claim and requests for medical treatment in order for the jury to conclude that Plaintiff was discharged in retaliation of those protected activities. *See, e.g.*, *Gomez v. The Finishing Co.*, 861 N.E.2d 189, 198 (Ill. App. Ct. 1st Dist. 2006) (even though plaintiff had no direct evidence of pretext, a reasonable jury could have concluded that defendant's reason for terminating plaintiff was pretextual and found that plaintiff's discharge was retaliatory). The jury only had to find that it was more likely than not that Plaintiff's workers' compensation claim and requests for medical treatment were causally related to his termination. *See Grabs*, 917 N.E.2d at 126. The evidence presented at trial, taken as a whole, supports the conclusion that Plaintiff began to experience adverse consequences as soon as he filed his workers' compensation claim, in retaliation of that claim, culminating in his termination.

In addition, Defendant's assertion that Plaintiff had to prove that his protected activities

under the IWCA were the but-for cause of his termination is incorrect. To succeed on his state law retaliatory discharge claim, Plaintiff was required to show that his workers' compensation claim and requests for medical treatment were the *proximate* cause of his termination. *See Clemons v. Mech. Devices Co.*, 704 N.E.2d 403, 408 (Ill. 1998) ("Cases brought for retaliatory discharge based on an employee's filing of a workers' compensation claim should be reviewed using traditional tort analysis."). The jury was informed of this standard and was given a modified version of the Illinois Pattern Jury Instruction for retaliatory discharge. *See* Ill. Pattern Jury Instr.-Civ. 250.01. The jury was also properly instructed that the "proximate cause" of Plaintiff's termination "need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury." (R. 498, Jury Instructions at 29); Ill.Pattern Jury Instr.-Civ. 15.01. Defendant's argument that the implementation of Kronos and the City-wide RIF were the reasons for Plaintiff's termination thus fails to convince the Court that no reasonable jury could have concluded that Plaintiff's workers' compensation claim and requests for medical treatment were proximate causes of his termination.

On January 24, 2001, despite having been informed by Dr. Gonzales that Plaintiff's injury was work-related, (Pl.'s Ex. 39), the Committee on Finance sent Plaintiff a letter denying liability for his worker's compensation claim. (Pl.'s Ex. 16). The Committee on Finance continued to refuse to authorize payment for any medical treatment or acknowledge that Plaintiff's injury was work-

related, despite being informed by Dr. Arnold that the condition was work-related, (Pl.'s Ex. 20), and receiving multiple requests for follow-up treatment by both Dr. Arnold and Dr. Gonzales, (*see, e.g.*, Pl.'s Exs. 21, 22, 23, 26, 30, 39, 45). The Law Department also informed the Committee on Finance that Plaintiff had a work-related injury and that he needed to be placed on duty disability and accommodated when Dr. Arnold released him to return to work. (Pl.'s Ex. 55, Schechter Mem.) The Law Department also recommended that Dr. Arnold reevaluate Plaintiff to consider whether the treatment Dr. Gonzales recommended was appropriate. (*Id.*) Plaintiff never received that treatment, though, and someone wrote the word "phony" on the top of the Schechter Memo before it was faxed to the BOE, suggesting that the Committee on Finance believed that Plaintiff's workers' compensation claim was fraudulent. (Pl.'s Exs. 55, 56.) The evidence outlined above persuasively demonstrates Defendant's retaliatory animus towards Plaintiff.

The Court also finds evidence by which a rational jury could have concluded that this retaliatory animus was a factor in Plaintiff's termination. An analysis of the timeline in this case demonstrates a series of progressively worse work assignments that began immediately after Plaintiff requested medical treatment and filed a worker's compensation claim. Despite Dr. Fischer's assessment that Plaintiff was qualified to perform the Chief Timekeeping functions with the same restriction he had been accommodated with for years—limited use of his right hand and arm, (Pl.'s Ex. 42)—the City effectively demoted Plaintiff once

he filed a workers' compensation claim. Hennessey testified that Plaintiff was not demoted because he still had the same job title and received the same salary, although the Court notes that the job title was later cited as the reason for Plaintiff's termination. The evidence presented at trial indicates that the transfer was a demotion: Plaintiff went from a supervisory position in which he was responsible for overseeing the payroll operations of the BOE to a position in which he checked receipts as people left the auto pound.

On September 1, 2000, the day Plaintiff filed his workers' compensation claim, he was transferred to the Construction Division to answer phones. (Trial Tr. at 89:1-8, 272:13-18.) A month later, he was transferred to the garage of the Transportation Division to answer phones. (Trial Tr. at 91:8-93:8, 290:20-22.) Hennessey testified that she authorized those transfers and she had no idea that Plaintiff had filed a worker's compensation claim. (Trial Tr. at 592:5-25.) Donlan testified, however, that he called Hennessey on August 24, 2000, a week before Plaintiff was transferred to the Construction Division, to request a blue card authorizing medical treatment for Plaintiff. (Trial Tr. at 287:9-288:6.) The Court observes that Hennessey was antagonistic on the stand, and the Court finds it plausible that the jury significantly discounted her testimony. The Court defers to credibility determinations the jury had to make to resolve witnesses' conflicting testimony. *Gower*, 377 F.3d at 666.

On December 18, 2000, Dr. Gonzales sent the City a note stating that Plaintiff was impaired by a work-related injury and requesting that

Plaintiff refrain from working due to that injury. (Pl.'s Ex. 43.) On December 21st, Hennessey sent Plaintiff a letter referencing Dr. Gonzales's note. (Def.'s Ex. 2.) The letter did not advise Plaintiff to apply for disability or authorize him to seek medical treatment for his injury; it advised him to apply for a leave of absence. (*Id.*) When Donlan delivered the letter to Plaintiff, Donlan told him not to report back to work. (Trial Tr. at 297:22-23.) Finally, after the Law Department wrote the Schechter Memo informing the Committee on Finance that Plaintiff should be placed on disability, (Pl.'s Ex. 55), Plaintiff was reinstated and put to work checking receipts at the auto pound, where he worked outside year-round, (Trial Tr. at 212:25-213:11.). Plaintiff's assignment to the auto pound happened the same day the Schechter Memo with the word "phony" written across it was faxed to the BOE. (Pl.'s Ex. 56.) This timeline evinces Defendant's retaliatory animus that kept Plaintiff in increasingly undesirable positions, kept Plaintiff in the dark about his multiple negative performance reviews and pay denials, and ultimately led to him being terminated in the RIF because of a job title that did not match his duties.

Defendant argues that Plaintiff's position was eliminated as a cost-cutting measure because the City no longer needed timekeepers. (R. 510, Def.'s Mem. J. at 9-11.) "[I]f an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met." *Clemons*, 704 N.E.2d at 406 (citing *Hartlein v. Ill. Power Co.*, 601 N.E.2d 720, 730 (Ill. 1992)). Nevertheless, an employer that

presents "an arguably valid basis for firing an employee, . . . may still be liable for retaliatory discharge if the actual motivation for the termination was the employee's pursuit of a workers' compensation claim." *Brooks v. Pactiv Corp.*, 729 F.3d 758, 768 (7th Cir. 2013) (citing *Siekierka v. United Steel Deck, Inc.*, 868 N.E.2d 374, 380 (Ill. App. Ct. 3d Dist. 2007)). Here, Defendant put forth a basis for Plaintiff's discharge, the City- wide RIF, and it is clear that the jury found that basis to be pretextual. This conclusion does not signify that the jury determined that Defendant did not actually need to lay off employees in order to maintain fiscal stability. Rather, the evidence presented at trial painted a clear picture that the filing of Plaintiff's workers' compensation claim and his continued requests for medical treatment led to a series of increasingly undesirable work assignments and pay raise denials. The Department employed individuals to supervise and edit payroll and timekeeping in the Kronos system until at least 2004, (Trial Tr. at 830:11-17), undermining Defendant's contention that Kronos rendered all timekeeping positions obsolete. Additionally, timekeepers other than Plaintiff were transferred to positions that did not have the timekeeper title in advance of the RIF. (Trial Tr. at 829:2-5.) Thus, the evidence at trial proved that despite the Department's continuing need for the very timekeeping tasks Plaintiff had been performing and despite the fact that Defendant could have transferred Plaintiff to a different title that would not have been eliminated, Plaintiff was terminated. The jury was entitled to find that his termination

was motivated by a retaliatory animus driven by Defendant's belief that Plaintiff's workers' compensation claim and requests for medical treatment were "phony." The Court concludes that a rational jury could have found for Plaintiff on his state law retaliatory discharge claim. *See AutoZone*, 707 F.3d at 835. Accordingly, the Court DENIES Defendant's renewed motion for judgment as a matter of law.

DEFENDANT'S MOTION FOR A NEW TRIAL OR, ALTERNATIVELY, TO REINSTATE THE ORIGINAL JURY VERDICT

Defendant next moves pursuant to Federal Rule of Civil Procedure 59 for a new trial or, alternatively, to reinstate the jury verdict from the first trial. (R. 511, Def.'s Mot. New Trial.) Rule 59 allows a court to order a new trial if "the verdict is against the clear weight of the evidence or the trial was unfair to the moving party." *Clarett v. Roberts*, 657 F.3d 664, 674 (7th Cir. 2011) (quoting *David v. Caterpillar, Inc.*, 324 F.3d 851, 863 (7th Cir. 2003)). In ruling on such a motion, a court "may consider the credibility of witnesses, the weight of the evidence, and anything else which justice requires." *Bob Willow Motors, Inc. v. Gen. Motors Corp.*, 872 F.2d 788, 798 (7th Cir. 1989). The trial court must afford some deference to the jury's conclusions. *Mejia v. Cook Cnty., Ill.*, 650 F.3d 631, 633 n.1 (7th Cir. 2011). "A court will set aside a verdict as contrary to the manifest weight of the evidence only if no rational jury could have rendered the verdict." *Whitehead v. Bond*, 680 F.3d 919, 928 (7th Cir. 2012) (internal alterations omitted) (quoting *Marcus & Millichap Inv. Servs. of Chi. v. Sekulovski*, 639 F.3d 301, 313 (7th Cir. 2011)); *see*

also Latino v. Kaizer, 58 F.3d 310, 315 (7th Cir. 1995) (A new trial should be granted "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks [the Court's] conscience.").

Defendant argues that it was deprived of a fair retrial for a number of reasons: (1) Plaintiff violated *in limine* rulings; (2) the Schechter Memo should have been excluded or remained redacted; (3) Plaintiff's expert witness should have been barred from testifying about Plaintiff's alleged lost pension benefits; (4) Plaintiff did not properly impeach Defendant's witnesses; (5) testimony regarding allegedly falsified personnel documents should have been excluded; and (6) the Court's statement about certain memoranda Plaintiff had drafted "potentially confused the issues and biased the jury." (R. 511, Def.'s Mot. New Trial ¶¶ 10-16.) The Court addresses each argument in turn.

I. Violations of *in Limine* Rulings

Defendant first argues that Plaintiff violated the Court's *in limine* rulings while the City complied with the rulings, thus giving Plaintiff an unfair advantage that warrants a new trial. (R. 524, Def.'s Mem. New Trial at 2.) As a preliminary matter, the Court notes that it clearly stated during the pretrial conference that its *in limine* rulings were conditional and subject to reexamination in the context of the trial. (R. 497, Mar. 18 Tr. at 39:4-7 ("[I]f you want to revisit that at trial, you're free to do that. All the rulings that I'm making right now are all conditional rulings subject to being revisited in the context of the trial.").) At trial, the Court did in fact adjust some

of its *in limine* rulings, which is within the Court's discretion. *Farfaras v. Citizens Bank & Trust of Chicago*, 433 F.3d 558, 565 (7th Cir. 2006). Defendant's argument that Plaintiff's violation of certain *in limine* rulings justifies a new trial strikes the Court as a backdoor attempt to seek reconsideration of those rulings. Nevertheless, the Court examines each of Plaintiff's alleged *in limine* violations to determine if they provide grounds for a new trial.

