10-3118

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DENICE TWIGG

Plaintiff-Appellant,

vs.

HAWKER BEECHCRAFT CORPORATION

Defendant-Appellee

Appeal from the United States District Court
for the District of Kansas

The Honorable J. Thomas Marten
District Court No. 08-2632-JTM

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT
REQUESTED

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PRIOR APPEALS

There are no prior or related appeals to this action.

STATEMENT OF JURISDICTION

The plaintiff, Denice Twigg, was employed by the defendant, Hawker Beechcraft Corporation ("HBC"), for twelve years. On April 7, 2008, Ms. Twigg was discharged from her employment by HBC. Ms. Twigg filed this lawsuit asserting four claims: (1) retaliation for protesting racial discrimination against a co-worker, in violation of 42 U.S.C. § 1981; (2) interference with Ms. Twigg's rights under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq.; (3) retaliation for Ms. Twigg's exercise of her rights under the FMLA; and (4) retaliation for Ms. Twigg's exercise of her rights under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Jurisdiction is based on 28 U.S.C. § 1331. (Aplt. App. at 9-19)

On April 21, 2010, the district court filed a memorandum and order granting summary judgment in favor of HBC on all of Ms. Twigg's claims. (Aplt. App. at 235-254) On the same day, final judgment was formally entered in favor of HBC. (Aplt. App. at 255) On May 18, 2010, Ms. Twigg filed a notice of appeal pursuant to Fed. Rule App. Pro. 4(a)(1). (Aplt. App. at 256) The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. In this appeal, Ms. Twigg has abandoned her claim of retaliation in violation of ERISA.

STATEMENT OF ISSUES

1. Could a reasonable jury, faced with the evidence presented, return a verdict in favor of Ms. Twigg on her § 1981 claim of retaliation for protesting racial discrimination against a co-worker?

2. Could a reasonable jury, faced with the evidence presented, return a verdict in favor of Ms. Twigg on her claim of interference with her rights under the FMLA?

3. Could a reasonable jury, faced with the evidence presented, return a verdict in favor of Ms. Twigg on her claim of retaliation for exercising her rights under the FMLA?

STATEMENT OF THE CASE

The following facts are stated in the light most favorable to Ms. Twigg, who is the party opposing summary judgment. For the sake of convenience, the facts which are truly undisputed are taken from the district court's memorandum opinion. (Aplt. App. at 235-254)

A. Ms. Twigg's Employment With HBC

Ms. Twigg was hired by HBC on April 2, 1996. HBC is a manufacturer of aircraft, which are utilized in general aviation and by the military. (Aplt. App. at 71, 155)

During the last years of her employment, Ms. Twigg was classified as a Media Production Specialist, and she worked in the Technical Manual Distribution Center. (Aplt. App. at 73, 155) Ms. Twigg's duties included converting aircraft document files and manuals into pdf electronic files for compact disc and web delivery. Her duties also included answering customer questions via e-mail and telephone concerning navigation of HBC's web site. (Aplt. App. at 140)

Ms. Twigg's immediate supervisor was Cindy Ealey, who held the position of team lead. Ms. Ealey reported to Kathy Sade, who held the position of manager. (Aplt. App. at 131, 133) Ms. Sade, in turn, reported to Nigel Gray. Mr. Gray died on June 1, 2006, and his position was not immediately filled. Greg Graber was eventually promoted to the position that Mr. Gray had held. (Aplt. App. at 236)

One of Ms. Twigg's co-workers was Teresa Cole, who also worked in the Technical Manual Distribution Center. Ms. Cole is African-American, and she held the position of Media Production Assistant. (Aplt. App. at 133) In approximately 1998, Ms. Sade became Ms. Cole's manager, and thereafter Shelley Huffman became her team lead. (Aplt. App. at 201)

Sometime while Ms. Huffman was Ms. Cole's team lead, there was a physical altercation between Ms. Huffman and Ms. Cole. This physical altercation was investigated by HBC's Human Resources ("HR") department, and as a result of HR's investigation, Ms. Sade's group was required to participate in a week-long counseling session. (Aplt. App. at 201-203) During the investigation by HR, Ms. Sade learned that one of the people in her group had accused her of being a racist. Ms. Sade suspected that Ms. Cole was the person who had made this accusation. (Aplt. App. at 203)

In 2006 or 2007, Ms. Huffman died, and then Sharon Schlegel became Ms. Cole's team lead. (Aplt. App. at 203) Ms. Twigg observed Ms. Schlegel constantly demeaning Ms. Cole, raising her voice when speaking to Ms. Cole,

and disparaging Ms. Cole's abilities and intelligence. (Aplt. App. at 190, 192) Ms. Twigg also observed Ms. Cole working after-hours in order to make up her time for taking off work for physical therapy to treat an injury covered by worker's compensation. (Aplt. App. at 125)

In the spring of 2007, Ms. Twigg first complained to Ms. Ealey that Ms. Cole was not being treated fairly by Ms. Schlegel. (Aplt. App. at 123-124) Ms. Twigg specifically told Ms. Ealey that she thought Ms. Cole was being treated unfairly because of her race. Ms. Twigg testified in her deposition as follows:

> Q. Now, in the complaint that you filed in federal court, you say in paragraph 38: 'Ms. Twigg complained to Ms. Ealey that Ms. Cole was being treated unfairly because of her race.' Do you specifically recall mentioning race to Cindy Ealey?
>
> A. As far as I can recall, yes.

(Aplt. App. at 191-192. Emphasis added.)

On May 25, 2007, Ms. Twigg received her annual performance review from Ms. Ealey. In this performance review, Ms. Twigg's overall performance rating was "Meets Requirements." (Aplt. App. at 143) Furthermore, Ms. Twigg received a "merit increase" in her hourly wage on June 14, 2007. (Aplt. App. at 220)

In late 2007 or early 2008, Ms. Twigg complained a second time to Ms. Ealey that Ms. Cole was still being treated unfairly by Ms. Schlegel. (Aplt. App. at 126) Ms. Twigg specifically told Ms. Ealey that she thought Ms. Cole was being treated unfairly because of her race. (Aplt. App. at 191-192) Ms. Ealey

told Ms. Twigg that she had discussed Ms. Twigg's complaints with Ms. Sade. Ms. Twigg testified in her deposition as follows:

> Q. Paragraph No. 38 goes on to say: 'Ms. Sade and Ms. Schlegel were aware of Ms. Twigg's complaints.' Do you have any personal knowledge that they were aware of your complaints?
>
> A. Because Cindy told me that she went to Kathy [Sade] with it.

