

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF BRONX: CIVIL TERM: IA-7

3 -----x
NIURKA ANDINO,

Index:
26798/04

4
5 Plaintiff,

6 -against-

7
8 RONALD MILLS and NEW YORK CITY TRANSIT
AUTHORITY,

9 Defendants.
-----x

10
11 851 Grand Concourse
Bronx, New York 10451
October 7, 2013

12 B E F O R E:

13 HONORABLE LIZBETH GONZALEZ, Supreme Court Justice

14 A P P E A R A N C E S:

15
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18 -and-
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BY: LANA S. KLEIN, ESQ.

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24
25 Tal R. Hahn,
Senior Court Reporter

Proceedings

1 MR. DANSKER: Paul Dansker for the plaintiff.

2 MS. KLEIN: Lana Klein for New York City Transit
3 Authority and Ronald Mills.

4 MR. SHRAMKO: Jonathan Shramko, S-H-R-A-M-K-O,
5 attorney of record for the plaintiff Andino.

6 THE COURT: All right. On the record. Good
7 morning, counselors.

8 MR. DANSKER: Good morning.

9 MS. KLEIN: Good morning.

10 THE COURT: I would like to hear what each party
11 expects to prove or what the defense is. This is a
12 collateral source hearing. I don't know when a collateral
13 source hearing was last done in the Bronx, but I understand
14 that they are quite rare in Bronx County. So let's start
15 with the defendant, since you have the burden of proof.

16 MS. KLEIN: All right. Well, your Honor, this
17 hearing will not just address collateral sources, it will
18 also address the numbers in the verdict to reflect the proof
19 in this case. But we will try to work that out. But the
20 testimony right now is addressing the collateral source
21 issues. One issue we intend to prove is that the plaintiff
22 will be entitled to lifetime medical insurance and,
23 therefore, the award for future medical expenses should be
24 set aside. And we also intend to prove that plaintiff has
25 been receiving an accidental disability.

Proceedings

1 THE COURT: Hold on one second.

2 (Brief pause.)

3 THE COURT: An accidental?

4 MS. KLEIN: Requirement allowance since she was
5 found disabled back in 2009. So she began receiving the
6 allowance as of September 1st, 2009.

7 THE COURT: Therefore?

8 MS. KLEIN: Therefore, the allowance that she has
9 been receiving will serve as a collateral offset as to the
10 awards for past loss of earnings, future loss of earnings
11 and future loss of pension.

12 (Brief pause.)

13 THE COURT: Continue.

14 MS. KLEIN: We have submitted a memorandum in
15 support of our position. We would like to have that marked
16 as a Court Exhibit.

17 THE COURT: All right. Let's mark this as
18 Defendant's A. Okay.

19 It will be Court Exhibit 1.

20 (Whereupon, Court's Exhibit 1 was marked into
21 evidence at this time.)

22 THE COURT: Thank you. Thank you, Ms. Klein.

23 Mr. Dansker?

24 MR. DANSKER: You done? Okay.

25 Judge, as I -- as we were saying off the record, I

Proceedings

1 just want to reiterate, collateral source hearings are few
2 and far between. We are not in the habit of -- it's in our
3 interest and the client's interest to file the judgment as
4 quickly as possible so we could recover on the appeal and be
5 done with it.

6 And we intended to resolve all the outstanding
7 issues until our research and our guidance by Brian Shu, our
8 appellate counsel, advised us of several cases that flew in
9 the face of what the Transit Authority is attempting to do
10 here. You will see from our memo, which I gave the Court,
11 and I would like it to be marked as well as Court's 2.

12 THE COURT: Yes. Let's mark that as -- the memo
13 submitted by plaintiff will be Court's 2. Thank you.

14 (Whereupon, Court's Exhibit 2 was marked into
15 evidence at this time.)

16 MR. DANSKER: And what our research has uncovered,
17 which clearly is controlling, is the Court of Appeals case
18 in Oden, O-D-E-N, which you will see is featured
19 predominantly in both of our memos because that is the Court
20 of Appeals case that creates the issue that caused us to
21 delay. And what that basically says is that -- the
22 defendant has a very high burden of proof.

23 They have to show with reasonable certainty clear
24 and convincing evidence that it's highly probable that in
25 the benefit that had been awarded to Ms. Andino are dollar

Proceedings

1 for dollar offset against the lost earnings award in the
2 future that the jury has given in their verdict.

3 In Oden they said it's a very, very high, if not
4 impossible burden for the Transit Authority here to meet.
5 Then there was one more case; Johnson, which is the 1st
6 Department case, only two years ago, 2011. And conveniently
7 it involves an injured police officer with a Transit
8 Authority defendant, matching facts, and they say in Johnson
9 no offset. Because the pension is, in fact, designed not
10 just as dollar for dollar match, which is required, but it's
11 a benefit conferred upon police officers who are
12 accidentally injured in the line of duty. You could see
13 that is a quote directly from the 1st Department case of
14 Johnson. We got served with a very extensive memo this
15 morning.

16 THE COURT: A what?

17 MR. DANSKER: An extensive memo, much longer than
18 ours which we had to quickly read and digest. It refers to
19 2nd Department cases and a lot of other things that don't
20 match up in terms of the interpretation of these -- these
21 are the two cases that are controlling. And we have the
22 plaintiff would could testify to some extent, and the City
23 attorney for the pension, the pension attorney who will come
24 in and give us some factual stuff that is maybe helpful or
25 not.

Proceedings

1 But at the end of the day, Judge, on the issue of
2 the pension I think it's clear that there is no direct match
3 pursuant to these two controlling cases. That is the
4 pension.

5 Now, we have the medical which is the other
6 question. And that is a much easier issue. Because at the
7 end of the day the medical plan Ms. Andino has been afforded
8 by the Police Department doesn't even allow her to go to her
9 own surgeon, doesn't allow her to go to her own physical
10 therapist. They keep changing who she could go to and who
11 she can't. And the cases are clear that, number one, this
12 injured police officer is entitled to the best care and it's
13 not for any health plan to dictate to her who she can or
14 can't see. If that is the case you do not get the direct
15 match that the Oden Court of Appeals case requires. And
16 that will fall away very quickly.

17 So I think the only issue before the Court is on
18 the issue of the pension and whether or not that is a
19 collateral offset to the future lost earnings claim. And I
20 think that is our position.

21 MS. KLEIN: Your Honor, I was not aware that they
22 were going to be arguing this now, I thought we were --

23 MR. DANSKER: That is the opening.

24 MS. KLEIN: I thought just opening statements. If
25 I may respond to the plaintiff's recitation of the case law?

Proceedings

1 In Johnson and Oden the Court noted at the very
2 least this pension award serves to offset -- sorry, the
3 pension, disability pension that plaintiff will be receiving
4 serves as an offset from lost pension award. The only
5 dispute that plaintiff has is that -- he is saying that this
6 disability pension does not offset a loss of earnings award.
7 However, the Teranova case which involved a firefighter
8 which received the same disability pension. The Teranova
9 case said if the firefighter could have continued -- the
10 firefighter would have continued working for another ten
11 years if not for this accident. He will not collect his
12 regular salary and this disability pension replaces that
13 salary.

14 Therefore, the disability pension serves as an
15 offset to the award for lost earnings. So if you read all
16 the cases together, the Teranova case holds that the
17 disability offsets, the Johnson holds that the disability
18 pension serves as an offset for the lost pension award, and
19 so, therefore, based upon those cases we are entitled to a
20 collateral source offset.

21 THE COURT: Thank you.

22 MR. DANSKER: Be aware that Teranova is a 2nd
23 Department case and not a 1st.

24 Big difference.

25 THE COURT: Thank you. Did you find any 1st

Proceedings

1 Department cases that support what Teranova says? I have
2 to ask you because you do know that there is distinctions
3 between the 1st and 2nd Departments. And where there are
4 nuances, as I call them, I am bound to follow the 1st
5 Department.

6 MS. KLEIN: Just so it's clear, the 1st Department
7 did not say that the defendant is not entitled to a
8 collateral source offset as to lost earnings. Johnson said
9 that the defendant failed to prove that they were entitled
10 to a collateral source offset. And Johnson, apparently the
11 defendant did not cite any legislative authority for the
12 offset and did not introduce other evidence that was
13 required. So, in other words, Johnson does not rule that we
14 are not entitled the offset.

15 THE COURT: Al right. Let me stop you. So I have
16 heard what you each hope to establish through this hearing.

17 Are you ready to call your witness?

18 MS. KLEIN: Yes, your Honor.

19 THE COURT: All right.

20 COURT OFFICER: Where do you want the witness?

21 THE COURT: Right here.

22 MR. DANSKER: That makes it easy.

23 THE COURT: Please don't make her stand.

24 Who do you call as the witness?

25 MS. KLEIN: Niurka Andino.

Andino - Defendant - Direct

1 THE COURT: The plaintiff.

2 MS. KLEIN: The plaintiff.

3 N U I R K A A N D I N O, the Plaintiff herein, having been
4 first duly sworn, was examined and testified as follows:

5 COURT OFFICER: State your name and address for
6 the record.

7 THE WITNESS: Nuirka Andino, live at 1001 Grand
8 Concourse, Bronx, New York, 10452.

9 COURT OFFICER: Witness is sworn.

10 MR. DANSKER: I will ask you, we are sitting in a
11 little room. You need to speak louder than that. Remember
12 we had that issue before.

13 THE WITNESS: Okay.

14 THE COURT: Counsel, you may inquire.

15 DIRECT EXAMINATION

16 BY MS. KLEIN:

17 Q. What is your date of birth?

18 A. 7/13/68.

19 Q. Are you here pursuant to the subpoena that was served
20 on your attorneys?

21 A. Yes.

22 MR. DANSKER: Yes.

23 Q. When did you become a New York City police officer?

24 A. 1996, July '96.

25 Q. And when did you leave the service?

Andino - Defendant - Direct

1 A. I don't know which date you want me to -- the pension
2 date?

3 Q. Yes. When you were found disabled.

4 A. The day I saw the doctors at the police department was
5 June 9th, I believe.

6 Q. And then at some point --

7 THE COURT: June 9th?

8 THE WITNESS: 2009.

9 THE COURT: 2009. Okay.

10 Q. And then at some point were you awarded an accidental
11 disability retirement allowance?

12 A. Yes.

13 Q. And when was that?

14 A. I know I left the job August 30th. So August 30th,
15 2009.

16 Q. And had you applied for disability benefits in order to
17 get that accidental disability retirement allowance?

18 A. I don't understand the question.

19 Q. Did you fill out an application to get the benefits?

20 A. What benefits?

21 Q. The accidental disability retirement allowance.

22 A. There is no benefits. It's an application that states
23 that -- asking what happened.

24 MR. DANSKER: Did you fill out an application?

25 THE WITNESS: Yes.

Andino - Defendant - Direct

1 MS. KLEIN: I would like to have that marked.

2 MR. DANSKER: I would like to see that. Was it
3 part of the record?

4 MS. KLEIN: It's part of the record.

5 (Documents submitted.)

6 THE COURT: This was previously marked in
7 evidence?

8 MS. KLEIN: No, it's part of the pension record.

9 THE COURT: Thank you.

10 (Brief pause.)

11 MR. DANSKER: Let her identify it and we will make
12 it a Court Exhibit.

13 THE COURT: Okay. So we are being very informal.
14 I am going to allow it, but she is asking the questions, not
15 you.