A. Evidence about Plaintiff's 1987 and 1992 injuries

Defendant contends that the Court granted Plaintiff's motion *in limine* number 8 to exclude any evidence regarding his 1987 and 1992 work-related injuries but allowed Plaintiff to testify about those injuries and the resultant 1995 legal settlement. (R. 524, Def.'s Mem. New Trial at 3-4.) In addition, Defendant contends that Plaintiff objected to its attempts to cross- examine witnesses on the same subjects and those objections were sustained. (*Id.*) Defendant argues that this double standard "undoubtedly confused the jury and prevented the jury from hearing evidence that oppugned the credibility of Plaintiff" and Dr. Gonzales. (*Id.* at 4.)

Defendant mischaracterizes Plaintiff's motion *in limine* number 8. Plaintiff's motion *in limine* number 8, which the Court granted, sought to exclude evidence regarding Plaintiff's 1987 and 1992 work-related injuries, related workers' compensation claims, and the legal settlement of those workers' compensation claims. (R. 395, Pl.'s Mots. *in Lim.* at 89.) It did *not* seek to bar reference to Plaintiff's alleged disability, which is a

substantial focus of this litigation, or Defendant's 1995 Agreement to accommodate the resulting medical restrictions. (*Id.*) The Court notes that the 1995 Agreement is different than any *legal* settlement of Plaintiff's claims, to which motion *in limine* number 8 applied. Plaintiff's counsel walked the fine line between refraining from referring to Plaintiff's prior work-related injuries so as not to relitigate those issues and providing the necessary context for the 1995 Agreement. For example, in the first section of the transcript Defendant complains about, Plaintiff said no more than was necessary to provide context for the accommodated position he held:

> Q: Okay. And what -- what happened in 1995 that caused you to have a change in position in the bureau?
>
> A: Oh, the City made an agreement that I would be made the Chief Timekeeper. Q: Okay. Before that agreement, was -- did you have any physical problem that arose?
>
> A: Yes. My arm had swollen up and there, you know -- and it was from doing a lot of repetitive use things.
>
> Q: Okay. And in that time, about 1995, you and the City of Chicago agreed that you would become Chief Timekeeper instead, right?
>
> A: Correct.

(Trial Tr. at 39:9-20.) Plaintiff did not mention anything about his workers' compensation claims or testify that his injury was work-related. If Plaintiff had not set out this scant background information, the jury would have been confused as

to why Plaintiff had an agreement with the City, why he was not performing all the tasks of a Chief Timekeeper, and why the addition of duties in the summer of 2000 would have been so surprising and detrimental. (*See also* Trial Tr. at 52:17-23, 79:21-80:7.) Similarly, Dr. Gonzales's testimony describing Plaintiff's medical condition and accompanying restrictions was directly relevant to the issues at trial, and Defendant's objections to that testimony are similarly meritless.

Defendant's argument that it was subject to a double standard is disingenuous. For the most part, Defendant did not raise any objections to testimony about these matters at trial. When Defendant did object, the Court ordered Plaintiff to rephrase the question. (Trial Tr. at 63:16- 24.) Defendant was able to elicit testimony about Plaintiff's prior injuries and the 1995 Agreement to the same extent Plaintiff was. (*See, e.g.*, Trial Tr. at 222:10-18.) Defendant was not, however, allowed to elicit testimony about any legal settlement regarding Plaintiff's prior injuries or testimony that Plaintiff's prior injuries were work-related, which would have violated the *in limine* ruling. (*See* Trial Tr. at 224:25-225:6, 259:1-7.) Additionally, Hennessy— Defendant's witness—seemed to attempt to refer to "the settlement agreement" and prior litigation as much as possible, to which Defendant did not object. (*See, e.g.*, Trial Tr. at 530:4-6, 537:9-18, 538:6-10, 539:4-8, 540:24-541:5, 542:9, 553:19-23, 554:2-5, 564:10-11, 564:15, 564:18, 564:21-23, 566:24-25, 568:14-16, 568:24-569:2.) Finally, the Court had to instruct Hennessy not to mention the legal settlement and instruct the jury to disregard any mention to the 1995

settlement agreement. (Trial Tr. at 569:16-22.)

Defendant urges the Court to find duplicitous Plaintiff's contention that because his references to injuries did not refer to the work-related nature of his injuries, they complied with the *in limine* ruling. Plaintiff's motion *in limine* number 8 states, in relevant part:

> This Court should bar the City from presenting evidence or testimony regarding the 1987 & 1992 work related injuries and the settlement of those claims because it is undisputed they were work related . . . The City admits that it was accommodating the Plaintiff for his disability as a result of these injuries from 1995 through 2000. The fact of prior workman's compensation injuries, claims and disposition is irrelevant to the issues in this case which relate to the Defendant's conduct in the years 2000-2002.

(R. 395, Pl.'s Mots. *in Lim.* at 89.) The Court does not find Plaintiff's characterization of this motion *in limine* duplicitous or deceitful. The clear intent of this motion *in limine* was to exclude evidence related to prior workers' compensation claims and work-related injuries in order to keep the jury focused on the relevant time period. The Court's rulings at trial served this purpose by excluding references to the work-related nature of the prior injuries while allowing basic background information the jury needed. Any violation Defendant perceived does not warrant a new trial.

B. Evidence about Plaintiff's workers' compensation claim

Next, Defendant argues that Plaintiff misled and confused the jury by "intentionally conflating medical insurance and duty disability benefits and . . . suggesting that he was denied medical treatment" in contravention of the Court's ruling on Defendant's motion *in limine* number 2 to exclude evidence of and references to the previously dismissed Workers' Compensation Act claim and any alleged denial of medical treatment. (R. 524, Def.'s Mem. New Trial at 5-6.) The Court granted Defendant's motion *in limine* number 2 in part, but denied it in part. Specifically, the Court ruled that evidence pertaining only to Plaintiff's unsuccessful retaliatory denial of medical treatment claim would be excluded but that evidence pertaining to elements of Plaintiff's remaining retaliation claim would be allowed. (R. 497, Mar. 18 Tr. at 14:6-23.) The Court indicated that it would rule on individual documents in context if necessary and stated: "I don't want to relitigate the WCA claim because that could confuse the jury, but I understand that the retaliation claim would allow for certain documents to be admitted." (*Id.* at 14:19-16:8.)

Defendant raises only one instance when it objected to Plaintiff's alleged relitigation[1]:

[1] Defendant raises several instances in which it objected to Plaintiff's line of questioning, but these objections were based on relevance and lack of foundation, (Trial Tr. 118:17-21, 139:17- 22, 146:2-7), and leading questions, (*id.* at 718:21-719:2), not on an alleged relitigation of Plaintiff's WCA claims or a violation of an *in limine* ruling.

when Plaintiff's counsel asked Serafin whether, as of September 17, 2002, he denied that Plaintiff's injury was work-related. (Trial Tr. at 782:16-25.)

Defendant argues that Judge Andersen's holding that Illinois does not recognize a cause of action for retaliation under the IWCA short of retaliatory discharge means that evidence that Defendant denied liability and denied Plaintiff's requests for medical treatment for a work-related injury are not evidence of Defendant's retaliatory intent. This argument is baseless. "[A]n employee exercises a right under the IWCA merely by requesting and seeking medical attention." *Gordon v. FedEx Freight, Inc.*, 674 F.3d 769, 773 (7th Cir. 2012); *see also Hinthorn v. Roland's of Bloomington, Inc.*, 519 N.E.2d 909, 913 (Ill. 1988). Evidence that Defendant interfered with Plaintiff's rights under the WCA is certainly relevant to the jury's determination as to whether Defendant later retaliated against the exercise of those rights. *See Michael v. Precision Alliance Grp., LLC*, 2014 IL App (5th) 120517-U (Ill. App. Ct. 5th Dist. Jan. 21, 2014) (indirect evidence properly admitted to prove retaliatory discharge); *Gomez*, 861 N.E.2d at 198 (same). Additionally, much of the evidence Defendant complains about was relevant to Plaintiff's ADA failure to accommodate claim.

The Court expressly stated in the pretrial conference that the line between what related to Plaintiff's unsuccessful retaliation claim and his remaining retaliation claim would be nuanced. (R. 497, Mar. 18 Tr. at 14:19-15:10.) Accordingly, the Court ruled on documents and testimony in the context of the trial. Upon review of the trial record as a whole, the Court does not find any support for

Defendant's claim that the jury's verdict is based on emotions and prejudices rather than facts. The Court does concur with Defendant that the jury award, pursuant to the jury instructions, included compensation for lost pension benefits. The proper response to the excessive award is not a third trial, but rather a remittitur. The Court addresses Defendant's motion for remittitur below.

C. References to defense counsel

Finally, Defendant objects to Plaintiff's violation of the Court's grant of Defendant's motion *in limine* number 10 to prevent Plaintiff from referring to counsel as, *inter alia*, "the City" or "the Law Department." (R. 524, Def.'s Mem. New Trial at 9.) Defendant argues that "Plaintiff was permitted, over the City's objections, to refer to defense counsel as attorneys from the City's Law Department." (R. 524, Def.'s Mem. New Trial at 9 (citing Trial Tr. at 532:7-15)). Defendant contends that Plaintiff's fleeting reference to "the City's Law Department" "implied to the jury that defense counsel were part of the elaborate conspiracy that Plaintiff concocted in an effort to find some tenuous support for his retaliatory discharge claim." (*Id.*)

In fact, Plaintiff referenced "attorneys from the Law Department," Defendant objected, and the Court ordered Plaintiff to rephrase the question. (Trial Tr. at 532:7-10.) Plaintiff did refer to "the City of Chicago" in its rebuttal, but most of those references were to the City itself and not to defense counsel personally. (Trial Tr. at 1161:15-25.) Plaintiff's single rebuttal reference to defense counsel as "the City," (Trial Tr. at 1160:25-1161:5), was not in strict accord with the Court's *in limine* ruling, but the Court finds that it did not have a

prejudicial impact on the jury. Defendant cannot honestly expect the Court to believe that two improper references to defense counsel as "the City" over the course of a seven-day trial, one of which Plaintiff was instructed to rephrase, were prejudicial. The Court thus finds no basis to conclude that any alleged violations of the Court's *in limine* rulings provide grounds for a new trial.

II. Evidentiary Rulings

Defendant also seeks a new trial based on certain evidentiary rulings. (R. 511, Def.'s Mot. New Trial ¶¶ 12, 13, 15.) A party seeking a new trial based on erroneous evidentiary rulings bears a "heavy burden." *Alverio v. Sam's Warehouse Club*, 253 F.3d 933, 942 (7th Cir. 2001). Even if an evidentiary ruling is erroneous, a new trial is warranted "only if the error had a substantial influence over the jury, and the result reached was inconsistent with substantial justice." *E.E.O.C. v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir. 2012) (quoting *Farfaras*, 433 F.3d at 564).

A. The Schechter Memo

Defendant argues that the Schechter Memo, (Exs. 55, 56), should have been excluded. (R. 524, Def.'s Mem. New Trial at 10.) Defendant argued this point unsuccessfully in a motion *in limine*. (R. 404, Def.'s Mot. *In Lim.* No. 8; R. 497, Mar. 18 Tr. at 33:6-8 (denying the motion).) Defendant also objected at trial to the introduction of the Schechter Memo into evidence, and the Court overruled that objection. (Trial Tr. at 763:21-764:15.) The Court ruled that the Schechter Memo was admissible and relevant to Plaintiff's claims of retaliatory discharge and discrimination. (R. 497, Mar. 18 Tr. at 33:6-15; Trial Tr. at 764:2-15.) Defendant has

presented no reason for the Court to conclude that its two previous rulings on this point were erroneous, and the Court declines to rehash that analysis for a third time.

