IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GARY WISTROM,

Plaintiff,

v.

KENNETH BLACK,

Defendant.

OPINION AND ORDER

11-cv-515-wmc

In this action, plaintiff Gary Wistrom, a former employee of the Wisconsin Department of Veterans Affairs, alleged that defendant Kenneth Black, the former Secretary of the Department, retaliated against him in violation of 42 U.S.C. § 1981 when he supported the discrimination claim of another Department employee.[1] The jury found in favor of Wistrom and awarded $300,000 in compensatory damages and $1,500,000 in punitive damages. (Dkt. ##129, 130.)

Before the court are defendant Kenneth Black's motions for judgment as a matter of law, a new trial and remittitur. (Dkt. #140.) For the reasons that follow, the court will deny plaintiff's motions for judgment as a matter of law and for a new trial as to liability. The court, however, finds that the amount of damages awarded was excessive in light of the evidence and jury awards in similar cases. Plaintiff must accept a reduced damages award of $150,000 for compensatory damages and $300,000 for punitive damages or retry his damages case.

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[1] Wistrom also brought a race and gender discrimination claim, but the court dismissed that claim at summary judgment. (Dkt. #66.)

OPINION[2]

I. Standard

Under Federal Rule of Civil Procedure 50, judgment as a matter of law may be granted where there is no "legally sufficient evidentiary basis" to find for the party on that issue. Fed. R. Civ. P. 50(a). In considering the motion, the court is to "construe the facts strictly in favor of the party that prevailed at trial." including drawing "[a]ll reasonable inferences in that party's favor and disregarding all evidence favorable to the moving party that the jury is not required to believe." *May v. Chrysler Group, LLC*, 692 F.3d 734, 742 (7th Cir. 2012) (internal citations and quotation marks omitted), *withdrawn in part on reh'g*, Nos. 11-3000, 11-3109, 2013 WL 1955682 (7th Cir. May 14, 2013). The court does not make credibility determinations or weigh the evidence, though the court must assure that "more than 'a mere scintilla of evidence' supports the verdict." *Id.* (quoting *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 859 (7th Cir. 2007)). The court's "job is to decide whether a highly charitable assessment of the evidence supports the jury's verdict or if, instead, the jury was irrational to reach its conclusion." *May*, 692 F.3d at 742.

"Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion." *Wallace v. McGlothan*, 606 F.3d 410, 418 (7th Cir. 2010); *see also Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010) (refusing to consider the defendant's argument that plaintiff failed to demonstrate that he suffered an adverse employment action, in part,

[2] This opinion assumes a general understanding of the undisputed facts and law of the case set forth in earlier opinions of this court, which will not be repeated here.

because the defendant did not raise argument in Rule 50(a) motion); *see also* Fed. R. Civ. P. 50 cmt. 1991 Amendments ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.").

Defendant also moves for a new trial under Federal Rule of Civil Procedure 59. "A new trial may be granted only if the jury's verdict is against the manifest weight of the evidence." *King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006) (citing *ABM Marking, Inc. v. Zanasi Fratelli, S.R.L.*, 353 F.3d 541, 545 (7th Cir. 2003)). To meet this standard, Black must demonstrate that no rational jury could have rendered a verdict against him. *King*, 447 F.3d at 534 (citing *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 926 (7th Cir. 2004)). In making this evaluation, the court must view the evidence in a light most favorable to plaintiff, leaving issues of credibility and weight of evidence to the jury. *King*, 447 F.3d at 534. "The court must sustain the verdict where a 'reasonable basis' exists in the record to support the outcome." *Id.* (quoting *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004)).

