**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

DEANNA CHEETHAM,

Plaintiff, CASE NO. 3:06-cv-704-J-PAM-TEM

vs.

CSX TRANSPORTATION, et al.,

Defendant.

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## REPORT AND RECOMMENDATION[1]

This case is before the Court on Plaintiff's Motion for Writ of Execution (Doc. #319), filed September 30, 2011; Plaintiff's Brief in Support of the Motion for Writ of Execution (Doc. #321), filed September 30, 2011; and Defendant's response thereto (Doc. #322), filed October 13, 2011. On December 15, 2011, the United States filed a brief as *amicus curiae* (Doc. #325), pursuant to the Court's November 17, 2011 order inviting its participation (Doc. #323). Plaintiff a response to the United States' *amicus* brief on January 6, 2012 (Doc. #326).

## Background

In the instant action, Plaintiff brought a claim for wrongful termination under the Family and Medical Leave Act ("FMLA"). Following a jury trial, Plaintiff was awarded "damages to compensate for loss of wages and benefits" in the amount of $225,100.

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[1] Any party may file and serve specific, written objections hereto within FOURTEEN (14) DAYS after service of this Report and Recommendation. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from attacking factual findings on appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); and, Local Rule 6.02(a), United States District Court for the Middle District of Florida.

(Doc. #262). An amended judgment was entered in this case on July 6, 2011, directing Defendant CSX Transportation ("CSX") to pay Plaintiff damages in the amount of $199,056 and attorney's fees and costs in the amount of $66,599.12, for a total amount of $265,655.12.[2]

The issue before the Court now is whether a damages award equal to lost wages and benefits under the FMLA constitutes "wages" subject to income and employment tax withholding obligations under applicable law.

Defendant maintains that it will withhold all applicable federal and state taxes from the $199,056 on the basis that the judgment constitutes wages subject to payroll deductions.[3] In support of its argument, Defendant notes that this amount represents the amount of lost back pay that Plaintiff claimed at trial she was entitled to recover.[4]

Plaintiff maintains the judgment must be satisfied in the amount as written. Plaintiff argues Defendant's position is against authority established by federal courts finding that a judgment under the FMLA does not constitute wages subject to tax withholding obligations, based upon the statutory language of the FMLA. Plaintiff cites to three district court cases wherein the court found, based upon the unique language utilized in the FMLA statute, damages awards under the FMLA are not subject to statutory deductions. *See*

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[2] The Court found the damages awarded by the jury were greater than those requested by Plaintiff, and a remittitur was appropriate. (Doc. #300 at 13-14). Thus, the Court reduced Plaintiff's damages to the amount requested: $199,056. (Doc. #300 at 14).

[3] CSXT acknowledges it must pay $66,599.12 in attorney's fees and costs, and this amount is thus not in dispute.

[4] The Trial Transcript reflects the following from Plaintiff's counsel: "So her total wage loss after deducting her post-termination earnings is $199,055.79. That's what we are asking you award in terms of damages to replace her lost income." Trial Tr. Vol. III: 71.

*Churchill v. Star Enterprises*, 3 F.Supp.2d 622 (E.D. Pa. 1998); *Longstreth v. Copple*, 101 F.Supp.2d 776 (N.D. Iowa 2000); *Carr v. Fresenius Medical Care*, No. 05-2228, 2006 WL 1339970 (E.D. Pa. May 16, 2006).

Defendant has not cited, and this Court has not found, any cases in which federal courts have held damages awards under the FMLA are subject to statutory deductions. However, Defendant contends that awards for "back pay" under other employment statutes, such as Title VII and ERISA, constitute wages subject to tax withholding. *See Rivera v. Baker West, Inc.*, 430 F.3d 1253 (9th Cir. 2005); *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999). Defendant also contends that if it is ordered to pay the entire $199,056 without any deductions, it could be liable to the IRS for failing to withhold necessary taxes. Defendant argues Plaintiff may request a refund from the IRS for the income and employment taxes that CSX withheld if she believes the withholding is improper.