Defendant additionally argues that even if the Schechter Memo was properly allowed, only the redacted version should have been allowed pursuant to a ruling by Magistrate Judge Valdez and because the document was protected by attorney-client privilege. (R. 524, Def.'s Mem. New Trial at 10.) This position was argued in Chambers at a pretrial conference on March 18, 2013, and this Court declined to vacate Judge Valdez's finding that the Memo had been widely distributed throughout the City such that Defendant had waived its ability to claim privilege. (R. 497, Mar. 18 Tr. at 38:18-39:3.) Defendant contends that the Court erroneously allowed Plaintiff to rescind a January 2006 stipulation to use the redacted Memo. (R. 524, Def.'s Mem. New Trial at 10-11.) In support, Defendant cites *Graefenhain v. Pabst Brewing Co.*, in which the Seventh Circuit held that "the district court has 'broad discretion' to decide whether to hold a party to its stipulations." 870 F.2d 1198, 1206 (7th Cir. 1989). At the March 18th pretrial conference, the Court found that the waiver of privilege supported the use of the unredacted Memo and held that Defendant's arguments as to the unknown writer of the word "Phony" and Serafin's denials were pertinent to the weight of the evidence, not to its admissibility. (R. 497, Mar. 18 Tr. at 33:9-17, 38:19-39:3.) The admission of this evidence was also proper because, though prejudicial to the City, its probative value was not substantially outweighed by the danger of

unfair prejudice. Fed. R. Evid. 403. Defendant has presented no reason to find that the admission of the unredacted Schechter Memo was erroneous.

B. DeBrock's testimony

Defendant next argues that DeBrock should have been barred from testifying for the reasons it set forth in its motion *in limine* and motion to reconsider. (R. 524, Def.'s Mem. New Trial at 13.) Defendant argues that DeBrock's testimony was irrelevant because Plaintiff could not recover lost wages and was not entitled to lost pension benefits; that his testimony was prejudicial because it misled the jury; and that his calculations were not the product of reliable principles and methods. (*Id.* at 13-14.) Defendant made these same arguments in its motion *in limine*, (R. 457, Def.'s Mot. *in Lim.* No. 6), which the Court denied in the pretrial conference, (R. 497, Mar. 18 Tr. at 47:12-24), and in its motion to reconsider that ruling, (R. 485, Def.'s Mot. Reconsider re Def.'s Mot. *in Lim*. No. 6), which the Court also denied, (R. 488, Min. Entry). As the Court stated in the pretrial conference, DeBrock had sufficient expertise as an economist to testify as to lost pension benefits, and Defendant's cross-examination of him was sufficient to expose any inaccuracies in his calculations. (R. 497, Mar. 18 Tr. at 47:17-24.) To the extent that the jury "heard calculations that were both inflated and incorrect," as Defendant claims, (R. 524, Def.'s Mem. New Trial at 14), it also heard Defendant's rigorous cross-examination of DeBrock as well as contradictory testimony from Defendant's own pension expert, Jane Tessaro. Because DeBrock satisfied the *Daubert* standards and presented testimony that was relevant to Plaintiff's damages,

the Court finds no error its refusal to bar him from testifying.

C. Allegedly falsified employment documents

Defendant argues that Plaintiff's question to Drumgould as to whether he was "aware that documents were falsified to justify employment decisions in the Department between the years of 1998 until [he] retired in 2004" had no probative value because Plaintiff did not present any evidence that the Department had falsified any personnel document related to him. (R. 524, Def.'s Mem. New Trial at 15-16.) Defendant similarly argued that such testimony would be irrelevant and prejudicial in its motion *in limine* number 1, (R. 398, Def.'s Mot. *in Lim.* No. 1), which the Court denied in part, specifically to allow this information to come in, because the Court determined that testimony that employment documents had been falsified could be particularly relevant to Plaintiff's retaliatory discharge claims, (R. 497, Mar. 18 Tr. at 13:11- 14:5). Defendant cites no legal support for its conclusory argument that this probative evidence should have been excluded. The Court still finds such testimony relevant, and Defendant's argument that such testimony was "prejudicial to the City," (R. 537, Def.'s Reply New Trial at 27), does not signify that the testimony should have been excluded. *See* Fed. R. Evid. 403 (permitting the exclusion of evidence that is *unfairly* prejudicial).

The Court thus finds that its evidentiary rulings as to the Schechter Memo, DeBrock's testimony, and Drumgould's testimony on falsified employment documents were not erroneous.

Additionally, even if the Court's evidentiary rulings were erroneous, the Court does not find that the jury's verdict "was inconsistent with substantial justice," and thus the evidentiary rulings provide no basis upon which a new trial may be granted. *See Mgmt. Hospitality of Racine*, 666 F.3d at 440.

III. Improper Impeachment

Defendant argues that Plaintiff failed to properly impeach any of its witnesses and instead read portions of their prior testimony into the record even though that testimony "was not inconsistent, was not impeaching, and/or was flagrantly mischaracterized." (R. 524, Def.'s Mem. New Trial at 14-15.) Defendant contends that this tactic was improper and prejudiced the jury against the City and its witnesses. (*Id.* at 15.) Some of the examples Defendant cites were, in fact, proper impeachment—Plaintiff illustrated that the witness had given a contrary answer on a prior occasion when under oath. (*See, e.g.*, Trial Tr. at 543:24-545:24, 555:7-556:24, 625:12-627:1, 766:9-767:20, 867:13-869:1.) Other times, Plaintiff's impeachment efforts fell short. (*Id.* at 574:9-575:10, 735:23-738:6, 741:20-743:16, 864:12-865:20.) Defendant fails, however, to provide any legal support for its argument that improper impeachment is justification for a new trial, (R. 524, Def.'s Mem. New Trial at 14-15), or any factual support for its spurious claim that "Plaintiff secured a victory through gamesmanship rather than evidence," (R. 537, Def.'s Reply New Trial at 26). The Court finds no support for either of these arguments.

The examples of improper impeachment Defendant cites were not calculated attempts at

"subterfuge to get before the jury evidence not otherwise admissible." *Taylor v. Nat'l R.R. Passenger Corp.*, 920 F.2d 1372, 1376 (7th Cir. 1990) (quoting *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)). They were simply failed attempts to undermine the credibility of Defendant's witnesses. Defendant provides no reason for the Court to find that these inefficiencies prejudiced the jury against it except for Plaintiff's argument in closing that certain witnesses were "impeached over and over." (R. 524, Def.'s Mem. New Trial at 15 (quoting Trial Tr. at 1099:14-20).) Certain of Defendant's witnesses *were* repeatedly impeached. (*See, e.g.*, Trial Tr. at 867:13-869:5, 877:17-878:3 (Murphy), 544:7-545:24, 555:7-557:16, 574:11-575:14 (Hennessey).) Even if Plaintiff's statement was inaccurate, however, "improper comments during closing argument rarely rise to the level of reversible error." *Soltys v. Costello*, 520 F.3d 737, 745 (7th Cir. 2008). The Court instructed the jury that attorney statements did not constitute evidence, and counsel's characterization of her attempts to impeach witnesses does not provide grounds for a new trial.

IV. The Court's Statement

Finally, Defendant argues that a statement the Court made when overruling one of the City's many objections was unduly influential on the jury. (R. 524, Def.'s Mem. New Trial at 16-17.) In support of its request for a new trial on this basis, Defendant quotes *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972), which held that "[j]udicial comments in the presence of the jury are subject to special scrutiny" and are less easily cured by cautionary instructions. In *Dellinger*, the

Seventh Circuit found that the trial judge exhibited a "deprecatory and often antagonistic attitude toward the defense" in both remarks and actions throughout the lengthy trial. *Id.* The judge's "comments were often touched with sarcasm, implying rather than saying outright that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit. . . . [C]umulatively, they must have telegraphed to the jury the judge's contempt for the defense." *Id.* at 387.

Here, in contrast, Defendant complains about a single comment the Court made. (R. 524, Def.'s Mem. New Trial at 16-17.) When Defendant objected to one of Plaintiff's exhibits, the Court asked Plaintiff how the document was relevant to the issues in the case. (Trial Tr. at 53:18-54:4.) Plaintiff responded: "That it shows that that was one of the functions of Chief Timekeeper that he was fulfilling." (*Id.* at 54:5-6.) The Court asked: "Okay. And this goes to your issue of retaliation and pretext." (*Id.* at 54:7-8.) Plaintiff responded that it did, and the Court stated that it would overrule Defendant's objection on that basis. (*Id.* at 9-11.) Defendant's argument that the Court's clarifying comment "gave undue weight to the memos" in the exhibit and that "[b]ased on the unsupported verdict on Plaintiff's state law retaliatory discharge claim, the jury heeded the Court's words and found for Plaintiff on a claim that he failed to prove," is simply unfounded in any legal principle. The Court's single clarifying comment does not provide grounds for a new trial.

V. Cumulative Effect of Errors

Defendant contends that even if the foregoing errors do not individually warrant a

retrial, their cumulative effect warrants a new trial. (R. 524, Def.'s Mem. New Trial at 17.) To prevail on an argument that the cumulative effect of errors warrants a new trial, Defendant "must show: (1) that multiple errors occurred at trial; and (2) those errors, in the context of the entire trial, were so severe as to have rendered [its] trial fundamentally unfair." *Christmas v. City of Chi.*, 682 F.3d 632, 643 (7th Cir. 2012) (quoting *United States v. Powell*, 652 F.3d 702, 706 (7th Cir. 2011)) (internal quotation marks omitted). In determining whether the alleged errors rendered the trial "fundamentally unfair," the Court must consider the nature and number of alleged errors, "their interrelationship, if any," and the efficacy of any curative measures. *Id.* (quoting *Powell*, 652 F.3d at 706).

The Court has thoroughly examined the trial record and has considered all of the errors Defendant alleges individually and in combination. The Court concludes that sustaining the meritorious objections Defendant made at trial and instructing the jury to disregard improper testimony was sufficient to cure any errors. Defendant's argument that the jury received a one-sided picture, (R. 537, Def.'s Reply New Trial at 7), is disingenuous and is belied by the verdict for Defendant on three of the four claims. Examining the trial record as a whole, the Court does not find that the verdict "cries out to be overturned or shocks [the Court's] conscience." *Latino*, 58 F.3d at 315. Consequently, the Court DENIES Defendant's motion for a new trial. Finding no error that warrants a new trial or undermines the validity of the instant jury verdict, the Court also denies

Defendant's request to reinstate the jury verdict from the first trial.

DEFENDANT'S MOTION TO ALTER JUDGMENT

Finally, Defendant moves pursuant to Federal Rule of Civil Procedure 59 for remittitur or, alternatively, for an evidentiary hearing as to damages. (R. 515, Def.'s Mot. Alter J.) Defendant argues that the jury's award is "monstrously excessive, has no rational basis in the evidence, and drastically exceeds the compensatory damage awards in comparable cases." (R. 516, Def.'s Mem. Alter J. at 1.) The jury was instructed that if it found for Plaintiff on his state law retaliatory discharge claim, it must "fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the wrongful conduct of the Defendant[:] 1. The value of lost pension benefits; and 2. Mental/emotional pain and suffering." (R. 498, Jury Instructions at 34.) The jury awarded Plaintiff two million dollars on his state law retaliatory discharge claim.

First, the Court must determine how much, if any, should be set off from the award. Plaintiff stipulated that his pension expert, DeBrock, did not consider workers' compensation benefits in his analysis, and the parties agreed that the Court should set off Plaintiff's workers' compensation award from the award of any lost pension benefits. (R. 487, Pl.'s Mot.; Trial Tr. at 368:11-370:17, 512:7-13.) DeBrock testified that the present value of Plaintiff's lost pension benefits, assuming Plaintiff had retired at age 55, was $1.2 million. (Trial Tr. at 374:8-10.) From the enormity of the

jury award and the lack of any substantive evidence as to Plaintiff's compensatory damages except for DeBrock's testimony about pension loss, the Court concludes that the jury award included $1.2 million in compensation for Plaintiff's pension loss. The Court must now determine how much to set off.

Defendant first argues, however, that the Court should not allow Plaintiff to receive any lost pension benefits because Plaintiff was judicially estopped from seeking lost pension benefits. (R. 516, Def.'s Mem. Alter J. at 5-6.) In 2008, Judge Andersen found that Plaintiff was judicially estopped from recovering back pay or front pay because he represented to the Illinois Workers' Compensation Commission that he was permanently and totally disabled as of September 4, 2002, and could not work at any job from that date forward. (R. 223, Mem. Op. & Order at 4.) The Illinois Workers' Compensation Commission accepted Plaintiff's position and awarded him total and permanent disability benefits of $716.86 per week for life. (*Id.* at 2-4.) Accordingly, Judge Andersen held that Plaintiff was barred from receiving back pay and front pay to prevent him from being overcompensated for his disability. (*Id.* at 4.) Defendant argues that Plaintiff is not entitled to any lost pension benefits because pension benefits are front pay. (R. 516, Def.'s Mem. Alter J. at 5-6.) Defendant provides no legal support for this claim, and the Court declines to take it at face value. Pension is not necessarily the same thing as front pay, and in fact the case Defendant does cite distinguishes between front pay and front benefits such as pension. *Best v. Shell Oil Co.*, 4 F. Supp. 2d

770, 776 (N.D. Ill. 1998). Thus, the Court concludes that Judge Andersen's previous ruling does not estop Plaintiff from seeking lost pension benefits.

