No. 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 REPLY BRIEF

ALAN V. JOHNSON, KS. #9992
SLOAN, EISENBARTH, GLASSMAN,
McENTIRE & JARBOE, L.L.C.
1000 Bank of America Tower
534 S. Kansas Avenue
TOPEKA, KS 66603
PHONE: 785/357-6311
FAX: 785/357-0152

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STATEMENT OF THE CASE

In its answer brief, the defendant-appellee, Hawker Beechcraft Corporation ("HBC"), sets forth a number of factual statements which are disputed, and/or which are not stated in the light most favorable to the plaintiff-appellant, Denice Twigg.

A. Ms. Twigg's Complaints About Racial Discrimination Toward Teresa Cole

The first of these contested factual statements is that "[p]laintiff is uncertain as to whether she ever told Cindy Ealey that she thought Teresa Cole was being treated unfairly due to her race." (Aplee . Br. at 9) This statement fails to view the record in the light most favorable to Ms. Twigg.

In her deposition, Ms. Twigg was initially asked if she had specifically mentioned race in her complaints to Ms. Ealey about discrimination toward Ms. Cole. Ms. Twigg testified: "I believe I did once, but I cannot recall which conversation." (Aplee. Supp. App. at 32) Later in her deposition, Ms. Twigg further testified 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.) When the record is viewed in the light most favorable to Ms. Twigg, a reasonable jury could find that Ms. Twigg told Ms. Ealey that Ms. Cole was being treated unfairly because of her race.

Another disputed factual statement asserted by HBC in its brief is that "[p]laintiff admits that Cindy Ealey never stated that she had told Kathy Sade about plaintiff's complaints [concerning Ms. Cole]." (Aplee. Br. at 11) Again, this statement fails to view the record in the light most favorable to Ms. Twigg.

In her deposition, Ms. Twigg was initially asked whether Ms. Ealey had ever said that she had told Ms. Sade about Ms. Twigg's complaints concerning Ms. Cole. Ms. Twigg testified:

> I don't recall exactly, no. I think maybe the second time or the third time that I spoke to her that she may have said that she had relayed my concerns.

(Aplee. Supp. App. at 27. Emphasis added.) Later in her deposition, Ms. Twigg further explained:

> Q. Paragraph No. 38 [of the complaint] 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. Emphasis added.)

In addition, Ms. Sade herself admitted in her deposition that she was aware that Ms. Twigg had complained that Ms. Cole was being discriminated against. (Aplt. App. at 204; Aplt. Opening Br. at 5) Consequently, when the

record is viewed in the light most favorable to Ms. Twigg, a reasonable jury could find that Ms. Ealey told Ms. Sade about Ms. Twigg's complaints of racial discrimination toward Ms. Cole.

B. Ms. Twigg's Alleged Violation of HBC's Computer Use Policy

Another contested factual statement asserted by HBC in its brief is that Ms. Twigg violated HBC's computer use policy, and "[h]ad the company known at the time that plaintiff was utilizing her computer for such purposes, she would have been terminated." (Aplee. Br. at 19) This statement raises a disputed issue of material fact.

In support of its statement that Ms. Twigg would have been terminated for violating the company's computer use policy, HBC relies on the declaration of Candye Daughhetee, who is an employee in HBC's Human Resources Department ("HR"). (Aplee. Supp. App. at 68-69) However, Nita Long, a former HR director, testified that the decision to terminate an employee is management's decision, with input from HR. (Aplt. App. at 134, 158A; Aplt. Supp. App. at 235)

In addition, Ms. Twigg's manager, Kathy Sade, testified in her deposition that she had formed no opinion as to whether or not she would have terminated Ms. Twigg for inappropriate use of her computer. (Aplt. App. at 158A; Aplt. Supp. App. at 235-236) In light of Ms. Sade's equivocal testimony, a reasonable jury could find that Ms. Twigg would not have been terminated for inappropriate use of her computer.

C. Ms. Twigg's Alleged Receipt Of HBC's First FMLA Approval Notice

Another contested factual statement asserted by HBC in its brief is that "[o]n February 21, plaintiff was notified that she was approved for FMLA leave from February 20 through February 29, 2008." (Aplee. Br. at 21) This statement fails to view the record in the light most favorable to Ms. Twigg.