II. Challenges to Jury Findings

A. Causation

The focus of Black's motion is on the jury's finding of a causal connection between Wistrom's statutorily-protected activity and his reassignment, attacking evidence of Black's knowledge of key facts and personal involvement in decisions. The court will address Black's challenges in-turn.

i. Evidence of Black's knowledge of Wistrom's support of Nitschke's discrimination claim

As his first challenge to proof of causation, Black argues Wistrom failed to submit a legally sufficient evidentiary basis to support the jury finding that Black had knowledge of Wistrom's support of Randall Nitschke's discrimination claim. To prove a retaliation claim, "it is not enough that the decisionmaker should have known about a discrimination complaint; the decisionmaker must have had actual knowledge of the complaint for [his] decision to be retaliatory." *Hayes v. Potter*, 310 F.3d 979, 982-83 (7th Cir. 2002).

Wistrom testified that he emailed Patrick Shaughnessy and Brian Marshall after speaking with Nitschke's attorney about comments Black made at a March 4, 2010, meeting. The evidence shows that Marshall forwarded that email to Black's Deputy Secretary and Department's legal counsel, Jimmy Stewart. (Trial Exs. 20, 21.) Wistrom also testified that he orally informed Shaughnessy that he had been asked to submit an affidavit. While Wistrom did not submit *direct* evidence that this email was forwarded to Black, the jury was free to draw the reasonable inference that Black became aware of Wistrom's possible involvement in Nitschke's discrimination claim.

Black also argues that knowledge of Wistrom's possible involvement in Nitschke's claim is not enough. Specifically, Black challenges the sufficiency of the evidence of his knowledge that Wistrom actually supported Nitschke's discrimination claim -- whether knowledge of the actual affidavit or otherwise. In making this argument, Black points to his own trial testimony that he did not know about Wistrom's affidavit specifically or his support of Nitschke's claim more generally. The jury's verdict, however, demonstrates

that the jury found Black not credible, and it is not this court's role to make credibility determinations.[3]

Once again, while Wistrom did not submit direct evidence of Black's knowledge of the affidavit or other support of Nitschke's claim, it was reasonable for the jury to infer Black's knowledge in light of (1) evidence that Black's leadership team was aware of Nitschke's discrimination claim and made Black aware of it shortly after it was filed; and (2) Nitschke's discrimination claim named Black individually as a defendant and accused him of making derogatory comments about "old white men." (Trial Tr. (dkt. #135) 43-44.) From this, the jury could infer that Black was tracking Nitschke's discrimination claim through his leadership team and was aware of Wistrom's support of that claim. *See Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 672 (7th Cir. 2009) (explaining that "it would be rare for a plaintiff to have smoking gun evidence that a defendant knew of her protected speech or for a defendant to admit such knowledge" and allowing plaintiff to demonstrate the causal link with circumstantial evidence); *Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994) ("A Title VII plaintiff may rely on circumstantial evidence to establish her employer's awareness of protected expression.").

[3] Indeed, most of defendant's motion is undermined by the jury's likely rejection of some or all of Black's own testimony. In light of Black's denial that he ever made the "old white men" statement in the face of several individuals' testimony to the contrary, the jury had a sound basis for rejecting Black's testimony in its entirety. (*See* Intro. Jury Instructions (dkt. #126) 4 ("In deciding the facts, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, part of it, or none of it.").)

ii. Evidence of Black's knowledge of Wistrom's sleep deprivation disorder and impact that might have on commute

Next, Black argues Wistrom did not submit legally sufficient evidence to prove that he had knowledge of Wistrom's sleep deprivation disorder and the impact on his commute. The court agrees with plaintiff that knowledge of Wistrom's sleep disorder was not required for the jury to find his reassignment sufficiently adverse to support a finding of retaliation. The reassignment's impact on Wistrom was, no doubt, amplified by his sleep disorder and its impact on his ability to drive, but this goes to damages, not causation.

Moreover, given his employment at Union Grove, Wistrom *did* submit evidence from which a jury could infer that Black was aware Wistrom lived in or near the Kenosha area and that Wistrom would be required to commute to Madison as part of the reassignment, at least in the near term. Wistrom testified that Black and he had multiple conversations over several years. (Trial Tr. (dkt. #135) 114-116; Trial Tr. (dkt. #136) 6.) Furthermore, there was testimony from Nitschke that Black told him that, 'whatever you do, do not trust" Wistrom while at Union Grove, providing further support that Black was aware that Wistrom worked there too. (Trial Tr. (dkt. #135) 133-34.)