Defendant next argues that Plaintiff was not entitled to lost pension benefits because he withdrew all the money from his pension account in 2005. (R. 516, Def.'s Mem. Alter J. at 6.) Defendant contends that if he had not withdrawn the money, he "would have been able to begin collecting a pension in the amount of $2,091.00 per month beginning on July 28, 2009, at the age of 55." (*Id.*) Defendant thus argues that any injury Plaintiff suffered as a result of withdrawing the money in his pension account was too remote and unforeseeable a consequence to have been caused by his termination, and the City is not liable. (*Id.*) "A foreseeable intervening cause does not break the chain of legal causation and to avoid liability, a defendant must show that the intervening event was unforeseeable as a matter of law." *Calloway v. Bovis Lend Lease, Inc.*, 995 N.E.2d 381, 406 (Ill. App. Ct. 1st Dist. Jan. 2014), *appeal denied*, 2014 WL 466522 (Ill. Jan. 29, 2014). The Court agrees with Defendant that, based on the size of the award, the jury probably held the City accountable for the necessity Plaintiff testified he faced of withdrawing money from his pension fund in order to pay his bills. (*See* R. 516, Def.'s Mem. Alter J. at 6.) The jury was presented with Plaintiff's testimony that he withdrew his entire pension contribution because he needed that money, along with loans from relatives, in order to pay bills after his termination. (Trial Tr. at 220:2-7, 353:1-8.) Defense counsel cross-examined Plaintiff

extensively about his pension contributions and account and his attempts to mitigate his pension loss. (Trial Tr. at 347-352.) Defendant presented expert testimony by Tessaro about the ramifications of Plaintiff's withdrawal and argued in closing that it was Plaintiff's fault he had no pension benefits to rely on. (Trial Tr. at 1145:17-1146:19.) The jury was thus presented with evidence on Plaintiff's decision to withdraw his pension benefits, and it evidently determined that Defendant was liable for his loss. The Court is not to disrupt the jury's determination without good cause, *Richardson v. Chapman*, 676 N.E.2d 621, 628 (Ill. 1997), and the Court finds that Plaintiff was entitled to the lost pension benefits the jury awarded. The Court turns now to the issue of the set-off.

Defendant contends, and presents evidence to support, that Plaintiff had received $433,748.92 in workers' compensation payments as of May 3, 2013. (R. 516, Def.'s Mem. Alter J. at 13; R. 516, Ex. I, Comm. on Finance Payments.) Defendant also contends that, according to Plaintiff's life expectancy as projected by his expert, Professor DeBrock, Plaintiff will receive $828,701.72 in future workers' compensation payments. (R. 516, Def.'s Mem. Alter J. at 13.) Thus, assuming the jury award of $2 million includes lost pension benefits, as Defendant argues, the Court should set off the $1,262,450.64 Plaintiff will receive in workers' compensation benefits in lieu of pension benefits. (*Id.*) Plaintiff did not respond to Defendant's instant motion or provide any contradicting evidence, so the Court assumes that Plaintiff agrees with Defendant's offset figures and

finds that he has waived any objection. The purpose of compensatory damages is to compensate plaintiffs justly, not to award a windfall. *Heldenbrand v. Roadmaster Corp.*, 660 N.E.2d 1354, 1360 (Ill. App. Ct. 5th Dist. 1996). Allowing Plaintiff to recover both pension benefits and lifetime workers' compensation benefits would overcompensate him. Accordingly, the Court finds it appropriate to offset the jury award by $1.2 million to avoid awarding Plaintiff a windfall.

Having set off the workers' compensation payments, the Court examines whether the remaining $800,000 representing non-pecuniary compensatory damages is excessive. Defendant argues that it is excessive and requests the Court to either reduce the jury award to $15,000 or less or "hold an evidentiary hearing to determine the actual value of Plaintiff's purported lost pension benefits." (R. 516, Def.'s Mem. Alter J. at 13.) Because the Court determined that the jury award included $1.2 million of Plaintiff's purported lost pension benefits, and set off that amount from the award, the Court does not need to hold an evidentiary hearing to determine the value of the pension benefits.

The jury awarded Plaintiff damages only on his state law claim, so Illinois state law governs Defendant's motion for remittitur. *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611 (7th Cir. 2006). Although courts in the Seventh Circuit typically compare a damages award with damages awards in similar cases, *Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 408 (7th Cir. 2010), as Defendant urges this Court to do, that is not the practice in Illinois courts, *Richardson*, 676 N.E.2d

at 628 (collecting cases). "The determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson*, 676 N.E.2d at 628. In Illinois, "all the law requires is that the evidence tend to establish, with a fair degree of probability, a basis for the assessment of damages." *F.L. Walz, Inc. v. Hobart Corp.*, 586 N.E.2d 1314, 1319 (Ill. App. Ct. 3d Dist. 1992). It is appropriate, however, to reduce an award to prevent a departure from the evidence presented at trial. *Richardson*, 676 N.E.2d at 628. "An award of damages will be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience." *Id.* (citing *Richter v. Nw. Mem'l Hosp.*, 532 N.E.2d 269 (1988)). If the court finds the award to be excessive, it may order a remittitur with the plaintiff's consent; if the plaintiff does not consent, the court must order a new trial to be held on damages. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1080 (Ill. 1997).

Having removed loss of pension from the equation, the jury award consisted solely of damages for pain and suffering. When asked how it made him feel to have to withdraw money from his pension in order to pay bills, Plaintiff stated, "Not too good. I mean I lost my pension." (Trial Tr. at 220:9.) He further testified that he was barely able to support himself and that he had to borrow money from relatives in order to make ends meet. (Trial Tr. at 219:4-17.) Plaintiff testified that he did not discuss his termination or how it made him feel with his wife or with any clergy or mental health

professional. (Trial Tr. at 353:22-354:8.) Although Plaintiff tried to present a stoic front, the evidence presented at trial clearly demonstrated that he suffered mental and emotional distress from the retaliatory discharge, which began when he was demoted at work. (*See* Trial Tr. at 99:14-23.) For example, when Plaintiff was ordered to take a leave of absence in December of 2000, he put off telling his wife until after Christmas because he "didn't want to ruin her Christmas." (Trial Tr. at 99:17-23.) Additionally, Plaintiff testified that he could not afford not to work because he needed the money for his house payments and his children's schooling. (Trial Tr. at 211:21-212:1.) Such evidence is proof that Defendant's mistreatment caused Plaintiff mental and emotional pain and suffering, for which the jury awarded compensatory damages.

While the Court sympathizes with the emotional distress Plaintiff must have felt after being terminated, however, the evidence presented at trial was insufficient to support an award of $800,000. "There is no exact standard for setting the damages to be awarded on account of pain and suffering," but the damages must be fair and reasonable. (R. 498, Jury Instructions at 36); *see Richardson*, 676 N.E.2d at 628. Consequently, the Court concludes that the jury award is excessive and finds it appropriate to reduce the award to $400,000. "The purpose of compensatory damages is to compensate the plaintiff for damages sustained, not to punish the defendant or to award a windfall to the plaintiff." *Heldenbrand*, 660 N.E.2d at 1360. This Court has great respect for the work of juries in general, and this jury specifically, and has only rarely modified a jury

verdict in nearly twenty years of judicial service. Yet because damages for emotional pain and suffering must be reasonable, the Court is compelled to enter this substantial remittitur. The Court concludes that a $400,000 award is not punitive or excessive given the evidence presented at trial and remains as faithful to the jury's original award as the Court can in good conscience. If Plaintiff refuses to accept the remittitur, the Court will hold an evidentiary hearing as to damages.

CONCLUSION

For the reasons set forth above, Defendant's motion to issue findings of fact and conclusions of law (R. 521) is GRANTED; Plaintiff's motion to partially vacate Judgment (R. 503) is DENIED; Defendant's renewed motion for judgment as a matter of law (R. 508) is DENIED; Defendant's motion for a new trial or to reinstate the first jury verdict (R. 511) is DENIED; and Defendant's motion for remittitur or for an evidentiary hearing as to damages (R. 515) is GRANTED. The Court hopes that with these rulings, this ten-year-old case, which has gone on for far too long, will finally be put to rest.

ENTERED: /s/ Rubén Castillo

Chief Judge Rubén Castillo United States District Court

Dated: March 31, 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ROBERT P. HILLMANN,	)	
	)	
Plaintiff,	)	
	)	No. 04 C 6671
v.	)	
	)	Chief Judge
CITY OF CHICAGO,	)	Rubén Castillo
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In 2004, Plaintiff Robert P. Hillmann filed this action against his former employer, the City of Chicago, alleging that his termination was illegal on various grounds. After a protracted history, this Court presided over a jury trial in April 2013. The jury returned a verdict in Defendant's favor on all charges except Plaintiffs claim of retaliatory discharge under the Illinois Workers' Compensation Act, 820 Ill. Comp. Stat. 305/1 *et seq.,* on which the jury returned a verdict in Plaintiffs favor. The jury assessed damages of two million dollars. Plaintiff's claim of retaliation in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.,* was before the bench at trial; on March 31, 2014, the Court issued an opinion granting judgment in Defendant's favor on that claim and ruling on various post-trial motions. (R. 539, Mem. Op. & Order); *Hillmann v. City of Chicago,* No. 04 C 6671, --- F. Supp. 2d---, 2014 WL 1613921 (N.D. Ill. Mar. 31, 2014). Presently before the Court is

Plaintiff's motion for reconsideration of the Court's ruling on Defendant's motion for remittitur.

This Court assumed responsibility for this lawsuit after the death of its dear colleague, William J. Hibbler. This opinion is the Court's third and hopefully final opinion in this delayed litigation, which has been tried twice before a jury. The Court's previous opinion thoroughly laid out the facts of the case and its extensive procedural history. For the sake of judicial economy, the Court assumes familiarity with those facts and does not repeat them here except as directly pertinent to the issue at hand.

Plaintiff began working for the Chicago Park District in June 1973 as a park attendant. After approximately five and a half years, he took a job in the Chicago Department of Streets and Sanitation, where he continued to work until he was terminated in July 2002 in retaliation for exercising his rights under the Workers' Compensation Act. At the trial, Professor Larry DeBrock testified as an expert witness. DeBrock performed an analysis of Plaintiffs pension loss, and he testified that if Plaintiff had retired at age 50, the present value of his lost pension benefits would be approximately $1.3 million. If Plaintiff retired at age 55, the present value of his lost pension benefits would be around $1.2 million. Jane Tessaro also testified about Plaintiffs pension loss. Tessaro was the manager of the benefits department at the Municipal Employees Annuity and Benefit Fund of Chicago (the "Pension Fund" or the "Fund"), the pension fund for some City workers. Tessaro testified

that when Plaintiff was terminated, he had 21 years of pension credit in the Fund, which would have enabled him to start collecting benefits at age 55.

In September 2005, Plaintiff withdrew all of his pension contributions, which amounted to $87,192.95. He testified that he needed the money to pay bills after he was terminated. Once an employee receives a refund of his pension contributions from the Fund, he forfeits all future pension benefits. Tessaro testified that, given Plaintiffs termination on July 31, 2002, if Plaintiff had not withdrawn money from his account, he would have received $2,091.00 per month beginning at age 55. If he had not been terminated and had instead continued to work at his same salary until age 55, he would have received a pension of $3,507.00 per month beginning at age 55.