On February 19, 2008, Ms. Twigg sent a written request for FMLA leave to the HR department, requesting FMLA leave from February 20 through April 17, 2008. (Aplt. App. at 145) On February 21, 2008, Amber Cotton prepared a memorandum addressing Ms. Twigg's request for FMLA leave. (Aplt. App. at 212) 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)

In addition, 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) Based on the above evidence, a reasonable jury could find that Ms. Twigg did not receive HBC's first FMLA approval notice.

HBC further states that "plaintiff telephoned her supervisor, Cindy Ealey, on February 20, 2008, and acknowledges that she was told that she was only

approved for FMLA leave through February 29, 2008." (Aplee. Br. at 22) Again, this statement fails to view the record in the light most favorable to Ms. Twigg.

Ms. Twigg testified that during her telephone conversation with Ms. Ealey, which occurred on February 25, 2008, she asked Ms. Ealey why she had only been approved for FMLA leave for one week. (Aplt. App. at 129, 194) Ms. Ealey replied, "I have no idea," so Ms. Twigg "promptly called HR." (Aplt. App. at 129) Ms. Twigg was able to reach Ms. Cotton by telephone the following day, February 26. (Aplt. App. at 194) Ms. Cotton advised Ms. Twigg that the procedure for obtaining FMLA leave was separate and different from the procedure for obtaining short-term disability ("STD") benefits from Metropolitan Life ("MetLife"). (Aplt. App. at 187)

On March 4, 2008, Ms. Twigg talked again to Ms. Cotton by telephone. (Aplt. App. at 222) According to Ms. Twigg, Ms. Cotton told her "that everything was taken care of; that I shouldn't be concerned about my FMLA leave; and that Ms. Cotton would call me if there was a problem." (Aplt. App. at 187) Based on the above evidence, a reasonable jury could find that as of March 4, 2008, HBC had notified Ms. Twigg that "everything was taken care of" in regard to her request for FMLA leave through April 17, 2008.

D. Ms. Twigg's Alleged Receipt Of HBC's Second FMLA Approval Notice

Another contested factual statement asserted by HBC in its brief is that "[b]y memorandum dated March 14, 2008, plaintiff was notified that she was

approved for FMLA leave through April 1, 2008." (Aplee. Br. at 23) Once again, this statement fails to view the record in the light most favorable to Ms. Twigg.

The March 14 memorandum was not addressed to Ms. Twigg's home address, and Ms. Twigg testified that she did not receive the March 14 memorandum at her home. (Aplt. App. at 130) In addition, Ms. Cotton 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) In light of this evidence, a reasonable jury could find that Ms. Twigg did not receive HBC's second FMLA approval notice.

In its brief, HBC further asserts the following:

> Plaintiff claims that she did not receive either of the mailed notices informing her that she was approved for FMLA leave through February 29, later through April 1, 2008. . . . However, plaintiff did not contact the company to get clarification on when her approved leave ended, after she was verbally told by both Cindy Ealey and Amber Cotton that her leave ended on February 29, 2008.

(Aplee. Br. at 23) Once again, this statement fails to view the record in the light most favorable to Ms. Twigg.

As discussed above, Ms. Twigg testified that she talked again to Ms. Cotton by telephone on March 4, 2008. (Aplt. App. at 222) According to Ms. Twigg, Ms. Cotton told her "that everything was taken care of; that I shouldn't be concerned about my FMLA leave; and that Ms. Cotton would call me if there was a problem." (Aplt. App. at 187) Based on the above evidence, a reasonable jury

could find that Ms. Twigg's last communication from HBC prior to her termination was on March 4. A reasonable jury could further find that on March 4, HBC assured Ms. Twigg that "everything was taken care of" in regard to her request for FMLA leave through April 17, 2008.