16 MR. DANSKER: Sorry.

17 THE COURT: All right. I know we are in the
18 robing room.

19 MR. DANSKER: Certainly.

20 Q. Do you recognize this document that I am showing you?

21 A. Yes.

22 Q. And what is it?

23 A. What is what?

24 Q. What is that document?

25 A. (No response.)

Andino - Defendant - Direct

1 THE COURT: I will let you lead her.

2 Q. Is that the application you made for disability --

3 A. It's part of it. I don't see the title. It says

4 "Board of Trustee" --

5 Q. Okay. Is that the application that you filled out to
6 get disability benefits?

7 A. It's part of the application.

8 Q. Okay. Is that your handwriting?

9 A. Yes.

10 Q. Is -- are all the handwritten portions in your
11 handwriting?

12 A. One moment.

13 THE COURT: Take a look.

14 (Brief pause.)

15 A. This part I believe is -- this part where it says part
16 A is my handwriting.

17 Q. Is that your signature on the bottom of the second
18 page?

19 A. This is my signature.

20 MS. KLEIN: I would like to have this marked and
21 entered into evidence as Defendant's Exhibit A.

22 MR. DANSKER: No objection.

23 THE COURT: Okay.

24 (Whereupon, Defendant's Exhibit A was received and
25 marked into evidence.)

Andino - Defendant - Direct

1 THE COURT: A for identification is accepted into
2 evidence as the Defendant's disability pension application.
3 I will point out that there is two pages. The witness
4 indicated that there are pages missing. I don't know
5 whether there are or not. But there is two pages here.

6 Q. Okay. Were you injured in a line-of-duty accident that
7 led you to apply for disability?

8 A. Repeat your question again please?

9 MR. DANSKER: Note my objection. We already had a
10 trial and established those things.

11 THE COURT: Yes. Hold on one second. I need two
12 things to happen here. One, if there is an -- if there has
13 already been testimony, perhaps you could stipulate as to
14 the answer to the question. Other thing is, you are
15 speaking very quickly for this witness.

16 MS. KLEIN: Well, I believe we could stipulate
17 that Ms. Andino was involved in an accident on August 18th,
18 2004, while she was working as a police officer.

19 MR. DANSKER: Except for the date, I don't have it
20 in front of me. Certainly subject to the trial she is
21 injured in an on-the-job accident. I don't have it in front
22 of me.

23 THE COURT: Show the application to counsel
24 please.

25 (Document submitted.)

Andino - Defendant - Direct

1 MR. DANSKER: August 18th, 2004. So stipulated.

2 Q. And that was a line-of-duty --

3 MR. DANSKER: So stipulated. And tried.

4 Q. How many years of service did you have with the NYPD
5 when you had your accident?

6 A. When the accident happened? Or when I left?

7 Q. When it happened.

8 MR. DANSKER: That is just a mathematical --

9 THE COURT: Off the record a second.

10 (Discussion off the record.)

11 THE COURT: Let's continue.

12 MS. KLEIN: So we stipulated at the time of the
13 accident the plaintiff had eight years on the force.

14 THE COURT: So stipulated?

15 MR. DANSKER: Yes.

16 MS. KLEIN: And at the time she went out on the
17 ADR pension, she had thirteen years on the force.

18 MR. DANSKER: Yes. So stipulated.

19 THE COURT: How many years, thirteen?

20 MR. DANSKER: Yes.

21 THE COURT: What did you call it?

22 MS. KLEIN: ADR. Accidental Disability Allowance.

23 MR. DANSKER: Which is the disability pension.

24 MS. KLEIN: We may use that interchangeably over
25 the course of this proceeding.

1 THE COURT: Okay.

2 Q. And how much do you receive per month?

3 A. (No response.)

4 Q. From the disability pension?

5 A. Right now it's like 5,700.

6 Q. And that is per week?

7 MR. DANSKER: 5,700 per month you asked?

8 THE COURT: Do you know --

9 Q. Do you know how much that is per year?

10 THE COURT: Counsel, you have a Blackberry.

11 MS. KLEIN: I have a witness that will testify as
12 to the total amount.

13 MR. DANSKER: So then times twelve.

14 A. It's about that. I can't give you full numbers.

15 Q. Since this accident have you applied for Social
16 Security benefits?

17 A. Yes.

18 Q. And what happened with that application?

19 A. So far it's denied.

20 Q. When was the last time it was denied?

21 A. I don't remember.

22 MR. DANSKER: I don't know what relevance that has
23 to the pension.

24 MS. KLEIN: Well, that would be another offset.

25 THE COURT: Let's continue.

Andino - Defendant - Direct

1 MR. DANSKER: Social Security is not an offset.

2 Q. Have you applied for any other disability benefits?

3 A. Like what?

4 Q. Anything else.

5 A. I don't know what anything else means.

6 Q. Do you remember filling out any applications, other
7 applications?

8 A. No.

9 Q. Since the date of the accident have you -- sorry.

10 Since you went out on disability in August 2009, have
11 you been employed by anyone?

12 A. Have I been what?

13 Q. Employed by anyone.

14 A. No.

15 Q. Since August 2009 have you received any other wages or
16 salaries from any other source other than your disability
17 pension?

18 A. There is no other sources, no.

19 Q. Have you received any Office of Employment since you
20 went out on your disability pension?

21 A. Office of Employment?

22 Q. Has anyone offered you a job since 2009, August?

23 A. For.

24 Q. Have you looked for any work since August 2009?

25 A. No.

Giambarrese - Defendant - Direct

1 Q. Have you been receiving your accidental disability
2 benefits from August 2009 until the present?

3 A. Yes.

4 Q. And other than the disability pension that you receive,
5 are you getting any other benefits since August 2009?

6 A. I don't understand the question.

7 Q. Are you getting any other disability payments, pensions
8 since --

9 A. No.

10 MS. KLEIN: Nothing further.

11 THE COURT: Do you have any questions?

12 MR. DANSKER: I might.

13 (Brief pause.)

14 MR. DANSKER: Nothing at this time.

15 THE COURT: Thank you. All right.

16 MR. DANSKER: Do you want to bring in --

17 THE COURT: Let's take a break for one minute.

18 (Recess taken.)

19 THE COURT: All right. On the record. Who do you
20 wish to call as the defendant's next witness, Ms. Klein?

21 MS. KLEIN: The defense calls Nicole Giambarrese.
22 N I C O L E G I A M B A R R E S E, called by and on behalf
23 of the Defendant, having been first duly sworn, was examined and
24 testified as follows:

25 COURT OFFICER: State your name and agency and

Giambarrese - Defendant - Direct

1 position for the record please.

2 THE WITNESS: Nicole Giambarrese, acting general
3 counsel for the New York City Police Pension Fund.

4 COURT OFFICER: You may be seated.

5 THE WITNESS: Thank you.

6 THE COURT: Counsel you may inquire.

7 DIRECT EXAMINATION

8 BY MS. KLEIN:

9 Q. Good morning, Ms. Giambarrese.

10 Are you here pursuant to a subpoena?

11 A. I am.

12 Q. And who do you work for?

13 A. New York City Police Pension Fund.

14 Q. What is your job title?

15 A. Acting general counsel.

16 Q. For how long?

17 A. Since April of this year.

18 Q. When did you start working for the Police Pension Fund?

19 A. May 2004.

20 Q. What are your current duties?

21 A. I currently oversee the legal division, accordingly the
22 legal staff reports directly to me. My main function is
23 statutory interpretation. I write legal memoranda for the agency
24 staff. I am the liaison to the Office of the Corporation Counsel
25 and other city agencies. And between the executive and

1 operational staff.

2 Q. And what are your prior duties?

3 A. From May 2004 through January 2008 I was a legal intern
4 for the New York City Police Pension Fund. I began working full-
5 time as an agency attorney in 2010, August.

6 Q. And what were your duties when you began full-time?

7 A. When I first started full-time about two days after I
8 started I worked pretty exclusively on a statutory interpretation
9 for a new tier 3 retirement plan. I wrote the summary plan
10 description, which is basically an explanation of benefits, what
11 the statutes provide in layman's terms.

12 Upon completion of that the executive staff had me
13 rewrite our tier 2 summary plan this way it would be as
14 consistent as possible.

15 Q. What is tier 2?

16 A. Tier 2 is like a specific pension plan offered by the
17 New York City Police Pension Fund. We have three tiers. Tier 2
18 is available to members who were appointed between July 1st,
19 1976, and June 30th, 2009.

20 THE COURT: Slow down one second. Tier 2 is 1976
21 through?

22 THE WITNESS: Through 2009.

23 THE COURT: Thank you.

24 THE WITNESS: I am sorry. 1973.

25 THE COURT: Start again.

Giambarrese - Defendant - Direct

1 THE WITNESS: Tier 2 is available to members who
2 are appointed between 1973 and 2009.

3 THE COURT: And this is police officers?

4 THE WITNESS: Uniformed members of the service
5 under the NYPD.

6 Q. When you say "appointed" you mean when they start
7 working for the N.Y.P.D.?

8 A. Correct.

9 Q. And as part of your duties, do you deal with accidental
10 disability retirement pensions?

11 A. I observe the monthly Board of Trustees meetings where
12 disability pensions are awarded.

13 Q. What is an accidental disability pension?

14 A. An ADR pension is awarded to a uniformed member of the
15 service who is found to be disabled and unable to perform
16 mentally or physically police duties as a result of an injury
17 that occurred in the line-of-duty.

18 Q. Is it also known as an ADR allowance?

19 A. ADR pension. The police officers use the slang term,
20 three-quarters, to describe the pension.

21 Q. And under what statute or statutes was the ADR pension
22 created?

23 A. Historically in subchapter 1 which predated tiers 1 and
24 2, the accidental disability statute was found in the New York
25 City Administrative Code, 13-206. The -- currently it's found in

Giambarrese - Defendant - Direct

1 13-252, which sets out the legal standard for what the ADR is.
2 And the calculation of the benefit is found in 13-258.

3 Q. And what is the process by which an ADR pension is
4 awarded?

5 A. It's a two-step process. The first step is whenever a
6 member is -- wants to apply for a disability pension or the
7 police department feels that the member is now disabled from
8 police service. An application is filed at the medical division
9 of the New York City Police Pension Fund. Upon filing of the
10 application, the member, the police officer is seen by what is
11 known as the medical board. It's a panel of three doctors.

12 THE COURT: Okay. I need you to slow down.

13 THE WITNESS: Sure.

14 THE COURT: I need you to slow down because I have
15 never heard this testimony before.

16 THE WITNESS: Okay.

17 THE COURT: And this is new. And I am trying to
18 absorb what you are saying.

19 THE WITNESS: Sure.

20 THE COURT: Okay.

21 THE WITNESS: I apologize.

22 THE COURT: It's not you. If counsel was asking
23 more questions you would be giving smaller pieces of
24 information. But you are giving huge chunks of information.

25 THE WITNESS: Okay.

Giambarrese - Defendant - Direct

1 THE COURT: All at once through your testimony.

2 So I need you to slow down because I am taking notes.

3 THE WITNESS: Okay.

4 THE COURT: And I rely on my notes, as the
5 attorneys well know, especially when there is a dispute. So
6 take it easy.