(Aplt. App. at 192)

In addition, Ms. Sade admitted in her deposition she was aware that Ms. Twigg had complained that Ms. Cole was being discriminated against by Ms. Schlegel. Ms. Sade testified:

> Q. Do you recall ever hearing that Ms. Twigg had voiced the opinion that Ms. Cole was being discriminated against by Ms. Schlegel?
>
> A. I believe that Denice had said some stuff like that, yes.
>
> Q. And did you investigate those allegations that Ms. Twigg made?
>
> A. The allegations would have been in dealing with her time off and we went through HR and workman's comp as to the correct procedure to deal with that time off, so there was no basis for any kind of discrimination. We were going by the HR policy.

(Aplt. App. at 204. Emphasis added.)

During the first part of February of 2008, Ms. Ealey conducted a review of Ms. Twigg's performance for 2007. Ms. Ealey told Ms. Twigg that she had done a lot better job of logging on to the "Telephony at Work" system when she arrived

at work. Ms. Ealey also told Ms. Twigg that she personally believed Ms. Twigg's overall performance rating for 2007 should be "Meets Requirements." Ms. Ealey did not say anything to Ms. Twigg about the possibility of being placed on a Performance Improvement Plan. (Aplt. App. at 186)

B. Ms. Twigg's Leave Under The FMLA

Nita Long was HBC's director of compensation and benefits, and she oversaw the FMLA program in 2008. Amber Cotton worked in HBC's HR department, and she assisted Ms. Long with FMLA-related matters. (Aplt. App. at 236)

On February 19, 2008, Ms. Twigg sent to the HR department a written request for FMLA leave. The request asked for the leave to begin the next day, February 20, 2008, and to continue through April 17, 2008. The request further stated that the leave was needed for "surgery on Feb. 20th, per Dr. possible 6-8 wk. required recovery." (Aplt. App. at 145)

According to Ms. Twigg, both Ms. Ealey and Ms. Sade knew that Ms. Twigg was having surgery, and that she had previously submitted a request for FMLA leave, but did not have the surgery due to her workload. Shortly before February 19, Ms. Ealey advised Ms. Twigg to resubmit her request for FMLA leave. (Aplt. App. at 127) Prior to Ms. Twigg's surgery on February 20, both Ms. Ealey and Ms. Sade had approved Ms. Twigg's absence from work until April 18, 2008. In addition, Ms. Ealey had also approved an "Out of Office Auto Reply" on

Ms. Twigg's e-mail which stated: "I will be out of the office until approximately April 28, 2008." (Aplt. App. at 186-187)

On February 19, 2008, Ms. Twigg also sent to the HR department a "Certification of Health Care Provider," in support of her request for FMLA leave. This medical certification was filled out and signed by Dr. Joseph Lickteig. (Aplt. App. at 146-147) Dr. Lickteig identified the diagnosis as "bunion right foot," and stated that the probable duration of the condition was "3 months." (Aplt. App. at 146) In describing the medical facts supporting the existence of a serious health condition, Dr. Lickteig stated: "Surgery to correct bunion with post-op recovery necessary i.e. non-wt. bearing etc." (Aplt. App. at 146)

Paragraph 12(a) of the medical certification form inquired: "If medical leave is required for the employee's absence from work because of the employee's own condition . . . is the employee unable to perform work of any kind?" Dr. Lickteig answered: "Can preform [sic] only non-wt. bearing work." (Aplt. App. at 147) Paragraph 12(b) of the certification form further inquired:

> If able to perform some work, is the employee unable to perform any one or more of the essential functions of the employee's job? If yes, please list the essential functions the employee is unable to perform:

Dr. Lickteig did not answer this question. (Aplt. App. at 147)

Because Dr. Lickteig failed to answer paragraph 12(b) on the FMLA medical certification form, Ms. Twigg contends that the medical certification form was incomplete, since it did not set forth a specific period of time which Ms.

Twigg would need to be off work. This issue was addressed in Ms. Cotton's deposition, where she was examined about the FMLA medical certification form. Ms. Cotton testified as follows:

> Q. How did you interpret Dr. Lickteig's statement in there that her [Ms. Twigg's] condition would last up to three months? In other words, what did you understand that to mean?
>
> A. She could have doctors' appointments, checkups, physical therapy, possibly. That would continue through a three-month period.
>
> . . . .
>
> Q. And how long did you understand Ms. Twigg would be recovering from that surgery and unable to come to work?
>
> A. It does not indicate that on there.
>
> Q. And you made no further inquiry from Dr. Lickteig as to how long Ms. Twigg was or was not able to come to work?
>
> A. Correct.

(Aplt. App. at 211. Emphasis added.)

Ms. Cotton also testified that when HBC wanted further clarification of the information which had been included on an employee's FMLA certification form, "[w]e send notification to the employee that their medical certification was insufficient and more documentation of the certification was needed." (Aplt. App. at 209) However, HBC never notified Ms. Twigg that her FMLA certification form was insufficient or incomplete, or that more information was needed from Dr.

Lickteig as to the specific period of time which Ms. Twigg would need to be off work. (Aplt. App. 187)

On February 21, 2008, Ms. Cotton prepared a memorandum addressing Ms. Twigg's request for FMLA leave. (Aplt. App. at 212) This memorandum stated in relevant part: "Your request for FMLA leave has been reviewed and approved for the following dates: February 20-29, 2008." (Aplt. App. at 148) A copy of this memorandum was sent to Ms. Sade. (Aplt. App. at 148)

The February 21 memorandum was addressed to "Denice Twigg 278807005845." (Aplt. App. at 148) This was Ms. Twigg's company badge number, and it indicates that the February 21 memorandum was sent to Ms. Twigg's email address at work. (Aplt. App. at 196) The February 21 memorandum was not addressed to Ms. Twigg's home address, and Ms. Twigg testified that she did not receive the February 21 memorandum at her home. (Aplt. App. at 128-129) Ms. Cotton testified that she does not keep a log, or any other kind of documentation, which would confirm that she mailed out FMLA information to an employee's home. (Aplt. App. at 209-210) Ms. Cotton further testified that she has no independent recollection of actually mailing the February 21 memorandum to Ms. Twigg's home address. (Aplt. App. at 212)

