Appeal 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, JUDGE
DISTRICT COURT CASE NO. 08-2632-JTM

BRIEF OF APPELLEE HAWKER BEECHCRAFT CORPORATION

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for appellee Hawker Beechcraft Corporation certifies the following:

1. The full name of every party or amicus we represent is:

Hawker Beechcraft Corporation

2. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party we represent are:

a. Onex Partners II, L.P. is a beneficial owner of Hawker Beechcraft Corporation and is affiliated with Onex Corporation, a publicly traded company.

b. GS Capital Partners VI, L.P. is a beneficial owner of Hawker Beechcraft Corporation and is affiliated with Goldman Sachs Group, Inc., a publicly traded company.

s/ Terry L. Mann
Terry L. Mann

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(C)(1) of the Rules of Court for the United States Court of Appeals for the Tenth Circuit, counsel for appellee hereby notifies the Court that no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title. Additionally, no cases are known to counsel to be pending in this or any other court that will directly affect this Court's decision in the pending appeal.

s/ Terry L. Mann
Terry L. Mann

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, because Plaintiff asserted claims under laws of the United States. The district court issued a final order disposing of Plaintiff's claims on April 21, 2010. Plaintiff timely filed her Notice of Appeal on May 18, 2010.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly granted summary judgment on Plaintiff's discrimination/retaliation claim under the FMLA because Plaintiff cannot prove the elements of a *prima facie* case and cannot show that the legitimate, nondiscriminatory reasons offered for Defendant's actions are a pretext for discrimination?

2. Whether the district court properly granted summary judgment on Plaintiff's interference/entitlement claim under the FMLA because Plaintiff cannot prove the elements of a *prima facie* case and cannot show that the legitimate, nondiscriminatory reasons offered for Defendant's actions are a pretext for discrimination?

3. Whether the district court properly granted summary judgment on Plaintiff's retaliation claim under 42 U.S.C. § 1981 because Plaintiff cannot prove the elements of a *prima facie* case?

STATEMENT OF THE CASE

Plaintiff was previously employed by Defendant and alleges claims pursuant to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*. and 42 U.S.C. § 1981.[1] Defendant's Motion for Summary Judgment was granted by the district court. For the reasons set forth below, defendant requests that the Court affirm the decision of the district court.

STATEMENT OF THE FACTS

The Parties

Plaintiff worked for Defendant from April 2, 1996 to April 7, 2008, when she was involuntarily terminated. (Aplee. Supp. App. 5). Defendant is a manufacturer of aircraft, which are utilized in general aviation and military use. (Aplt. App. 71).

Other Persons Who Will Be Mentioned

At the time plaintiff was terminated, her immediate supervisor was Cindy Ealey. (Aplee. Supp. App. 20 [Depo. p. 105, ll. 6-9]). Ealey was classified as a Team Lead II Sales/Support. (Aplee. Supp. App. 48).

[1] In the district court, Plaintiff also asserted a claim that she had been unlawfully retaliated against in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001. (Aplt. App. 17-18). She has abandoned that claim on appeal. (Plaintiff's Brief, at 1).

Cindy Ealey reported to Kathy Sade, who was classified as Manager I – Sales Support/Customer Service Administration. (Aplee. Supp. App. 48, 51).

At certain times that are material hereto, Kathy Sade reported to Nigel Gray. (Aplee. Supp. App. 20 [Depo. p. 105, ll. 12-17]). Nigel Gray died on June 1, 2006. (Aplee. Supp. App. 41 [Depo. p. 249, ll. 12-21]). His position was not immediately filled. (Aplee. Supp. App. 20-21 [Depo. p. 105, ll. 12 – p. 106, ll. 1]). Eventually, Greg Graber was promoted to the position previously held by Nigel Gray. (*Id.*).

At certain times material hereto, Nita Long was the company's Director – Compensation and Benefits. (Aplee. Supp. App. 53-54 [Depo. p. 3, ll. 20 – p. 4, ll. 1]). Although Long has now retired, at the time of plaintiff's termination, she oversaw the company's FMLA program. (Aplee. Supp. App. 53-54 [Depo. p. 3, ll. 11-14; p. 4, ll. 14 – p. 5, ll. 4]).