In *Kendrick v. Jefferson County Board of Education*, 13 F.3d 1510 (11th Cir. 1994), the Eleventh Circuit remanded to the district court for determination of whether a back pay award under § 1983 is subject to payroll deductions for taxes. *Id.* at 1514-15. The Eleventh Circuit noted the Internal Revenue Service ("IRS") had not been heard from in the case. *Id.* at 1515. "Given the IRS's expertise and its statutory responsibility, courts should be reluctant to decide important tax questions without giving the IRS an opportunity to express its views." *Id.* The Eleventh Circuit ordered the district court to provide the IRS and relevant state and local taxing authorities the opportunity "to express their views, through an appropriate means such as *amicus curiae* participation, on the taxation issues

within their area of responsibility." *Id.*

As this case involved a similar question of taxation, but under a distinct statute, the FMLA, the undersigned found participation by the IRS would be helpful. Therefore, the Court invited the Commissioner of Internal Revenue to file an *amicus curiae* brief (Doc. #323). Specifically, the Court requested the IRS's position on whether an award for damages equal to lost wages and benefits under the FMLA constitutes "wages" subject to income and employment tax withholding obligations under applicable law, and whether Defendant would be liable for failure to withhold necessary taxes if it paid the full amount awarded without deductions. The United States filed its *amicus* brief on December 15, 2011 (Doc. #325).

**Analysis**

The United States averred damages equal to lost wages and benefits under the FMLA are "wages" subject to income and employment tax withholding obligations under applicable federal law. Thus, it claims the $199,056 in damages awarded to Plaintiff is subject to withholding obligations under the Internal Revenue Code because this amount is equal to the Plaintiff's lost pay. Further, the United States claimed if Defendant fails to withhold the federal taxes due on the damages award, it would be liable to the government for those taxes, unless it could demonstrate that Plaintiff included the damages award on her income tax return and paid the taxes due. For the reasons to be discussed herein, the undersigned agrees with the United States' well-reasoned position on this issue.

Under the Internal Revenue Code ("IRC"), federal income taxes and Railroad

Retirement Tax Act ("RRTA")[5] taxes must be withheld from wages paid to employees. RRTA taxes "shall be collected by the employer of the taxpayer by deducting the amount of the taxes from the compensation of the employee as and when paid." 26 U.S.C. § 3202.[6] The IRC requires "every employer making payment of wages shall deduct and withhold upon such wages" a federal income tax determined by the Secretary of the Treasury. 26 U.S.C. § 3402(a). "Wages" are defined to include "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," unless specifically excepted. 26 U.S.C. § 3121(a). "Remuneration for employment" constitutes wages regardless of the name by which it is designated and even though the employer and employee relationship no longer exists at the time the remuneration is paid. 26 C.F.R. § 31.3121(a)-1(c), (i).

Plaintiff argues the damage award does not represent "back wages" because no services were performed by the Plaintiff on behalf of the Defendant during the relevant time period. However, this argument has been rejected by the Supreme Court in a wrongful discharge case under the National Labor Relations Act ("NLRA").

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[5] The RRTA tax is an employment tax similar to, and in lieu of, the Federal Insurance Contributions Act ("FICA") tax, on compensation to railroad employees by employers. *See* 26 U.S.C. § 3201, et seq. Railroad employers collect and pay RRTA taxes rather than FICA taxes. *Id.* The RRTA imposes employment taxes on employees and employers measured by rail workers' "compensation . . . for services rendered." 26 U.S.C. §§ 3201(a), 3221(a). The distinction between RRTA taxes and FICA taxes does not affect the issues before this Court. The term "compensation" in the RRTA has the same meaning as the term "wages" in the FICA. Treas. Reg. § 31.3231(e)-1(a)(1).

[6] This mirrors the language in 26 U.S.C. § 3102, stating FICA taxes "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." As stated previously, the term "compensation" in the RRTA has the same meaning as the term "wages" in the FICA. Treas. Reg. § 31.3231(e)-1(a)(1).