7 So you were saying that an application is filed
8 with the medical division of the --

9 THE WITNESS: No, the NYPD. We are separate
10 agencies.

11 THE COURT: NYPD?

12 THE WITNESS: Correct.

13 THE COURT: I will ask a question. This is a
14 hearing and we don't have a jury. You are a separate
15 agency?

16 THE WITNESS: Yes.

17 THE COURT: So does that mean that your offices
18 are located at 1 Police Plaza but --

19 THE WITNESS: No. Our office is located at 233
20 Broadway. In 2001 we were given corpus funding so we are no
21 longer under the police department. We are considered a
22 city agency but a non-mayoral agency.

23 THE COURT: Okay. And then to continue with the
24 rest of your testimony after you were saying that an
25 application is filed with the police department, then --

Giambarrese - Defendant - Direct

1 THE WITNESS: The medical division.

2 THE COURT: The police department's medical
3 division?

4 THE WITNESS: Yes.

5 THE COURT: They have a medical division?

6 THE WITNESS: Yes. Upon the application being
7 filed the case is forwarded to the medical board. The
8 medical board is made up of a panel of three doctors. One
9 doctor appointed by the New York City Police Pension Fund,
10 Bored of Trustees. One doctor --

11 THE COURT: Hold on. I am going to do something
12 different. I am going to rely on the transcript. I will
13 need a copy of the transcript. And I will stop taking
14 notes. I can't take notes fast enough.

15 THE WITNESS: I could slow down.

16 THE COURT: Okay. I am not faulting you in the
17 speed of what you are saying. It's the framework that you
18 are presenting. I need to listen to you more than take
19 notes.

20 THE WITNESS: Okay.

21 THE COURT: So normally I am a copious note-taker.

22 MR. DANSKER: Your Honor, just -- can the court
23 reporter could hear everything from where you are sitting?

24 (Brief pause.)

25 THE COURT: No. We are fine. We are expecting --

Giambarrese - Defendant - Direct

1 well, the forecast calls for huge storms today. So the
2 windows are actually -- the plastic is rattling. Anyways, I
3 will listen to you more than anything else.

4 THE WITNESS: Okay.

5 THE COURT: I need you to A-B-C this and
6 understand that I am not familiar with the pension board or
7 the function. Notwithstanding the fact that I read the
8 memos of the attorneys.

9 THE WITNESS: Sure.

10 THE COURT: Go ahead.

11 THE WITNESS: So after the application is filed at
12 the medical division, the member is seen by a panel of three
13 doctors. One doctor is appointed by the New York City
14 Police Pension Fund Board of Trustees. One doctor is
15 appointed by the New York City Department of City-wide
16 Administrative Services, also known as DCAS. The third
17 doctor is appointed by the New York City Department of
18 Health and Mental Hygiene.

19 They are supposed to be a panel of three
20 independent doctors. Statutorily they have the obligation
21 to prepare a medical board report and present a
22 recommendation as to whether or not the member is disabled.
23 The way it works under the pension fund statutory rubric, a
24 member is disabled if they are physically or mentally
25 incapacitated from the performance of police duties. It's

Giambarrese - Defendant - Direct

1 the medical board's purview to determine the competent
2 causal factor of such disability, whether or not it was a
3 line-of-duty injury or a non-line-of-duty incident. The
4 medical board then makes a recommendation as to whether or
5 not the member should be retired for an accident disability
6 pension, or an ordinary disability pension. The case is
7 then forwarded to the New York City Police Pension Fund --

8 THE COURT: I need to stop you.

9 THE WITNESS: Sure.

10 THE COURT: There is a difference between an
11 accident disability pension and --

12 THE WITNESS: Ordinary disability pension.

13 THE COURT: And the difference would be?

14 THE WITNESS: Whether or not the competent causal
15 factor of such injury was a line-of-duty injury or a non-
16 line-of-duty incident. That difference has gone up to the
17 Court of Appeals. A line-of-duty injury would be an injury
18 that occurs in the performance of police duties, that is
19 sudden, fortuitous, not the result of the police officer's
20 negligence or willful misconduct.

21 An example we give police officers --

22 THE COURT: Please.

23 THE WITNESS: -- when we do the pension seminars
24 would be if you were chasing a perp and you are in pursuit
25 and you get shot. That is obviously line-of-duty. If you

1 are not working and you are in a car accident, that would be
2 non-line-of-duty. That would be an ordinary disability. So
3 you could be so injured from the car accident that you could
4 no longer perform police duties but it didn't happen in the
5 line-of-duty. So that is a different disability benefit.

6 MR. DANSKER: Your Honor, the only way I could
7 make an objection, although I don't mean to object, I mean
8 to intercede, we don't need to review this because that is
9 already decided. We don't have to reinvent the wheel. I
10 don't think defendant is disputing it was line-of-duty.

11 The -- it was tried and the jury found that.

12 THE COURT: Believe it or not, what counsel is
13 saying is important to my analysis.

14 MR. DANSKER: Okay.

15 THE COURT: Otherwise I wouldn't be asking all the
16 questions. It's not mere curiosity.

17 MR. DANSKER: I thought what you meant --

18 THE COURT: And if I think it's material, the fact
19 that you don't really is not dispositive.

20 MR. DANSKER: No, Judge. I thought what you
21 wanted to know what the difference was between the
22 fifty-fifty and three-quarters.

23 THE COURT: No. I have no idea about anything
24 fifty-fifty and three-quarters.

25 MS. KLEIN: We will get to that.

Giambarrese - Defendant - Direct

1 MR. DANSKER: That was the question.

2 THE COURT: Okay. Thank you.

3 Q: Were you done with your answer about the process?

4 A. Not quite. Sorry.

5 MR. DANSKER: Sorry. Withdraw my objection.

6 THE COURT: Good.

7 A. So after the medical board makes its recommendation
8 the case is given to the Police Pension Fund, Board of Trustees.
9 The slang term there is pension board. The -- legally, the
10 P.P.F., or, Police Pension Fund Board of Trustees cannot disrupt
11 a finding of disability. If the medical board found that the
12 member is disabled, the member is disabled. The only
13 determination that is made at the level where the Board of
14 Trustees are is the legal basis for that disability; whether or
15 not it was an accident or incident.

16 There are also other nuances in the area of the law
17 carved-out with trapping cases and other areas which may not rise

Giambarrese - Defendant - Direct

1 MR. SHRAMKO: Objection, your Honor. This goes to
2 the ultimate issue. If she is an expert, we should have
3 been told she is an expert-witness who will offer an
4 opinion. It's the ultimate issue in this case.

5 MS. KLEIN: No, it's not an opinion.

6 Q. Can you tell me what the purpose of the ADR is pursuant
7 to statute?

8 MR. DANSKER: Again, that is an interpretation --

9 MS. KLEIN: No.

10 MR. SHRAMKO: It belongs in a brief, not in
11 testimony. It's the ultimate issue at the heart of this
12 case.

13 MS. KLEIN: Your Honor, she testified that --

14 MR. SHRAMKO: Judge --

15 MS. KLEIN: Her job is statutory interpretation.
16 She testified to that. So she should be permitted to
17 testify.

18 THE COURT: I am going to allow counsel -- excuse
19 me. I am referring to you as counsel.

20 THE WITNESS: It's quite all right.

21 THE COURT: I will allow the witness to testify in
22 light of her background and the role she plays at the
23 agency.

24 A. Historically as found in New York City Administrative
25 Code 13-206 which is a Subchapter 1 statute, or shall I say

Giambarrese - Defendant - Direct

1 administrative provision, historically accident disability
2 retirement was to be in lieu of salary. And it has -- it has
3 evolved and been, at least since I have been in the Police
4 Pension Fund, and to my knowledge since 13-206, ADR has been in
5 lieu of such salary.

6 Q. Are you familiar with the pension that -- the
7 disability pension that is awarded to firefighters?

8 A. I am.

9 Q. And do you know what statute that it's under?

10 THE COURT: Why are we talking --

11 MR. DANSKER: Objection.

12 THE COURT: Sustained. We don't need to know
13 about firefighters, counsel.

14 MS. KLEIN: The reason why, the Teranova case
15 dealt with a firefighter and it dealt with the --

16 MR. DANSKER: Objection.

17 THE COURT: Sustained. That is very interesting,
18 but that is not material. It may be relevant, but it's not
19 material for me.

20 Q. How is the ADR pension calculated?

21 A. Pursuant to New York City Administrative Code 13-258,
22 the accident disability statute is comprised of three parts. The
23 first is a pension attributable to seventy-five percent of the
24 member's final average salary. The second portion --

25 THE COURT: Seventy-five percent of the member's

1 what?

2 THE WITNESS: Final average salary.

3 A. The second part is the annuity value of any shortage or
4 excess in the member's annuity savings fund, which is basically
5 their pension fund. Their member contributions.

6 THE COURT: I need you to speak to me in English.

7 THE WITNESS: Sure. Just to back up, there are
8 two sources of funding for the pensions. There is the city
9 contributions which go into, for lack of a better term, a
10 special bank account. And then there is the member's
11 contribution which goes into another bank account. So the
12 member's contributions go into the annuity savings fund. So
13 the second portion of the ADR pension is the annuity value
14 of any shortage or excess in that account.

15 THE COURT: Okay. Of which account?

16 THE WITNESS: Annuity savings fund.

17 THE COURT: Belongs to the member?

18 THE WITNESS: Correct. Every member has a
19 required contribution amount in which they have to
20 contribute a certain percentage of their pensionable
21 earnings to help fund their pension.

22 THE COURT: I need to ask another A-B-C question.

23 THE WITNESS: Sure.

24 THE COURT: Why would there be a shortage or
25 excess if the money is deducted from the member's salary?

Giambarrese - Defendant - Direct

1 THE WITNESS: Members are allowed to take pension
2 loans. And if they take a pension loan it would reduce the
3 balance of their annuity savings fund. While we are a
4 mandatory membership plan, in tier 2, pension contributions
5 are not mandatory. They could seize the contributions which
6 would create a shortage, and when they retire they would
7 have an offset as to the value of the shortage. With
8 accident disability pensions there is no required amount.

9 THE COURT: Why would there be an excess?

10 THE WITNESS: Because the member would have
11 contributed pension contributions throughout the course of
12 his or her career. However, because the member is found to
13 be disabled in the line-of-duty there is no required amount.
14 So if the member were to have a shortage it wouldn't hurt
15 the member. So anything left in the fund would be excess
16 which would only increase the pension benefit from the City.

17 THE COURT: Off the record.

18 (Discussion off the record.)

19 THE COURT: On the record. Are you saying that if
20 a member decided to forego the pension completely, that
21 would have no effect on their disability pension?

22 THE WITNESS: Not an accident disability. It
23 would create a shortage in another type of pension.

24 THE COURT: Right. But if we are talking about an
25 accident disability pension, would there be a consequence if

Giambarrese - Defendant - Direct

1 an injured member had failed to contribute even one dollar?

2 THE WITNESS: No.

3 THE COURT: They would still be entitled --

4 THE WITNESS: To seventy-five percent. It just
5 wouldn't increase that benefit. Any member contributions
6 merely increase the benefit.