Amber Cotton works in the Human Resources department, and, at times material hereto, assisted Nita Long with FMLA-related matters. (Aplee. Supp. App. 61-62 [Depo. p. 4, ll. 10-17; p. 5, ll. 12-17]).

Candye Daughhetee works in the Human Resources department, and was involved in the decision to terminate plaintiff's employment. (Aplee. Supp. App. 68-69).

During portions of plaintiff's employment with HBC, Teresa Cole was also an employee in the Technical Manual Distribution Center. Cole was classified as a Media Production Assistant, and reported to Team Lead Sharon Schlegel. (Aplee Supp. App. 51). Cole is African-American. (*Id.*).

Plaintiff's Department and Job Duties

When plaintiff was hired, she was classified as a Publications Aide. At the time of her termination, plaintiff was classified as a Media Production Specialist. (Aplee. Supp. App. 5). At the end of plaintiff's employment, she worked in the Technical Manual Distribution Center ("TMDC"). Her job assignment in the TMDC required her to convert aircraft document files and manuals into pdf electronic files for compact disc and web delivery. (Aplee. Supp. App. 71).

Throughout her employment with defendant, plaintiff was always a non-exempt employee. Plaintiff was never part of the bargaining unit which is represented by the International Association of Machinists and Aerospace Workers ("IAM"). (Aplee. Supp. App. 5, 68).

Defendant's Attendance Policy for Non-Exempt Employees

When she went through new employee orientation in 1996, plaintiff was given a copy of the attendance policy and Rules of Conduct. (Aplee Supp. App. 73, 36 [Depo. p. 227, ll. 15-21]).

The Rules of Conduct provide that the presumptive discipline for an absence for three consecutive working days without proper notification is termination on the first offense. (Aplee. Supp. App. 76-77).

Plaintiff's FMLA Leave in 2004

Plaintiff utilized FMLA leave in approximately 2004, when she had cosmetic surgery. (Aplee. Supp. App. 36 [Depo. p. 228, ll. 9-24]). Plaintiff was approved for six weeks of FMLA leave. (Aplee. Supp. App. 36 [Depo. p. 229, ll. 13-16]).

Plaintiff was aware that information about the company's FMLA program was available on the company intranet. (Aplee. Supp. App. 37 [Depo. p. 230, ll. 24 – p. 231, ll. 2]). She knew that she was supposed to ask for leave thirty days in advance of the need, if possible. (Aplee. Supp. App. 37 [Depo. p. 231, ll. 3-13]). She submitted her request for leave to the company's Human Resources department. (Aplee. Supp. App. 37 [Depo. p. p. 233, ll. 11-15]).

The company makes an FMLA brochure available to all employees. (Aplee. Supp. App. 58-59 [Depo. p. 96, ll. 19 – p. 97, ll. 12]; Aplee. Supp. App. 84-86). The brochure, which was mailed to all employees in addition to being available on the company intranet, explains the employee's obligations, including the warning that "until you receive formal

notification that your family leave has been approved, you must properly report your absence to your department every day. Proper reporting is defined as reporting prior to the beginning of your shift." (Aplee. Supp. App. 85-86).

Plaintiff did not experience any retaliation after using FMLA leave in 2004. (Aplee. Supp. App. 36-37 [Depo. p. 229, ll. 19 – p. 230, ll. 10]). No one said anything critical or derogatory about plaintiff using FMLA leave, either to her or to anyone else, so far as she knew. (*Id.*). She continued her employment for another four years after returning from her FMLA leave in 2004. (Aplee. Supp. App. 5).

Plaintiff's Complaints About the Treatment of Teresa Cole

One of plaintiff's co-workers was Teresa Cole. (Aplee. Supp. App. 24 [Depo. p. 130, ll. 13-21]). Plaintiff is Caucasian. (Aplee. Supp. App. 10 [Depo. p. 17, ll. 1-3]). Teresa Cole is African-American. (Aplee. Supp. App. 51).

Plaintiff says she went to Nigel Gray in approximately 1996, shortly after plaintiff's employment began, with a litany of complaints about her supervisor and co-workers, including that she had overheard her supervisor at the time, Pat Tos, say that African-American employees were lazy. (Aplee. Supp. App. 27-29 [Depo. p. 143, ll. 17 – p. 151, ll. 1]). According to

plaintiff, Gray asked her if she wanted him to intercede, and she said no. (Aplee. Supp. App. 29 [Depo. p. 150, ll. 2-23]). Plaintiff did not report the remark about African-American employees to the Human Resources department, or to the 1-800 phone number provided to employees. (Aplee. Supp. App. 29 [Depo. p. 151, ll. 2-9]).