In addition to requesting FMLA leave for her bunion surgery, Ms. Twigg also applied for short-term disability ("STD") benefits from Metropolitan Life ("MetLife"). (Aplt. App. at 237, 240) HBC provides STD coverage to its employees. The coverage provides income replacement equal to seventy-five

percent of the employee's weekly wage, for up to twelve weeks. Employees may purchase additional coverage, which provides income replacement equal to twenty-five percent of the employee's wage. Ms. Twigg purchased the optional additional STD coverage through MetLife. (Aplt. App. at 237)

If an employee who has applied for FMLA is approved for STD benefits, HBC's practice is to approve FMLA leave for the same period of time. (Aplt. App. at 240) Ms. Long explained HBC's policy and practice of approving FMLA leave for the same period of time as MetLife approved STD benefits as follows:

> Well, MetLife, number one, when they made a determination as to whether the employee would be approved for short-term disability, they received information from the physician and they were able to get detailed information from the physician that we - - we're not privy to unless the doctor chose to share it with us because of the privacy rules and so forth, so they had more thorough - - I believe more thorough medical information than we had in our office, so we would watch to see if an employee filed STD. Now, MetLife was always very, very strict in how they made their determinations. So if they approved a period of time for an employee to be off on a short-term disability, then it was my belief it must be legit and, therefore, we would comply with anything that STD decided.

(Aplt. App. at 136)

On February 25, 2008, Ms. Twigg made a telephone call to Ms. Ealey. (Aplt. App. at 194) Ms. Twigg described her telephone conversation with Ms. Ealey as follows:

> I called in to talk to her, give her an update on my surgery and stuff. She told me she received an e-mail telling her that I had . . . only approval for a week. I

> said: 'Why?' She said: 'I have no idea.' I promptly called HR.

(Aplt. App. at 129. Emphasis added.)

On February 26, 2008, Ms. Twigg was able to reach Ms. Cotton by telephone to discuss her FMLA leave. (Aplt. App. at 194) During this telephone conversation, Ms. Cotton told Ms. Twigg that the procedure for obtaining FMLA leave was separate and different from the procedure for obtaining STD benefits. Ms. Cotton further advised Ms. Twigg that STD benefits must be approved by MetLife, and that she needed to call MetLife to find out why her STD benefits had only been approved through February 29, 2009. However, Ms. Cotton did not advise Ms. Twigg that HBC had a policy and practice of approving FMLA leave for the same period of time as MetLife approved STD benefits. (Aplt. App. at 187, 193)

After her telephone call with Ms. Cotton on February 26, 2008, Ms. Twigg immediately called MetLife and was able to talk to a representative for about thirty minutes. During this conversation, MetLife told Ms. Twigg that they were waiting on documents from her doctor. (Aplt. App. at 194)

On February 28, 2008, Dr. Lickteig faxed additional information to MetLife regarding Ms. Twigg's medical condition. (Aplt. App. at 218-219) In response to a question asking Dr. Lickteig to "[p]lease advise the date on which you anticipate your patient will be able to return to work," he answered "4-21-08." (Aplt. App. at 218)

On March 3, 2008, Ms. Sade sent an e-mail to Ms. Cotton regarding Ms. Twigg's FMLA leave. The e-mail stated:

> Is there an extension of this FMLA request? Denice is still out from her foot surgery and I have not seen anything from Insurance as to whether her STD has been approved. I have completed her time card for the 4th and 5th waiting period days for last week. Should I contact Denice and let her know I haven't heard anything from MetLife yet? She may want to use her vacation if she's not going to get paid for her time off?

(Aplt. App. at 227. Emphasis added.)

On March 4, 2008, Ms. Twigg called Ms. Cotton on the telephone and was able to talk to her for about five minutes. (Aplt. App. at 222) During this conversation, Ms. Cotton told Ms. Twigg that everything was taken care of; that Ms. Twigg shouldn't be concerned about her FMLA leave; and that Ms. Cotton would call Ms. Twigg if there was a problem. (Aplt. App. at 187, 195) However, Ms. Cotton did not tell Ms. Twigg that she was only approved for STD benefits through April 1, 2008. (Aplt. App. at 195)

On March 13, 2008, Mr. Graber sent an e-mail to Ms. Cotton regarding Ms. Twigg's FMLA leave. The e-mail stated:

> Have you heard anything more on an extension to the FMLA for Denice Twigg? We are way past the deadline on her FMLA and we have not heard a thing and she has not reported for work as of yet. He[r] direct supervisor (Cindy Ealy) has not heard a thing from her. What can you tell us?

(Aplt. App. at 226) Later on March 13, Ms. Cotton replied to Mr. Graber's e-mail, saying:

> I spoke with MetLife and so far she is approved for STD thru 4/1 with the option to get an extension after that.

(Aplt. App. at 225. Emphasis added.)

Ms. Cotton testified that between February 29 and March 13, 2008, Ms. Twigg's status with HBC was "FMLA pending," meaning that "she had nothing covering her absences at that point." (Aplt. App. at 213-214) Although Ms. Twigg had nothing covering her absences during this period of time, Ms. Sade did not consider taking any disciplinary action against Ms. Twigg. Ms. Sade explained, "I thought the paperwork just needed to catch up, I guess." (Aplt. App. at 205)

On March 14, 2008, MetLife notified Ms. Cotton through an e-mail that MetLife had approved STD benefits for Ms. Twigg through April 1, 2008. The e-mail stated in relevant part:

> Last Day Worked: 2/19/08
> First Day Disabled: 2/20/08
> Benefit Start Date: 2/25/08
> Benefit Pay Through: 4/1/08
> Estimated RTW Date: [blank]

(Aplt. App. at 149)

Also on March 14, 2008, Ms. Cotton prepared a memorandum addressing Ms. Twigg's FMLA leave. This memorandum stated in relevant part: "Your request for FMLA leave has been received and approved for the following dates: February 20, 2008 thru April 1, 2008 (STD approved thru 4/1)." (Aplt. App. at 150) A copy of this memorandum was sent to Ms. Sade. (Aplt. App. at 150)

The March 14 memorandum was addressed to "Denice Twigg 278807005845." (Aplt. App. at 150) This was Ms. Twigg's company badge number, and it indicates that the March 14 memorandum was sent to Ms. Twigg's e-mail address at work. (Aplt. App. at 196) The March 14 memorandum was not addressed to Ms. Twigg's home address, and she testified that she did not receive the March 14 memorandum at her home. (Aplt. App. at 130) Ms. Cotton testified that she does not keep a log, or any other kind of documentation, which would confirm that she mailed out FMLA information to an employee's home. (Aplt. App. at 209-210, 215) Ms. Cotton further testified that she has no independent recollection of actually mailing the March 14 memorandum to Ms. Twigg's home address. (Aplt. App. at 214-215)

On March 18, 2008, Ms. Twigg sent an e-mail to Ms. Ealey, with copies to the other members of her department, including Ms. Sade. This e-mail was an update on Ms. Twigg's status, and the last sentence stated: "Take care all, I will see you in about a month." (Aplt. App. at 233. Emphasis added.)