7 MS. KLEIN: Just so it's clear, your Honor, when
8 you said that the member decided to forego contributing to
9 the pension, that would be the service pension, contributing
10 to the service pension as opposed to the --

11 THE WITNESS: That is not accurate.

12 MR. DANSKER: Ask the question.

13 THE COURT: Is that accurate?

14 THE WITNESS: No.

15 THE COURT: So is there more than one pension?

16 THE WITNESS: There are four pensions we offer.
17 There is a vested benefit for members would have less than
18 twenty years of service. There is a service pension for
19 members who have twenty or more years, and then the two
20 disability pensions, ordinary and accident. All members
21 make contributions regardless unless they make the
22 affirmative decision to cease pension contributions.

23 THE COURT: And for purposes of this case, do we
24 have any issues with respect to the contributions made by
25 the plaintiff or her failure to make contributions?

Giambarrese - Defendant - Direct

1 THE WITNESS: No. She -- since she was found to
2 be disabled as a result of a line-of-duty accident she would
3 get that seventy-five percent regardless of anything she had
4 in the fund.

5 THE COURT: Okay. So did she have a shortage or
6 did -- in her account or does that make no difference?

7 THE WITNESS: She had a slight excess; however,
8 all that did was increase the annuity portion of her
9 pension, not the pension portion of her pension which is
10 funded by the City. The City pays for the seventy-five
11 percent of final average salary.

12 THE COURT: So the annuity comes from the member?

13 THE WITNESS: Yes.

14 THE COURT: And the pension comes from the City?

15 THE WITNESS: Correct.

16 I apologize. This is a complex area.

17 MR. DANSKER: Well -- all right.

18 THE COURT: Now I need another A-B-C definition.

19 THE WITNESS: Sure.

20 (Brief pause.)

21 THE COURT: The difference between an annuity and
22 a pension is?

23 THE WITNESS: In what regard?

24 THE COURT: I just want a definition.

25 THE WITNESS: The annuity portion is funded by

1 member contributions. The pension portion is funded by city
2 contributions. I apologize, but there are so many other
3 nuances that this could go on.

4 THE COURT: Forever.

5 THE WITNESS: I don't know if you mean in a
6 service pension or disability --

7 THE COURT: No. That is the basic difference you
8 would start out with?

9 THE WITNESS: At a most basic level.

10 THE COURT: If there is anything more complicated
11 the attorneys will ask.

12 Q. What is a service pension?

13 A. Service pension is available to members who have at
14 least twenty years of allowable police service.

15 Q. And what is the difference between an ADR pension and
16 service pension?

17 A. The calculating, how the pension is calculated. The
18 components that go into the calculation. Its tax status.

19 THE COURT: They have different tax statuses?

20 THE WITNESS: They do.

21 THE COURT: Okay.

22 THE WITNESS: Would you like me --

23 THE COURT: No. Only if they need to ask you.

24 Q. What is the difference?

25 A. Well, of course member contributions are derived from

Giambarrese - Defendant - Direct

1 Internal Revenue Code Section 414(h) which allow for such
2 contributions to be tax deferred.

3 THE COURT: Member contributions to the annuity?

4 THE WITNESS: Correct.

5 THE COURT: Is tax deferred?

6 THE WITNESS: Yes.

7 THE COURT: Okay.

8 THE WITNESS: New York State -- all pensions,
9 service based or disability based are not subject to New
10 York State and local taxes. If a member moves post-
11 retirement, there may be tax consequences at the State level
12 wherever they choose to move.

13 However, a service pension is -- a vested and -- a
14 service, vested and ordinary and are subject to federal tax
15 on all components on each pension. The accident disability
16 pension, the pension portion, the seventy-five percent of
17 the member's final average salary is not subject to federal
18 taxes.

19 However, the other two components, the annuity
20 value of any shortage or excess, and the actuarial equivalent
21 are subject to federal taxes as well as any benefit
22 enhancers for the member beyond twenty years of allowable
23 police service.

24 THE COURT: I need to reduce this to its simplest
25 component. The member's -- the accident pension is

1 seventy-five percent, that is the one that is paid by the
2 city?

3 THE WITNESS: Correct.

4 THE COURT: And that is subject to federal taxes?

5 THE WITNESS: Not subject.

6 THE COURT: Not subject to federal. So is it tax
7 deferred also?

8 MR. DANSKER: Tax free.

9 THE COURT: Triple tax free?

10 THE WITNESS: So New York State and local does not
11 tax any of its pensions. The seventy-five percent portion
12 of an ADR pension is not subject to federal taxes. And that
13 is because it's been held by the IRS to be a statute in the
14 nature of Worker's Compensation.

15 THE COURT: So is the result that it's tax free?

16 THE WITNESS: Yes, correct.

17 THE COURT: Okay.

18 THE WITNESS: Nothing attributable to 414(h) or
19 member contributions, that small portion is subject to
20 federal taxes.

21 THE COURT: Okay. What did you just say?

22 THE WITNESS: In this case the small portion of
23 her pension, Ms. Andino's pension that is attributable to
24 member contributions, that is subject to taxation.

25 However, I believe that this member only pays

1 approximately \$20 a month, because the large portion of her
2 pension is tax free.

3 THE COURT: Off the record.

4 (Discussion off the record.)

5 THE COURT: With respect to Ms. Andino's
6 seventy-five percent -- how would you call that? ADR?

7 THE WITNESS: ADR pension.

8 THE COURT: Is that triple tax free?

9 THE WITNESS: Yes.

10 THE COURT: Thank you. You may continue.

11 Q. When is mandatory retirement for a police officer?

12 A. It's different for each tier. Tier 2, which is Ms.
13 Andino, is sixty-three.

14 Q. And after sixty-three ordinarily if there was no
15 accident, would Ms. Andino have been entitled a service pension?

16 A. Assuming she had had twenty years of police officer
17 service, yes.

18 Q. And how is a service pension calculated?

19 MR. DANSKER: Note my objection that we already
20 established that the service pension is not relevant to our
21 proceeding. Why?

22 MS. KLEIN: To show there is a distinction and
23 calculation.

24 THE COURT: Why do I need to know that?

25 MR. DANSKER: The ADR is the issue that is in

Giambarrese - Defendant - Direct

1 dispute. And I will just ask that we focus on that to keep
2 things more simple otherwise it gets complicated.

3 MS. KLEIN: I think it may be relevant.

4 THE COURT: Is the -- the question is not
5 relevance. As I learned, it's whether the item is material
6 and I don't know that it's material.

7 (Discussion off the record.)

8 THE COURT: All right.

9 MR. DANSKER: We have something we want to put on
10 the record.

11 THE COURT: What is the problem?

12 MR. SHRAMKO: I'd like to object to the
13 participation of an unsworn witness in this proceeding. Ms.
14 King is in here as an observer. That is my understanding of
15 the Court's ruling and this is the second time she has
16 actively participated in coaching Ms. Klein on what
17 questions to ask, how to approach the hearing. I mean,
18 either she is participating or not.

19 MR. DANSKER: And the ruling is that she is not to
20 participate in this case at all. She is advising Ms. Klein
21 on issues that relate to this case. The City is not a
22 direct defendant. However, the City has an interest in the
23 outcome of this proceeding because it effects future cases
24 on -- when they are defended. So in this case the plaintiff
25 is prejudiced by Ms. King participating. We have no

1 objection to her sitting there, but when she starts advising
2 the attorney for the Transit Authority, then let the record
3 be clear that the City is -- has an interest in the outcome.

4 THE COURT: Counsel?

5 MS. KLEIN: Ms. King is not telling me what to
6 say. I have my own questions prepared. And she is not
7 actively participating in the hearing. So that is why she
8 is not permitted to sit here. She is not asking questions
9 and not testifying. It's the same as somebody passing a
10 note to somebody in a courtroom. There is for prohibition
11 against that.

12 MR. DANSKER: There could be if the Court rules on
13 it.

14 THE COURT: I don't have a problem. Mostly
15 because this area for me is new. And I am obviously asking
16 questions that are basic fundamental questions. To the
17 extent that anybody could clarify the answers to my
18 questions, I am okay with it.

19 MR. SHRAMKO: My point, your Honor, is that this
20 is not a neutral -- she is not a fact witness. This
21 attorney is -- is called as a fact witness, but she has an
22 interest in it, in the outcome of this matter.

23 THE COURT: Who has an interest?

24 MR. SHRAMKO: Ms. Giambarrese and the pension
25 fund. As well as the City of New York. If the City of New

Giambarrese - Defendant - Direct

1 York wants to write the briefs and ask the questions in this
2 case, let them petition to intervene then. They are not
3 parties to this case and shouldn't be permitted to
4 participate.

5 MR. DANSKER: If the Court record is clear, by
6 participation, the outcome of this proceeding will have a
7 bearing --

8 THE COURT: So you guys are double-teaming which
9 you know I have a problem with. I really so. It's not
10 right.

11 MR. SHRAMKO: Sorry.

12 MR. DANSKER: No, it's just --

13 THE COURT: This is informal.

14 MR. DANSKER: One or the other. Okay.

15 THE COURT: We are informal.

16 MR. DANSKER: I apologize, Judge.

17 THE COURT: I can't have you double-team.

18 MR. DANSKER: We will have one or the other. Go
19 ahead.

20 THE COURT: Okay. This is what I will do.

21 If Ms. Klein needs help framing something, you
22 could ask her with respect to this witness. Because this is
23 an area where I need clarification. I don't know pensions,
24 annuities, and anything else other than the fact that all of
25 us receive pensions and annuities. Or pensions at least.

1 So if it's a question of simplifying the language for me and
2 you can't figure out how to simplify this for me, I will let
3 you speak to counsel. All right.

4 And similarly, I need you to really speak in very
5 simple language.

6 THE WITNESS: I apologize, your Honor. I will try
7 to be as simple as possible.

8 THE COURT: Right. I also don't want to have this
9 testimony go on forever simply because I don't understand
10 given portions that may be interesting, but immaterial for
11 the purpose of the hearing.

12 MS. KLEIN: Well, your Honor, the service pension
13 is relevant because the courts in the past have actually
14 studied, looked at how the service pension is calculated as
15 opposed to the ADR's calculation in order to determine the
16 ADR --

17 THE COURT: I don't see it as relevant honestly
18 and truly. The pension that we have here is the ADR
19 pension. And the witness has testified that there is
20 different kinds of pensions with different kinds of rules,
21 by which I mean calculation rules, service rules,
22 qualifications, and tax status. So I don't need to know
23 about the service pensions because it will only confuse the
24 record and confuse me.

25 If, on the other hand, there is reason to bring up

1 the service pension, then I trust that the witness who is
2 obviously an expert in this field will point out what the
3 similarities that are important for the Court to know.

4 MS. KLEIN: Or the difference.

5 THE COURT: Or the difference.

6 THE WITNESS: I could do it on a basic level.

7 THE COURT: Right now I don't see any relevance
8 for the service pension.

9 Let's move on.

10 Q. Are there any differences that are relevant to what we
11 are discussing here?

12 A. Without going into the seven or so components, at a
13 very basic level a service pension is fifty percent of the
14 average final salary. There are other components that could --

15 THE COURT: I don't need to know this. I really
16 don't. Let's move on.

17 Q. Okay.

18 THE COURT: Thank you. But I need to move on.

19 Q. You mentioned that there is such a thing as an ordinary
20 disability pension as opposed to accident.

21 What is the difference?

22 THE COURT: I don't want to know this information,
23 counsel. What we have here is an accident disability
24 pension.

25 MS. KLEIN: But the courts -- to distinguish

Giambarrese - Defendant - Direct

1 between the different pensions the courts have looked at the
2 difference between the pensions. And why one pension does
3 not act as a collateral offset and why another does.