Plaintiff does not recall ever hearing Kathy Sade or Cindy Ealey make any remark that referenced an employee's race. (Aplee. Supp. App. 29 [Depo. p. 151, ll. 13 – p. 152, ll. 4]). Likewise, plaintiff does not recall that Sharon Schlegel, who was Teresa Cole's supervisor, made any remark about any employee's race. (Aplee. Supp. App. 29 [Depo. p. 152, ll. 5-12]). Although plaintiff contends that Sharon Schlegel "constantly demeaned" Teresa Cole, when asked about Sharon Schlegel in her deposition, plaintiff could not recall ever hearing Sharon Schlegel making any remark that had a racial connotation. (Aplee. Supp. App. 29 [Depo. p. 152, ll. 5-12]). While she complained about Schlegel's "actions," when asked to describe those actions, plaintiff described some convoluted story about a temporary employee and a note, the contents of which she did not know, and the author of which she did not know. (Aplee. Supp. App. 29 [Depo. p. 152, ll. 13 – p. 153, ll. 24]).

Plaintiff testified that, in the spring of 2007, she complained to her direct supervisor, Cindy Ealey, about the treatment of Teresa Cole. (Aplee. Supp. App. 23-24 [Depo. p. 129, ll. 5-9; p. 130, ll. 7-11]). Plaintiff's complaint to Ealey was that Teresa Cole was not being treated fairly with regard to having to make up time she was away from work. (Aplee. Supp. App. 25 [Depo. p. 135, ll. 16 – p. 137, ll. 8]). Plaintiff admits, however, that she had no supervisory authority over Teresa Cole, no knowledge regarding Teresa Cole's medical diagnosis, workers compensation claim, attendance records, use of paid time off, or how her time was actually being counted. (Aplt. App. 78, ¶ 32-36; Aplt. App. 156, ¶ 32-36).

Teresa Cole did not report to Cindy Ealey, and Teresa Cole did not report to plaintiff. (Aplee. Supp. App. 24 [Depo. p. 130, ll. 13-19]). Rather, Teresa Cole reported to Sharon Schlegel. (Aplee. Supp. App. 24 [Depo. p. 130, ll. 20-21]). Cindy Ealey, the person to whom plaintiff was complaining, did not have supervisory authority over Sharon Schlegel. (Aplee. Supp. App. 26 [Depo. p. 139, ll. 19 – p. 140, ll. 5]).

Plaintiff told Cindy Ealey that the company did not understand how the workers compensation law worked. (Aplee. Supp. App. 24-25 [Depo. p. 132, ll. 12 -25; p. 135, ll. 18 – p. 136, ll. 4]). Plaintiff had no access to Teresa Cole's workers compensation information. (Aplee. Supp. App. 25 [Depo. p.

136, ll. 5-13]). Plaintiff did not have any information from the person who manages HBC's workers compensation program. (Aplee. Supp. App. 25 [Depo. p. 136, ll. 17-20]). Plaintiff's information about how the workers compensation system works comes from attending seminars prior to commencing her employment with HBC in 1996, and doing research on the Internet. (Aplee. Supp. App. 26 [Depo. p. 138, ll. 1 – p. 139, ll. 4]). All of plaintiff's information about how Teresa Cole's time was allocated came from Teresa Cole. (Aplee. Supp. App. 25 [Depo. p. 136, ll. 21-25]).

Cindy Ealey responded that she was sure that Sharon Schlegel had good reasons for her decisions, and that plaintiff should not concern herself about Teresa Cole's situation. (Aplee. Supp. App. 26 [Depo. p. 139, ll. 20-23; p. 141, ll. 5-8]).

Plaintiff is uncertain as to whether she ever told Cindy Ealey that she thought Teresa Cole was being treated unfairly due to her race. (Aplee. Supp. App. 32 [Depo. p. 172, ll. 23 – p. 173, ll. 24]).