C. HBC's Discharge of Ms. Twigg

On April 1, 2008, Ms. Sade sent an e-mail to Ms. Cotton, stating in relevant part:

> I have not heard that Denice's STD is approved past today so I assume she will be at work tomorrow. If anyone knows anything different please let me know.

(Aplt. App. at 151)

On April 2, 2008, Ms. Cotton sent an e-mail back to Ms. Sade, stating:

> She has not applied or been approved for an extension according to MetLife. Her benefit start and end dates are 2/25 through 4/1. The process is if an employee is approved by MetLife for STD, they require medical documentation. It is only up to the doctor to release with restrictions, in which case we would accommodate her here. Her doctor has not done that, which is why the case manager never contacted the supervisor or me back.

(Aplt. App. at 224)

HBC's Rules of Conduct stated that "[a]bsence for three consecutive working days without proper notification" may lead to "[t]ermination" on the first offence. (Aplt. App. at 142) However, management has the discretion to decide whether or not an absence for three consecutive working days without proper notification will result in termination on the first offense. The introductory paragraph to HBC's Rules of Conduct specifically states:

> Committing any of the following violations will be sufficient grounds for disciplinary action ranging from reprimand to immediate termination, depending upon the seriousness of the offense in the judgment of Management.

(Aplt. App. at 142. Emphasis added.) As Ms. Long explained in her deposition:

> Well, they [managers] have the ability to look at a situation that an employee's in and make a determination as to whether or not the seriousness of the offence - - and which in this case is termination on the first offense - - whether that's warranted.

(Aplt. App. at 198)

On April 7, 2008, Ms. Sade sent a certified letter to Ms. Twigg, stating in relevant part:

> Our records indicate you did not report in to work or contact the Company for three consecutive working days. According to the Company's Rules of Conduct #1, 'Absence for three consecutive working days without proper notification,' shall cause the employee to be terminated. Due to the aforementioned violations your employment with Hawker Beechcraft is terminated as of April 7, 2008.

(Aplt. App. at 152) Ms. Twigg did not pick up this letter from the Post Office until April 17, 2008. (Aplt. App. at 153)

Ms. Sade was asked in her deposition to explain why she had decided to terminate Ms. Twigg's employment. She testified as follows:

> We talked previously about Performance and Development summaries and we were going through that process and Denice was going to be placed on a does-not-meet rating, which means when she came back she would be put on a Performance Improvement Plan. Typically, a Performance Improvement Plan, depending on what the problem is, you have a certain amount of time that you have to fix that problem or problems. If you don't, then you are subject to disciplinary action up to and including termination. So she was going to be placed on that based on the problems we had had and the decline in her performance, the absenteeism, tardiness more than absenteeism, not logging onto the phone system as she was told to, and various other things.

(Aplt. App. at 206)

On April 11, 2008, Ms. Twigg was examined by Dr. Lickteig. The chart note for this examination stated in relevant part:

> The patient is in today for postop check from her bunionectomy performed six weeks ago. She is doing very well on the right foot. . . . Is set to return to work on

> 04/21/2008 and I gave her a back to work slip for that time.

(Aplt. App. at 219. Emphasis added.)

On April 15, 2008, Ms. Twigg sent an e-mail to Ms. Ealey and Ms. Sade, stating in relevant part:

> I wanted to let you know I will be returning to work on Monday April 21st. I believe I report directly to Health Services first with my return authorization. If that's not correct let me know, otherwise I will see you directly following.

(Aplt. App. at 221)

On April 16, 2008, Dr. Lickteig faxed to MetLife his chart note regarding his April 11 examination of Ms. Twigg. (Aplt. App. at 219) On April 17, 2008, MetLife notified Ms. Cotton through an e-mail that MetLife had extended STD benefits for Ms. Twigg through April 20, 2008. The e-mail stated in relevant part:

> Last Day Worked: 2/19/08
> First Day Disabled: 2/20/08
> Benefit Start Date: 2/25/08
> Benefit Pay Through: 4/20/08
> Estimated RTW Date: 4/21/08

(Aplt. App. at 223)

Also on April 17, Ms. Twigg picked up from the Post Office the certified letter from Ms. Sade, which terminated her employment. Later in the day on April 17, Ms. Twigg talked to Ms. Sade on the telephone. (Aplt. App. at 222) Ms. Sade summarized this conversation in a "Note to File," which states in relevant part:

> She asked me what was going on and I explained that FMLA had not been approved past April 1 and she was basically a no-show. So she was terminated. . . . She said no one told her about it and I again corrected her and said Amber Cotton had called her and informed her it was only approved to the 1st of April. She said she thought I could get it changed and when I didn't say anything, she asked if I wanted her back. I told her no, based on her past performance and attitude for the last couple of years, especially the last year, I was not willing to try to get her back.

(Aplt. App. at 234. Emphasis added.)

Ms. Sade's statement to Ms. Twigg on April 17 that "Amber Cotton had called her and informed her it [FMLA] was only approved to the 1st of April" is false. Ms. Cotton testified in her deposition as follows:

> Q. Do you agree or disagree that you called Ms. Twigg and informed her that her FMLA had only been approved through April 1st?
>
> A. I can't recall that I called her.
>
> Q. Do you recall ever telling Ms. Sade that you had called Ms. Twigg and told her that her FMLA had been approved only through April 1st.
>
> A. I do not.

(Aplt. App. at 216) Ms. Twigg likewise testified that Ms. Cotton never called her and informed her that her FMLA had been approved only through April 1. (Aplt. App. at 187)

D. HBC's Refusal To Reinstate Ms. Twigg

Ms. Sade was advised that MetLife had decided to extend Ms. Twigg's STD benefits through April 20, 2008. However, MetLife's decision to extend Ms.

Twigg's STD benefits through April 20 did not cause Ms. Sade to rethink Ms. Twigg's termination, and to consider retracting the termination. (Aplt. App. at 207) Ms. Sade explained:

> Because, as I said earlier, she was going to be put on a Performance Improvement Plan when she got back - - if she got back. And she still had a failure to report.

