IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. CARR, JR.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
v.	:	
	:	
FRESENIUS MEDICAL CARE, et al.,	:	
	:	
Defendants	:	NO. 05-2228

MEMORANDUM OPINION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE May 16, 2006

This matter comes before the Court following upon an agreement between the parties that the Defendants Fresenius Medical Care South Philadelphia Dialysis Center / St. Agnes Medical Ctr. ("Fresenius"), Sheila Donofry and Deborah Yingling (collectively "Defendants") would pay an undisclosed sum to Plaintiff John Carr ("Carr" or "Plaintiff") in return for what the Court assumes are appropriate releases and an agreement to a dismissal of the action pursuant to Rule 41.1(b) of the Local Rules of Civil Procedure. After filing the appropriate consent forms, and with the concurrence of the assigned District Court Judge (The Honorable Anita B. Brody), jurisdiction has been conferred upon this Court pursuant to 28 U.S.C. § 636(c). Before the Court is correspondence from Plaintiff's counsel dated March 31, 2006, which we have construed as Plaintiff's Motion to Enforce Settlement (Doc. No. 18) and correspondence from defense counsel dated April 6, 2006, which we construe as Defendants' Response. (Doc. No. 19).

Plaintiff's suit concerned his claim that he was wrongfully terminated from his employment with Fresenius in violation of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*

("FMLA"). Plaintiff asserted that he was "deprived of economic and non-economic benefits including, but not limited to[,] lost wages . . . [and] loss of fringe benefits," and sought, *inter alia*, "further relief as may be necessary and appropriate to effectuate the objectives of the Family and Medical Leave Act of 1993." *See* Compl. (Doc. No. 1) ¶¶ 33, 35. The claim was brought against Fresenius, as well as Donofry and Yingling, who were Carr's supervisors. Defendants denied that Carr was wrongfully terminated. *See* Ans. (Doc. No. 3).

The parties report that they have resolved their differences for a set sum in what Plaintiff has characterized as a "settlement in principle." *See* Pl.'s Mot. at 1. While the precise terms of the settlement have not been disclosed to the Court, it is agreed that some portion of the settlement amount is to represent payment to Carr for what Defendants describe as "back pay." *See* Defs.' Resp. at 1.[1] The parties have not agreed, however, upon the narrow question of whether this portion of the settlement amount is to be subject to the withholding by Fresenius of federal and state income and other payroll taxes.[2]

Federal law requires that an employer deduct and withhold from an employee's wages federal income tax on behalf of the employee, except in circumstances not relevant here. *See* 26 U.S.C.

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[1]Plaintiff's motion first raised the issue of the equity of withholding of taxes from settlement proceeds that would be "deductible" — a somewhat confusing choice of words, given the focus on tax matters — from the settlement for attorneys fees and costs. *See* Pl.'s Mot. at 3. Apparently in response to this, Defendants state: "As a preliminary matter, Defendants agree that any portion of the settlement amount that the parties reasonably agree represents payment for attorneys' fees and costs is not subject to withholding. The sole issue before the Court is whether the portion of the settlement amount fairly attributable to back pay is subject to federal and state income tax, FICA and FUTA withholding." *See* Defs.' Resp. at 1. We accept in general terms Defendants' characterization.

[2]We note that Plaintiff did "not contest that he owed taxes on the award" but rather challenges only the question of withholding. *See* Pl.'s Mot. at 1.

§ 3402(a). In addition, employers are required to withhold the employee taxes that fund the old-age, survivors, disability insurance (Social Security) and medicare programs pursuant to the Federal Insurance Contribution Act ("FICA"), 26 U.S.C. § 3101, *et seq*. *See* 26 U.S.C. §§ 3101-3102. As with the federal income tax, the FICA tax is based upon and withheld from the employee's "wages." *See* 26 U.S.C. § 3102(a) (providing that FICA tax "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid"). For purposes of both provisions, and apart from listed exclusions that do not apply here, "the term 'wages' means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *See* 26 U.S.C. § 3306(b) (income tax withholding); 26 U.S.C. § 3121(a) (FICA withholding). In both instances, the term "employment" is defined, again excluding conditions not relevant here, as "any service, of whatever nature, performed . . . by an employee for the person employing him." *See* 26 U.S.C. § 3306(c) (income tax withholding); 26 U.S.C. § 3121(b) (FICA withholding).[3]

Similarly, Pennsylvania law requires an employer that "mak[es] payment of compensation" to an individual "performing services on behalf of such employer" to "deduct and withhold from such compensation for each payroll period" state income tax. *See* 72 P.S. § 7316. The term "compensation" "means and shall include salaries, wages, commissions, bonuses and incentive

[3]We note that Defendants describe the withholdings at issue as "federal and state income tax, FICA and FUTA." *See* Defs.' Resp. at 1. Our understanding of the Federal Unemployment Tax Act, 26 U.S.C. § 3301, *et seq.* ("FUTA"), is that it imposes an excise tax on employers and is the sole responsibility of the employer; it does not require a deduction from an employee's wages. As a result, even if the settlement proceeds in this case were characterized as "wages" under FUTA, that designation would not impact the amount of money that will pass from Defendants to Plaintiff. For this reason, we will not focus our attention on FUTA.

payments whether based on profits or otherwise, fees, tips and similar remuneration received for services rendered . . . ." *See* 72 P.S. § 7301(d).