In *Social Security Board v. Nierotko*, the Supreme Court held that back pay awarded to an employee who was found to have been wrongfully discharged under the NLRA constituted wages for purposes of the Social Security Act. 327 U.S. 358 (1946). The Court emphasized that "wages" and "employment" should be interpreted broadly:

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that service can only be produced activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

*Id.* at 366-67.

Applying this principle, courts have repeatedly held that awards that reflect compensation that would have been paid to the employee, i.e. back pay or future pay, constitutes "wages" subject to withholding obligations. Following the Supreme Court's reasoning, the Sixth Circuit held settlement proceeds in an ERISA action that represented back wages and future wages were "wages" subject to tax withholding. *Gerbec v. United States*, 164 F.3d 1015, 1026 (6th Cir. 1999). The court explained,

> The phrase "remuneration for employment" as it appears in § 3121 should be interpreted broadly. We hold that the phrase "remuneration for employment" includes certain compensation in the employer-employee relationship for which no actual services were performed. . . . The holding in *Nierotko* clearly supports the conclusion that awards representing a loss in wages, both back wages and future wages, that otherwise would have been paid, reflect compensation paid to the employee because of the employee-employer relationship, regardless of whether the employee actually worked during the time period in question.

*Id.* (internal footnotes and citations omitted); see also *Rivera v. Baker West, Inc.*, 430 F.3d 1253, 1258-59 (9th Cir. 2005) (holding award for back pay and lost wages under Title VII constituted "wages" subject to income tax withholding); *Mayberry v. United States*, 151

F.3d 855, 860 (8th Cir. 1998) (holding compensation based on pre-layoff earnings and earnings impairment additur constituted "wages" subject to FICA tax withholding); *Hemelt v. United States*, 122 F.3d 204, 209-10 (4th Cir. 1997) (holding ERISA settlement award representing compensation for lost wages is subject to FICA tax withholding); *Blim v. Western Elec. Co.,* 731 F.2d 1473, 1480 n.2 (10th Cir. 1984) ("Back pay is taxable to the plaintiffs and subject to income tax and social security withholding."); *Archie v. Grand Central Partnership,* 86 F.Supp.2d 262, 273 (S.D.N.Y. 2000) ("[C]ourts are generally of one mind that withholding from back wages must be made, whether in the FLSA context or analogous employment discrimination contexts."); *Melani v. Board of Higher Education*, 652 F. Supp. 43, 48 (S.D.N.Y. 1986) (holding back pay award under Title VII for the loss of prospective employment because of discriminatory hiring practices subject to income tax and FICA withholding), *aff'd without published op.,* 814 F.2d 653 (2nd Cir. 1987). *But see Dotson v. United States*, 87 F.3d 682, 690 (5th Cir. 1996) (portion of settlement paid for "loss in earning capacity" was not "for services already performed" and thus not subject to wage taxation).

In the instant case, the trial transcript indicates that the damages award to Plaintiff was based on her total wage loss. Plaintiff argued for damages "to replace her lost income" and alleged "her total wage loss after deducting her post-termination earnings is $199,055.79." Trial Tr. Vol. III: 71. Thus, it appears the entire $199,056 award is to compensate Plaintiff for wages she would have been paid by Defendant had Plaintiff not been wrongfully terminated. Therefore, the award for lost wages in the instant case appears to fall squarely within the same category of awards found to constitute "wages"

subject to tax withholding in *Nierotko* and its progeny, notwithstanding the fact that Plaintiff did not perform any services for Defendant during that time.

Plaintiff argues the unique statutory language of the FMLA, which authorizes damages in an amount "equal to" any denied or lost wages, warrants different treatment of awards under its provisions. The remedial provision of the FMLA 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
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> (B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1)(A)(i)(1).

Plaintiff cites to three district court cases wherein the court found, based upon the unique language utilized in the FMLA statute, damages awards under the FMLA are not subject to statutory deductions. *See Churchill v. Star Enterprises*, 3 F.Supp.2d 622 (E.D.

Pa. 1998); *Longstreth v. Copple*, 101 F.Supp.2d 776 (N.D. Iowa 2000); *Carr v. Fresenius Medical Care*, No. 05-2228, 2006 WL 1339970 (E.D. Pa. May 16, 2006).