(Aplt. App. at 207)

On or about April 28, 2008, Ms. Twigg filed an administrative complaint with the U.S. Department of Labor, asserting that HBC had violated the FMLA in terminating her employment. (Aplt. App. at 229, 231)

On October 20, 2008, Ms. Long participated in a final telephone conference with an investigator for the Department of Labor in regarding to Ms. Twigg's administrative complaint. During this conference, Ms. Long was asked by the investigator if she would reinstate Ms. Twigg to her employment with HBC. Ms. Long refused to reinstate Ms. Twigg. (Aplt. App. at 199) In her deposition, Ms. Long explained her decision not to reinstate Ms. Twigg as follows:

> Q. And you were the decision-maker who made the decision not to reinstate Ms. Twigg, correct?
>
> A. Based on the fact that I wasn't going to change my decision on the FMLA.
>
> Q. And what was the reason why you refused to reinstate Ms. Twigg?
>
> A. Well, number one, the employee was already terminated for failure to report. I felt that the decision to terminate her for failure to report was correct. That based on the evidence that we had, she had not done -

> - had not held up her responsibility by staying in touch with the company. That was her obligation, she didn't do it and so I felt that the termination was proper. I didn't see any reason to go back and make any changes from my perspective.

(Aplt. App. at 199)

E. Proceedings In The District Court

The district court granted summary judgment in favor of HBC on all of Ms. Twigg's claims. As to the retaliation claim under § 1981, the district court concluded Ms. Twigg has failed to show that she engaged in opposition to racial discrimination, and that a causal connection existed between her alleged protected activity and any adverse employment action by HBC. (Aplt. App. at 251-254) As to the interference claim under the FMLA, the district court concluded that Ms. Twigg has failed to establish that she was entitled to take the full twelve weeks of leave guaranteed by the FMLA, and that HBC's action was related to the exercise of her FMLA rights. (Aplt. App. at 245-247) As to the retaliation claim under the FMLA, the district court concluded Ms. Twigg has failed to show that a causal connection existed between her protected activities and any adverse employment action by HBC. (Aplt. App. at 247-249)

ARGUMENT AND AUTHORITIES

This court reviews a district court's grant of summary judgment de novo to determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Garrett v. Hewlett-Packard Company, 305 F.3d 1210, 1216 (10th Cir. 2002). In considering

whether there are any genuine issues of material fact, "the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." Gullickson v. Southwest Airlines Pilots' Ass'n, 87 F.3d 1176, 1183 910th Cir. 1996), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). See also Munguia v. Unified School Dist. No. 328, 125 F.3d 1353, 1356 (10th Cir. 1997). In analyzing a summary judgment motion, the court "may not make credibility determinations or weigh the evidence," and "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 150 (2000). The nonmoving party must be given "wide berth to prove a factual controversy exists." Jeffries v. State of Kan., 147 F.3d 1220, 1228 (10th Cir. 1998).

In the instant case, the district court erroneously weighed the evidence, and failed to view the record in the light most favorable to Ms. Twigg. As discussed in detail below, a reasonable jury, when faced with the evidence presented here, could return a verdict for Ms. Twigg on her claims under § 1981 and the FMLA.

I. A REASONABLE JURY, FACED WITH THE EVIDENCE PRESENTED, COULD RETURN A VERDICT IN FAVOR OF MS. TWIGG ON HER § 1981 CLAIM OF RETALIATION FOR PROTESTING RACIAL DISCRIMINATION AGAINST A CO-WORKER

Ms. Twigg's claim under § 1981 is based on her complaints that her co-worker, Ms. Cole, was being treated unfairly because of her race. Specifically,

Ms. Twigg complained to Ms. Ealey, in the spring of 2007 and then again in late 2007 or early 2008, that Ms. Schlegal was treating Ms. Cole unfairly because of her race. (Aplt. App. at 123-126, 190-192) Ms. Sade was aware of Ms. Twigg's complaints that Ms. Schlegel was treating Ms. Cole unfairly because of her race. (Aplt. App. at 192, 204)

Ms. Twigg contends that Ms. Sade retaliated against her for her complaints of racial discrimination towards Ms. Cole by terminating Ms. Twigg's employment. (In this appeal, Ms. Twigg has abandoned her claim that Ms. Sade retaliated against her by failing to promote her in the fall of 2007.) This court has recognized that a non-minority employee may bring a claim under § 1981 for retaliation precipitated by the plaintiff's efforts to vindicate the rights of minority employees. Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988).

A. Ms. Twigg's Mixed-Motive Theory of Recovery

An employment discrimination claim may proceed initially on two alternative theories of recovery: a "mixed-motive" theory, or a "pretext" theory. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 1789 n. 12, 104 L.Ed.2d 268 (1989) [plurality opin.]. See also Fye v. Oklahoma Corp. Com'n, 516 F.3d 1217, 1225-1227 (10th Cir. 2008) [explaining the differences between a mixed-motive theory and a pretext theory]; Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999) [Price Waterhouse continues to control a mixed-motive theory of recovery]. Under a mixed-motive theory of recovery, the plaintiff

must show that an employment decision "was the product of a mixture of legitimate and illegitimate motives." Price Waterhouse, 109 S. Ct. at 1788. Where such a theory of recovery is asserted, "it simply makes no sense to ask whether the legitimate reason was the 'true reason' . . . for the decision." Price Waterhouse, 109 S. Ct. at 1788-1789. Emphasis in original. Rather, the essential inquiry is whether "an impermissible motive played a motivating part in an adverse employment decision." Price Waterhouse, 109 C. St. at 1790. Emphasis added.

Under a pretext theory of recovery, on the other hand, the plaintiff must show that the ostensible legitimate business reason for an employment decision was not the "true reason" for the decision. Where such a theory of recovery is asserted, the basic premise "is that either a legitimate or an illegitimate set of considerations led to the challenged decision." Price Waterhouse, 109 S. Ct. at 1789. Emphasis added. The essential inquiry is whether "the employer's stated reason for its decision is pretextual." Price Waterhouse, 109 S. Ct. at 1789 n. 12.

In the present case, Ms. Twigg is asserting a mixed-motive theory of recovery in regard to her retaliation claim under § 1981. Where a mixed-motive theory of recovery is asserted, the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is not applicable. Price Waterhouse, 109 S. Ct. at 1788-1789. See also Fye v. Oklahoma Corp. Com'n, 516 F.3d at 1225; Medlock v. Ortho Biotech, Inc., 164 F.3d at 550; Greene v. Safeway Stores, Inc., 98 F.3d 554, 557-58 (10th Cir. 1996).