Following the trial, Defendant moved pursuant to Federal Rule of Civil Procedure 59 for the Court to reduce the jury's two-million-dollar award to $15,000.00. (R. 515, Def.'s Mot. Alter J.) Because Plaintiff failed to respond to Defendant's motion, the Court assumed that he agreed with any offset calculations and found that he had waived any objection. *Hillmann,* 2014 WL 1613921, at *42. The Court set off the $1.2 million Plaintiff had already received or would receive as a result of his worker's compensation award and reduced the damages for pain and suffering so that Plaintiff's remitted award totaled $400,000.00. *Id.* at *42-*43. The Court gave Plaintiff the option of accepting the remittitur or requesting an evidentiary hearing

as to damages. *Id.* at *43.

Plaintiff now contends that he thought briefing on the issue of damages was suspended until the Court ruled on Defendant's motion for a new trial, and he asks the Court to reconsider its ruling on Defendant's motion for remittitur with the benefit of Plaintiffs responsive briefing. (R. 540, Pl.'s Mot. Reconsider.)

LEGAL STANDARDS

Any order "that adjudicates fewer than all the claims ... does not end the action as to any of the claims ... and may be revised at any time before the entry of a judgment[.]" Fed. R. Civ. P. 54(b). "An order that offers a choice between a remitted award and a new trial is not a final decision." *Republic Tobacco Co. v. N. Atl. Trading Co.,* 381 F.3d 717, 739 (7th Cir. 2004). Accordingly, the Court may freely reconsider or revise its prior ruling on Defendant's motion for remittitur. Reconsideration is appropriate "when there has been a significant change in the law or facts since the parties presented the issue to the court, when the court misunderstands a party's arguments, or when the court overreaches by deciding an issue not properly before it." *United States v. Ligas,* 549 F.3d 497,501 (7th Cir. 2008). However, "as a rule courts should be loathe to [reconsider prior rulings] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800,817 (1988) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)).

The jury awarded Plaintiff damages only on his state law claim, so Illinois state law governs the Court's review of that award. *Naeem v. McKesson Drug Co.,* 444 F.3d 593,611 (7th Cir. 2006). Although courts in the Seventh Circuit typically compare a damages award with damages awards in similar cases, *Thompson v. Mem'l Hosp. of Carbondale,* 625 F.3d 394,408 (7th Cir. 2010), as Defendant urges this Court to do, that is not the practice in Illinois courts, *Richardson v. Chapman,* 676 N.E.2d 621,628 (Ill. 1997) (collecting cases). Defendant contends that the statement in *Naeem* that state law should govern damages is dicta and does not indicate the prevailing law in the Circuit. (R. 544, Def.'s Resp. at 2-3.) Defendant maintains that the proper approach to damages is to compare awards in similar cases, regardless of whether the decision is based in state or federal law. *(Id.)* (citing *Arpin v. United States,* 521 F.3d 769, 776-77 (7th Cir. 2008); *Jutzi-Johnson v. United States,* 263 F.3d 753, 759-60 (7th Cir. 2001)). In both *Arpin* and *Jutzi-Johnson,* however, the district courts were required to consider awards in similar cases in order to properly explain their reasoning pursuant to Federal Rule of Civil Procedure 52(a) because they were determining the appropriate award following bench trials. *See Arpin,* 521 F.3d at 776 ("When a federal judge is the trier of fact, he, unlike a jury, is required to explain the grounds of his decision. This means, when the issue is the amount of damages, that the judge must indicate the reasoning process that connects the evidence to the conclusion." (citing Fed. R. Civ. P. 52(a);

Jutzi-Johnson, 263 F.3d at 758) (internal citation and quotation marks omitted)). Where, as here, there has been a jury verdict and the court's responsibility is to review the jury award rather than determine an award, the Supreme Court has held that courts must apply the appropriate state standard for review of damages on a post-trial motion. *See Naeem,* 444 F.3d at 611 (citing *Gasperini v. Ctr. for Humanities, Inc.,* 518 U.S. 415, 431 (1996)). The Court thus applies Illinois law regarding review of jury awards.

"A remittitur is an agreement by the plaintiff to relinquish, or remit, to the defendant that portion of the jury's verdict which constitutes excessive damages and to accept the sum which has been judicially determined to be properly recoverable damages." *Tri-G, Inc. v. Burke, Bosselman & Weaver,* 856 N.E.2d 389, 409 (Ill. 2006). The practice of remittitur has long been acknowledged in Illinois as a way to promote "both the administration of justice and the conclusion of litigation." *Best v. Taylor Mach. Works,* 689 N.E.2d 1057, 1079 (Ill. 1997).

Nevertheless, "[t]he determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson,* 676 N.E.2d at 628. "The deference given to the careful deliberative process of the jury is overcome if, after examining the evidence presented at trial, the trial judge determines that the jury verdict is excessive." *Best,* 689 N.E.2d at 1079. "An award of damages will be deemed excessive if it falls outside the range of fair and reasonable

compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience." *Richardson,* 676 N.E.2d at 628 (citing *Richter v. Nw. Mem'l Hosp.,* 532 N.E.2d 269 (Ill. App. Ct. 1st Dist. 1988)). For an award to fall within the range of reasonable compensation, "all the law requires is that the plaintiff present evidence which will establish, with a fair degree of probability, a basis for the assessment of damages." *Sutton v. Overcash,* 623 N.E.2d 820, 838 (Ill. App. Ct. 3d Dist. 1993).

It is appropriate to reduce an award when necessary to prevent a departure from the evidence presented at trial. *Richardson,* 676 N.E.2d at 628. If the court finds the award to be excessive, it "may not allow the verdict to stand but must act to correct the injustice" by ordering a remittitur with the plaintiffs consent. *Best,* 689 N.E.2d at 1079-80 (quoting *Haid v. Tingle,* 579 N.E.2d 913, 916 (Ill. App. Ct. 1st Dist. 1991)). If the plaintiff does not consent, the court must order a new trial to be held on damages. *Id.* at 1080. Finally, "the application of remittitur should be considered on a case-by-case basis because the evidence and circumstances supporting verdicts must be carefully examined." *Id.*

ANALYSIS

Plaintiff avers that he did not intend to waive his argument regarding set-off and that his failure to respond to Defendant's motion was based on his understanding that the briefing was stayed. (R. 541, Pl.'s Mem. Reconsider at 3.) The Court thought it was clear in its intention to resolve as much of the case as possible at once,

rather than drag this ten-year-old case through multiple separate briefing schedules. Nevertheless, to ensure that its initial decision would not "work a manifest injustice," *Christianson,* 486 U.S. at 817, the Court will consider Plaintiff's arguments in response to Defendant's motion for remittitur at this late date.

Defendant argues that Plaintiff is not entitled to pecuniary damages and so to the extent the jury award includes lost pension benefits, it should be set aside. (R. 516, Def.'s Mem. Alter J. at 5.) Defendant contends that recovery of pension benefits is precluded by Judge Andersen's 2008 holding that Plaintiff was judicially estopped from recovering back pay or front pay because he received a worker's compensation award based on his representations to the Illinois Workers' Compensation Commission that he was totally disabled and could not work any job. *(Id.* at 5-6) (citing R. 223, Mem. Op. & Order). In this Court's prior opinion, it concluded that pension is not necessarily the same as front pay, and thus Judge Andersen's previous ruling does not estop Plaintiff from seeking lost pension benefits. *Hillmann,* 2014 WL 1613921, at *41.

Defendant next argues that Plaintiff is not entitled to lost pension benefits because he withdrew all of his pension contributions in 2005. (R. 516, Def.'s Mem. Alter J. at 6.) Again, the Court concluded in its prior opinion that the jury was presented with evidence on Plaintiff's decision to withdraw his pension benefits, and it evidently determined that Defendant was liable

for his loss. *Hillmann,* 2014 WL 1613921, at *41. The Court declined to disrupt the jury's determination without good cause and held that Plaintiff was entitled to the lost pension benefits the jury awarded. *Id.* (citing *Richardson,* 676 N.E.2d at 628). Because neither party has provided reason for the Court to reconsider these two holdings,[1] the Court turns now to the issue of the set-off.

Defendant asks the Court to offset Plaintiff's workers' compensation award from his pension benefits. *(Id.* at 13.) Defendant establishes that Plaintiff had received $433,748.92 in workers' compensation payments as of May 3, 2013. *(Id.;* R. 516, Ex. I, Comm. on Finance Payments.) Defendant calculates, according to Plaintiff's life expectancy as projected by DeBrock, that Plaintiff will receive $828,701.72 in future workers' compensation payments. (R. 516, Def.'s Mem. Alter J. at 13.) Thus, assuming the jury award of $2 million includes $1.2 million of lost pension benefits, as

[1] In Defendant's response to Plaintiff's motion for reconsideration, it continues to argue that Plaintiff was judicially estopped from seeking pecuniary damages, including lost pension benefits, pursuant to Judge Andersen's Order of December 2008, (R. 544, Def.'s Resp. at 6-7), and that Defendant is not responsible for the harm Plaintiff suffered as a result of his failure to timely apply for duty disability benefits and his decision to withdraw the money from his pension account, *(id.* at 12). Defendant adds no new law, facts, or arguments in support of its position, however, and merely restates the arguments it had previously made, which the Court found meritless. Restating these same arguments in response to Plaintiff's motion for reconsideration without providing the Court any reason to reconsider its prior opinion is unavailing.

the Court concluded it did,[2] Defendant maintains that the Court should offset the $1,262,450.64 Plaintiff will receive in workers' compensation benefits from the award of lost pension benefits. *(Id.)* Defendant argues that without a set-off, the jury award overcompensates Plaintiff. (R. 544, Def.'s Resp. at 12.)

At bottom, the issue presented by Defendant's motion for remittitur is what position Plaintiff would have been in if he had not been terminated in retaliation for exercising his rights under the Workers' Compensation Act. "The purpose of awarding compensatory damages is to make the injured party whole and restore him to the position he was in before the loss, but not to enable him to make a profit or windfall on the transaction." *Gambino v. Blvd. Mortg. Corp.,* 922 N.E.2d 380, 417 (Ill. App. Ct. 1st Dist. 2009). Plaintiff contends that if he had not been fired, he would have received "both his workers' compensation payments for his inability to work and the pension benefits to which he contributed throughout his working life." (R. 541, Pl.'s Mem. Reconsider at 11.) Defendant maintains that if he had not been fired, Plaintiff would have received duty disability benefits

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[2] Although the Court obviously has no clear indication as to the basis of the jury's award, the jury was instructed to award damages for the value of lost pension benefits and for emotional pain and suffering. (Tr. at 1182:3-13.) Both parties assume that $1.2 million of the jury award was to compensate Plaintiff for his lost pension benefits, as that was the value established by trial witnesses. *(See* R. 516, Def.'s Mem. Alter J. at 7-8; R. 545, Pl.'s Reply at 6.) Considering the totality of the evidence presented at trial, the Court finds this assumption sound.

through the Pension Fund from September 2002 until his retirement and that any workers' compensation award he received would have been deducted from the benefits he received from the Fund. (R. 544, Def.'s Resp. at 9.) As explained in detail below, the Court finds that both parties correctly but incompletely state the position Plaintiff would have been in but for the illegal termination. Accordingly, it is not appropriate to offset his workers' compensation award from the jury award.

I. Whether the Pension Code permits pension payments to be offset by workers' compensation payments

First, Plaintiff contends that because the terms of the pension plan under the Fund do not allow for a set-off, "but for the illegal firing, Plaintiff would have been able to receive both his workers' compensation award and his vested pension." (R. 541, Pl.'s Mem. Reconsider at 9.) Plaintiff cites the Fund's informational booklet, *(id.* at 9-10), which states that "[e]mployees disabled as the result of an accidental injury have a right to receive benefits under the provisions of the Workers' Compensation Act, and any amount so received or receivable under such Act must be deducted from payments of duty disability benefit," (R. 541-1, Ex. A, Fund booklet at 38). Plaintiff thus contends that the pension plan does not authorize the deduction of a workers' compensation award from pension payments, only from duty disability benefits. (R. 541, Pl.'s Mem. Reconsider at 8-9.)