4 THE COURT: The only pension I am dealing with is
5 the accident disability retirement pension, also known as
6 ADR. So what I need to know is -- what I need to know is
7 information pertaining to this that is relevant to the
8 issues of offsets.

9 Q. Did you bring any records with you pertaining to Ms.
10 Andino?

11 A. I did.

12 Q. And what did you bring?

13 A. I have in my possession a medical board report dated
14 June 9th, 2009. I have an application for accident disability
15 retirement, dated April 30th, 2009. I have a line-of-duty injury
16 report and the accompanying documentation dated August 18th,
17 2004. I have a redacted transcript of the New York City Police
18 Pension Fund Board of Trustees dated August 12th, 2009.

19 THE COURT: Excuse me. Would that document be --
20 a transcript of what the Board discussed?

21 THE WITNESS: Correct.

22 THE COURT: About this person's pension?

23 THE WITNESS: Correct.

24 THE COURT: Continue.

25 A. I have a pension application dated August 27th, 2009.

Giambarrese - Defendant - Direct

1 Pension estimate, also dated August 27th, 2009. I have an
2 accident disability worksheet dated September 2nd, 2010. I have
3 a finalization worksheet dated March 4th, 2011. I have two
4 letters from the Police Pension Fund to Ms. Andino dated March
5 5th, 2011, regarding the finalization of her pension.

6 I have an allowable earnings worksheet for financial
7 disclosure year 2013. I have duplicate IRS form 1099R's for the
8 tax years 2009, 2010, 2011, 2012. I have the COLA history for
9 the New York City Police -- COLA, cost of living adjustment from
10 2001 to 2013. I have the summary plan description of tier 2 as
11 well as the various New York City Administrative Code statutes
12 that I discussed. New York Admin Code 13-206, 13-252, 13-254,
13 and 13-258.

14 MR. SHRAMKO: Your Honor, may I interject? Are
15 the Administrative Code sections part of Ms. Andino's file?

16 THE WITNESS: No, it's what I reviewed.

17 MR. SHRAMKO: That is what you brought?

18 THE WITNESS: Yes.

19 MS. KLEIN: I would like to have those marked. We
20 don't need them entered into --

21 MR. DANSKER: Usually counsel gets a chance to
22 look. Some of those have never been exchanged with us.

23 THE COURT: Let's give you a chance to --

24 THE WITNESS: I would like to highlight for your
25 Honor, these are unredacted records. Usually prior to the

Giambarrese - Defendant - Direct

1 Police Pension Fund releasing records we take member
2 security and privacy very seriously.

3 Some of these documents contain her Social
4 Security number and home address. I would ask should they
5 become part of the record I would ask that they be redacted
6 and put on the record that I --

7 MR. DANSKER: That is not a problem.

8 THE COURT: Okay.

9 (Documents submitted.)

10 THE COURT: It's almost 1:00. Take a look. And
11 then we will decide where we are going.

12 How long do you expect to go with this witness?
13 Because I have a sense we are at the very beginning.

14 MS. KLEIN: No, I think I need about a half hour.
15 She testified to all the background information already.
16 Now it's specific to what Ms. Andino is receiving.

17 THE COURT: Off the record.

18 (Discussion off the record.)

19 THE COURT: All right. We will break for lunch.
20 During lunchtime the plaintiff's attorneys will have an
21 opportunity to review the pension file. It's been handed
22 over by the witness.

23 Thank you everyone. I will see you 2:15.

24 MR. DANSKER: Thank you very much.

25 (Whereupon, a luncheon recess was taken at this

Giambarrese - Defendant - Direct

1 time.)

2 THE COURT: Good afternoon, counselors. I believe
3 you had a chance to review the documents?

4 MR. DANSKER: No objection.

5 THE COURT: So this will be --

6 MR. SHRAMKO: Defendant's 2?

7 MR. DANSKER: I think we need to mark them
8 individually.

9 THE COURT: All right. The -- George is not here,
10 which is my biggest concern. Normally everything is
11 identified with a description.

12 MR. DANSKER: Or we could mark them and say what
13 they are. Either way. Afterwards, Judge. I don't have any
14 objection to that.

15 THE COURT: All right. It's not your --

16 MR. DANSKER: I am just saying I have no
17 objection.

18 THE COURT: Okay. But I am talking about having
19 documents identified in an organized fashion for my
20 convenience. Remember, this is not a jury trial.

21 MR. DANSKER: Correct.

22 THE COURT: This is a hearing. It will facilitate
23 my analysis. Let's mark these documents. If you want to be
24 haphazard, it's up to you.

25 MS. KLEIN: I believe the witness organized them.

Giambarrese - Defendant - Direct

1 THE COURT: Let's start. Is it going to be the
2 bulk of your exhibits?

3 MS. KLEIN: These are all the exhibits.

4 THE COURT: And after this we have no further
5 exhibits?

6 MS. KLEIN: As far as I know.

7 THE COURT: Okay. Let's give them individual
8 letters.

9 (Whereupon, Defendant's Exhibits B through M were
10 received and marked into evidence at this time.)

11 MS. KLEIN: Judge, before I proceed, there is one
12 issue. In plaintiff's memorandum he raises the ordinary
13 disability pension. And he compares it to the accidental
14 disability retirement pension.

15 THE COURT: Is that true?

16 MR. SHRAMKO: Yes.

17 MS. KLEIN: Yes. And that is why --

18 MR. DANSKER: Wait a minute. In what context?

19 MS. KLEIN: By charge --

20 MR. DANSKER: Show me where that is. Mr. Shramko
21 did the memo. I read it ten times but I don't remember.

22 THE COURT: Let's go off the record.

23 (Discussion off the record.)

24 THE COURT: Back on the record.

25 MS. KLEIN: In light of that, I ask that I be

Giambarrese - Defendant - Direct

1 permitted to ask the witness questions about the ordinary
2 disability pension, because the plaintiff refers to the
3 ordinary disability pension and explains why the defendants
4 are not entitled an offset in light of the comparisons
5 between the ordinary and accidental disability retirement.

6 THE COURT: I will allow you to ask limited
7 questions. But I am warning you, try to keep this simple.

8 MS. KLEIN: Yes. Of course.

9 THE COURT: So that we don't get into esoteric
10 areas that have nothing to do with the issues before me.
11 All right.

12 Q. What is an ordinary disability pension?

13 A. An ordinary disability pension is a pension that is
14 awarded to a member who is disabled and no longer mentally or
15 physically capable of performing police duties. However, it's
16 awarded to a member who is injured outside of the line-of-duty.

17 Q. And is an ordinary disability pension based on a number
18 of contributions?

19 A. Yes. Portions.

20 Q. And what percentage of salary is taken into account for
21 an ordinary --

22 A. Depends on the member's length of service. There are
23 three different calculations for ordinary pensions based upon how
24 long the member -- how much accredited service the member has,
25 which is allowable police service.

Giambarrese - Defendant - Direct

1 Q. And in an accidental disability retirement pension, is
2 that dependent on the member's service?

3 A. No.

4 Q. If Ms. Andino had worked one day on the police force
5 and sustained a line-of-duty injury on that day she would be
6 entitled the accidental disability retirement pension?

7 A. The calculation would be the same.

8 Q. So she would be entitled to that pension?

9 A. Yes, she would.

10 Q. Now, can you just list -- I am sorry. Identify each of
11 these exhibits for the record.

12 THE COURT: So these records have been marked for
13 identification.

14 Are you --

15 MR. DANSKER: No objection.

16 THE COURT: No objection?

17 MR. DANSKER: No.

18 THE COURT: Okay. So let's go one by one.

19 A. Exhibit B is an application for accident disability
20 retirement dated 4/30/09. I would note, however, none of these
21 are redacted. Exhibit C is a pension application dated 8/27/09.
22 Exhibit D are redacted minutes of the Police Pension Fund Board
23 of Trustees dated August 12th, 2009.

24 Exhibit E is a pension estimate completed by the New
25 York City Police Pension Fund dated August 27th, 2009. Exhibit F

Giambarrese - Defendant - Direct

1 is an accident disability worksheet, created by the New York City
2 Police Pension fund dated 9/2/10.

3 THE COURT: Sorry. What is it?

4 THE WITNESS: An accident disability worksheet.

5 MR. SHRAMKO: What is the date, sorry?

6 THE WITNESS: September 2nd, 2010.

7 (Brief pause.)

8 THE WITNESS: Exhibit G is a finalization
9 worksheet, also created by the New York City Police Pension
10 Fund dated March 4th, 2011. Exhibit H is the allowable
11 earnings worksheet for financial disclosure year 2013. Also
12 created by the New York City Police Pension fund. Exhibit I
13 collectively are duplicate IRS Form 1099R's for the tax
14 years 2009, 2010, 2011, and 2012. Exhibit K --

15 THE COURT: J?

16 MR. DANSKER: J.

17 THE WITNESS: Exhibit J is the COLA history for
18 cost of living adjustments awarded by the New York City
19 Police Pension Fund for the years 2001 through 2013.
20 Exhibit I is collectively --

21 THE COURT: You did I already.

22 THE WITNESS: Sorry.

23 MR. DANSKER: K.

24 THE COURT: K.

25 THE WITNESS: K collectively are two letters dated

Giambarrese - Defendant - Direct

1 March 5th, 2011, regarding the finalization of Ms. Andino's
2 pension. And Exhibit L is the report of the medical board
3 of the Police Pension Fund dated June 9th, 2009. And then
4 Exhibit M is the summary plan description written and put
5 out by the New York City Police Pension Fund.

6 THE COURT: Exhibits B through M are admitted into
7 evidence without objection.

8 Q. Generally, what is the summary plan description?

9 A. It's an explanation of benefits. Pretty much in
10 layman's terms for police officers to understand the statutory
11 benefits that are available to them.

12 Q. And did you play a role in directing that?

13 A. I did not draft the original; however, I did do the
14 redesign and I recreated the current one that is put out by my
15 office.

16 Q. And is this the current one, marked as Defense Exhibit
17 M?

18 A. It is. The last revision was in January this year.

19 MR. DANSKER: Not to interfere, but for the sake
20 of time I am not sure that anything that is in here,
21 although we have no objection to admitting them, has any
22 relevance.

23 Nothing in here has any relevance to the issues
24 before the Court. They are all background. And they all
25 establish background information. And just to save time --

Giambarrese - Defendant - Direct

1 THE COURT: Can you stipulate to anything?

2 MS. KLEIN: Not yet. We cannot.

3 MR. DANSKER: I don't think going through each one
4 of these does anything but waste time.

5 I want to give you --

6 MS. KLEIN: I am not going through each one but if
7 the witness needs to refer to something to answer a question
8 she --

9 MR. DANSKER: That's fine.

10 THE COURT: Thank you very much.

11 Let's move on.

12 Q. And it's already stipulated that Ms. Andino had a line-
13 of-duty injury --

14 MR. DANSKER: Yes.

15 MS. KLEIN: So I don't have to go into that.

16 Q. When did Ms. Andino stop earning her regular salary?

17 A. She was before the Police Pension Fund Board of
18 Trustees on August 12th. She earned her regular salary through
19 August 30th.