In order to prevail on her mixed-motive theory of recovery, Ms. Twigg need only show that "an impermissible motive [i.e. retaliation] played a motivating part in an

adverse employment decision," Price Waterhouse, 109 S. Ct. at 1790, even though other factors may have also played a motivating part in the employment decision. In other words, Ms. Twigg is not required to show that retaliation was the sole, exclusive, or even principal factor in the employment decision. Ostrowski v. Atlantic Mut. Inc. Companies, 968 F.2d 171, 180-181 (2nd Cir. 1992).

B. Evidence of Retaliation As A Motivating Factor In Ms. Twigg's Termination

Ms. Twigg may use either direct or circumstantial evidence to prove her mixed-motive theory of recovery. This point was established in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), where the Supreme Court explained:

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), we recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of circumstantial evidence that is probative of intentional discrimination.' Id., at 147 (emphasis added). The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'

539 U.S. at 100. See also Fye, 516 F.3d at 1226.

Here, Ms. Twigg relies on four pieces of circumstantial evidence to prove her mixed-motive theory of retaliation. These forms of circumstantial evidence are typically used in pretext cases, but they may also be used in mixed-motive cases. See Desert Palace, 539 U.S. at 100; Fye, 516 F.3d at 1226-1227; Wright v. C & M Tire, Inc., 545 F. Supp. 2d 1191, 1205 n. 11 (D. Kan. 2008).

The first piece of circumstantial evidence from which a reasonable jury could infer a retaliatory motive consists of the false explanation given by HBC for terminating

Ms. Twigg's employment. The sufficiency of this type of circumstantial evidence to prove a wrongful motive was upheld by the Supreme Court in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), explaining:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' [Citations omitted]. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

530 U.S. at 147. Emphasis added. See also Desert Palace, 538 U.S. at 100; Kendrick v. Penske Transp. Services, Inc., 220 F.3d 1220, 1230 (10th Cir. 2000).

Here, Ms. Sade's letter of April 7, 2008, stated that Ms. Twigg was terminated because she "did not report in to work or contact the Company for three consecutive working days." (Aplt. App. at 152) A reasonable jury could find this explanation to be false because prior to Ms. Twigg's surgery on February 20, Ms. Ealey had approved an "Out of Office Auto Reply" on Ms. Twigg's e-mail which stated: "I will be out of the office until approximately April 28, 2008." (Aplt. App. at 186-187)

In addition, Ms. Twigg called Ms. Cotton on the telephone on March 4, 2008. (Aplt. App. at 222) During their conversation, Ms. Cotton told Ms. Twigg that everything was taken care of; that Ms. Twigg shouldn't be concerned about her FMLA leave; and that Ms. Cotton would call Ms. Twigg if there was a problem. (Aplt. App. at 187, 195) Finally, on March 18, 2008, Ms. Twigg sent an e-mail to Ms. Ealey, with copies to the other members of her department, including Ms. Sade. This e-mail was an update on

Ms. Twigg's status, and that last sentence stated: "Take care all, I will see you in about a month." (Aplt. App. at 233)

The second piece of circumstantial evidence from which a reasonable jury could infer a retaliatory motive consists of the close temporal proximity between Ms. Twigg's protected conduct and HBC's adverse action. This court has recognized that "protected conduct closely followed by adverse action may justify an inference of a retaliatory motive." Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996). See also Annett v. University of Kansas, 371 F.3d 1233, 1240 (10th Cir. 2004); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999). Here, Ms. Twigg complained for the second time about race discrimination toward Ms. Cole in late 2007 or early 2008. (Aplt. App. at 126, 191-192) Shortly thereafter, her employment was terminated. (Aplt. App. at 152)

The third piece of circumstantial evidence from which a reasonable jury could infer a retaliatory animus consists of "inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action. . . ." Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir. 1997). See also Trujillo v. Pacificorp, 524 F.3d 1149, 1158 (10th Cir. 2008). Here, Ms. Sade stated, in her letter of April 7, that Ms. Twigg was terminated because she "did not report in to work or contact the Company for three consecutive working days." (Aplt. App. at 152) However, this explanation was inconsistent with the one which Ms. Sade gave in her deposition, where she cited Ms. Twigg's work performance, saying:

> We talked previously about Performance and Development summaries and we were going through that process and Denice was going to be placed on a does-not-meet rating,

> which means when she came back she would be put on a Performance Improvement Plan.

(Aplt. App. at 206)

The fourth piece of circumstantial evidence from which a reasonable jury could infer a retaliatory motive consists of "disturbing procedural irregularities," including "deviations from normal company procedure." Doebele v. Sprint/United Management Co., 342 F.3d 1117, 1138 n. 11 (10th Cir. 2003), quoting Garett v. Hewlett-Packard Co., 305 F.3d 1210, 1219-20 (10th Cir. 2002). See also Trujillo v. Pacificorp., 524 F.3d at 1158. Here, HBC's normal company procedure was to approve FMLA leave for the same period of time as MetLife approved STD benefits. (Aplt. App. at 136, 240) However, Ms. Sade deviated from this normal company procedure when she refused to retract her termination of Ms. Twigg, after learning that MetLife had approved Ms. Twigg's STD benefits through April 20, 2008. (Aplt. App. at 207, 223)

II. A REASONABLE JURY, FACED WITH THE EVIDENCE PRESENTED, COULD RETURN A VERDICT IN FAVOR OF MS. TWIGG ON HER CLAIM OF INTERFERENCE WITH HER RIGHTS UNDER THE FMLA

Ms. Twigg's second claim is that HBC interfered with her right to take FMLA leave, in violation of 29 U.S.C. § 2615(a)(1), by terminating her employment on April 7, 2008. Under an interference claim, if an employer interferes with an employee's FMLA-created right to a medical leave, the employer has violated the FMLA, regardless of its intent. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 960 (10th Cir. 2002). To establish an interference claim under the FMLA, Ms. Twigg must show that: (1) she was entitled to FMLA leave; (2) some adverse action by the employer interfered with her right to take FMLA leave; and (3) the employer's action was related to the exercise or attempted exercise of her FMLA rights. Campbell v. Gambro Healthcare, Inc., 478 F.3d

1282, 1287 (10th Cir. 2007); Metzler v. Fed Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006.) "[T]he employer bears the burden of proof on the third element of an interference claim once the plaintiff has shown her FMLA leave was interfered with." Campbell, 478 F.3d at 1287.