Defendants assert that they (although presumably Fresenius only, as the employer) "must withhold on the back pay amount" of the settlement pursuant to IRS mandates regarding "back pay" and that these IRS guidelines must control here. *See* Defs.' Resp. at 1. For the reasons set out within, we agree with Plaintiff and conclude that no part of the settlement fund is subject to withholding.

We start our analysis by considering the language of the FMLA. Its remedial provision states:

> Any employer who violates section 2615 of this title shall be liable to any eligible employee affected —
>
> (A) for damages **equal to** —
>
> (i) the amount of —
>
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
>
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
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> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
>
> (iii) an additional amount as liquidated damages . . .; and
>
> (B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1) (emphasis added). As one court has observed: "The phraseology of 'equal to the amount of' included in the damages provision of the FMLA is unique as compared with other employment discrimination statutes." *Longstreth v. Copple*, 101 F. Supp.2d 776, 780 (N.D. Iowa 2000). Moreover, the FMLA does not use the term "back pay," although that term is, and was at the time the FMLA was enacted, widely used in discussions of remedies available under other employment statutes. *See id.* at 780-81. As we read the statutory provision, and given the broader context of the FMLA vis-a-vis other employment statues, a recovery under the FMLA does not constitute "back pay" but an amount of damages "equal to" the sum of various components, including, but not limited to, lost wages.[4] As such, an award or settlement for an FMLA claim does not constitute "wages" subject to withholding under the tax codes.

This interpretation of the FMLA damages provision comports with decisions in other cases with facts most similar to those here. In *Churchill v. Star Enterprises*, 3 F. Supp.2d 622 (E.D. Pa. 1998), a case decided in this Court by Chief Judge Bartle, the plaintiff claimed that she was improperly terminated because of a medical condition in violation of the FMLA. The jury returned a verdict in plaintiff's favor and awarded, in accordance with the language of the FMLA, "damages equal to the amount of any wages, salary, employment benefits or other compensation denied or lost to [her] by reason of the violation." *Churchill*, 3 F. Supp.2d at 623 (citing 29 U.S.C. § 2617(a)(1)(A)(i)(I)). The parties then disputed whether the employer should have withheld from the judgment monies for the federal and state income taxes and FICA contributions. *Id.* at 624. Judge Bartle noted that federal withholding was required under the tax laws only for wages or remuneration

[4]This could encompass damages for non-wage benefits lost by the employee as a result of the violation, as well as liquidated damages — neither of which, we suspect, even Defendants would suggest are subject to withholding under their conception of "back pay."

"for services performed by an employee for [her] employer," *id.*, and concluded that an award under the FMLA did not trigger the withholding obligation:

> [T]he jury's award does not and cannot represent wages for services performed since [the plaintiff] performed none during the relevant time frame. The FLMA explicitly recognizes this reality. The employer who violates the statute is liable not for any denied or lost wages but for damages '*equal to* the amount of' any denied or lost wages. 29 U.S.C. § 2617(a)(1)(A)(i)(I). (Emphasis added).

Id. Because the same analysis applied to the state withholding law, Judge Bartle concluded that withholding was not required under the Pennsylvania statute either. *Id.*

Like the plaintiff in *Churchill*, Carr claims that he was wrongfully terminated. As a result, the portion of the settlement allocated to Carr's damages cannot represent remuneration for services performed by him for Fresenius as there was not even an employee/employer relationship between the two at the time when Defendants suggest that the loss of "back pay" occurred. At best, the settlement award is for amounts relating to services that could have been performed in the future. We agree with Judge Bartle and conclude that settlement funds paid to Carr in this context do not constitute "wages" subject to withholding. *Accord Kelly v. Hunton & Williams*, No. 97-5631, 1999 U.S. Dist. LEXIS 14605, *4 (E.D.N.Y. Sept. 21, 1999) (settlement payment for breach of future employment prospects does not constitute "wages" subject to withholding by former employer).