E. Ms. Twigg's Incapacity

Another contested factual statement asserted by HBC in its brief is that "[t]hroughout her absence [from work], plaintiff was regularly engaging in shopping activities in Derby, Wichita, Mulvane, Emporia, and Hayesville, starting on the day of her surgery and continuing through her termination date." (Aplee. Br. at 26) Again, this statement fails to view the record in the light most favorable to Ms. Twigg.

Ms. Twigg testified that during her absence from work following her surgery on February 20, 2008, she regularly gave her debit card to friends and family to shop for her. (Aplt. App. at 186) In addition, and more to the point, Dr. Joseph Lickteig examined Ms. Twigg on February 28, 2008, and then faxed a questionnaire to MetLife regarding Ms. Twigg's medical condition. In this questionnaire, Dr. Lickteig stated that Ms. Twigg "isn't ready to return to work yet." (Aplt. App. at 218A) 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 April 11, 2008, Dr. Lickteig examined Ms. Twigg a second time. In his chart note for this examination, Dr. Lickteig stated that Ms. Twigg "[i]s 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) Based on the above evidence, a reasonable jury could find that Ms. Twigg was incapacitated and unable to return to work from February 20 to April 21, 2008.

F. Ms. Twigg's Reapplication For Employment

The last contested factual statement asserted by HBC in its brief is the following:

> Plaintiff, who was not a member of the collective bargaining unit, and who thus has no recall rights, admits that she has not reapplied for work at HBC since her termination.

(Aplee. Br. at 26) Once again, this statement fails to view the record in the light most favorable to Ms. Twigg.

On April 17, 2008, Ms. Twigg talked to Ms. Sade on the telephone. (Aplt. App. at 222) According to Ms. Sade's notes of this conversation, Ms. Twigg "asked if I wanted her back." (Aplt. App. at 234) Ms. Sade then "told her no, . . . I was not willing to try to get her back." (Aplt. App. at 234) In light of this evidence, a reasonable jury could find that Ms. Twigg requested to be rehired by HBC on April 17, and that Ms. Sade refused this request.

In addition, on October 20, 2008, Ms. Long participated in a final telephone conference with an investigator for the U.S. Department of Labor in regard to Ms. Twigg's administrative complaint, alleging that HBC had violated the FMLA. During this conference, Ms. Long was asked by the investigator if she would

reinstate Ms. Twigg to her employment with HBC. (Aplt. App. at 199, 230) Ms. Long refused to reinstate Ms. Twigg, explaining:

> . . . 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) Based on this evidence, a reasonable jury could find that Ms. Twigg requested to be reinstated by HBC on October 20, and that Ms. Long refused this request.

ARGUMENTS AND AUTHORITIES

HBC also raises several legal arguments in its brief which require a response from Ms. Twigg. These arguments related to one or another of the three claims asserted by Ms. Twigg in this appeal.

I. MS. TWIGG'S § 1981 CLAIM OF RETALIATION FOR PROTESTING RACIAL DISCRIMINATION TOWARD MS. COLE

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

In regard to Ms. Twigg's claim of retaliation for protesting racial discrimination toward Ms. Cole, in violation of 42 U.S.C. § 1981, HBC first argues that this court should not consider Ms. Twigg's mixed-motive theory of recovery. HBC contends: "No mixed motive claim was preserved in the pretrial order, and it should therefore not be considered at this point." (Aplee. Br. at 32) This contention must fail because, as this court has explained:

> We emphasize that a plaintiff need not characterize her case as a mixed-motive or pretext case from the outset. Although the distinction between a mixed-motive and a pretext case is crucial on appellate review, the Supreme

> Court has explained that such a distinction at the beginning of a case is unnecessary.

Fye v. Oklahoma Corp. Com'n, 516 F.3d 1217, 1225 (10th Cir. 2008), citing Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n. 12 (1989) [plurality opinion]. See also Semsroth v. City of Wichita, 548 F. Supp. 2d 1203, 1214 n. 12 (D. Kan. 2008); Wright v. C & M Tire, Inc., 545 F. Supp. 2d 1191, 1200 n. 6 (D. Kan. 2008) [concluding that a plaintiff should not be "required to 'preserve' in a pretrial order the specific evidentiary framework under which he or she believes his evidence should be analyzed"].