A. Ms. Twigg's Entitlement To FMLA Leave

The FMLA entitles a qualified employee up to twelve weeks of leave during any twelve month period "because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The term "serious health condition" is defined to mean "an illness, injury, impairment, or physical or mental condition that involves - - (A) inpatient care in a hospital, hospice, or residential care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

Ms. Twigg requested FMLA leave for six to eight weeks beginning on February 20, 2008. (Aplt. App. at 145) The district court concluded, as a matter of law, that Ms. Twigg has failed to establish that she was entitled to FMLA leave for these eight weeks, saying:

> There is no evidence that Twigg had a serious health condition, therefore she does not satisfy the first element necessary to establish a prima facie case. Twigg provided certification that she was having a bunion removed on February 20, 2008. Twigg's physician noted that she could perform non-weight bearing work, and did not specify that there were any essential job functions that Twigg could not perform, as long as she was in a sitting position. Her certification did not establish the need to be off work for eight weeks.

(Aplt. App. at 246. Emphasis added.) In reaching this conclusion, the district court erroneously weighed the evidence, and failed to view the record in the light most favorable to Ms. Twigg.

Ms. Long testified that it was HBC's normal policy and practice to approve FMLA leave for the same period of time as MetLife approved STD benefits. (Aplt. App. at 136, 240) On April 17, 2008, MetLife notified HBC that Ms. Twigg's STD benefits were being approved through April 20, 2008, based on Dr. Lickteig's chart note regarding his examination of Ms. Twigg on April 11, 2008. (Aplt. App. at 219, 223) Dr. Lickteig's chart note stated in relevant part:

> The patient is in today for postop check from her bunionectomy performed six weeks ago. . . . Is set to return to work on 4/21/08 and I gave her a back to work slip for that time.

(Aplt. App. at 219. Emphasis added.) Dr. Lickteig's April 11 chart note repeated the information which he had earlier sent to MetLife on February 28, 2008, stating that Ms. Twigg would be able to return to work on "4-21-08." (Aplt. App. at 218)

Based on the above facts, a reasonable jury could find that Ms. Twigg was entitled to FMLA leave through April 20, 2008. Consequently, a genuine issue of material fact exists as to how long Ms. Twigg was entitled to FMLA leave.

In addition, a second genuine issue of material fact also exists in regard to Ms. Twigg's entitlement to FMLA leave: whether Dr. Lickteig's medical certification was incomplete or insufficient, since Dr. Lickteig failed to answer paragraph 12(b) of the certification form, which inquired:

> If able to perform some work, is the employee unable to perform any one or more of the essential functions of the

> employee's job? If yes, please list the essential functions the employee is unable to perform?

(Aplt. App. at 147)

Because Dr. Lickteig failed to answer paragraph 12(b) on the FMLA medical certification form, a reasonable jury could find that the certification form was incomplete or insufficient, since it did not set forth a specific period of time which Ms. Twigg would need to be off work. Thus, when Ms. Cotton was asked in her deposition how long Ms. Twigg would be unable to come to work, she replied: "It [the medical certification] does not indicate that on there." (Aplt. App. at 211)

If the jury finds that Dr. Lickteig's medical certification was incomplete or insufficient - - because it did not clearly indicate how long Ms. Twigg would be unable to perform the essential functions of her job - - then the obligations imposed by 29 C.F.R. § 825.305(d) are triggered. This regulation states:

> At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

Emphasis added.

The legal effect of § 825.305(d) was explained in Baldwin-Love v. Electronic Data Systems Corp., 307 F. Supp. 2d 1222 (M.D. Ala. 2004) as follows:

> Under the Department of Labor regulations, an employer is required to notify an employee when it finds a certification incomplete and requires the employer to allow the employee a reasonable period of time to cure any deficiency. 29 C.F.R. § 825.305(3)(2003). Without providing a reasonable opportunity for the employee to cure the deficiency, an employer cannot terminate an employee for an incomplete

> certification. See Marrero v. Camden County Bd. of Soc. Servs., 164 F. Supp. 2d 455, 466 (D. N.J. 2001). An incomplete certification is akin to an inadequate certification or a certification that fails to provide the information requested by the employer. . . . An incomplete certification is not the same as a certification that is non-existent or that has not been provided to the employer.

307 F. Supp. 2d at 1234. Emphasis added. See also Novak v. Metrohealth Med. Ctr., 503 F.3d 572, 579 (6th Cir. 2007); Sorrell v. Rinker Materials Corp., 395 F.3d 332, 337 (6th Cir. 2005) and cases cited therein.

B. HBC's Interference With Ms. Twigg's Right To Take FMLA Leave

As to the second element of Ms. Twigg's interference claim under the FMLA, the district court concluded:

> There is no evidence that HBC interfered with Twigg's right to take FMLA leave. In fact HBC authorized FMLA leave from February 20, 2008 until April 1, 2008, in spite of her doctor's medical opinion that she could perform the duties of her position with a non-weight bearing accommodation.

(Aplt. App. at 246)

The district court erred in reading this conclusion because it is based upon a disputed issue of material fact: Was Ms. Twigg entitled to FMLA leave through April 20, 2008, or at least to notice that Dr. Lickteig's medical certification was inadequate or incomplete? As discussed above, a reasonable jury could find that HBC failed to notify Ms. Twigg that Dr. Lickteig's medical certification was inadequate or incomplete, since it did not clearly indicate how long Ms. Twigg would be unable to perform the essential functions of her job.

If the jury makes this finding, then HBC interfered with Ms. Twigg's right to take FMLA leave by terminating her employment on April 7, 2008. This is so because

pursuant to § 825.305(d), HBC was obligated to provide Ms. Twigg with a reasonable opportunity to cure the deficiency in Dr. Lickteig's medical certification and in the absence of such an opportunity, "an employer cannot terminate an employee for an incomplete certification." Baldwin-Love, 307 F. Supp. 2d at 1234.

C. Relation Between Ms. Twigg's Termination And The Exercise Of Her FMLA Rights

As to the third element of Ms. Twigg's interference claim under the FMLA, the district court concluded:

> Even if the court were to assume that Twigg established the first and second elements necessary for a prima facie case, she fails to establish the third element, a correlation between the alleged adverse action and her exercise of FMLA rights. HBC maintains that Twigg was terminated for her violation of the company policy regarding notice of absences. A reason for dismissal that is insufficiently unrelated to a request for an FMLA leave will not support recovery under an interference theory.