Defendant criticizes Plaintiff's reliance on the Pension Fund's booklet instead of the

Pension Code, as the booklet itself advises that "it is not intended to contain a synopsis of all the provisions of the law governing the Fund" and states that "[t]he full text of the law governing the Fund may be found in Chapter 40, Act 5, Articles 1, 8 and 20 of the Illinois Compiled Statutes, and supersedes anything stated or implied in this booklet." (R. 544, Def.'s Resp. at 8; R. 541-1, Ex. A, Fund booklet at 5.) The Fund's booklet is a helpful summary of the Pension Code and is not improperly relied upon. *See Mathews v. Sears Pension Plan,* 144 F.3d 461, 468-69 (7th Cir. 1998). The statutory language of the Illinois Pension Code, which Defendant cites, supports Plaintiff's interpretation of the booklet and states, as relevant here, that an eligible employee shall receive duty disability benefits "during disability until the employee attains age 65.... The employee shall thereafter upon withdrawal from service receive such annuity as is otherwise provided in this Article." 40 Ill. Comp. Stat. 5/8-160. The Pension Code also provides that any award an employee receives "under the Workers' Compensation Act ... shall be applied as an offset to the disability benefit paid by the Fund . . ." 40 Ill. Comp. Stat. 5/8-163(c). The trial testimony of the Fund's benefits manager, Jane Tessaro, confirmed that if an employee receives duty disability benefits, his award is offset by any award he receives under the Workers' Compensation Act. (Trial Tr. at 1047:6-16.)

Plaintiff avers that the above is the only scenario in which a set-off is permitted by the pension plan. (R. 541, Pl.'s Mem. Reconsider at

10.) Plaintiff contends that this provision is irrelevant because he was not receiving duty disability from the Fund, and thus "the offset provisions under the pension plan were never triggered in this case." *(Id.)* Plaintiff argues that if he "had not been injured, upon retirement from the City he would have had a fully vested pension, no permanent medical injury, and be able to work elsewhere upon his retirement from the City." *(Id.* at 14.) This statement is probably true, but it is also irrelevant. Plaintiff *was* injured, and prevailing against Defendant in his wrongful termination claim does nothing to change that. The purpose of damages for wrongful termination is to return Plaintiff to the position he would have been in had he never been wrongfully fired-he still would have had a permanent medical injury and been unable to work elsewhere. Defendant contends that Plaintiff's representations to the Illinois Workers' Compensation Commission establish that if he had not been terminated, he would have been on duty disability through the Pension Fund from September 2002 until his retirement. (R. 544, Def.'s Resp. at 9.) Plaintiff applied for duty disability benefits in October 2002, and he concedes that the only reason he did not receive the benefits is because he was no longer an employee and was thus ineligible to receive duty disability benefits through the Fund. (R. 541, Pl.'s Mem. Reconsider at 10.) Accordingly, the Court concludes that but for the illegal termination, Plaintiff would have received duty disability benefits beginning in October 2002. *(See* Trial Tr. at 1048:18-1049:5.) These benefits

would have been paid from the Pension Fund and would have been offset by the amount of his workers' compensation award.

This conclusion does not, however, have the effect Defendant wishes it to. The Pension Code requires the City to contribute to an employee's pension fund in his stead while he receives duty disability benefits under the Fund. 40 Ill. Comp. Stat. 5/8-187. Additionally, Plaintiff would have continued to receive years-of-service credit towards his pension eligibility while receiving duty disability benefits under the Fund. 40 Ill. Comp. Stat. 5/8-232. The Court has accepted Defendant's claim that but for the illegal termination, Plaintiff would have received duty disability benefits until he retired, and the Court accordingly concludes that Defendant would have been required to contribute to Plaintiff's pension fund in his stead and that Plaintiff would have continued accruing service credit towards his pension eligibility. The trial evidence established that Plaintiff would have been eligible to retire and receive a monthly pension payment when he turned 55 in July 2009 and that the total value of Plaintiff's lost pension benefits is $1.2 million. The Pension Code provides that Plaintiff's workers' compensation award would have been deducted from his duty disability benefits, 40 Ill. Comp. Stat. 5/8-163(c), but not from his pension payments once he retired.

II. Whether the award overcompensates Plaintiff

Defendant argues that Plaintiff's workers' compensation award should be offset from the jury award for lost pension benefits to prevent double recovery. (R. 516, Def.'s Mem. Alter J. at 13.) The purpose of damages in a wrongful termination suit is to make the plaintiff whole. *See Graefenhain v. Pabst Brewing Co.,* 870 F.2d 1198, 1212 (7th Cir. 1989). "In order to make plaintiffs whole, a discharged employee should be compensated for pension benefits lost through the wrongful termination....Pension benefits may not be available where an award would make a plaintiff more than whole." *Id.* (quoting *Blum v. Witco Chem. Corp.,* 829 F.2d 367,374 (3d Cir. 1987) (internal citations and alterations omitted)); *see also Wilson v. Hoffnum Grp., Inc.,* 546 N.E.2d 524, 530 (Ill. 1989) ("double recovery is a result which has been condemned"). Thus, under Illinois law, the Court must determine whether the jury award that includes lost pension benefits appropriately compensates Plaintiff for the wrongful termination or whether it provides him with double recovery.

Plaintiff argues that, contrary to Defendant's assertion, he would not be overcompensated if the Court declined to offset his workers' compensation award because it and the jury's award of lost pension benefits provide distinct reparations. (R. 541, Pl.'s Mem. Reconsider at 12.) Plaintiff contends that workers' compensation regimes are designed to address a specific situation and provide a substitute for tort liability for work-related accidents, *(id.)* (quoting *Howard Delivery Serv.,*

Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 662 (2006)), while the Pension Fund has a purpose that is "wholly independent of the purpose of the Workers' Compensation Act," *(id.* at 13). Plaintiff thus argues that pension benefits should not be offset pursuant to the collateral source rule. *(Id.* at 12-13.)

"Under the collateral source rule, the amount of damages a plaintiff is entitled to in a civil action will not be decreased by the amount of benefits the plaintiff received from a source wholly independent and collateral to the wrongdoer." *City of Chi. v. Human Rights Comm'n,* 637 N.E.2d 589, 592 (Ill. App. Ct. 1st Dist. 1994). Whether to deduct or set off collateral benefits "lies within the sound discretion of the trial court." *Id.* at 593. In *City of Chicago v. Human Rights Commission,* the Illinois appellate court found that "[i]n discrimination cases, funds supported in part, but not entirely, by contributions from a defendant, such as unemployment compensation and social security disability benefits are generally considered collateral," but that there was no "clear consensus on the issue of whether pension and/or disability benefits fall within the collateral source rule" and instead "the result appears to be determined on a case by case basis." *Id.* at 592-93 (citations omitted) (citing *Nat'l Labor Relations Bd. v. Gullett Gin Co.,* 340 U.S. 361,364 (1951); *E.E.O.C. v. O'Grady,* 857 F.2d 383 (7th Cir. 1988)).

Although the issues in *E.E.O.C. v. O'Grady* involved wrongful termination under a federal statute (the Age Discrimination in

Employment Act) rather than a state law, the Seventh Circuit's reasoning in that case applies to the issues at bar. There, the Seventh Circuit affirmed the district court's refusal to offset the award of back pay and damages by the amount of pension benefits wrongfully-terminated corrections officers had received since their terminations. 857 F.2d at 391. The court found that the pension benefits were earned by the claimants as part of their compensation rather than paid for by the employer, and that the contributions to the pension fund were intended to fulfill a different policy goal than the back pay awards. *Id.* The court concluded that the employer "would have had to contribute to the [pension fund] and pay claimants' salaries if it had not wrongfully retired the corrections officers" and held that "[t]he collateral source rule should not afford a 'discrimination bonus' by allowing an adjudicated violator of the ADEA to pay less than it would have paid had it acted lawfully." *Id.; see also Halek v. United States,* 178 F.3d 481, 483 (7th Cir. 1999) (finding that the collateral source rule should have prevented the offset of the plaintiff's pension benefits from the negligence damages when his work-related accident forced him to retire early because the plaintiff "paid, directly or indirectly, for the employee benefits ... [and] the tortfeasor should not be permitted to appropriate those benefits by being allowed to offset them against what he owes his victim"). Finally, in a general discussion of the application of the collateral source rule to employment benefits, the Seventh Circuit has stated that if a court is faced with a

choice between conferring a windfall on the wrongdoer and conferring a windfall on the victim, the victim "is the logical choice." *Hunter v. Allis-Chalmers Corp., Engine Div.,* 797 F.2d 1417, 1429 (7th Cir. 1986); *see also O'Grady,* 857 F.2d at 389.

The general rule is that "there is no double recovery as long as plaintiff has contributed to the original source of the payments received." *Laird v. Ill. Cent. Gulf R. Co.,* 566 N.E.2d 944, 955 (Ill. App. Ct. 5th Dist. 1991); *see also Human Rights Comm'n,* 637 N.E.2d at 593 ("Arguably, the disability benefits in this case were collateral since both the City and its employees contributed to the annuity fund."). In more recent cases, the Seventh Circuit has indicated that whether the employee contributes is less important than "whether the victim is put in the same position he would have occupied had his rights been respected." *U.S. Can Co. v. N.L.R.B.,* 254 F.3d 626,634 (7th Cir. 2001). To determine whether payments should be offset, "courts must look to the purpose and nature of the fund and of the payments and not merely at their source." *Laird,* 566 N.E.2d at 956. As discussed above, Plaintiff contributed to his pension fund, and if his rights had been respected, his workers' compensation award would not have been offset from his pension benefits. Keeping the lessons from *O'Grady* in mind, the Court now examines "the purpose and nature" of the Pension Fund and the Workers' Compensation Act.

The Pension Code "is beneficial in nature and is to be liberally construed in favor of the beneficiary." *Lelis v. Bd. of Trustees of Cicero*

Police Pension Fund, 990 N.E.2d 1208, 1214 (Ill. App. Ct. 1st Dist. 2013). The Illinois Supreme Court has concluded that the legislative history of the Pension Code "indicates a general intent to protect the pension benefits of public employees," *Peters v. City of Springfield,* 311 N.E.2d 107, 112 (Ill. 1974), and Illinois courts "have time and again made clear that any reduction, diminution or impairment of pension benefits violates an enforceable contractual relationship between an employee and his employer, impinges upon the employee's constitutional protections, and will not be tolerated," *Gillen v. State Farm Mut. Auto. Ins. Co.,* 812 N.E.2d 595,600 (Ill. App. Ct. 1st Dist. 2004) (collecting cases and concluding that "the difference between worker's compensation and pension payments [are] a distinction *with import').* Pension benefits are generally considered "compensation for services previously rendered" because the amount of the annuity payments are determined by the employee's wage and length of service. *Laird,* 566 N.E.2d at 956 (holding that the collateral benefits did not warrant an offset from damages).

The Workers' Compensation Act, on the other hand, "is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment." *Meerbrey v. Marshall Field* & *Co.,* 564 N.E.2d 1222, 1225 (Ill. 1990). "Unlike pension provisions or group life, health, and disability insurance plans-negotiated or granted as pay supplements or substitutes-workers' compensation prescriptions have a dominant employer-oriented thrust: They modify, or substitute for,

the common-law tort liability to which employers were exposed for work-related accidents." *Howard Delivery Serv.,* 547 U.S. at 662; *see Meerbrey,* 564 N.E.2d at 1225 ("the Act imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer"). "Although an employee seeking such compensation must prove that he has sustained a permanent medical disability as a result of a work-related accident ... the award of compensation is not for the disability as such, but for the impaired earning capacity which results from that disability." *E. R. Moore Co. v. Indus. Comm'n,* 376 N.E.2d 206,209 (Ill. 1978) (internal citations omitted) (citing *Bd. of Educ. v. Indus. Comm'n,* 290 N.E.2d 247 (Ill. 1972); *Consol. Coal Co. v. Indus. Comm'n,* 145 N.E. 675 (Ill. 1924)). Worker's compensation awards are not duplicative with pension plans because they are meant to recompense an employee for injuries he may have suffered due to the employer's negligence in exchange for a waiver of tort liability-workers' compensation awards have nothing to do with an employee's work and are not intended to fund an employee's retirement. *See Wood Dale Elec. v. Ill. Workers Comp. Comm'n,* 986 N.E.2d 107, 113 (Ill. App. Ct. 1st Dist. 2013) (holding that where the pension payments "are the result of normal pension retirement benefits, wholly unrelated to the claimant's workers' compensation accident ... those payments cannot entitle [the employer] to a credit against its liability under the [Workers' Compensation] Act").