B. Ms. Twigg's Protected Conduct

HBC also contends that "[t]here is no evidence in the record suggesting that plaintiff ever stated that she believed Sharon Schlegel was mistreating Teresa Cole due to her race." (Aplee. Br. at 34-35) This contention fails to view the record in the light most favorable to Ms. Twigg. As discussed above (p. 1), when Ms. Twigg's deposition testimony is viewed as a whole, a reasonable jury could find that Ms. Twigg told Ms. Ealey that Ms. Cole was being treated unfairly because of her race.

C. Evidence of a Retaliatory Motive

According to Ms. Sade's letter of April 7, 2008, the reason given by HBC for terminating Ms. Twigg's employment was that she "did not report in to work or contact the Company for three consecutive days." (Aplt. App. at 152) Ms. Twigg asserts that a reasonable jury could find this to be a false explanation because,

as discussed above (p. 5), Ms. Twigg called Ms. Cotton on March 4, 2008, and Ms. Cotton assured her that "everything was taken care of" in regard to her request for FMLA leave through April 17, 2008. (Aplt. App. at 145, 187) In response, HBC argues:

> Plaintiff's contention that Amber Cotton told her on March 4, 2008, that everything was 'taken care of' is inadmissible hearsay which is not supported by the evidence.

(Aplee. Br. at 41)

HBC's argument must fail because Ms. Cotton's statement to Ms. Twigg on March 4 constitutes a non-hearsay admission by a party opponent. Under Fed. R. Evid. 801(d)(2)(D), an admission by a party opponent includes a "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." See Jaramillo v. Colorado Judicial Dept., 427 F.3d 1303, 1314 (10th Cir. 2005).

II. MS. TWIGG'S CLAIM OF RETALIATION FOR EXERCISING HER RIGHTS UNDER THE FMLA

A. Scope of the Adverse Actions Taken by HBC

In regard to Ms. Twigg's claim of retaliation for exercising her rights under the FMLA, HBC argues:

> [P]laintiff's contention that she was mistreated because she filed a complaint with the Department of Labor is illogical, because she filed that in late April 2008, after all the adverse actions about which she complains had already happened.

(Aplee. Br. at 50. Emphasis in original.) This argument must be rejected because it ignores the full scope of the adverse actions taken by HBC against Ms. Twigg.

Ms. Twigg contends that the adverse actions taken against her by HBC included the following: (1) Ms. Sade's termination of her employment on April 7, 2008 (Aplt. App. at 152); (2) Ms. Sade's refusal to rehire her on April 17, 2008 (Aplt. App. at 222, 234); and (3) Ms. Long's refusal to reinstate her on October 20, 2008 (Aplt. App. at 199, 230). As discussed above (pp. 8-9), the last adverse action - - Ms. Long's refusal to reinstate Ms. Twigg on October 20 - - occurred during a final telephone conference with an investigator for the U.S. Department of Labor in regard to Ms. Twigg's administrative complaint against HBC.

B. Evidence of a Retaliatory Motive

HBC further contends that Ms. Twigg has failed to come forward with any evidence of a retaliatory motive because "[i]n making a pretext determination, a court looks at the facts as they appeared to the person making the employment decision. . . ." (Aplee. Br. at 56) This argument is not persuasive, particularly in regard to Ms. Long's decision not to reinstate Ms. Twigg.

As discussed above (pp. 8-9), Ms. Long's decision not to reinstate Ms. Twigg occurred on October 20, 2008. Ms. Long testified that she refused to reinstate Ms. Twigg "[b]ased on the fact that I wasn't going to change my decision on the FMLA." (Aplt. App. at 199) However, by October 20, Ms. Long was aware that MetLife had decided to extend STD benefits to Ms. Twigg

through April 20, 2008. (Aplt. App. at 223) Consequently, a reasonable jury could find that Ms. Long's explanation that she "wasn't going to change [her] decision on the FMLA" in October of 2008 is inconsistent with, or contradictory to, her explanation that it was HBC's policy to approve FMLA leave for the exact same period of time as MetLife approved STD benefits. (Aplt. App. at 136) A reasonable jury could further infer a retaliatory motive, based on the "inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions. . . ." Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir. 1997).