(Aplt. App. at 246-247)

The district court erred in reaching this conclusion because, once again, it is based upon a disputed issue of material fact: Was Ms. Twigg entitled to FMLA leave through April 20, 2008, or at least to notice that Dr. Lickteig's medical certification was inadequate or incomplete? Again, as discussed above, a reasonable jury could find that HBC failed to notify Ms. Twigg that Dr. Lickteig's medical certification was inadequate or incomplete, since it did not clearly indicate how long Ms. Twigg would be unable to perform the essential functions of her job.

If the jury makes such a finding, then there is a sufficient relation between Ms. Twigg's termination and the exercise of her FMLA rights. Again, this is so because pursuant to § 825.305(d), HBC was obligated to provide Ms. Twigg with a reasonable

opportunity to cure the deficiency in Dr. Lickteig's medical certification and in the absence of such an opportunity, "an employer cannot terminate an employee for an incomplete certification." Baldwin-Love, 307 F. Supp. 2d at 1234.

III. A REASONABLE JURY, FACED WITH THE EVIDENCE PRESENTED, COULD RETURN A VERDICT IN FAVOR OF MS. TWIGG ON HER CLAIM OF RETALIATION FOR EXERCISING HER RIGHTS UNDER THE FMLA

Ms. Twigg's third claim is that HBC retaliated against her for exercising her rights under the FMLA, in violation of 29 U.S.C. § 2615(a)(2). Ms. Twigg is asserting a mixed-motive theory of recovery in regard to her retaliation claim under the FMLA. See Burnett v. Southwestern Bell Telephone, L.P., 471 F. Supp. 2d 1121, 1138-1139 (D. Kan. 2007), aff'd, 555 F.3d 906 (10th Cir. 2009) [noting that "some courts including the Tenth Circuit have applied the mixed-motive analysis to FMLA retaliation claims"].

As discussed above (pp. 22-24), in order to prevail on her mixed-motive theory of recovery, Ms. Twigg need only show that "an impermissible motive [i.e. retaliation] played a motivating part in an adverse employment decision." Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 1790, 104 L.Ed.2d 268 (1989). In other words, Ms. Twigg is not required to show that retaliation was the sole, exclusive, or even principal factor in the employment decision. Ostrowski v Atlantic Mut. Inc. Companies, 968 F.2d 171, 180-181 (2nd Cir. 1992).

A. HBC's Adverse Employment Actions

Ms. Twigg asserts that retaliation was a motivating factor in three adverse employment actions which HBC took against her, after she had exercised her right to take leave under the FMLA. The first adverse action consisted of the termination of Ms. Twigg's employment by Ms. Sade on April 7, 2008. (Aplt. App. at 152)

The second adverse action consisted of Ms. Sade's refusal to retract Ms. Twigg's termination following their telephone conversation on April 17, 2008. (Aplt. App. at 207, 222, 234) Significantly, this occurred after Ms. Sade had learned that MetLife had extended Ms. Twigg's STD benefits through April 20, 2008. (Aplt. App. at 207, 223)

The third adverse action consisted of Ms. Long's refusal to reinstate Ms. Twigg to her employment on October 20, 2008, during the final conference with the investigator for the Department of Labor. (Aplt. App. at 199, 229, 231) Significantly, this also occurred after Ms. Long had learned that MetLife had extended Ms. Twigg's STD benefits through April 20, 2008. (Aplt. App. at 223)

B. Circumstantial Evidence Of Retaliation As A Motivating Factor In HBC's Adverse Employment Actions

In order to establish HBC's retaliatory animus in regard to her claim under the FMLA, Ms. Twigg relies on the four same pieces of circumstantial evidence discussed above (pp. 24-27) in regard to her § 1981 retaliation claim: (1) the false explanations given by HBC for its adverse actions; (2) the close temporal proximity between Ms. Twigg's protected activities under the FMLA and HBC's adverse actions; (3) the inconsistencies or contradictions in HBC's explanations for its adverse actions; and (4) the deviations from normal company procedure. These four pieces of circumstantial evidence also support Ms. Twigg's retaliation claim under the FMLA, but with additional factual nuances.

In regard to the false explanations given by HBC, Ms. Sade told Ms. Twigg during their telephone conversation on April 17 that "Amber Cotton had called her and informed her that it [FMLA leave] was only approved to the 1st of April." (Aplt. App. at 234) A reasonable jury could find this explanation to be false. Ms. Cotton testified that

she could not remember ever calling Ms. Twigg and informing her that her FMLA leave had been approved only through April 1. (Aplt. App. at 216) Ms. Twigg likewise testified that Ms. Cotton had never called her and informed her that her FMLA leave had been approved only through April 1. (Aplt. App. at 187)

In regard to the inconsistencies or contradictions in HBC's explanations, Ms. Long testified that she refused to reinstate Ms. Twigg to her employment in October of 2008, "[b]ased on the fact that I wasn't going to change my decision on the FMLA." (Aplt. App. at 199) However, Ms. Long also explained that it was HBC's policy and practice to approve FMLA leave for the same period of time as MetLife approved STD benefits. (Aplt. App. at 136) A reasonable jury could find Ms. Long's explanations to be inconsistent or contradictory, since MetLife approved Ms. Twigg's STD benefits through April 20, 2008 (Aplt. App. at 223), yet Ms. Long refused to change her decision to approve Ms. Twigg's FMLA leave only through April 1, 2008. (Aplt. App. at 150, 199)

Finally, in regard to the close temporal proximity between Ms. Twigg's protected activities under the FMLA and HBC's adverse actions, it is significant that Ms. Long's refusal to reinstate Ms. Twigg to her employment in October of 2008 occurred in the course of the Department of Labor's investigation of Ms. Twigg's administrative complaint that HBC had violated the FMLA. (Aplt. App. at 199, 229-231) A reasonable jury could infer a retaliatory motive from the close temporal proximity between Ms. Twigg's pursuit of her administrative complaint and Ms. Long's refusal to reinstate Ms. Twigg to her employment in October of 2008, particularly in light of MetLife's decision to approve Ms. Twigg's STD benefits through April 20, 2008.

CONCLUSION

For the reasons discussed above, the district court erred in granting summary judgment in favor of HBC on Ms. Twigg's claims under § 1981 and the FMLA. Accordingly, the judgment in favor of HBC must be reversed, and the case remanded to the district court for further proceedings.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 10,534 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

ORAL ARGUMENT

Oral argument is requested in this case because it raises at least one issue of first impression in the Tenth Circuit: What is the legal effect of 29 C.F.R. § 825.305(d), and when does it apply?

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CERTIFICATE OF SERVICE

I herby certify that on the 1st day of September, 2010, I delivered a copy of the foregoing document via electronic mail to the following parties:

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