Finally, there was evidence that members of Black's leadership team -- Jimmy Stewart, the Department's legal counsel, and Amy Franke, the Human Resources Manager -- were aware of Wistrom's rejected January 2009 FMLA request based on his claim of a sleep disorder. Under all the circumstances here, the jury could reasonably infer that Black became aware of Wistrom's FMLA request and appeal of the denial because of its high-profile within his leadership team. Indeed, after the Department

prevailed on appeal, Stewart sent an email to the "team" -- which included Black -- congratulating them on the Department's win against the "Wistrom Complaint." (Trial Ex. 15; Trial Tr. (dkt. #135) 67).)

iii. Evidence of Black's personal involvement in reassignment decision

Black also challenges the evidence in support of the jury's finding that he was personally involved in the decision to reassign Wistrom to the central office in Madison, relying again primarily on his own testimony that he simply approved Brian Marshall's recommendation to reassign Wistrom. Given that a reasonable jury could have found this testimony contradicted by Black's other testimony, as well as by Brian Marshall's testimony, this challenge warrants minimal discussion. Black testified that he was the ultimate decisionmaker at the Department, and that he initiated the reorganization plan. (Trial Tr. (dkt. #135) 50, 59, 123.) Black also testified that he created the position to which Wistrom was reassigned. (*Id.* at 159, 204.) Moreover, Marshall testified that he knew nothing about Wistrom or his qualifications because Marshall was new and had never supervised Wistrom. (*Id.* at 5, 16, 27-28.) Marshall also testified that the selection of Wistrom was a collaborative decision, and that Black was the ultimate decision maker. (*Id.* at 21-22, 27-28.) Finally, the other members of the leadership team denied that they had any involvement in the selection of Wistrom for this new position. (Trial Tr. (dkt. #136) 7-8, 11, 16-17.) In light of all of this, there was ample evidence from which the jury could reasonably infer, if not feel compelled to conclude, that Black made the decision to reassign Wistrom to the new position in Madison.

iv. Evidence of Black's personal involvement in post-reassignment accommodations decisions

As his final challenge to the adequacy of plaintiff's proof of causation, Black contends there was insufficient evidence that Black was personally involved in the post-reassignment decisions regarding Wistrom's requests for accommodations. While Wistrom's post-reassignment accommodations request may have been material to the jury's finding that the reassignment was an adverse action or to a finding that the position to which Wistrom was reassigned was contrived, the jury need not find that Black was personally involved in the post-reassignment accommodations decisions to find that he was personally involved in the decision to reassign Wistrom. Regardless, in light of the Department's excessively formal style of communication with Wistrom and Wistrom's 2009 FMLA complaint, a reasonable jury could infer that Black was aware of Wistrom's requests for accommodation.

B. Adverse Action

Black also challenges the jury's finding that Wistrom's reassignment to the Department's Madison office was an adverse action. As plaintiff points out, Black's Rule 50(a) motion did not raise this basis as a ground for judgment as a matter of law. (*See* Trial Tr. (dkt. #135) 218-19 (making motion on basis of lack of causation, but not mentioning lack of evidence to support a jury finding of an adverse action).) Defendant effectively acknowledges this omission by failing to address it in his reply brief. As such, this ground for judgment as a matter of law has been waived. *See Wallace*, 606 F.3d at 418.

Even if the court were to consider the merits of this argument, the court finds sufficient evidence to support the jury's finding that Wistrom was subjected to a material adverse action. Coming as it did on the heel of Wistrom's filing of an affidavit in support of a co-worker's discrimination claim, Black's decision to reassign Wistrom to a position in the Department's central office likely subjected him to closer supervision by Black and his leadership team and unquestionably required him to commute or move to Madison from his home in Kenosha. While a jury was certainly not compelled to find that a reasonable employee would deem such an action materially adverse such that the employee would be dissuaded from engaging in the protected activity, the circumstances are a sufficient basis for the jury to so find, especially in light of the Department's apparent refusal to make any accommodation as to the timing of this seemingly-unnecessary (or at least non-urgent) reassignment. *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 740 (7th Cir. 2011).