III. MS. TWIGG'S CLAIM OF INTERFERENCE WITH HER RIGHTS UNDER THE FMLA

A. Ms. Twigg's Entitlement To FMLA Leave After April 1, 2008

In regard to Ms. Twigg's claim of interference with her rights under the FMLA, HBC first argues that Ms. Twigg has failed to establish that she had a "serious health condition" within the meaning of 29 U.S.C. § 2612(a)(1)(D), since her "physician did not indicate that she was incapacitated from performing her regular duties." (Aplee. Br. at 60) This argument must be rejected because it fails to view the record in the light most favorable to Ms. Twigg.

As discussed above (pp. 7-8), Dr. Lickteig examined Ms. Twigg on February 28, 2008, and then sent a questionnaire to MetLife, stating that he did not anticipate that Ms. Twigg would be able to return to work until "4-21-08." (Aplt. App. at 218) On April 11, 2008, Dr. Lickteig examined Ms. Twigg a second

time, and determined that she "[i]s set to return to work on 4/21/2008." (Aplt. App. at 219) Based on this evidence, a reasonable jury could find that Ms. Twigg was incapacitated and unable to perform the functions of her position from February 20 to April 21, 2008. See Jones v. Denver Public Schools, 427 F.3d 1313, 1321 (10th Cir. 2005) [holding that a serious health condition under the FMLA "entails an absence of more than three consecutive calendar days during which the employee obtained treatment by a health care provider at least two times"].

HBC further argues that Ms. Twigg failed to substantiate the existence of her serious health condition, since she failed to submit an appropriate physician's certification. HBC contends:

> The certification provided by plaintiff in this case established that plaintiff was having a bunion removed on February 20, 2008. However, plaintiff's physician explicitly stated that plaintiff could perform non-weight-bearing work. Although asked to identify any essential job functions which plaintiff was unable to do, the physician left that portion of the form blank, indicating that plaintiff would perform her regular job functions, so long as she could do so in a sitting position.

(Aplee. Br. at 60. Emphasis added.) This argument must be rejected because, once again, it fails to view the record in the light most favorable to Ms. Twigg.

As HBC correctly states, 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)

A reasonable jury could find that the language of paragraph 12(b) requires an answer of either "yes" or "no," and therefore paragraph 12(b) is incomplete if it is left blank and not answered at all. A reasonable jury could further find that because Dr. Lickteig failed to answer paragraph 12(b) on his certification form, the form was incomplete or insufficient.

If the jury finds that Dr. Lickteig's certification form was incomplete or insufficient - - because it did not clearly indicate if, and 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) were triggered. This regulation states in relevant part: "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." The language of § 825.305(d) is not permissive, but rather "imposes an affirmative duty on an employer that finds a medical certification incomplete." Sorrell v. Rinker Materials Corp., 395 F.3d 332, 337 (6th Cir. 2005).

Ms. Cotton admitted in her deposition that Dr. Lickteig's certification form did not indicate how long Ms. Twigg would be recovering from her surgery and unable to come to work. (Aplt. App. at 211) Ms. Cotton also admitted that she "made no further inquiry from Dr. Lickteig as to how long Ms. Twigg was or was

not able to come to work." (Aplt. App. at 211) In addition, Ms. Twigg testified that HBC never notified her that Dr. Lickteig's 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. at 187)

Based on the above evidence, a reasonable jury could find that HBC failed to fulfill the obligations imposed by § 825.305(d), since HBC failed to notify Ms. Twigg that Dr. Lickteig's certification was incomplete or insufficient, and further failed to give her the opportunity to cure any deficiency. If the jury makes such a finding, then HBC will be precluded or estopped from contesting Ms. Twigg's entitlement to FMLA leave from February 20 to April 21, 2008. See Sorrell v. Rinker Materials Corp., 395 F. 3d at 336-337.

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

HBC next argues Ms. Twigg has failed to establish that HBC interfered with her right to take FMLA leave, saying:

> The certification provided by plaintiff does not establish the need to be off work for eight weeks, when non-weight-bearing work was available to plaintiff, and within the limits her physician had advised.