We do not believe that the various IRS Revenue Rulings and court of appeals cases cited by Defendants require a different result. Revenue Ruling 78-176 and Revenue Ruling 96-65 both address situations where payments were made by a company in settlement of Title VII claims. Significantly, and in contrast to the language of the FMLA, the remedial provision of Title VII states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g)(1). The language employed by Congress in this section indicates that it viewed the damages recoverable in a Title VII action as constituting "pay." By contrast, the FMLA provides that the liability of an employer will be "for damages **equal to**," *inter alia*, "the amount of any wages, salary, employment benefits or other compensation denied or lost to such employee by reason of the violation" and liquidated damages. *See* 29 U.S.C. § 2617(a)(1) (emphasis added). We have to assume that the specific reference to the "damages equal to" language appears in the statute for a reason. Congress could have quite easily used the existing Title VII language, but it chose not to. We cannot and will not assume that where Congress referred to "damages equal to" wages it meant the same thing as "wages." This is particularly the case when the FMLA was enacted in 1993, well after the passage of Title VII and its 1991 amendments. Thus we find the Revenue Rulings cited by counsel as well as the Ninth Circuit's decision in *Rivera v. Baker West, Inc.*, 430 F.3d 1253 (9th Cir. 2005), all dealing with Title VII claims, to be inapposite.

Defendants also cite three cases that arose in an ERISA context: *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999); *Mayberry v. United States*, 151 F.3d 855 (8th Cir. 1998); and *Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997). The remedial provision of the ERISA statute allows for a civil action to be brought "by a participant, beneficiary, or fiduciary [to enjoin a violation or] to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any

provision of this subchapter . . . ." 29 U.S.C. § 1132(a)(3). Again, like Title VII, this statutory language is distinct from the "equal to the amount of" language in the FMLA. Because the FMLA postdates the passage of and significant amendments to both Title VII and ERISA, we presume Congress to have acted intentionally in crafting the language of the remedial provision of the FMLA as it did. Thus, we conclude that the Title VII and ERISA cases cited by Defendants, which did not include any Third Circuit authority, do not dictate the resolution of this dispute regarding an FMLA award.

Defendants also cite to *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), for the proposition that "backpay covering [a] wrongful discharge" meets the definition of "wages" under the Social Security Act. *See* Defs.' Resp. at 2. *Nierotko* involved an employee who had been wrongfully discharged in violation of the National Labor Relations Act. The National Labor Relations Board (the "NLRB") ordered his employer to reinstate him and provide him with "back pay" for a specific period of time. Thereafter, Nierotko petitioned the Social Security Board to credit his Old Age and Survivor's Insurance account — the account to which FICA taxes are posted — for the period in which "back pay" was awarded by the NLRB.[5] The Supreme Court interpreted the Social Security Act's definition of "wages" to include "'back pay' for a period of time during which he was wrongfully separated from his job." *Nierotko*, 327 U.S. at 364.

We find *Nierotko* distinguishable from this case. First, *Nierotko* was decided in the context of an employee who was reinstated, such that an employment relationship between the employer and

[5]The characterization under the Social Security laws of the back pay award had implications on Nierotko's eligibility for future Social Security payments, as he was required to have a certain number of quarters of coverage in order to be eligible for the Social Security benefits in the future.

employee continued after the improper discharge. The reinstatement also provided "bookends," so to speak, framing a defined period of presumed lost wages. That is not the case here. Further, as with the other authorities cited by Defendants, the claim the Court was dealing with in *Nierotko* was not made under a remedial scheme using the "equal to the amount of" language Congress utilized in the passage of the FMLA. In fact, the *Nierotko* case was specifically based upon a situation where "back pay" as pure back pay was awarded. Therefore, we do not believe that *Nierotko* requires that the award in this case be characterized as "wages" subject to withholding under the federal tax laws.

Having considered the matter carefully, we conclude that an award of damages under the FMLA — even pursuant to a settlement and to the extent the proceeds are separated from the recovery designated for attorneys' fees and costs — is not subject to withholding by the employer under federal and state tax laws.[6] An appropriate Order follows.

[6]As did Judge Bartle in the *Churchill* case, we conclude that our discussion as to the propriety of withholding under the federal tax law applies with the same force as to the Pennsylvania income tax statute, 72 P.S. § 7316.

ORDER

AND NOW, this 16th day of May, 2006, for the reasons set forth in the foregoing Memorandum, it is hereby **ORDERED** that Plaintiff's Motion to Enforce Settlement (Doc. No. 18) is **GRANTED** and Defendants are directed to make payment to Plaintiff in accordance with the terms of the parties' settlement agreement without making any deductions therefrom for payroll taxes.

In light of the fact that counsel have reported that this matter has been settled, **IT IS FURTHER ORDERED** that this matter be **DISMISSED WITH PREJUDICE**, without costs, pursuant to Rule 41.1(b) of the Local Rules of Civil Procedure.

The Clerk shall mark this case "closed" for statistical purposes.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
United States Magistrate Judge