C. Punitive Damages

Next, Black seeks judgment as a matter of law on the punitive damage award, asserting there is insufficient evidence from which a reasonable jury could find that Black acted with reckless disregard of Wistrom's statutory rights. Bootstrapping from his challenges to causation, Black essentially argues that a reasonable jury could not find that Black acted with reckless disregard of Wistrom's rights absent a finding of Black's personal involvement in the reassignment decision, knowledge of Wistrom's support of Nitschke's discrimination claim, and knowledge of the circumstances surrounding

Wistrom's commute and post-reassignment accommodations requests. Because the court rejected Black's challenges to the jury's findings of causation, the court also denies Black's motion for judgment as a matter of law on the jury's award of punitive damages.[4]

III. Challenges to Court Rulings

Black also seeks a new trial based on the court's ruling allowing evidence of Black's alleged discriminatory statements. The court rejects defendant's argument that the court erred in allowing this evidence for the same reasons explained on the record during the final pretrial conference and in its final pretrial conference decision: Black's alleged discriminatory statements, which he denied making, go to his motive to retaliate. (*See* 9/21/12 Order (dkt. #122) 4.)

IV. Remittitur

Finally, defendant seeks remittitur of the jury's $300,000 compensatory damages award and $1,500,000 punitive damages award. On this point, the court agrees. In reviewing a request for remittitur, the court is to consider "(1) whether the award is monstrously excessive; (2) whether there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases." *Deloughery v. City of Chi.*, 422 F.3d 611, 619 (7th Cir. 2005). As the jury

[4] Accepting the jury's finding of liability, Black does not argue, nor could one reasonably argue, that Black did not act "in the face of a perceived risk that [his] actions will violate federal law." *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 447 (7th Cir. 2010) (describing "malice or reckless indifference" standard in punitive damages context) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999)). Black does, however, seek a new trial because the jury's verdicts are against the manifest weight of evidence. For the same reasons explained above, the court disagrees.

obviously did, the court readily accepts Wistrom's testimony that his reassignment was emotionally devastating and, as is well-established, Wistrom's testimony alone was sufficient to prove his emotional distress. *See Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 580-81 (7th Cir. 1996) (holding that plaintiff's testimony alone may support an award for emotional distress). Still, the court was struck by the size of both awards at the time the verdict was rendered, and even more so now having reviewed damages awards in similar cases. As such, the court will grant defendant's motion for remittitur, finding both awards excessive in light of the evidence presented and not in line with awards made in similar cases.

As for the compensatory damages, any award was necessarily limited to the reassignment itself, and not to Wistrom's decision to retire in light of the court's summary judgment ruling that Black's adverse actions did not constitute a constructive discharge. Despite the jury being so instructed, evidence of Wistrom's decision to leave his employment and the circumstances surrounding that decision likely impacted the jury's determination given the significant amount awarded.

The $300,000 compensatory award is also significantly greater than awards approved by the Seventh Circuit for emotional distress in similar retaliation or discrimination claims. *See E.E.O.C. v. Autozone, Inc.*, 707 F.3d 824, 833-34 (7th Cir. 2013) (affirming award of $100,000 for emotional and/or mental pain as a result of defendant's failure to provide reasonable accommodation); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 446 (7th Cir. 2010) (affirming award of $15,000 in compensatory damages in retaliation claim involving termination of employment); *Marion Cnty.*

Coroner's Office v. E.E.O.C., 612 F.3d 924, 931 (7th Cir. 2010) (remitting $200,000 jury award to $20,000 for emotional distress caused by racial discrimination); *Deloughery*, 422 F.3d at 621-22 (affirming remitted amount of $175,000 in compensatory damages for failure in First Amendment retaliation claim involving a failure to promote); *Harvey v. Office of Banks & Real Estate*, 377 F.3d 698, 714 (7th Cir. 2004) (upholding compensatory awards of $50,000, $100,000 and $150,000 for retaliatory firings); *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 484 (7th Cir. 2003) (affirming jury award of $75,000 in compensatory damages involving retaliation where plaintiff found a new job within two months).