Defendant contends that "compensatory

damages awards are not intended to be 'retirement' plans." (R. 544, Def.'s Resp. at 12.) "Damages in employment discrimination cases are not intended to insure a plaintiff's future financial success. Damages should ordinarily extend only to the date upon which the sting of any discriminatory conduct has ended." *McKnight v. Gen. Motors Corp.,* 973 F.2d 1366, 1371 (7th Cir. 1992) (quoting *Smith v. Great Am. Rests., Inc.,* 969 F.2d 430,439 (7th Cir. 1992) (quotation marks omitted)). Here, however, the pension benefits Plaintiff lost because of his wrongful termination were, in fact, intended to be his retirement plan. When asked about the purpose of the Pension Fund, Tessaro testified:

> If the person has other employment, if they worked outside of the City of Chicago employment, then they would have Social Security coverage; but while they are working for the City of Chicago and participating in the municipal fund, during that employment, they don't have any Social Security coverage. The municipal pension fund basically, you know, takes the place of Social Security coverage.

(Trial Tr. at 1060:3-9.) Rather than being overcompensatory, Plaintiff's lost pension benefits were appropriate damages because they were originally intended to insure his future financial stability. *See Midgett v. Sackett-Chicago, Inc.,* 473 N.E.2d 1280, 1285 (Ill. 1984) ("The loss of pension rights would be a consequence of his discharge, and he may allege

it as an element of damages in a retaliatory-discharge action against his employer."). The purpose of Plaintiff's pension was to provide for him during his retirement, and the purpose of his workers' compensation award was to compensate him for his disability. Accordingly, the Court finds no overlap between the workers' compensation award Plaintiff received and the jury award of lost pension benefits.

Defendant argues that the City pays Plaintiff's workers' compensation award, "as it would have paid his duty disability benefits from the Pension Fund," and thus the collateral source rule is inapplicable to the matter at hand. (R. 544, Def.'s Resp. at 13.) This argument is misleading for several reasons. First, while the duty disability benefits would be paid from the Pension Fund, those payments come from contributions to the fund made by both Plaintiff and Defendant during the course of Plaintiff's employment. Second, the award Defendant seeks to reduce is the pension benefits Plaintiff would have received during his retirement, not the duty disability benefits he would have received while he continued to work. And finally, Illinois courts that have applied the collateral source rule to employment benefits have done so in exactly this situation: when the benefits the employer seeks to set off were actually bargained-for compensation. *See, e.g., Harden v. Playboy Enters., Inc.,* 633 N.E.2d 764, 772 (Ill. App. Ct. 1st Dist. 1993); *Laird,* 566 N.E.2d at 955-56. Based on Illinois case law and the teachings of *O'Grady,* the Court concludes that it would be inappropriate to deduct Plaintiff's workers'

compensation award from his lost pension benefits.

Finally, Defendant argues that Plaintiff failed to present sufficient evidence at trial to warrant the jury's award, and thus its motion for remittitur should be granted. (R. 544, Def.'s Resp. at 14) (citing *McKnight,* 973 F.2d at 1372). "The determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson,* 676 N.E.2d at 628. "In order to recover lost earnings, all the law requires is that the plaintiff present evidence which will establish, with a fair degree of probability, a basis for the assessment of damages." *Sutton,* 623 N.E.2d at 838. The Court concludes that the evidence presented at trial through the expert testimony of DeBrock and Tessaro establishes "with a fair degree of probability" a basis for the jury's award of lost pension benefits. *See id.* Because the lost pension benefits are supported by expert testimony, the Court finds that it does not fall outside the range of reasonable compensation, result from passion or prejudice, or shock the judicial conscience. *See Richardson,* 676 N.E.2d at 628.

When the Court set the briefing schedule on the instant motion for reconsideration, it specifically requested that Defendant address whether an evidentiary hearing would be useful. Defendant stated that an evidentiary hearing is not warranted, (R. 544, Def.'s Resp. at 14), and Plaintiff did not request one in his reply. Defendant criticizes DeBrock's calculations, but

those criticisms are unavailing. First, Defendant contends that DeBrock's calculations relied on erroneous assumptions that Plaintiff would have continued to work for the City after September 4, 2002. (R. 516, Def.'s Mem. Alter J. at 7.) As the Court explained above, the purpose of compensatory damages is to put Plaintiff in the position he would have been in had he not been terminated, so assuming that he would have continued to work for the City, receiving duty disability benefits until he retired, is appropriate. Next, Defendant argues that DeBrock was an insufficient expert witness and should have been barred from testifying. *(Id.* at 9-12.) Once again, however, Defendant simply repeats the same arguments it made in its motion *in limine* without adding any new reasoning or case law that might form a basis for this Court's reconsideration. As the Court explained in the pretrial conference, DeBrock was sufficiently qualified to offer expert testimony on the value of Plaintiff's lost pension benefits. Defendant had ample opportunity to cross-examine DeBrock and Defendant presented its own witness, Tessaro, to testify about the Pension Fund. Tessaro, whose testimony the Court has no reason to question, testified that a person who receives disability benefits through the Fund receives pension credit, (Trial Tr. at 1049:17-18), and that Plaintiff would have been able to begin collecting a pension at age 55, (Trial Tr. at 1043:10-16). The Court concludes that an evidentiary hearing is not necessary because the evidence presented at trial was sufficient to resolve the issues raised by

Defendant's motion for remittitur.

The Court concludes that it previously "patently misunderstood" Plaintiff's position with regards to Defendant's motion for remittitur, *Bank of Waunakee v. Rochester Cheese Sales, Inc.,* 906 F.2d 1185, 1191 (7th Cir. 1990), and that its misunderstanding "would work a manifest injustice" if uncorrected, *Christianson,* 486 U.S. at 817. Thus, reconsideration of its previous opinion is appropriate. *See Ligas,* 549 F.3d at 501. Upon consideration of Plaintiff's arguments and a close examination of the Illinois Pension Code, the Court concludes that the $1.2 million award for Plaintiff's lost pension benefits is not outside the range of fair compensation, is not the result of passion or prejudice, and does not shock the judicial conscience. Plaintiff does not challenge the Court's reduction of the portion of the award the parties contribute to emotional pain and suffering by $400,000.00. "There is no exact standard for setting the damages to be awarded on account of pain and suffering," but the damages must be fair and reasonable. (R. 498, Jury Instructions at 36); *Richardson,* 676 N.E.2d at 628. For the reasons stated in its previous opinion, 2014 WL 1613921, at *43, the Court continues to find that a $400,000.00 reduction is appropriate.

CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiff's motion to reconsider its order of remittitur (R. 540). The Court believes, based on its now twenty years of judicial experience, that this new modified verdict is strongly supported by the trial evidence and the

law applicable to this hotly contested case. The jury verdict entered in Plaintiffs favor is reduced to a new total of $1.6 million. If Plaintiff does not accept the modified remittitur, he must inform the Court of his intention to proceed to a new trial on damages within 14 days from the entry date of this Memorandum Opinion and Order. Otherwise, the Clerk of the Court is instructed to enter judgment for the Plaintiff in the amount of $1,600,000.00.

ENTERED: /s/ Rubén Castillo

Chief Judge Rubén Castillo United States District Court

Dated: September 4, 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ROBERT P. HILLMANN, Plaintiff, v. CITY OF CHICAGO, a Municipal Corporation, THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO AND LOCAL 1001 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, Defendants.	)	Wayne R. Andersen District Judge No. 04 C 6671

MEMORANDUM, OPINION AND ORDER

This case is before the Court on the motion of Defendant, City of Chicago, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the following reasons, the motion is granted in part and denied in part.

BACKGROUND

Plaintiff's complaint alleges five causes of action against Defendant City of Chicago. Plaintiff Robert Hillmann was employed by the City of

Chicago ("City") for twenty-nine years beginning in June 1973. On February 23, 1995, Plaintiff and the City entered into a settlement agreement (the "Agreement"), settling a prior claim of handicapped discrimination filed by Plaintiff under the Illinois Human Rights Act and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Pursuant to the Agreement, Hillmann was assigned the position of Deputy Commissioner of the Bureau of Electricity in Streets and Sanitation. The position carried the job title of "Chief Timekeeper." Hillmann alleges that he had an oral agreement with the city that this new job would not involve use of his injured right arm, the written agreement notwithstanding.

As the Chief Timekeeper, Hillmann prepared reports regarding Bureau employees and documented the jobs they were performing. Hillmann maintained the Bureau's database, reviewed the monthly automobile mileage reimbursements for the Bureau and reported to the Deputy Commissioner on the various research projects he performed. Hillmann attended all 911 Board meetings, and all project work regarding the Chicago Emergency Telephone System was given to him for dissemination to Board members.

In late spring and summer of 2000, Patrick Slattery was named the Director of Staff Services in Streets and Sanitation. Hillmann's job duties were altered at this point. Hillmann claims that he was medically restricted from performing this additional, more taxing clerical work due to a host of pre-existing medical conditions, including cervical spondylosis, multilevel disc disease, cervical radiculopathy, brachial plexopathy, and

arthritis. As a result of these conditions, Plaintiff allegedly requested that the City enforce the Agreement, which Plaintiff claims included the implicit provision that he not have to perform physically taxing work.

One day after making this request, Plaintiff was allegedly advised that one of the "bureau timekeepers" would be transferred and that Hillmann could be demoted to a Supervising Timekeeper. Plaintiff informed the City of Chicago in writing that his new job duties would violate the prior Agreement and requested that the City accommodate his physical impairments.

Plaintiff's job duties were then changed again on August 18, 2000, to include the following new job duties: "Mr. Hillmann will also be responsible for maintaining a 249- employee payroll; receiving and entering 30-35 edits per day in the Kronos system; performing a mass edit in Kronos for 90 employees who work in the field; entering exceptions into the Kronos system; entering daily activity onto time rolls; maintaining 300 Cards; and maintaining the Employee File Maintenance Module for said payroll."

On August 21, 2000, Assistant Commissioner Hennessy ordered Hillmann to report to the offices of Dr. Barry L. Fisher for a "Fitness for Duty Evaluation." Following this examination, the doctor recommended Hillmann for the position of Chief Timekeeper, but noted Plaintiff had limited use of his right arm and limited ability to lift and reach.

On September 1, 2000, Plaintiff filed a workers' compensation complaint with the Illinois Industrial Commission. At this point, he was

transferred from his position as Chief Timekeeper to answering phones in the Bureau of Electricity, Construction Division. Following this demotion, Plaintiff alleges that a non-disabled employee, Steve Morales assumed the duties of Chief Timekeeper.

On September 13, 2000, Assistant Commissioner Hennessy ordered Hillmann to report for a "Functional Capacity Evaluation" for the position of Chief Timekeeper. The job description sent to the rehabilitation specialist contained Hillmann's newly added duties from August 18, 2000. On December 21, 2000, Hennessy ordered Plaintiff not to return to work, without pay and allegedly without explanation of his job status.

On January 23, 2001, Robert Serafin, Director of Workers' Compensation for the City, ordered Plaintiff to undergo medical tests at Mercy Hospital allegedly based on a referral from one Dr. Arnold. Plaintiff claims that prior to this date, he had never been seen by a Dr. Arnold.

On January 24, 2001, Serafin allegedly sent Plaintiff a letter denying medical care payments and liability under the Illinois Workers' Compensation Act because Hillmann's injuries were not work related. On January 29, 2001, Dr. Arnold determined that Hillmann's injuries were indeed work related. Despite this finding, Plaintiff did not receive payments under the Workers' Compensation Act.

On March 1, 2001, the City ordered Hillmann to return to work, allegedly without explanation for his layoff. Upon Hillmann's return to work, he was instructed to report to the Auto Pound, where his duties included opening and

closing a heavy gate at the facility, which Plaintiff claims caused further injury. Plaintiff remained at the Auto Pound until his discharge on July 1, 2002.