20 MR. DANSKER: Of?

21 A. 2009. That is the last day she remained on the active
22 payroll of the NYPD. Her first pension payment would have been
23 September 30th, 2009.

24 Q. Would that have covered the entire month of September?

25 A. Yes.

Giambarrese - Defendant - Direct

1 THE COURT: One minute.

2 (Brief pause.)

3 THE COURT: September 30th --

4 MR. DANSKER: August 30th.

5 THE COURT: September 30th's check was retroactive
6 for September?

7 THE WITNESS: We pay all our benefits for the --
8 on the last business day for the month prior. October's
9 goes out on October 31. You have to make it through the
10 whole month to get --

11 THE COURT: There is a lag?

12 THE WITNESS: Yes.

13 Q. When would Ms. Andino have reached her twentieth year
14 of service?

15 A. July 18th, 2016.

16 THE COURT: And that would have been what?

17 THE WITNESS: The anniversary of twenty years of
18 allowable police service.

19 Q. And until what year was she permitted to work as a
20 police officer?

21 A. Till she turns sixty-three.

22 MR. DANSKER: Which would be what year?

23 THE WITNESS: I do not -- I could tell you -- I
24 don't know if I have her date of birth. I am sure it's here
25 somewhere.

Giambarrese - Defendant - Direct

1 She was forty-one at retirement in 2009.

2 Q. Did she start collecting the ADR pension right after
3 her regular earnings stopped?

4 A. Yes.

5 Q. And did her ADR pension depend on how many years she
6 was in service?

7 A. No.

8 Q. And the ADR benefits that she is receiving, are they in
9 lieu of her income as a police officer?

10 MR. SHRAMKO: Objection.

11 THE COURT: I believe that is the whole --

12 MR. SHRAMKO: That is my point, Judge.

13 MS. KLEIN: She testified as to the statutory
14 history and these earnings are in lieu of any salary.

15 THE COURT: Right. I understand that she
16 testified that -- I understand that she testified that the
17 pension is awarded to the police department members who are
18 disabled and unable to perform. That is with respect to the
19 ADR pension.

20 MS. KLEIN: Yes. And Ms. Giambarrese also
21 testified that the statutory period of the applicable
22 statutes states that the ADR pension is in lieu of any
23 salary.

24 MR. SHRAMKO: That was over my objection and I
25 renew my objection. That is the ultimate issue for your

Giambarrese - Defendant - Direct

1 Honor to decide.

2 MS. KLEIN: It's in the statute and her role as
3 her -- in her job is to interpret --

4 THE COURT: Is there a section in the statute that
5 says --

6 THE WITNESS: This is in the Subchapter 1 statute.

7 THE COURT: Could you tell me where it is?

8 THE WITNESS: New York Administrative Code 13-206.

9 THE COURT: You have a copy?

10 THE WITNESS: I do.

11 (Brief pause.)

12 (Documents submitted.)

13 THE COURT: Could you show me the section?

14 THE WITNESS: It's found in Subsection A.

15 THE COURT: Okay. So Section -- Section 13-206,
16 Subsection A of the Administrative Code says:

17 The Board of Trustees shall retire any member who
18 upon an examination as provided in Subsection D of this
19 subsection to be found disqualified physically or mentally
20 from the performance of his or her duties.

21 Such members -- and then it reviews the different
22 conditions including total permanent disability.

23 Ma'am?

24 THE WITNESS: That is not the standard for tier 2
25 police officers. But --

Giambarrese - Defendant - Direct

1 THE COURT: Which part of it?

2 THE WITNESS: The qualifications. That would be
3 found in --

4 THE COURT: No, no, no. I just read from
5 paragraph A of Section 13-206. So which part of A is not
6 applicable to tier 2?

7 THE WITNESS: The total and partial disability.
8 What is found below it.

9 THE COURT: What is found below it?

10 THE WITNESS: Correct. Tier 2 does not have total
11 or partial disability.

12 THE COURT: This is an exhibit.

13 MS. KLEIN: This is not an exhibit.

14 MR. DANSKER: That is not. That wasn't accepted.
15 She had that in her file. It's not in evidence.

16 THE COURT: Okay. You made a copy of this
17 yourself?

18 THE WITNESS: I did.

19 THE COURT: Okay. If the attorneys don't mind, I
20 will take the witness's copy of the statute and mark it up.
21 It will be easier for me.

22 MR. DANSKER: We don't mind.

23 THE COURT: Off the record please.

24 (Discussion off the record.)

25 THE COURT: All right. So I have been given two

Giambarrese - Defendant - Direct

1 different sections of the Administrative Code that I
2 understand are read together where an accident disability
3 pension for a tier 2 member is at issue.

4 THE WITNESS: Yes.

5 THE COURT: All right. And 13-206 includes
6 Subsection A, but then you jump over to Section 13-252 in
7 order to get both the legal standard and the allowance
8 calculations for tier 2 members.

9 THE WITNESS: Partially correct, your Honor. The
10 allowance is calculated in 13-258.

11 THE COURT: So 13-252 is simply the legal
12 standard?

13 THE WITNESS: Correct.

14 THE COURT: And the allowance is where?

15 THE WITNESS: 13-258. I have a copy of that as
16 well.

17 THE COURT: The attorneys have any objection to my
18 taking counsel's -- sorry.

19 MR. DANSKER: I would like to see what that is.

20 (Document submitted.)

21 MR. DANSKER: No objection.

22 THE COURT: All right.

23 MR. DANSKER: Anything that helps clear things up.

24 THE COURT: So 13-258 is what?

25 THE WITNESS: How the allowance -- the retirement

Giambarrese - Defendant - Direct

1 allowance for an accident disability is calculated.

2 THE COURT: Thank you.

3 Let's continue.

4 Q. Has Ms. Andino received any Worker's Comp benefits?

5 A. No.

6 Q. Okay.

7 A. Police officers are not eligible for Worker's
8 Compensation.

9 Q. I will not go into the formula with you again, but what
10 is the total amount that Ms. Andino is entitled to?

11 THE COURT: Under what?

12 Q. As her accidental disability?

13 A. After finalization, her entire retirement allowance is
14 68,948.75.

15 Q. And that is effective as of when?

16 A. March 2011.

17 Q. Does that go back retroactively?

18 A. It did. Ms. Andino was finalized in March 2011 and she
19 received a retroactive check to cover the amount that she should
20 have been receiving from her retirement date.

21 Q. So it would have started -- the payments go back
22 actually to December 1, 2009?

23 A. August 31, 2009.

24 Q. Had Ms. Andino ever received her regular salary and her
25 accidental disability retirement pension at the same time?

Giambarrese - Defendant - Direct

1 A. No.

2 Q. Would she have received her accidental disability
3 retirement pension if she had not been in the accident and
4 continued working?

5 A. No.

6 Q. Will Ms. Andino -- does Ms. Andino receive any other
7 lifetime benefits due to her work as a police officer?

8 A. My office only administers Police Pension Fund
9 benefits. I do happen to know, however, that health insurance is
10 provided by the New York City Office of Labor Relations.

11 Q. Is that for the rest of her life?

12 A. I believe it will be.

13 Q. And how long will the accidental disability retirement
14 pension be paid?

15 A. So long as Ms. Andino does not return to work as a
16 uniformed police officer or violate any of the statutory earnings
17 restrictions or pension benefits will cease upon her death. So
18 they are statutorily guaranteed for life.

19 Q. So if she returned as a police officer the benefits
20 would stop?

21 A. Correct.

22 Q. And you mentioned something about other earnings
23 restrictions?

24 A. There are.

25 Q. And could you explain that?

Giambarrese - Defendant - Direct

1 A. Well, it all depends. Prior to what would have been
2 twenty years of allowable police service or the service
3 eligibility date, all members who are retired on accidental
4 disability retirement have to file what is called an FDQ,
5 Financial Disclosure Questionnaire, because all earnings both in
6 the public and private sector are subject to the earnings
7 limitations which prior to what would have been twenty years of
8 allowable police service is defined as salary of the rank, the
9 next highest rank above what the member retired at, plus the last
10 twelve months of the member's overtime and any night differential
11 pay less the benefit that is being received, which gives you the
12 maximum allowable earnings for that tax year.

13 THE COURT: The FDQ has to be filed every year?

14 THE WITNESS: Every year. Otherwise we suspend
15 pension benefits for failure to submit a questionnaire.

16 Q. In this case could you explain the maximum that Ms.
17 Andino could earn in other fields without her ADR being
18 suspended?

19 A. So Exhibit H is the allowable earnings worksheet for
20 financial disclosure year 2013. Ms. Andino retired as a
21 sergeant. So we would have to look to the present salary for the
22 next higher rank, which in this case would be a lieutenant.

23 The current contractual salary, top pay, you always
24 look at top pay, is 126,958.76. Then you have to look at the
25 last twelve months that Ms. Andino worked on the job to get her

Giambarrese - Defendant - Direct

1 overtime, night differential, if she was in a night chart because
2 she worked all night shifts, and you would factor that in as well
3 as the annual uniform allowance.

4 And that makes up the total FDQ allowable income. So
5 when you add the overtime, night chart, night differential and
6 uniform allowance that brings the allowable income for the base
7 salary up to 137,545.32. Then you have to subtract Ms. Andino's
8 annual --

9 THE COURT: What did you call that?

10 THE WITNESS: Total FDQ allowable income. This
11 would change every calendar year.

12 THE COURT: I don't understand.

13 THE WITNESS: So every year potentially the salary
14 could change for the rank, the next highest rank. So every
15 year the allowable earnings is recalculated by my office for
16 members who are out on accidental disability retirement.

17 THE COURT: So this means she could have earned
18 137 and change minus the 68,000 and change?

19 THE WITNESS: Correct. Which would mean her
20 maximum allowable earnings for the year 2013 are 68,862.78.
21 If she would earn in excess of that we would suspend it.

22 THE COURT: What did you call the 68,862? That
23 would be the ADR?

24 THE WITNESS: Correct.

25 THE COURT: And the balance is the maximum --

1 THE WITNESS: Allowable earnings for the year
2 2013.

3 Q. And you mentioned cost of living increases?

4 A. Yes.

5 Q. And what is that, generally?

6 A. Cost of living adjustments are available to tier 2
7 members. For service retirees to be eligible they must be fifty-
8 five years old and retired for ten years or sixty-two years old
9 and retired for five years. All Disability retiree both
10 accidental an ordinary are eligible after being retired for five
11 years. COLA adjustments are calculated as one half of the
12 federal consumer price index, with the minimum being one percent
13 and the maximum being three percent. This percentage is applied
14 to the first \$18,000 of a member's pension.

15 Q. And so it's clear, Ms. Andino right now is not yet
16 entitled the COLA increase because it has not been five years?

17 A. Correct.

18 THE COURT: So I need to understand something.
19 Why are we discussing that if she is not eligible
20 for it?

21 MS. KLEIN: Within the next two years she will be
22 entitled to the COLA increase. So there will be a cost of
23 living adjustment of her pension within the next two years.

24 MR. DANSKER: And for the rest of her life.

25 MS. KLEIN: It's a small amount anyway.

1 THE COURT: Okay.

2 Q. Will Ms. Andino ever receive a service pension?

3 A. It's not likely.

4 Q. And why is that?

5 A. In order for Ms. Andino to receive a service pension
6 prior to what would have been twenty years of allowable police
7 service she would have to be reinstated to the Department and
8 finish out I believe about nine years of police service in order
9 to obtain a service pension.