In *Longstreth*, a former employee brought suit against her former employer and her former supervisor under the FMLA. *Longstreth*, 101 F.Supp.2d at 776. Defendants served an Offer of Judgment in the amount of $40,000, which the plaintiff accepted. *Id.* The offer did not indicate whether the amount represented lost past income and benefits, lost future income and benefits, actual and compensatory damages, or liquidated damages. *Id.* Nor did the offer indicate which portion represented damages payable by the corporation and those payable by the individual supervisor. *Id.* The court found the "equal to the amount of" language suggested Congress intended to allow for individual liability under the FMLA, because individuals held liable under the FMLA would be required to pay damages "equal to the amount of" any denied or lost wages, as opposed to "back pay." *Id.* at 780. The court concluded "the inclusion of the language 'equal to the amount of' recognizes that damages available under the FMLA do not *per se* constitute wages that are subject to statutory deductions." *Id.* at 781. The court then held that, because the defendants did not specify whether their settlement consisted of damages payable from the individual defendant (which would not trigger withholding obligations) or the defendant corporation (which would trigger withholding obligations), the defendants could not withhold taxes. *Id.*

Thus, contrary to Plaintiff's assertion, the court in *Longstreth* did not hold "that an employer may not withhold statutory deductions from an FMLA damages award" because "damages under the Act do not constitute wages." (Doc. #321, at 2). Rather, the court held that damages do not "*per se* constitute wages that are subject to statutory deductions"

because the FMLA provides for individual liability, *id.* at 781, and it was "possible that the $40,000.00 represent[ed] damages payable by [the individual supervisor] who has no obligation to withhold statutory deductions." *Id.* at 778. The court held plaintiff was entitled to the full amount of the award without withholdings, "because the defendants failed to allocate which portion of the $40,000.00 judgment represented payment by [the employer corporation] as opposed to payment by [the individual supervisor]," thus making it impossible for the court "to ascertain what amount of the $40,000.00 constitutes wages for purposes of statutory wage deductions." *Id.* Further, in contrast to Plaintiff's position, *Longstreth* actually stands for the proposition that an award which represents compensation from the defendant corporation to an employee would be subject to withholding obligations. *See id.* at 777-78 ("The court agrees with the defendants' statement that MCI is required by federal and state law to withhold from wages paid to its employees amounts owed by the employees for statutory wage deductions. . . . [H]ad MCI included language in the Offer of Judgment indicating that the $40,000 made payable to Longstreth represented payment on behalf of both MCI and Tom Copple, MCI's withholding of statutory deductions would have been proper.").

In *Churchill*, the plaintiff sued her former employer and two former supervisors under the FMLA. *Churchill*, 3 F.Supp.2d at 623. The jury returned a verdict of $8,609.02 in her favor, representing "damages equal to the amount of any wages, salary, employment benefits or other compensation denied or lost to such employees by reason of the violation" of the FMLA. *Id.* The court added prejudgment statutory interest and concluded liquidated damages, as well as reinstatement, were warranted. *Id.* Judgment was entered against

the defendants in the amount of $18,337.22. In holding that the award was not subject to tax withholding, the court reasoned,

> In this action, plaintiff, who had been terminated from her job, sought damages for the period when she was an ex-employee. Thus, the jury's award does not and cannot represent wages for services performed since she performed none during the relevant time frame. The FMLA 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.

*Id.* at 624. The court also reasoned that the jury verdict did not delineate between lost wages and lost employment benefits, and noted the IRC excludes certain employee benefits from the definition of "wages." *Id.* Thus, "even if withholding were otherwise appropriate, it is not possible to determine the proper amount in this case." *Id.*

Likewise, the court in *Carr* also focused on the "equal to" language found in the FMLA. In *Carr*, the plaintiff brought suit against her former employer and two supervisors under the FMLA. *Carr*, 2006 WL 1339970, at *1. The parties entered into a settlement agreement, but disagreed as to whether the portion of the settlement representing "back pay" was subject to withholding for federal and state income and payroll taxes. *Id.* The court held, "[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. As such, an award or settlement for an FMLA claim does not constitute 'wages' subject to withholding under the tax codes." *Id.* at *2 (internal footnotes omitted). The court then stated, "We cannot and will not assume that where Congress referred to 'damages equal to' wages it meant the same thing as 'wages.'" *Id.* at *3.

The court relied heavily on the decision in *Churchill* and agreed that damages could

not represent remuneration for services performed by the plaintiff because there was not an employee/employer relationship between the two when the loss of "back pay" occurred. *Id.* at *3. The court distinguished *Nierotko* on the grounds that it was decided in the context of an employee who was reinstated, "such that an employment relationship between the employer and employee continued after the improper discharge," and it did not involve a claim made under a remedial scheme which used 'equal to the amount of' language. *Id.* at *4.

Thus, in both *Churchill* and *Carr*, the Eastern District of Pennsylvania reasoned FMLA damages could not be wages for withholding tax purposes because the damages "cannot represent wages for services performed since [the plaintiff] performed none during the relevant time frame." *Carr*, 2006 WL 1339970 at *3; *Churchill*, 3 F.Supp.2d at 624. As discussed previously, the Supreme Court has expressly rejected the idea that the determination of whether taxes must be withheld from a damages award depends upon whether services were actually performed by the employee.

> The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done." We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind *import breadth of coverage*. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

*Nierotko*, 327 U.S. at 355-56 (footnotes omitted) (emphasis added). Relying on *Nierotko*, several circuits have followed the Supreme Court's guidance that "wages" and

"employment" should be interpreted broadly in the context of employment statutes, including ERISA, Title VII, and the ADEA. *See Gerbec*, 164 F.3d at 1026 (ERISA); *Rivera*, 430 F.3d at 1258-59 (Title VII); *Blim*, 731 F.2d at 1480 n.2 (ADEA).

The courts in *Churchill* and *Carr* also placed significant emphasis on the "unique" language of the FMLA to distinguish it from the previously employment statutes, holding the "equal to" language provided for damages representing something other than lost wages or back pay. However, the undersigned does not believe that this language mandates an award for lost wages awarded under the FMLA be treated differently from almost every other type of back pay award. The plain language of the statute provides that plaintiff is entitled to an award "equal to" three categories of damages – lost wages or actual monetary damages, plus interest, plus liquidated damages if warranted. As Defendant aptly puts it, "the most logical and plain interpretation of these provisions when read together is that 'damages equal to' is an acknowledgment of the fact that there are three separate amounts that (if awarded) can be added together to arrive at a total damages award that is 'equal to' – 'the amount of' lost wages (or other compensation), plus interest on that amount, plus any liquidated damages." (Doc. #322 at 5-6). Further, as the court in *Longstreth* recognized, this language is better explained as accounting for the fact that the FMLA allows for liability on an individual who violates its provision. *Longstreth*, 101 F.Supp.2d at 780. Finally, the undersigned finds *Carr* and *Churchill* to be distinguishable from the instant case, where Plaintiff is not suing any individual supervisors and it is not in dispute that the amount of damages awarded directly reflects the amount of wages lost, as indicated by Plaintiff herself at trial.

Plaintiff's interpretation of the FMLA damages provision would also place Defendant in an unfair position. Defendant argues if it is ordered to pay the entire $199,056 without any deductions, it could be liable to the IRS for failing to withhold necessary taxes. The United States agreed that if Defendant fails to withhold the federal taxes due on the damages award, it would be liable to the government for those taxes, unless it could demonstrate that Plaintiff included the damages award on her income tax return and paid the taxes due. This could leave Defendant in the position of potentially paying the same amount twice – once to Plaintiff and once to the IRS.

As the United States explained,

> An employer is liable to the Government for [income and RRTA] taxes, whether or not it collects them from its employees' wages. 26 U.S.C. § 3403, titled "Liability for Tax," states that "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter," and the corresponding Treasury Regulation states that the employer "is liable for the payment of such tax whether or not it is collected from the employee by the employer." Treas. Reg. § 31-3403-1.[7] In fact, an individual employer (or a "responsible person" of a corporate employer) who fails to withhold FICA and income taxes from the wages of his employees, or who fails to pay those withheld taxes over to the Government, can be held personally liable for a penalty under 26 U.S.C. § 6672 that is equal to the amount that should have been withheld and paid over.
>
> An employer is not liable for the tax owed if the tax it failed to withhold is later paid, but, even then, the employer is not relieved of liability for any applicable penalties or other additions. 26 U.S.C. § 3402(d). Moreover, to be relieved of liability for that tax, the employer must show that the tax has been paid. Treas. Reg. § 31.3402(d)-1. Thus, an employer (such as CSX here) will not be relieved of liability for withholding taxes unless it can show that the taxes have been paid, and even then it will still be liable for applicable penalties and other statutory additions.

(Doc. # 325 at 10).

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[7] Likewise, a railroad employer is liable for the RRTA tax "whether or not collected from the employee." Treas. Reg. § 31.3202-1(e).

The Internal Revenue Code requires that federal taxes be withheld from wages because withholding is the most reliable means of ensuring that income and FICA (or RRTA) taxes are paid. *See Baral v. United States*, 528 U.S. 431, 436 (2000) (describing withholding as a "method[] for collecting the income tax"). In recognition of the burden placed on employers to properly withhold taxes and the possible penalties they could face for failure to do so, courts considering similar tax withholding issues have placed the burden on Plaintiff to seek a refund from the IRS for the amount withheld. In determining whether an award of back pay under the FLSA should consist of gross wages or wages net of taxes, the Eastern District of Virginia reasoned,

> Courts do not disagree . . . with respect to the general principle that employer-paid back pay in satisfaction of a judgment constitutes wages for purposes of income taxes and withholding, that tax authorities must receive their due, and that neither plaintiffs nor defendants should receive windfalls. Here, the Court concludes that these principles may best be satisfied by having the County withhold taxes and remit them to the appropriate revenue authorities; plaintiffs may then seek to reclaim any excess withholding according to their individual circumstances. This process will most closely approximate the actual pay that plaintiffs should have received.

*Thomas v. Fairfax*, 758 F.Supp. 353, 367 (E.D.Va. 1991) (internal citations omitted); *see also Rivera*, 430 F.3d at 1259-60 (holding back pay wages were "subject to withholding," noting the employer "might have been liable for failing to withhold the necessary taxes," and stating plaintiff "remain[ed] free to seek a refund for wrongfully withheld taxes via a direct claim to the Internal Revenue Service"); *Archie*, 86 F.Supp.2d at 273 ("There is no reason the plaintiffs here should be excused from following the procedure that must be followed by all employees in the country of filing the appropriate tax forms and receiving any refund from the tax authorities that may be due for excess withholding."). Permitting Defendant

to withhold taxes ensures Defendant will not be held liable to the IRS for Plaintiff's failure to pay and leaves Plaintiff "not without recourse, either as to the fact or the amount of the income tax withheld." *Rivera*, 430 F.3d at 1260.

**Conclusion**

As indicated in Defendant's brief and the United States' *amicus* brief, the vast weight of authority suggests damages awards equal to lost wages and benefits under the FMLA constitute "wages" subject to income and employment tax withholding obligations under applicable law. Accordingly, for the reasons discussed herein, the undersigned respectfully **RECOMMENDS** Plaintiff's Motion for Writ of Execution (Doc. #319) be **DENIED** to the extent that it requests a Court order for Defendant to pay $199,056 without withholding applicable federal and state taxes. Defendant should be permitted to withhold require federal and state taxes from the gross amount of $199,056, with the net amount payable to Plaintiff.

**DONE AND ENTERED** at Jacksonville, Florida this 13th day of February, 2012.

Thomas E. Morris

**THOMAS E. MORRIS**
United States Magistrate Judge

Copies to:
Hon. Paul A. Magnuson
All counsel of record