In late 2007 or early 2008, plaintiff reports having a second conversation with Cindy Ealey regarding Teresa Cole. (Aplee. Supp. App. 30 [Depo. p. 163, ll. 19 – p. 164, ll. 1]). Plaintiff thought that Teresa Cole should be given paid vacation, and that her requests for time off were being unfairly denied. (Aplee. Supp. App. 30 [Depo. p. 164, ll. 2-25]). Plaintiff

opines that Teresa Cole had "legitimate health concerns," but admits that she was never privy to Teresa Cole's medical records or diagnosis. (Aplee. Supp. App. 32 [Depo. p. 170, ll. 4-24]).

Plaintiff thought that Shelley Huffman, who had been diagnosed with what proved to be terminal cancer, was being allowed to not do very much at work, while Teresa Cole was "chastised" for being absent. (Aplee. Supp. App. 30 [Depo. p. 164, ll. 13-18]). Plaintiff judged Huffman's productivity by what she happened to observe as she occasionally walked by Huffman's desk. (Aplee Supp. App. 31 [Depo. p. 169, ll. 1-25).]

Plaintiff's complaint about Shelley Huffman was that, while Huffman was still at work as she was dying from cancer, she was not doing enough work to suit plaintiff, who was not her supervisor. Cole, on the other hand, wanted to be absent from work, according to plaintiff.

Plaintiff admits that she did not know whether Teresa Cole had asked for FMLA leave, workers compensation leave, or earned time off (ETO). (Aplee. Supp. App. 30 [Depo. p. 165, ll. 8-24]). Plaintiff admits that she did not know what other employees may have already scheduled vacation in advance on the day when Teresa Cole wanted to take vacation with no prior notice, and whether Cole's absence would leave the department shorthanded. (Aplee. Supp. App. 31 [Depo. p. 166, ll. 4-15]). Plaintiff also

did not know on how many prior occasions Teresa Cole had called in the morning and wanted to take unscheduled vacation the same day. (Aplee. Supp. App. 31[Depo., p. 166, ll. 25 – p. 167, ll. 3]).

At the time of the second conversation between plaintiff and Cindy Ealey regarding Teresa Cole, plaintiff was not a supervisor, and had no supervisory responsibility for Teresa Cole. (Aplee. Supp. App. 31 [Depo. p. 168, ll. 11-21]). Cindy Ealey was not Teresa Cole's supervisor. (Aplee. Supp. App. 31 [Depo. p. 168, ll. 11-14]). Plaintiff does not recall that she mentioned Teresa Cole's race when she complained to Cindy Ealey about how Teresa Cole was treated in late 2007 or early 2008. (Aplee. Supp. App. 32 [Depo. p. 173, ll. 16-18]).

Plaintiff never complained directly to Kathy Sade or Sharon Schlegel that she believed Teresa Cole was being mistreated due to her race. (Aplee. Supp. App. 27 [Depo. p. 143, ll. 10-12]). Plaintiff admits that Kathy Sade never stated that Cindy Ealey ever mentioned plaintiff's complaints about Teresa Cole. (Aplee. Supp. App. 27 [Depo. p. 143, ll. 6-9]). Plaintiff admits that Cindy Ealey never stated that she had told Kathy Sade about plaintiff's complaints. (Aplee. Supp. App. 27 [Depo. p. 142, ll. 20-23]).

Plaintiff's Unwillingness to Follow Directions

Plaintiff, who was expected to be at work at 8:00 a.m., regularly had a problem with tardiness. (Aplee. Supp. App. 95 [Depo. p. 102, ll. 1-20]). The company tracked the work time of the employees in the TMDC department by having them log onto the Telephony at Work ("TAW") system when they arrived at work. (Aplee. Supp. App. 93-95 [Depo. p. 69, ll. 6-13; p. 100, ll. 7 – p. 101, ll. 21]). The log-on time was recorded by the TAW system. (Aplee. Supp. App. 94 [Depo. p. 100, ll. 10-24]). Plaintiff's performance review in May of 2007 noted the need to correct the tardiness issue, and instructed plaintiff to log onto the TAW system every day. (Aplee. Supp. App. 97-98).

Plaintiff was required to repay the company when she inappropriately accepted seven personal long-distance collect calls to her telephone at work during September and October of 2007, at a cost of $55.80. (Aplee. Supp. App. 100, 92 [Depo. p. 37, ll. 6-25]). Burdening the company with the cost of personal collect calls is contrary to the company's policies permitting limited personal use of company resources. (Aplee. Supp. App. 92 [Depo. p. 38, ll. 3-8]; Aplee. Supp. App. 102-05, at ¶5.1.7).