10 Q. Can Ms. Andino receive a service pension and the ADR
11 pension at the same time?

12 A. No, you only get one pension.

13 Q. As far as your records show is Ms. Andino still
14 collecting the ADR benefits?

15 A. Yes.

16 Q. And between 2009 and 2012 how much does she receive?

17 MS. KLEIN: I have the number. It's in the --

18 MR. DANSKER: What is the difference of what she
19 is -- I mean, how is that relevant?

20 MS. KLEIN: Because that is part of the offset.

21 THE COURT: All right. You all can get up.

22 (Recess taken.)

23 Q. Do you know how much Ms. Andino received in ADR
24 benefits between 2009 and 2012?

25 A. I believe it's approximately \$230,000. I have the

Giambarrese - Defendant - Direct

1 exact, although it will require basic addition. In 2009 she
2 received \$20,602.52. In 2010 she received \$61,807.56.

3 In 2011 she received \$78,655.14. In 2012 she received
4 68,948.52. And from January through this current month she
5 received -- receives \$5,745.71 per month. So she received it
6 through September 30th. October's pension payment will be on
7 October 31st.

8 Q. And the reason why the 2011 number was higher, was that
9 because of her pension payments -- they were adjusted
10 retroactively?

11 A. Correct. She was finalized in 2011 so she received a
12 lump sum retro check.

13 Q. And will it be -- the ADR benefits, will it replace her
14 service pension?

15 A. Yes.

16 Q. Does her file reflect that her ADR benefits have been
17 suspended or reduced at all?

18 A. No.

19 Q. And what type of proceeding would there be if her
20 pension was to be reduced or suspended?

21 A. Safeguards proceeding pursuant to New York City
22 Administrative Code 13-254.

23 Q. And when are those proceedings initiated?

24 A. They could be initiated by the Board once a year every
25 year until the member reaches what would have been twenty years

Giambarrese - Defendant - Direct

1 of allowable police service.

2 Q. And is that to determine if she is capable of working?

3 A. Correct.

4 MR. DANSKER: Could I get the last question read
5 back?

6 THE COURT: Read it back.

7 (Whereupon, the testimony was read back by the
8 reporter.)

9 Q. Have there been any safeguard proceedings initiated
10 against Ms. Andino?

11 A. No.

12 MS. KLEIN: Sorry. Can I just ask a question off
13 to the side?

14 THE COURT: You want to ask a question? Yes.
15 Go ahead.

16 (Brief pause.)

17 MR. DANSKER: I have nothing further at this time.

18 MR. SHRAMKO: Your Honor, I have some questions.

19 THE COURT: Will you do the questioning?

20 MR. SHRAMKO: Yes.

21 THE COURT: Okay.

22 MS. KLEIN: I just ask that both attorneys not --

23 MR. DANSKER: I will whisper in the ear or hand a
24 note. Like Ms. King is doing.

25 THE COURT: Okay. You may cross-examine her.

Giambarrese - Defendant - Cross/Mr. Shramko

1 CROSS-EXAMINATION

2 BY MR. SHRAMKO:

3 Q. Good afternoon. I just have a few follow-ups.

4 You testified about the significance of the twentieth
5 year of service for a service member.

6 Could you explain why the twentieth year is important
7 in the context of ADR?

8 A. Sure. Because when a member attains what would have
9 been the twentieth anniversary of allowable police service, the
10 earnings limitations then change because that is the year that
11 the member would have retired presumably.

12 THE COURT: I did not understand what you said.

13 THE WITNESS: Sure. When the member reaches the
14 twentieth anniversary of their appointment date, what would
15 have been their twentieth anniversary, the earnings
16 limitations change. Because that is the point in time in
17 which the member presumably would have been entitled to a
18 service pension.

19 THE COURT: I still don't understand.

20 THE WITNESS: Okay.

21 THE COURT: When you say the earnings limitations
22 change, what do you mean?

23 THE WITNESS: For accident disability retirement,
24 the limitations that I previously described, the next
25 highest rank less the pension equals --

Giambarrese - Defendant - Cross/Mr. Shramko

1 THE COURT: Right.

2 THE WITNESS: Right. That is only for members who
3 are out on ADR who have not attained twenty years of
4 allowable police service.

5 After that, after what would have been twenty
6 years of allowable police service, the Police Pension Fund
7 no longer requires financial disclosure questionnaires, or,
8 FDQ's because we no longer look at earnings in the private
9 sector. It only matters whether or not the member returns
10 to work for New York State or one of its political
11 subdivisions thereof.

12 MR. SHRAMKO: Okay.

13 Q. So paraphrasing what you just said, what you are
14 talking about is until -- and you mentioned that her twentieth
15 year of service would have been July 18th of 2016. That is
16 twenty years after she was appointed?

17 A. Correct.

18 Q. And so up until July 18th, 2016. Ms. Andino is
19 entitled to go into the private sector and make almost double
20 what her retirement income is?

21 A. I think you have it backwards. Can you say it one more
22 time?

23 Q. So Ms. Andino would be entitled to go into the private
24 sector and earn a salary of \$68,000, give or take?

25 A. At what point?

1 Q. At any time until her twentieth year?

2 A. Correct.

3 Q. So from the date she retired when she was -- when she
4 began receiving approximately \$68,000 per year, from that day
5 until July 18th, 2016, she would only be limited in the sense
6 that she could not make more in total than -- than the top pay of
7 a lieutenant?

8 A. Less her current pension benefit.

9 Q. Okay.

10 A. Correct.

11 Q. So \$68,000 being her approximate current benefits?

12 A. Yes.

13 Q. She would be entitled earn another approximately
14 \$68,000?

15 A. Correct.

16 Q. Without losing her pension benefits?

17 A. Yes.

18 Q. And after July 18th of 2016 there would be no
19 limitation on how much she could earn outside --

20 A. Only in the private sector.

21 Q. In the private sector. So she could make 2, \$300,000
22 without any penalty against her ADR after her twentieth year of
23 service?

24 A. As long as she is not working for New York State or one
25 of its subdivisions.

1 Q. Okay.

2 THE COURT: Okay. I need to break this down
3 further. I need more basic layperson's language.

4 If I receive an ADR pension and -- because I am
5 physically incapable of being a police officer, I could
6 still make a living in other ways up to a certain number,
7 right?

8 THE WITNESS: Yes.

9 THE COURT: For the purposes of this discussion,
10 this hearing, the plaintiff would have been able to receive
11 \$68,948.75 as her ADR pension, and subtracting that from her
12 total FDQ allowance, you come up with 137,554.32, which is
13 the amount the next highest grade police officer; to wit, a
14 lieutenant would have received. The plaintiff would have
15 been able to earn 68 --

16 THE WITNESS: Correct.

17 THE COURT: And because she went out on Disability
18 before reaching her twentieth anniversary, does she have
19 this cap of \$68,862.72 until she dies?

20 THE WITNESS: No, that cap is adjusted yearly
21 annually. And it's until she reaches twenty years of
22 allowable police service. So it would cease in 2016.

23 THE COURT: So the cap ceases for her irrespective
24 of whether she goes out of service on Disability or out of
25 service after her twentieth year?

1 THE WITNESS: No. There are different earnings
2 restrictions for members who retire for service. And those
3 only contemplate those in the public sector being --

4 THE COURT: That is where I got confused with your
5 answer.

6 So explain that more simply.

7 THE WITNESS: Sure. There are three relevant
8 statutes. New York City Charter Section 1117, New York
9 State Retirement and Social Security Law, Sections 211 and
10 212. So the New York City Charter Section 1117 applies to
11 all retirees. And that states that after retiring, this is
12 not just police pensions now, states that you could not earn
13 more than \$1,800 when you combine the salary paid by New
14 York State or its political subdivisions and the pension
15 benefit.

16 Now, just about November of the year 2013 --

17 THE COURT: Stop. Stop. I lost you again.

18 MR. SHRAMKO: Judge, maybe I could explain. The
19 point of this line of questioning --

20 THE COURT: Please tell me where we are going,
21 yes.

22 MR. SHRAMKO: The point of my line of questioning
23 here is to bring it -- bring to the Court's attention the
24 similarities between this situation and the situation
25 decided in Oden, the Court of Appeals case. Okay?

1 THE COURT: Okay.

2 MR. SHRAMKO: That is why this is important.

3 Because in Oden the question was whether this was a
4 substitute for salary. Whether a pension benefit is a
5 substitute for salary. And the Court there said it's not a
6 substitute -- it's not in the same category because this
7 person could go out in the private sector without risking
8 his ADR, his retirement benefit and go to work and earn as
9 much as he wanted to.

10 My point here is that the plaintiff in this case
11 is similarly entitled to do that subject to the single
12 limitation that until she reaches twenty years of service
13 she could not earn more than a lieutenant --

14 THE COURT: I don't understand why you are going
15 into this area at all.

16 MR. SHRAMKO: Because the question is whether --
17 if it is a substitute for it, if it's in the same category
18 and exactly equal to --

19 THE COURT: No. No.

20 MR. SHRAMKO: Then it's a setoff. We are saying
21 it's not. And we are asking you to look at the Oden case.
22 I don't mean to complicate it. It's a simple question of
23 whether or not she is allowed to earn outside income and
24 still retain her --

25 MS. KLEIN: Oden doesn't deal with a police

Giambarrese - Defendant - Cross/Mr. Shramko

1 officer. It's a completely different question.

2 MR. DANSKER: Are we taking argument?

3 MS. KLEIN: Why are we doing argument now?

4 THE COURT: Let's go off the record.

5 (Discussion off the record.)

6 THE COURT: All right. So we have discussed this
7 at length off the record. And let me just state what my
8 understanding is. You tell me if my understanding is right
9 or wrong.

10 THE WITNESS: Okay.

11 THE COURT: So with respect to an injured retiree,
12 that person has a cap with respect to the public and private
13 sectors if the person retires before twenty years.

14 THE WITNESS: Correct.

15 THE COURT: And the status of an injured retiree
16 is whether you are injured in the line of service or out of
17 the line of service.

18 THE WITNESS: This cap only applies to accident
19 disability retirees.

20 No, I am sorry. All retirees.

21 THE COURT: All injured retirees?

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24 THE WITNESS: So that is ODR and ADR.

25 THE COURT: Okay. Once the twentieth anniversary

Giambarrese - Defendant - Cross/Mr. Shramko

1 of allowable police service is reached, then there is no cap
2 with respect to what injured retirees could earn in the
3 private sector; is that correct?

4 THE WITNESS: Yes, correct.

5 THE COURT: And but with respect to government
6 service there is a cap?

7 THE WITNESS: Yes, correct.

8 THE COURT: So, counsel, why does this make a
9 difference? Why are we getting into this?

10 MR. SHRAMKO: As I explained to your Honor, and I
11 will not argue or go into any detail, I asked the Court to
12 review this particular factor when reading the Oden case.
13 The Court of appeals case.

14 MR. DANSKER: Oden and Johnson.

15 MR. SHRAMKO: Particularly Oden.

16 (Brief pause.)