(Aplee. Br. at 62) This argument must be rejected because, once again, it fails to view the record in the light most favorable to Ms. Twigg.

As discussed above (pp. 14-15), there is evidence in the record from which a reasonable jury could find that: (1) Dr. Lickteig's certification form was

incomplete or insufficient; and (2) HBC failed to fulfill the obligations imposed by § 825.305(d). If the jury makes both of these findings, then as a matter of law HBC interfered with Ms. Twigg's right to take FMLA leave by terminating her employment. This result follows because "an employer may not assert incompleteness of a medical certification as grounds for disciplining an employee where the employer never notified the employee of the problem or gave [her] an opportunity to cure it." Sorrell v. Rinker Materials Corp., 395 F.3d at 337.

C. Causal Connection Between Ms. Twigg's Termination And the Exercise Of Her FMLA Rights

HBC further argues that it has presented evidence showing that Ms. Twigg would have been terminated regardless of her request for FMLA leave, explaining:

> Plaintiff was in violation of defendant's Rules of Conduct. Defendant did not terminate plaintiff for exercising her rights under the FMLA. It terminated her for violation of the company's attendance policy.

(Aplee. Br. at 64) This argument must fail because it raises disputed issues of material fact.

As discussed above (pp. 14-15), there is evidence in the record from which a reasonable jury could find that: (1) Dr. Lickteig's certification form was incomplete or insufficient; and (2) HBC failed to fulfill the obligations imposed by § 825.305(d). If the jury makes both of these findings, then HBC will be precluded or estopped from contesting Ms. Twigg's entitlement to FMLA leave from February 20 to April 21, 2008. See Sorrell v. Rinker Materials Corp., 395

F.3d at 336-337. This, in turn, will mean that Ms. Twigg was terminated for exercising her rights under the FMLA, since she was terminated for absences which were in fact protected by the FMLA.

IV. HBC'S DEFENSE OF AFTER-ACQUIRED EVIDENCE OF MISCONDUCT

HBC lastly contends that based on Ms. Twigg's violation of HBC's computer use policy, HBC "has established the necessary elements for a defense of after-acquired evidence, and any damages claimed by plaintiff should be limited by this doctrine." (Aplee. Br. at 66) The district court did not reach the merits of this issue (Aplt. App. at 254), and therefore this court should decline to decide this issue in the first instance. Furthermore, as discussed above (p. 3), this issue is a disputed factual issue. Ms. Sade testified in her deposition that she had formed no opinion as to whether or not she would have terminated Ms. Twigg for inappropriate use of her computer. (Aplt. App. at 158A; Aplt. Supp. App. at 235-236) In light of Ms. Sade's equivocal testimony, a reasonable jury could find that Ms. Twigg would not have been terminated for inappropriate use of her computer.

CONCLUSION

For the reasons discussed above and in Ms. Twigg's opening brief, 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 DIGITAL SUBMISSION AND PRIVACY REDACTIONS

No privacy redactions were necessary in this document. The document submitted in digital form is an exact copy of the written document filed with the Clerk. The document is a native PDF document. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection - Antivirus and Antispyware Protection Program, most recently updated October 5, 2010, and, according to the program, is free of viruses.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,799 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

CERTIFICATE OF SERVICE

I herby certify that on the 21st day of October, 2010, I delivered a copy of the foregoing document via electronic mail to the following parties:

Terry L. Mann
MARTIN, PRINGLE, OLIVER,
WALLACE & BAUER, L.L.P.
100 N. Broadway, Suite 500
Wichita, Kansas 67202
Attorneys for Defendant

and seven (7) true and correct copies were sent to:

U.S. Court of Appeals, Tenth Circuit
Office of the Clerk
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: No one.

s/Alan V. Johnson

Alan V. Johnson, KS #9992
Sloan, Eisenbarth, Glassman,
McEntire & Jarboe, L.L.C.
534 s. Kansas Ave, Suite 1000
Topeka, Kansas 66603
Telephone (785) 357-6311
Fax (785) 357-0152
ajohnson@sloanlawfirm.com