Concurrent with these allegations of illegal job transfer and discharge, Plaintiff alleges that the City unjustly denied him a series of six merit pay increases between the dates of July 1, 2000 and June 1, 2002. Plaintiff also alleges that the City fraudulently altered his work history to hide this information. Specifically, Plaintiff claims that Assistant Commissioner Hennessy submitted an altered work history, in which five merit pay increase denials were expunged and the sixth denial was altered to indicate that Hillmann had received a pay increase. On March 28, 2001, Hillmann filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On July 1, 2002, Hillmann learned that his position was eliminated due to lack of funds.

On September 10, 2002, Plaintiff filed a timely charge of discrimination with the EEOC. He received a right-to-sue letter on September 9, 2004. Plaintiff filed a suit in the Circuit Court of Cook County on September 24, 2004. On October 15, 2004, the City removed the case to this court based on Counts II and IV of the complaint alleging violations of the ADA, 42 U.S.C. § 12101 et seq.

On May 16, 2005, Plaintiff claims that he first discovered he was denied merit pay increases. At this time, the City had produced a new version of Hillmann's work history in the City's Answers to Plaintiff's First Set of Interrogatories in this lawsuit. Upon discovery of these facts, Plaintiff filed a new charge of discrimination with the EEOC on July 5, 2005. He then received a right-to-sue

letter from the U.S. Department of Justice Civil Rights Division on October 3, 2005.

In his Third Amended Complaint, Plaintiff alleges five counts against the City of Chicago: breach of contract (Count I); discrimination under the Americans with Disabilities Act (Count II); retaliation under the Americans with Disabilities Act (Count III); violation of the First Amendment pursuant to 42 U.S.C. §1983 (Count IV); and retaliation under Illinois Workers' Compensation Act (Count V).

DISCUSSION

Summary judgment is appropriate when the parties' evidentiary materials show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court must construe all allegations and favorable inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). However, in order to create a question of fact, a party responding to a summary judgment motion must set forth specific facts showing that there is a genuine issue of material fact for trial. *LINC Financial Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir. 1997).

I. Breach of Contract

The City argues that it is entitled to judgment in its favor on Count I because it did not breach the 1995 Agreement. It is Plaintiff's claim that he received assurances from the City prior to his signing the Agreement that his new job as Chief Timekeeper would not involve duties that could be injurious to his right arm. The Agreement, though,

is glaringly devoid of specific provisions, stating only that Plaintiff should be given the job as Chief Timekeeper and paid as such. The contract provides no particulars regarding what were to be Plaintiff's job duties, or for how long he was guaranteed to hold this employment.

The Agreement contained a so-called integration clause, indicating the parties' agreement that the written contract represents the sole repository of their intent. The Agreement specifically provides that "[t]his instrument . . . constitutes a contract and not a mere recital, and it contains the entire agreement between the parties hereto." Agreement, ¶ 12. As a result of this clause, the City contends that it should prevail on all of Plaintiff's contract claims relating to evidence not contained in the written agreement. Since Plaintiff is unable to point to a specific provision that was breached, the City claims that it is entitled to summary judgment.

The parol evidence rule generally forbids the use in evidence of a prior or contemporaneous agreement or terms not included in an integrated contract. *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Products, Inc.* 212 F.3d 373, 380 (7th Cir. 2000) (rejected use of extrinsic evidence when contract had integration clause and terms were clear). However, if a contract is ambiguous as to an issue in dispute, extrinsic evidence can be used to discover the genuine intent even if the contract contains an integration clause. *First American Commercial Bancorp v. Interior Architects, Inc.*, 2004 WL 2011398, at *9-10 (N.D. Ill. Aug 31, 2004).

The threshold issue on this matter, then, is whether the language of the contract is ambiguous enough on the disputed issue to allow consideration of extrinsic evidence, despite the integration clause. Here, Plaintiff does not ask the Court to interpret ambiguous language, as the Agreement contains no language that could reasonably be interpreted to describe the Chief Timekeeper job duties. Rather, Plaintiff asks the Court to add a new term to the agreement. This we will not do.

The 1995 Agreement mandated that the City hire Plaintiff and pay him as Chief Timekeeper. This the City did for over five years. Therefore, we grant the motion for summary judgment on Count I because the City did not breach the Agreement.

II. Americans with Disabilities Act

The City also moves for summary judgment on Plaintiff's Americans with Disabilities Act ("ADA") claims, Counts II and III. In his Complaint, Plaintiff alleges that the City failed to reasonably accommodate him and denied him merit pay increases, thereby discriminating and retaliating against him in violation of the ADA. The ADA prohibits any covered entity from discriminating against a qualified individual with a disability on the basis of that disability. 42 § 12112(a). The City is a covered entity because it employs fifteen or more employees. *Id.* at § 12111(5). The City makes three claims in its motion. First, the City claims that the Plaintiff has not shown that a genuine dispute exists regarding the alleged discrimination and retaliation. Second, the City argues that Plaintiff's claims regarding reasonable accommodation are barred by his original charge with the Equal Employment

Opportunity Commission ("EEOC"). Third, the City argues that Plaintiff's claims regarding denial of merit pay increases are barred by the statute of limitations.

We deny summary judgment on Plaintiff's ADA claims in Counts II and III because we find that there are genuine issues of material fact which preclude the entry of summary judgment. The following issues of material fact, among others, exist which preclude the Court from granting summary judgment in the City's favor:

1. Whether the City fraudulently concealed the fact that Plaintiff was denied merit pay increases;
2. Whether Plaintiff knew, or should have known, that he was denied merit pay increases;
3. Whether the decision to discharge Plaintiff was motivated by the City's discriminatory intent;
4. Whether the City made reasonable accommodations;
5. Whether similarly situated employees were treated more favorably than Plaintiff;
6. Whether the City's stated reasons for Plaintiff's discharge are pretextual; and
7. Whether there is a causal link between Plaintiff's protected activity and Plaintiff's discharge;

For these reasons, we deny the City's motion for summary judgment on Count II (ADA discrimination) and Count III (ADA retaliation).

III. Section 1983 Claims

In Count IV, Plaintiff alleges a cause of action under 42 U.S.C. § 1983. He claims that he was discharged because he was not politically aligned with his superior John Sullivan, in violation of his First Amendment rights. The City argues that this claim is time-barred.

The statute of limitations for § 1983 claims is two years. *Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir. 2005). The statute begins to run on the date the plaintiff had notice that the challenged action may be unlawful, and not the date that he receives confirmation that he suffered an unlawful injury. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 2005).

Plaintiff filed his original complaint in Illinois state court on July 1, 2003. At that time he would have been within the two-year statute of limitations for the § 1983 claims. However, Plaintiff's original complaint did not contain any § 1983 claims. On September 26, 2003, Plaintiff voluntarily dismissed the original suit, without prejudice, pursuant to 735 ILCS 5/2- 1009 of the Illinois Code of Civil Procedure. Under Illinois law, a party has one year to re-file an action that was voluntarily dismissed, regardless of whether the limitations period has expired. Plaintiff then refiled in state court and the City removed the case to this Court.

Plaintiff's Third Amended Complaint filed in this Court now alleges the § 1983 claims for the first time. The City argues that the § 1983 claims

are time-barred because they were not asserted in the original complaint. Plaintiff argues that the claims are not time-barred because they arise out of the same facts alleged in the original complaint and thus relate back to that filing.

Under Fed. R. Civ. P. 15(c), a new claim contained in an amended complaint is not time-barred if the claim asserted in the amendment arises out of the same conduct, transaction or occurrence set forth in the original complaint. Accordingly, Plaintiff's § 1983 claim would not be barred if it arose from the same conduct, transaction or occurrence as his other claims alleged in the original complaint. The fact that an amendment changes the legal theory on which the action was initially brought is of no consequence if the factual situation upon which the action depends remains the same *and has been brought to the defendant's attention by the original pleading*. *Bulie v. Stephen Woolway,* 2000 WL 528645, at *2 (N.D. Ill. March 27, 2000) (emphasis added).

Here, Plaintiff's Third Amended Complaint alleges a different set of facts than the original complaint, as well as adding the legal theory that Plaintiff was subjected to adverse employment actions in violation of the First Amendment because he lacked proper political affiliations. Plaintiff's § 1983 claim turns on the assertion that his lack of involvement with a political organization precipitated his discharge. However, this factual situation was not asserted in his original Complaint. Furthermore, Plaintiff's § 1983 claims alleges a legal theory, political patronage, that was not brought to the City's attention in the original pleading.

We, therefore, find that the § 1983 claims for First Amendment violation asserted in the Third Amended Complaint do not relate back to the filing of the original complaint because they do not arise from the same conduct, transaction, and occurrence as the claims contained in the original complaint. Accordingly, we grant the City's motion for summary judgment on Count IV. We note that the plaintiff may be able to file a claim under the Shakman Accord.

IV. State Law Workers' Compensation Claims

In Count V, Plaintiff asserts a claim for retaliation under the Illinois Workers' Compensation Act. Plaintiff filed a workers' compensation claim on September 1, 2000 as a result of his alleged job-related injuries. In his Complaint, Plaintiff alleges that in retaliation for this claim, he was: 1) denied medical benefits; 2) transferred; and 3) discharged. In its motion, the City argues that: 1) the medical benefits and job transferring claims are untimely; and 2) the retaliatory discharge claim is barred by the Tort Immunity Act. We will address each of these arguments in turn.

A. Retaliatory Denial of Medical Benefits and Transfer Claims

The City first argues that Plaintiff has exceeded the statute of limitations for two of the workers' compensation claims—the denial of medical benefits and job transfer claims. We agree. A plaintiff has one year from the date of alleged injury to file his workers' compensation retaliation claims against the City. 745 ILCS 10/8-101(a), (c). In this case, Plaintiff claims that he was denied

medical benefits on January 24, 2001. Further, his job transfer occurred on March 1, 2001. As Plaintiff did not allege this cause of action until September 24, 2004, in the Third Amended Complaint, these claims are time-barred under the statute of limitations.

Moreover, even if we were to find the denial of medical benefits and job transfer workers' compensation claims timely filed, the City would be entitled to judgment in its favor because Illinois courts have refused to recognize the tort of workers' compensation retaliation when the challenged employment actions fall short of actual discharge. *See Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978); *Graham v. Commonwealth Edison Co.*, 742 N.E.2d 858 (Ill.App.Ct. 2000); *Welsh v. Commonwealth Edison Co.*, 713 N.E.2d 679, 683 (Ill.App.Ct. 1999).

For these reasons, summary judgment is granted in favor of the City on Plaintiff's Count V claims of retaliation under the Workers' Compensation Act for denial of medical benefits and transfer.

B. Retaliatory Discharge Claim

The City next contends that Plaintiff's retaliatory discharge workers' compensation claim is barred by Sections 2-101 and 2-109 of the Illinois Tort Immunity Act. Plaintiff counters that as his discharge was ministerial rather than discretionary, his claim is not barred by the Act.

We deny the motion for summary judgment on this claim because issues of material fact are present. While the City claims that its decision to eliminate Plaintiff's job was discretionary, evidence is also presented that such decisions are limited by

the ministerial duties under the Collective Bargaining Agreement and the rights of union employees. See, e.g., *Rizzi v. City of Chicago*, 2003 WL 23023847, at * 11 (Ill. App. Ct. 2003).

Therefore, the City's motion for summary judgment on the Workers' Compensation retaliatory discharge claim in Count V is denied.

CONCLUSION

For the foregoing reasons, we grant in part and deny in part the City of Chicago's motion for summary judgment. (# 156). The motion is granted as to Plaintiff's Counts I, IV, and the denial of medical benefits and transfer claims in Count V. Judgment is hereby entered in favor of the City on these claims. The motion is denied as to Counts II, III, and the retaliatory discharge claim in Count V.

Plaintiff's motion to set a trial date (# 154) is denied at this time, and this case is set for status on October 18, 2007 at 9:00 a.m.

It is so ordered.

/s/ Wayne R. Andersen

Wayne R. Andersen
United States District Judge

Dated: September 26, 2007

UnitedStatesCourtofAppeals
For the Seventh Circuit
Chicago, Illinois 60604

October 17, 2016

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Nos. 14-3438 & 14-3494

ROBERT P. HILLMANN, *Plaintiff-Appellee/ Cross-Appellant,* *v.* CITY OF CHICAGO, *Defendant-Appellant/ Cross-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 04 C 6671 Rubén Castillo, *Chief Judge*.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.