17 THE COURT: All right. Thank you for the diagram
18 everybody. This should have been prepared beforehand.

19 Let's continue.

20 Q. You mentioned, Ms. Giambarrese, about health insurance?

21 A. Yes.

22 Q. That is not your area of expertise, is it?

23 A. No.

24 Q. You don't deal with that at all in your job?

25 A. Not entirely accurate.

1 Q. Okay. Were you ever called upon to answer questions
2 about or deal with that in the normal course of your job?

3 A. No, but my office is.

4 Q. Do you have any personal knowledge as to what type of
5 insurance? You mentioned that Ms. Andino will have health
6 insurance for the rest of her life, that is your testimony as to
7 your understanding of what she is entitled to?

8 A. That is correct.

9 Q. Do you have any factual knowledge, are you sure that
10 that is the case?

11 A. That is --

12 Q. Other than what you heard from elsewhere?

13 A. That is provided to all New York City retirees. It's
14 not just limited to Police Pension Fund retirees.

15 Q. Do you have any idea what type of health insurance she
16 is provided with?

17 A. Sure. When a member comes in to retire the member
18 fills out the health benefits packet at our office and the
19 retiree is entitled to select what health insurance the member
20 wants. That information is then compiled by the retirement
21 counseling unit and then sent to the Office of Labor Relations
22 who actual resets the retiree up with the health insurance.

23 Q. Okay.

24 A. I don't know what Ms. Andino selected.

25 THE COURT: This is done upon retirement?

1 THE WITNESS: Correct. When they come in for
2 their counseling session.

3 Q. I will be done shortly.

4 MR. SHRAMKO: All right. Judge, I have nothing.

5 MS. KLEIN: No further questions.

6 THE COURT: You have no further questions. All
7 right.

8 Off the record.

9 (Discussion off the record.)

10 THE COURT: Thank you. Have a good day.

11 THE WITNESS: Thank you.

12 (Witness excused.)

13 THE COURT: Off the record.

14 (Discussion off the record.)

15 (Recess taken.)

16 THE COURT: All right.

17 I want to state for the record that I am really
18 annoyed because I found both of you to be disorganized
19 today. When we discussed this case previously, I told you
20 that the subject matter is difficult and certainly new for
21 me.

22 But it is difficult no matter who you are. And I
23 strongly suggested that you have charts and that you
24 organize this properly. Putting that aside, I came down
25 just a few minutes ago because I was told that you were

Proceedings

1 ready. You had -- someone spoke to my clerk and said you
2 were all ready. I come downstairs and the stipulations are
3 not written out. Now I have been handed up a stipulation
4 and I am told that this is not complete.

5 Is it or not?

6 MR. DANSKER: As far as we could go at the moment
7 before you make a decision on the argument today, then we
8 will stipulate to one more bit of numbers. The goal at
9 least on the plaintiff's end is to not have you crunch any
10 numbers, that your decision is -- in this hearing is legal
11 only. And then we will, as I told Lana, agree to the
12 numbers based upon what you decide.

13 THE COURT: Why wasn't this stipulation done at
14 the beginning? Why am I being given a stipulation now?
15 When a lot of the questioning that took place could have
16 been obviated because the parties had agreed to the numbers.

17 MS. KLEIN: No. The stipulation has nothing to do
18 with the numbers. This stipulation is an adjustment of the
19 jury verdict to conform to the evidence at trial. This
20 stipulation has nothing to do with the reduction.

21 MR. DANSKER: These are separate issues that are
22 ancillary to what we are doing today. While we are here
23 cleaning up the jury verdict, that is separate and apart and
24 doesn't require your --

25 THE COURT: You told me you were doing a

Proceedings

1 stipulation so the economist would not have to testify as to
2 certain information.

3 MS. KLEIN: Correct.

4 MR. DANSKER: That's correct.

5 MS. KLEIN: That's correct, your Honor. That is
6 what the Court directed us to do.

7 THE COURT: Which -- directed you to do what?

8 MS. KLEIN: The Court directed us to have the
9 economist here to calculate the amount of pension benefit
10 that plaintiff will receive. I have the economist here.
11 His testimony will take five minutes.

12 Plaintiff wants to hold off on that calculation
13 until that -- until the Court determines if we are entitled
14 to an offset at all. I don't want the economist to come in
15 a second time. He is actually here. He won't have to
16 testify to anything else since we stipulated to adjusted
17 verdict numbers.

18 THE COURT: So according to the stipulation the
19 parties have agreed that the plaintiff's past lost earnings
20 are \$283,422; is that right?

21 MR. DANSKER: Yes.

22 MS. KLEIN: Yes. As adjusted --

23 MR. DANSKER: Yes.

24 MS. KLEIN: Without waiving any objection to the
25 amount of the verdict.

Proceedings

1 MR. DANSKER: Just -- she is just reading those
2 numbers, yes, we stipulate that and signed off on it.

3 THE COURT: Is this the amount that the jury
4 agreed to?

5 MR. DANSKER: It's an adjusted amount.

6 MS. KLEIN: The jury's numbers were slightly off
7 from what the evidence showed. So we stipulated to what the
8 correct numbers should be.

9 MR. DANSKER: If you remember, the economist who
10 testified for the plaintiff had all the charts and they
11 rounded up or down, so we then adjusted them to conform to
12 what --

13 THE COURT: So the stipulation also says future
14 lost earnings, \$2,392,512 and the future lost pension amount
15 is \$2,490,000. You both agreed?

16 MR. DANSKER: Yes.

17 MS. KLEIN: Yes.

18 MR. DANSKER: So, Judge, what I said to Ms. Klein,
19 to make things similar and easier, we don't need the
20 economist to testify to any numbers because all the numbers
21 I said I would stipulate to with her --

22 THE COURT: That is not your call. That is hers.
23 And the longer you talk the less time you have to do
24 anything.

25 MS. KLEIN: Let's just put him on now.

Goldman - Defendant - Direct

1 THE COURT: We are stopping at 4:30 sharp.

2 Have a seat. Let me mark the stipulation as a
3 Court Exhibit. This will be Court's Exhibit 3.

4 (Whereupon, Court's Exhibit 3 was received into
5 evidence at this time.)

6 THE COURT: Who does the defendant wish to call as
7 her next witness?

8 MS. KLEIN: Fred Goldman.

9 F R E D G O L D M A N, called by and on behalf of the
10 Defendant herein, having been first duly sworn, was examined and
11 testified as follows:

12 COURT OFFICER: State your name and business
13 affiliation and your business address.

14 THE WITNESS: Fred Goldman, G-O-L-D-M-A-N, 10 West
15 66th Street, New York, New York, 10023. I am the company.
16 I don't know if I have a title. I am President.

17 THE COURT: Have a seat. You may inquire.

18 DIRECT EXAMINATION

19 BY MS. KLEIN:

20 Q. Mr. Goldman, this will be just a limited questioning.
21 I want you to testify as to your calculations --

22 THE COURT: Counsel, I don't know what his
23 qualifications are.

24 MR. DANSKER: Stipulate to qualifications.

25 MS. KLEIN: I understand we stipulated as an

Goldman - Defendant - Direct

1 economist.

2 THE COURT: You want to say that for the record?

3 MS. KLEIN: The parties stipulate that he owns
4 Goldman & Associates Incorporated. Economist.

5 MR. DANSKER: Agreed to, yes. So stipulated.

6 Q. I just want you to explain your calculations of
7 accidental disability pension that Ms. Andino received from the
8 date that she qualified for the Disability pension up until the
9 date of the verdict.

10 MR. DANSKER: Let's just give the final number and
11 save a little time.

12 MS. KLEIN: Which final number?

13 MR. DANSKER: The final calculation. The one
14 issue that is left.

15 MS. KLEIN: So the total amount that Mr. Goldman
16 calculated of the Disability payments from September 1,
17 2009, until Ms. Andino's life expectancy, which is 81.6
18 years is \$2,801,370.

19 THE COURT: 2 million?

20 MS. KLEIN: 801,370 dollars.

21 MR. DANSKER: That is the total minus the set-off?

22 THE WITNESS: Past Disability payments, that is a
23 combination of both past and future. The past Disability
24 payment is \$247,066.

25 THE COURT: How much?

Goldman - Defendant - Direct

1 THE WITNESS: 247,066. That is to the date of
2 verdict.

3 THE COURT: Until today?

4 THE WITNESS: Until the date of verdict.

5 Q. So if you subtracted 247,066 from the jury award of
6 283 -- no, I am just doing past. If you subtract 283 --

7 THE COURT: I have no idea what you are doing.
8 You have spoken with each other and agreed with each other
9 as to various numbers but there is no testimony on the
10 record that explains to me what you are doing. Nor is there
11 a series of further stipulations. So I am in the dark.

12 MS. KLEIN: There is a stipulation on the record
13 that the jury verdict for past lost earnings is 283,422.
14 And your calculations for the amount of past --

15 MR. DANSKER: I am sorry. This is not -- this is
16 past Disability payments, am I right? What is the bottom
17 line?

18 THE WITNESS: The bottom line after the
19 subtraction is \$36,356 for the past.

20 THE COURT: I have no idea what you are doing. I
21 have -- excuse me. The plaintiff's counsel is asking
22 questions while the defendant's counsel is in the middle of
23 her Direct Examination.

24 Mr. Dansker, you have jumped into Ms. Klein's
25 queries a million times because you have indicated that you

Goldman - Defendant - Direct

1 don't want the economist to testify. The result is a total
2 blur for me.

3 MR. DANSKER: Sorry, Judge.

4 THE COURT: This is wrong. This is interference.
5 And it is now twenty-four minutes after 4:00. So we have
6 six minutes.

7 Q. Okay. What is the adjusted verdict for past lost
8 earnings if you subtract the Disability pension payments that Ms.
9 Andino --

10 THE COURT: Let's start with what the past lost
11 earnings are.

12 MS. KLEIN: I read that into the record.

13 THE COURT: Well, that is nice. I need it to be
14 repeated so I could follow -- if you don't like it, too bad.

15 Thank you. I will see you tomorrow morning. I've
16 had it. I have had it. I am not doing this again. This
17 level of informality has not worked and I am angry with you.

18 The fact that we are working in my robing room
19 because I accommodated you while I am having a jury selected
20 for my next trial in my courtroom has apparently meant to
21 you that you could dispense with all the normal protocols
22 that we follow. And I have had it. So I am done.

23 Thank you very much. 10:00 tomorrow morning.

24 MS. KLEIN: Judge, Mr. Goldman is not available.

25 THE COURT: Then we will reschedule for another

Goldman - Defendant - Direct

1 date at some other point after my trial is over.

2 MS. KLEIN: Okay.

3 THE COURT: And my trial begins on Tuesday. I set
4 aside yesterday for you specifically. I told both of you
5 that I was putting everything aside for two days just to
6 accommodate you. I have adjourned this repeatedly, this
7 hearing at your request.

8 MS. KLEIN: Not at my request.

9 THE COURT: At Mr. Dansker's request. And I am
10 not accommodating anymore.

11 You could let me know in the morning when
12 Mr. Goldman -- sorry, your last name is?

13 THE WITNESS: Goldman.

14 THE COURT: -- when he is available and we will
15 meet at that time.

16 Thank you.

17 MS. KLEIN: Should we call the court?

18 THE COURT: You could conference call me in the
19 morning. Thank you very much.

20 COURT OFFICER: Okay. Everybody could step out.

21 (Whereupon, the case is adjourned to October 25,
22 2013, at 10:00 a.m.)
23
24
25