While the jury had sufficient evidence to award damages for emotional distress, Wistrom provided no evidence of physical pain or threats of physical pain, nor was he subjected to adverse actions over a long period of time. Since these are the factors the Seventh Circuit has considered in approving awards higher than the norm, *see, e.g.*, *Neal v. Honeywell, Inc.*, 191 F.3d 827, 832 (7th Cir. 1999) (finding award of $200,000 not excessive because of threats of physical injury); *Farfaras v. Citizens Bank & Trust of Chi.*, 433 F.3d 558, 566 (7th Cir. 2006) (upholding award of $200,000 because it involved "repeated physical and verbal harassment"), the court will grant defendant's request for remittitur and plaintiff will have the option to accept a reduced damages award of $150,000 for compensatory damages or retry his damages case.

In light of punitive awards approved in similar cases, the court also finds the jury's award of $1,500,000 excessive.[5] In cases involving retaliation claims, the Seventh Circuit has approved punitive damages awards ranging from $50,000 to $270,000. *See Houskins v. Sheahan*, 549 F.3d 480, 496 (7th Cir. 2008) (affirming district court's denial of remittitur of jury's award of $50,000 punitive damages to county social worker who was retaliated against by sheriff in violation of her First Amendment rights); *Lampley*, 340 F.3d at 485 (affirming district court's denial of remittitur of $270,000 punitive damages award to African-American plaintiff who was fired after he complained to the EEOC about race discrimination); *David v. Caterpillar, Inc.*, 324 F.3d 851, 865 (7th Cir. 2003) (affirming district court's remittitur of punitive damages award from $750,000 to $150,000 for Title VII sex discrimination and retaliation claim); *see also Abegglen v. Town of Beloit*, No. 10-cv-110 (W.D. Wis. May 13, 2011) (dkt. #187) (awarding $500,000 in punitive damages against each defendant for retaliation over a significantly longer period of time and for significantly harsher actions taken by defendants against husband and wife plaintiffs).

Given the size of the damage award here, the court is concerned that the jury may have impermissibly considered Black's treatment of other individuals in determining

[5] A district court may reduce a punitive damages award on due process grounds without the offer of a new trial in the alternative, but defendant has not challenged the jury's award of punitive damages here on due process grounds. *See* 12 James Wm. Moore, *Moore's Fed. Practice* § 59.13[2][g] at 59-83 (3d. ed. 2013) ("[W]hen a court finds that a damages award is excessive as a matter of law because it exceeds due process limits, a reduction of the award to the constitutional maximum does not interfere with the right to a jury trial, and the court need not offer the plaintiff the option of a new trial.") (citing *Cortez v. Trans Union, LLC*, 617 F.3d 688, 716 (3d Cir. 2010)).

punitive damages. *Phillip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (holding that due process clause does not allow a jury to base an award of punitive damages "in part upon its desire to punish the defendant for harming persons who are not before the court").

In considering the facts in these cases, in particular the nature of the retaliation and whether defendant was an individual or a large corporation, the court finds that an award of $300,000 in punitive damages is reasonable and fair. Plaintiff will, therefore, be given the option of accepting a reduced damages award of $300,000 in punitive damages or retrying his punitive damages case.

ORDER

IT IS ORDERED that:

1) defendant Kenneth Black's renewed motion for judgment as a matter of law, and, in the alternative, motion for a new trial or remittitur (dkt. #140) is GRANTED IN PART AND DENIED IN PART. The motion is granted as to defendant's request for remittitur. In all other respects, the motion is denied; and

2) plaintiff Gary Wistrom must accept a reduced compensatory damages award of $150,000 and a reduced punitive damages award of $300,000 or retry his damages case. Plaintiff shall have twenty-one (21) days to advise the court of his choice.

Entered this 15th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge