STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

SANDRA ROJAS, LPN, formerly and also known as SANDRA MENDOZA,	)	
Plaintiff,	)	
vs.	)	No. 2016-L-160
DR. SANDRA MARTELL, Public Health Administrator of the Winnebago County Health Department, in her official capacity,	)	
Defendants.	)	

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FILED
Date: 10/25/21
Clerk of the Circuit Court
By _____ Deputy
Winnebago County, IL

MEMORANDUM OPINION

This case reflects the tension between conflicting values honestly held. Acting on sincerely held religious beliefs, Plaintiff Sandra Rojas decided that she could not perform certain job duties that would have been assigned to her as a nurse at the Winnebago County Health Department's consolidated clinic. Defendant Dr. Sandra Martell, in her capacity as Public Health Administrator of the Winnebago County Health Department ("Health Department") acted to meet the Health Department's responsibility to provide the objected-to services at its clinic.

The question presented here is whether that conflict of values was resolved in accordance with applicable law. After consideration of the evidence and the excellent legal arguments of counsel, the Court finds, as explained more fully below:

- The Health Department improperly discriminated against Plaintiff by refusing to accommodate her objections of conscience in her existing job at the clinic.
- Plaintiff failed to mitigate her damages by pursuing a nursing job at the River Bluff nursing home which she would certainly have obtained, and which would have prevented her from incurring the damages she claims in this lawsuit.
- Plaintiff is still entitled to a statutory minimum award of $2,500, and the issue of attorney fees is yet to be addressed.

Facts

The Court previously denied motions for summary judgment in this case; the dispute then, as now, is not so much about the facts, but about the inferences to be drawn from those facts. The Court will briefly summarize some of the important facts here, most of which are uncontested; other conclusions about the inferences to be drawn from those facts will be stated in the context of the legal issues presented. In resolving any disputed facts, the Court at all times has placed

the burden of proof on Plaintiff, except when it pertains to the Health Department's affirmative defense.

Plaintiff Sandra Rojas. Plaintiff Sandra Rojas, formerly Sandra Mendoza, is a Licensed Practical Nurse (LPN) formerly employed by the Health Department. She received her LPN in 1990 or 1991, and her first job as an LPN was with the Walter Lawson Children's Home. Among her jobs at the Children's Home was to administer medications, place tracheal tubes, give medications, administer nebulizers, and give tube feedings to resident pediatric patients.

In 1996, Plaintiff was hired by the Health Department to work as a part-time pediatric nurse. She pursued the job because it involved pediatrics and involved immunizations, with which she was already familiar, and because they were looking for a bilingual nurse (Plaintiff speaks Spanish and English).

At one point in her employment with the Health Department, Plaintiff accepted a position in what was then the women's health clinic. After working there six months, however, she had a conversation with her priest that made her concerned about whether dispensing birth control or giving abortion-related services would be a violation of her faith. She raised these concerns with her employer, and for a time she was permitted to work in the clinic without doing women's health services. About 80% of her time was actually spent as an interpreter for other providers. Eventually, she learned that her old position in the pediatric clinic was available, so she transferred out of women's health and back to pediatrics; this meant going from a full-time position back to a part-time position. These events occurred in approximately 2000.

On August 15, 2014, Plaintiff accepted a job with the Health Department in the position of "Public Health Nurse 1," which would, in combination with her existing part-time pediatrics position, make her a full-time employee. She knew when she accepted this position that the various Health Department clinics were in the process of consolidation.

Consolidation of Health Department Clinics. Pediatrics was not the only health clinic operated by the Health Department; there was also women's health, immunization, refugee, travel, and breast and cervical. When Plaintiff began working at the pediatric clinic these various clinics were separate from each other and not integrated.

After 27 years in Cook County, Defendant Dr. Sandra Martell was recruited by the Health Department to serve as its Public Health Administrator. Under Dr. Martell's guidance, the Health Department began looking at the possibility of combining its various health clinics into one. This was already a part of the Health Department's strategic plan, and one of Dr. Martell's responsibilities when she came on board was to lead the effort toward integration. Dr. Martell said that the benefit of integration was both operational (more comprehensive services available to the patient at a visit) and financial (leveraging funding and more efficient use of staff).

Cross-training of staff in anticipation of consolidation of the clinics began in January 2015, with a plan to "go live" on July 1, 2015. After consolidation, there would be 12 nurses working in the clinic; women's health services would constitute more than 50 percent of the clinic's services.

Consequently, about 50 percent of Plaintiff's job would involve women's health issues in the consolidated clinics.

Nurses' Objections to Certain Services. Three nurses expressed moral objections to providing abortion/contraception services as a result of the consolidation of the clinics: Christine Savage, Karen Gugliazza, and Plaintiff. This presented an issue for the Health Department, because the terms of its grants required it to deliver such services and to do so using a "non-directed approach" to patient care, meaning that options are explained without the staff member expressing their own opinion. When dealing with the three nurses who objected to providing abortion/contraception services, Dr. Martell testified that she approached each situation the same: first looking at the employee's role, their training and qualifications, and how they might be accommodated in comparable positions and roles. They were each treated individually despite having the same objections.

Dr. Martell stated, "I did not believe I had to keep them in the clinic. I recognize that I had to make some kind of an accommodation or look for an accommodation for them." She compared these accommodations to those that she would have to make for other employees under the Family Medical Leave Act or the Americans with Disabilities Act. It was her understanding that accommodation did not mean that she had to keep them in the "exact same position."[1]

On April 17, 2015, Dr. Martell met with Christine Savage. Savage was 'placed' in the Health Department's clinic but technically worked for a different employer, and that employer's rules prevented Savage from engaging in any services related to abortion or contraception. Savage was an advanced practice nurse ("APN"), which is "the highest level of credential, and she was able to function as a clinician" in the clinic. An arrangement was worked out such that Savage could job share with another APN in the clinic; as long as one of the two was available to provide the women's health services, Savage's restrictions could be accommodated.

Karen Gugliazza was an R.N. who had worked part time in the travel program. Dr. Martell met with Gugliazza on June 4, 2015, to address her concerns by offering her an RN position in the breast and cervical cancer program. This position worked with a patient population beyond the family planning ages, so it would not present the same issues for Gugliazza; both parties felt it was a reasonable accommodation.

The third nurse to approach Dr. Martell with concerns was Plaintiff. Plaintiff had a religious objection to participating in abortion referrals and contraception. She first raised her concerns with supervisors, and they arranged for Plaintiff to meet with Dr. Martell.

Meeting Between Rojas and Dr. Martell. Dr. Martell testified that she met with Plaintiff on June 24, 2015, to discuss her concerns about the objected-to services.

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[1] In fairness to Dr. Martell, and to any attorney who might have been advising her at the time, it appears they viewed the requirements of the Conscience Act as being essentially the same as those under Title VII. It was only after the appeal earlier in this case that we all learned that the Title VII analysis was not applicable to claims under the Conscience Act.

Dr. Martell did not question the genuineness of Plaintiff's religious objections, but she determined that the clinic could not accommodate Plaintiff in the clinic in the long term. She testified that there were "no other LPN positions that we could job share with, that we could split." Dr. Martell explained that, if the clinic had more women's health clients on a particular day and had to direct them away from Plaintiff, "that burden would have gone to the other nurse working in the clinic." Dr. Martell was also concerned about the "risk" that "leaving her in position where she would potentially not perform the job duties and a client's rights and religious observations could have been impacted." Dr. Martell explained that, due to non-discrimination conditions of grant funding, "we would not want to jeopardize any of our funding should we discriminate against another employee or a client."

Immediately following her conversation with Plaintiff, Dr. Martell contacted the clinic supervisors to instruct them to temporarily accommodate Plaintiff's limitations. Neither supervisor commented on whether they would have any difficulty making the accommodation.

Other Positions Identified for Plaintiff. Having concluded that she could not continue to accommodate Plaintiff, Dr. Martell felt that the only option was to find "a comparable position to use [Plaintiff's] skill level and her credentialing for." She reached out to Winnebago County's human resources director, Kim Ponder, to see what other positions might be available. Both the County and the Health Department utilized Ponder for human resources issues.

Martell Letter of June 30, 2015. Dr. Martell followed up the June 24 meeting with a letter to Plaintiff dated June 30, 2015. The letter advised Plaintiff that the department had "diligently considered" her request for an accommodation, but that the request was being denied. Dr. Martell stated that the terms of the Health Department's grants required "staff in the clinics to utilize a non-directed approach with our clients." She stated that that Plaintiff could not be segregated from the objected-to job duties "without creating an undue hardship for the other employees in the clinics and the Health Department as a whole."

Dr. Martell's letter stated that two other options were available to Plaintiff:

> While we cannot accommodate you in the Health Department clinics, we can offer some alternatives outside of the clinics. The first position would be as a temporary part-time food inspector for the Health Department. The second would be as an LPN at River Bluff Nursing Home, which is owned by the County of Winnebago. Should you have any questions or be interested in either of these positions, please let me know and we can assist you or direct you to the appropriate personnel to assist you.

The letter concluded by stating that Plaintiff could have the next 14 days to consider her options, and that a temporary accommodation of her objections would be made during that time.

On July 14, 2015, Dr. Martell emailed Plaintiff and asked for a response to the options laid out in her June 30 letter. Dr. Martell learned, however, that Plaintiff had not received the emailed letter, so another copy was given to Plaintiff the same day. In a follow-up phone call, Dr. Martell allowed Plaintiff an additional week's time of temporary accommodation due to the

delay in receiving the June 30 letter. Dr. Martell said that, during this conversation, Plaintiff expressed interest in at least touring the River Bluff nursing home facility.

Activity During the Temporary Period of Accommodation. During the three-week period in which she was temporarily accommodated, Rojas would not work with women's health clients who needed birth control or abortion referrals; she would skip that client's chart and move to the next. She said that the clinic was busy and nurses were frequently grabbing charts for the next patient; if she skipped a chart, the next nurse would pick it up. Rojas testified that there were always other nurses available for the women's health clients she skipped over; there was no additional cost to the clinic; and none of the other nurses complained about the arrangement. She estimated that there were only "one or two" women's health cases that she had to pass over during the three weeks in which she was accommodated.

During the period of temporary accommodation, Rojas continued to provide services in relation to immunizations, pediatrics, pediatric immunizations, refugee services, phlebotomy, and tuberculosis, as well as women's health services which did not implicate her objections. She had no objection to lab testing (including pregnancy, blood tests, STD tests, TB tests, and urinalysis), pediatric care, refugee clinic care; immunizations, and flu shots. She also acted as an interpreter when called on to do so. She had no objection to working alongside those who performed the services to which she objected.

Dr. Martell was asked why, if Plaintiff could be accommodated for 14 days, the accommodation couldn't continue longer. She replied that the clinic would have to "make work for her that she would not find objectionable," such as paperwork or clinic follow-ups, or assign her to do interpreting in various scenarios. However, Plaintiff testified that she was always very busy during the three weeks in which she was temporarily accommodated:

> Actually, I was working very hard to prove to Dr. Martell that I could stay busy through the day. I was very busy. I was, you know, still training ... the other nurses in pediatrics. I was doing everything else. So I was very busy. You know, even our cashier had made the comment, "Are you the only one working back there?" Because I was trying to work extra hard to prove to her that I could do it; that there was plenty of work for me to do ... without having to do [the objected-to services].

Dr. Martell agreed that, after consolidation, there were actually more nurses working together in the same building, and therefore "more nurses available to cover for a nurse if she came across a particular health care matter she could not provide in good conscience." Dr. Martell agreed that she was aware of no patients who were denied services during the three weeks that Plaintiff's objections were accommodated at the clinic.

Plaintiff's decision. Plaintiff interpreted Dr. Martell's June 30, 2015, letter as essentially telling her that she had to do the abortion-related services or she would lose her current job.

Plaintiff felt that the food inspector job being offered to her was "an insult." She felt that she was trained as a nurse, not a food inspector, and she had no experience in the latter.

Plaintiff also felt that the nursing position at the River Bluff nursing home was not viable because her son worked there and she "would be working under him," as he was an RN and she was an LPN. She understood that this would be prohibited under the county's anti-nepotism policy. She also felt that she was a pediatric nurse, not a geriatric nurse. Plaintiff did nothing to explore or learn more about the nursing home position.

On July 16, 2015, Dr. Martell received a telephone call from Plaintiff, who informed Dr. Martell that she would not pursue either of the other two jobs and would submit her two-week letter of resignation. Her letter of resignation was dated July 17, 2015, and was effective July 31, 2015. Plaintiff eventually returned to working at the Walter Lawson Childrens Home. The parties have stipulated that Plaintiff lost salary in the amount of $18,767.15 and pension benefits of $213,088.34 as a result of leaving her employment at the clinic.

Analysis – Healthcare Right of Conscience Act

Count I of Plaintiff's Second-Amended Complaint is a claim under the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq.* ("Conscience Act"). Before engaging in the legal analysis, however, it is perhaps useful to set forth a couple of key factual findings. First, the Court finds that Plaintiff did not voluntarily leave her position; she had to leave unless she compromised her objections of conscience. If she could have remained on the job without performing the services to which she objected, she clearly would have done so. Plaintiff left her job only because staying in it would have required her to participate in the provision of services to which she had a moral objection.

Second, the Court find that the Health Department prevented Plaintiff from continuing in her prior position specifically because of her objections of conscience to assisting in abortion referrals and birth-control services. The Health Department "discriminated" against Plaintiff by refusing to let her stay in her job, i.e., it treated her differently from others who did not make such objections and remained on the job. The Health Department wished to "transfer" Plaintiff out of her job because of her objections. Finally, it is clear that the Health Department was willing to terminate Plaintiff as a result of her refusal to abandon her objections, and that it would have done so had Plaintiff not resigned or agreed to a transfer.

The specific words expressed above might superficially trigger the application of the Conscience Act, but the analysis requires something more. The Appellate Court's earlier decision in this case establishes that it is not *always* a violation of the Act to discriminate on these bases. Reaching that conclusion requires careful consideration of what is allowed under the Conscience Act, and what is prohibited by it.

The policy underlying the Conscience Act was stated as follows by the legislature:

> It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with

> other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in providing, paying for, or refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

745 ILCS 70/2.

The provision of the Conscience Act directly at issue here is Section 5, which states as follows:

> Discrimination. It shall be unlawful for any person, public or private institution, or public official to discriminate against any person in any manner, including but not limited to, licensing, hiring, promotion, transfer, staff appointment, hospital, managed care entity, or any other privileges, because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.

745 ILCS 70/5.

As noted above, the Court has found that the Health Department discriminated against Plaintiff as a result of her objections of conscience, and they tried to effectively transfer her because of them. In the prior appeal in this case, however, the Appellate Court clarified that a transfer for these reasons does not *per se* constitute a violation of the Conscience Act:

> Thus, by prohibiting discrimination against one who exercises the right of personal conscience, the statute reflects an intent to protect that right in the provision of health care services. Robotically proscribing an employer from transferring an employee to a job that does not include a duty to which the employee has invoked a conscience-based objection would be inconsistent with the statute's clear purpose.
>
> Moreover, inherent in the statute is the recognition that health care facilities are in the business of providing health care services that might include those that are contrary to an employee's conscience. See 745 ILCS 70/3(a), (d) (West 2014) (defining, respectively, "health care" and "health care facility"). If plaintiffs' position that a transfer necessarily violates the statute were adopted, health care facilities would be required to allow an employee who invokes a conscience-based objection to particular job duties to remain in the employee's position and not perform those duties. But the objectionable job duties might constitute a major portion or all of the employee's work. The legislature could not have intended to require the employer to pay an employee for performing no duties at the workplace. And there might be an instance where the objecting employee is the

> only employee who performs the particular duties. The legislature could not have intended that the employer effectively cease its operations, leaving no one employed at the business. We are obliged to construe the statute in a manner that avoids such absurd, unreasonable, or unjust results. See *Palm*, 2018 IL 123152, ¶ 21, 433 Ill.Dec. 104, 131 N.E.3d 462.

Rojas v. Martell, 2020 IL App (2d) 190215, ¶¶ 56-57.

This guidance from the Appellate Court is extremely helpful in addressing the instant case. It is not *per se* a violation of the Conscience Act for the Health Department to have attempted to transfer Plaintiff from her position in the combined clinic. Doing so might be permissible if the objectionable duties "constitute a major portion or all of" Plaintiff's work.

Here, however, the objected-to services do not comprise all, or even a majority, of Plaintiff's work. Plaintiff reviewed Defendant's' Exhibit 28, which is agreed to be the job description for that part of her position in which she would be acting as a "Women's Health Clinic Nurse." The job description lists 13 individual job responsibilities. It would be unwise to assume that each one should be assumed to represent 1/13 of the position's workload; the record is unclear as to the weight to be given to each. However, Plaintiff testified that her objections to providing abortion referral or birth control services would implicate only five of the numbered duties. Furthermore, as to those five, her objections would not prevent her from performing those duties in all cases, but only in those cases which also involve abortion referral or birth control services.

Again, the Court will not assume that each of Plaintiff's 13 job duties accounts for exactly 1/13 of her time on the job, but those 13 women's health job duties would constitute only about half of Plaintiff's job in the combined clinic; of the 13 job duties applicable to the women's health half of her job, Plaintiff could undertake 8 of the 13 job duties without limitation; and as to the five job duties which would be implicated by her objections, her objections would prevent her performing those five duties only in cases that related to abortion services or contraception. It is difficult to construe the implicated job duties as "a major portion or all of" Plaintiff's job when a *minority,* of *half* of her job, will only *sometimes* be implicated.

The most concrete evidence of the degree to which Plaintiff's objection interfered with her ability to do her job is the experience of the three-week period in which her objections were accommodated. During that time, Plaintiff estimated that there were only 1-2 instances in which she had to "skip" a patient because it would require her to address one of the objected-to services. Plaintiff remained busy at all times with the many other types of patient services at the clinic. There was no need to "make work" for Plaintiff, as Dr. Martell speculated might occur. Plaintiff's testimony in this regard is unrebutted by any witness with personal knowledge (including Dr. Martell, who was not involved in day-to-day operations at the clinic).

Dr. Martell identified a variety of job duties which *might* implicate the objected-to duties, but this fails to quantify how much of Plaintiff's actual work day might fall into this category. In addition, Dr. Martell's interpretation of the scope of Plaintiff's objections appeared more expansive than Plaintiff's own statement. For example, Plaintiff testified that she could obtain a patient's history without any limitation; Dr. Martell, however, felt that Plaintiff would be limited

if the history involved birth control. Needless to say, the ability to accommodate needs to be assessed on the basis of the actual objections made, not exaggerations of them.

Additionally, it is difficult to understand Dr. Martell's view that Plaintiff's LPN licensure would be an impediment to accommodation. Dr. Martell stated that Plaintiff's status as an LPN means that she could not be substituted for an RN, and that there were no other LPN's who could "job share" with Plaintiff:

> In all situations, the LPN could not be substituted for an RN, and so that became the challenge. There were no other LPN positions that we could job share with, that we could split, that had to find a comparable position to use her skill level and credentialing for, and so she could not be simply placed into an RN position for which she was not qualified for.

On closer examination, this rationale simply doesn't hold up.

First, it is important to note that while Plaintiff was the only LPN in the clinic, there was no evidence that the duties of an LPN were strictly segregated and different from the duties of the RNs. An RN has to meet greater educational requirements and is able to do some things that an LPN cannot, such as assessments. However, the duties of an RN and an LPN in the consolidated clinic were in many respects the same; both RN and LPNs could administer medications and provide counseling and patient education. Plaintiff testified that she "did everything that the RNs were doing in the clinic area." Defendant's Exhibit 4 shows the "cross-training" undertaken with respect to clinic nurses in advance of the consolidation; the training reflects no differentiation between RNs and Plaintiff as the sole LPN. While there might be occasional services needed that only an RN could perform, the testimony suggests that the RNs and LPNs were otherwise interchangeable. Consequently, unlike the situations of the APNs (who Dr. Martell described as "clinician[s]), there would be no need to "match" Plaintiff with another LPN in a job-sharing arrangement in order to accommodate her. As compared to Savage, who was accommodated by having only *one* other APN to handle any services to which she objected, there were *multiple* nurses who could perform the services to which Plaintiff objected. In Plaintiff's case, she was effectively interchangeable with any RN; even if Plaintiff could not do everything an RN could do, any RN could do anything Plaintiff could do.

Second, in illustration of the foregoing, Plaintiff would have been allowed to continue at the clinic if she had been willing to perform the objected-to services. The fact that she was an LPN – the only LPN – did not affect her utility to the clinic.[2] The licensure difference was not an impediment that needed to be overcome; the only issue was whether she could continue to serve as a clinic nurse without being required to perform the specific services to which she objected.

Third, the record suggests that, whenever limitations due to licensure arose, they were easily handled. If Plaintiff would encounter a service outside of her licensure, she would have to pass that matter off to one of the RNs. But this presents a question: if a nurse's inability to perform some services due to *licensure* could be accommodated, why couldn't a limitation arising from a

[2] The clinic did eventually go to an all-RN staff, but this was later and not suggested as a reason why Plaintiff could not be retained in the clinic at the time the decisions at issue here were made.

religious objection? Far from being a reason as to why Plaintiff's objection could not be accommodated, Plaintiff's ability to function with a lesser degree of license provides an *illustration* of how accommodation could work.

Finally, although Dr. Martell felt that accommodating Plaintiff's request could impose a hardship on other employees, this is a conclusion unsupported by other evidence. It is certainly true that, if Plaintiff spent no time on the objected-to services, other nurses would have to spend more time on those services. However, it is also necessarily true that Plaintiff would spend *more* of her time on the many other services to which she did not object, so other nurses would have to spend *less* of their time on them; it is a zero-sum proposition. Dr. Martell acknowledged that none of the clinic nurses ever informed her that accommodating Plaintiff was causing them any hardship, and no on-site supervisor testified to any such issues. Dr. Martell also acknowledged that, after Plaintiff's departure, they were even *more* shorthanded.

As another basis offered as to why they could not accommodate Plaintiff, the Health Department notes that it is obligated under the terms of many grants to provide "non-directed" and non-judgmental care to its patients. In other words, the staff must present patients with their options and let the patient decide without advocating for a position. However, Plaintiff has not disputed the clinic's obligation to provide non-directed care; she simply asked that she not be the one to provide it when it came to abortion referrals or birth control. The question isn't whether the Health Department will continue to provide non-directed care to its patients; instead, the question is whether it is necessary that *Plaintiff* provide that care in the cases where she has an objection of conscience.

Dr. Martell explained that, due to non-discrimination conditions of grant funding, "we would not want to jeopardize any of our funding should we discriminate against another employee or a client." However, if Plaintiff's objections were accommodated, what is the basis for such a concern? Accommodation of Plaintiff's concerns insulates, rather than exposes, the Health Department from these concerns. Furthermore, Plaintiff never demonstrated any effort or intention to interject her views into patient decisions; she was simply asking not to be involved in certain aspects of care. This choice is what the Conscience Act is designed to protect.

Listening closely to the Health Department's evidence and arguments, it appears that its real concern is whether Plaintiff could be *trusted* to deliver non-directed care even in situations where she had no express objection, but which might tangentially involve abortion or birth control. As the Health Department stated in a prior brief, it was "concerned that an employee with Plaintiff's objections may have a difficult time taking a complete medical history in a nonjudgmental fashion if the medical history involved abortion and birth control." (Defendant's Summary Judgment Memorandum, July 3, 2018.) Dr. Martell testified to her concern about "leaving [Plaintiff] in position where she would potentially not perform the job duties."

Requiring Plaintiff to transfer out of her job because of things she *might* do – but has exhibited no intention or inclination to do, even during her three-week period of accommodation – gives short shrift to Plaintiff's rights under the Conscience Act. Note that no concerns were expressed that Christine Savage "would potentially not perform the job duties" of an APN when her objections were accommodated. Indeed, Dr. Martell expressed that she herself had personal

beliefs that could be characterized as "pro-life," but she did not feel that such beliefs would affect her own work. For her part, Plaintiff demonstrated a thoughtful understanding of her limited objections of conscience. For example, she had no objection to acting as an *interpreter* when the subject turned to abortion or birth control; she just objected to providing such services herself. It would seem that this is precisely the type of objection that the Conscience Act was designed to protect. Deciding that Plaintiff could not be trusted in any aspect of her clinic work because of her objections of conscience clearly constitutes "discrimination" against her in violation of the Conscience Act.

Damages and Mitigation

The parties have stipulated that Plaintiff's lost wages are $18,767.15, and that she has also lost $213.088.34 in pension benefits. However, the Health Department argues that Plaintiff has failed to mitigate her damages by seeking other employment. Specifically, the Health Department argues that Plaintiff should have pursued the other job options presented to her.

The duty to mitigate damages requires the injured party to exercise reasonable diligence and ordinary care to minimize its damages. *Mayster v. Santacruz*, 2020 IL App (2d) 190840, ¶ 34. The failure to mitigate damages is an affirmative defense that must be pleaded and proved by the defendant. *Id.*, at ¶ 31. When an employer breaches an employment contract, the employee generally has a duty to mitigate damages by seeking alternate employment. *Reed v. Getco, LLC*, 2016 IL App (1st) 151801, ¶ 38.

Plaintiff argues that the Health Department failed to prove that there were substantially equivalent positions available to her. With respect to the food inspector position, the Court agrees. Plaintiff was employed in the nursing field, and the food inspector position would have been in an entirely different field.

With respect to the nursing home position, however, the Court finds that this was substantially equivalent to Plaintiff's position at the consolidated clinics. It would have remained a position within the nursing field. Instead of working in a wide range of patient populations at the consolidated clinics, Plaintiff would have been working with a more narrow population (the elderly and those otherwise confined to nursing-home care). However, both before and after taking the position at issue, Plaintiff had worked with the Walter Lawson Children's Home, which while presenting a different demographic slice still presented an institutionalized population. There is no dispute that the pay level at the nursing home job would have been at least equivalent to what Plaintiff had been earning. And, as discussed below, the nursing home position would have preserved Plaintiff's pension benefits.

Plaintiff argues that the nursing home position was only a possibility, and that the Health Department could not ensure she would get the job. However, former River Bluff nursing home administrator Pam Gentner testified that nurses applying for jobs would go through the County's HR department for the application, and then they are interviewed before they are hired. Gentner testified that, in 2015, nurses were hard to find. The nursing home had a preference for nurses who had prior experience working for the county because they had a "track record." If they were vested in the pension plan, Gentner felt they were more likely to stay with their jobs and

therefore more desirable employees. She had no doubt that Plaintiff would have been hired if she had applied.

Plaintiff's failure to even consider the nursing home position was a result of her understanding – which was clearly mistaken – that a nepotism policy would keep her from working where her son already worked. No one else shared this understanding. When Gentner spoke with Plaintiff's son, she actually encouraged him to tell Plaintiff to apply. Gentner was familiar with the county's nepotism policy, but with multiple shifts and units she felt they would be able to prevent Plaintiff from having to report directly to her son. In short, the nepotism policy was not likely to prevent Plaintiff from taking advantage of this opportunity.

Plaintiff also argues that an employee is not required to mitigate damages by taking a different position with her original employer; there is authority for such a proposition:

> However, when the alternate employment is, in fact, an offer of reemployment by the original employer, exceptions arise to the general rule of mitigation. Depending upon the substance of the offer and the circumstances under which it is made, the employee need not always accept such an offer or be precluded from seeking damages. It has long been recognized that a discharged employee need not accept an offer of reemployment where to do so would constitute a disadvantageous renegotiation of his original contract or an abandonment of his rights and remedies thereunder. (*Trawick v. Peoria & Ft. C. St. Ry. Co.* (1896), 68 Ill.App. 156, 159; *Claeson v. Hennessey* (1959), 20 Ill.App.2d 437, 443, 156 N.E.2d 234, 238.) In *Trawick*, the court held that an employee had no duty to continue employment at a reduced wage since to do so would have operated as an abandonment of his rights under his original contract. Similarly in *Claeson*, the employer's offer to reemploy two weeks after his breach of the employment contract was held not to be a valid defense to the action.

Schwarze v. Solo Cup Co., 112 Ill. App. 3d 632, 638, 445 N.E.2d 872, 876 (2d Dist. 1983).

This Court doubts whether this line of cases should apply here because of Plaintiff's claim for lost pension benefits. Plaintiff's claimed damages from her loss of pension benefits is the largest part of her claim, outweighing her lost wage claim by a factor of more than 11 to 1. No case has ever examined whether a plaintiff fails to mitigate damages by refusing alternate employment with the original employer that could uniquely prevent the greatest part of the damages claim – the lost pension benefits. Winnebago County's River Bluff nursing home is one of the few employers which could have allowed Plaintiff to protect her pension benefits. Refusing to even consider an offer of alternate nursing employment under these circumstances may well take this case out of the scope of the rule set forth above.

However, the technical basis to invoke the argument – that the new position would be with the same employer – is not present in this case. The Winnebago County Health Department and the County of Winnebago both have "Winnebago" in their names, but they aren't the same entity. Despite the common geographic descriptor in their titles, the mayor of New York doesn't get to conduct the New York Philharmonic or play first base for the Yankees; they are separate legal

entities, just as the County of Winnebago and the Winnebago County Health Department are separate legal entities. Under Illinois law, each county's health department is managed not by the County Board, but by a separate and distinct Board of Health. 55 ILCS 5/5-25012. It is the health department, not the county, which is vested with the "exclusive right to employ and discharge its officers and employees." 55 ILCS 5/5-25015. This is true even if all "county" employees (i.e., employees of both the county and various independent officeholders) are paid through the county treasurer's office. It is true regardless of whether they collaborate on things such as HR management. This is the type of arrangement with which the "Winnebago County" Circuit Court is intimately familiar, as the court's own employees receive a county paycheck but remain employees of the State judicial branch:

> Thus, not only are nonjudicial employees of a court the employees of a State agency rather than of a county, but even the counties' salary-setting and facilities-providing function is subject to the courts' own ultimate power to ensure reasonable adequacy. Except for setting and paying salaries and providing facilities subject to ultimate court power, the counties are entitled to no other role in regard to the courts' nonjudicial employees that might arguably be considered the role of a joint employer.

Orenic v. Illinois State Labor Relations Bd., 127 Ill. 2d 453, 480, 537 N.E.2d 784, 797 (1989) (prohibiting the Labor Relations Board from classifying counties as "joint" employers of a circuit court's employees).

So too it is with the employees of the Health Department, who are hired, fired, and directed under the authority of the Winnebago County Board of Health – and not the Winnebago County Board. Because the position available to Plaintiff at the River Bluff nursing home was under the auspices of Winnebago County, and not the Health Department, the rule stated in cases like *Schwarze* does not apply.

For the reasons stated above, the Court concludes that Plaintiff failed to reasonably mitigate her damages by pursuing a nursing position at the River Bluff nursing home. Doing so would have prevented all of her damages, both the wage loss claim and the pension benefits claim. That does not mean, however, that Plaintiff recovers nothing, because the Conscience Act specifically provides that "in no case shall recovery be less than $2,500 for each violation in addition to costs of the suit and reasonable attorney's fees." 745 ILCS 70/12. Consequently, the Court awards Plaintiff the sum of $2,500 for the Health Department's violation discussed above. The question of reasonable attorney fees is reserved.

Religious Freedom Restoration Act

The foregoing conclusion makes it unnecessary for the Court to consider Plaintiff's claim under Illinois' Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* No greater or different recovery could be had under that statute.

One point, however, deserves comment. Earlier in this case, the Health Department advanced the argument that it cannot have burdened Plaintiff's free exercise because, as an at-will employee, Plaintiff had no "legitimate expectation of remaining in her preferred position." The Court fairly easily dismissed this argument in deciding the cross-motions for summary judgment, and it was not well developed. Now, however, the Health Department has articulated a more nuanced version of that argument, citing authority that suggests a different *standard* for determining such claims against the government as an employer. See, e.g., *Kukla v. Village of Antioch,* 647 F. Supp. 799, 805 (N.D. Ill. 1986). While the Court does not need to reach the issue, it simply notes that the argument is more fully developed at this stage than it was at summary judgment.

Conclusion

As stated at the outset, this case presents legitimate interests in conflict. Plaintiff had a right to have her objections of conscience respected; the Health Department had the right to run its clinic and provide the services it was obligated to provide. As discussed above, the conflict here was not unavoidable; both goals could have been achieved. This isn't a matter of the Health Department not trying to accommodate Plaintiff; it actually *did* accommodate her, successfully, for three weeks. The Court has concluded that the Health Department could have reasonably accommodated Plaintiff's objections without removing her from her job.

The Appellate Court clarified in its early decision in this case that cases decided under the Conscience Act are not to be analyzed under the familiar structure seen in Title VII cases; this is something that the Health Department could not have known at the time its decisions in this case were made. Now, however, given the paucity of cases under the Act, the parameters of its requirements may have to be developed case by case. Perhaps this case will one day stand for the proposition that, when one member of a team of employees makes an objection of conscience to performing a minority of her job duties, the employer should be required to accommodate the employee in her present position if doing so does not unreasonably compromise the employer's operations.

10/25/21
Date

Hon. Eugene G. Doherty, Circuit Judge