The Hiring of John Beasley

The death of Shelley Huffman, another employee in Technical Publications, left an open position in the department. (Aplee. Supp. App. 89 [Depo. p. 25, ll. 6-21]). A hiring requisition could only be opened if management was replacing an employee, or had justification for adding a new position. (Aplee. Supp. App. 89 [Depo. p. 25, ll. 14-20]). Management decided to make the duties of the position more oriented toward electronic publications. (Aplee. Supp. App. 89 [Depo. p. 26, ll. 7-16]).

Sade was aware that plaintiff was interested in attaining a different position, so she told plaintiff that there would be interviews for the position, and if she was interested in interviewing, then she would need to be there for the interviews. (Aplee. Supp. App. 89 [Depo. p. 27, ll. 25 – p. 28, ll. 9]). Sade knew that plaintiff was contemplating having her bunion removed in 2007. (*Id.*).

The requisition for the new position specified that qualified applicants would have a bachelor's degree or two years of college and ten years of related work experience in web and computer applications and customer support. (Aplee. Supp. App. 107-15). Plaintiff has a high school diploma. (Aplee. Supp. App. 9 [Depo. p. 11, ll. 5-8]). Plaintiff also completed a year of study at the Wichita Area Technical College in 1976-77.

(Aplee. Supp. App. 9 [Depo. p. 11, ll. 10 – 11, ll. 17]). She has also taken about nine credit hours of various courses at Butler Community College. (Aplee. Supp. App. 9 [Depo. p. 13, ll. 13-24]).

Plaintiff was told by her supervisors on several occasions that, if she wished to be promoted, she needed to improve her educational qualifications by attaining a bachelor's degree. (Aplee Supp. App. 21 [Depo. p. 106, ll.13-21; p. 107, ll. 2 – p. 109, ll. 4]; Aplee. Supp. App. 117, 119, 121-23).

Defendant provides tuition assistance to its employees. (Aplee. Supp. App. 21 [Depo. p. 106, ll. 24 – p. 107, ll. 1]). Although plaintiff had access to the tuition assistance program, she never used it to attain a bachelor's degree. (Aplee. Supp. App. 21 [Depo. p. 107, ll. 7-10; p. 108, ll. 25 – p. 109, ll. 3]).

The basic experience and educational requirements for salaried and nonexempt positions are determined by the Human Resources department, based on the Consolidated Exempt Classification Guide -- not by the hiring supervisors. (Aplee. Supp. App. 68). The company prefers to place degreed employees into salaried or nonexempt positions. If a manager determines that he or she wishes to hire or promote an applicant who does not meet the

minimum educational and experience criteria, they must provide documentation explaining their rationale to Human Resources. (*Id.*).

The job opening was advertised both internally and outside the company. (Aplee. Supp. App. 91 [Depo. p. 35, ll. 10-19]). Applicants from both within and outside the company responded. (Aplee. Supp. App. 126). The interview team of Kathy Sade, Cindy Ealey, and Sharon Schlegel eliminated some applicants without an interview, and then interviewed eight candidates for the position, including plaintiff. (Aplee. Supp. App. 90 [Depo. p. 31, ll. 1-21]; 126).

Each person on the interview team ranked the applicants from one to ten in the categories of web/job related experience, personality, computer skills, team fit, and overall interview. (Aplee. Supp. App. 128). Then the individual rankings were numerically combined. (Aplee. Supp. App. 90 [Depo. p. 31, ll. 6-21]; 130-31). John Beasley, who had a bachelor's degree, achieved ratings of ten across the board, and thus had an average rating of ten. Three other applicants were rated higher than plaintiff, who had an overall rating of 5.8. (Aplee. Supp. App. 130-31). John Beasley was offered the Sales Support/Customer Service Admin II position on October 17, 2007. (Aplee. Supp. App. 133).

Beasley accepted the offer, and worked for HBC until July of 2008, when he was hired away by Cessna Aircraft. (Aplee. Supp. App. 91 [Depo. p. 35, ll. 22-23]; 51). Beasley performed his assigned tasks in an exemplary fashion, by all accounts. (Aplee. Supp. App. 51; 33 [Depo. p. 178, ll. 6-24]).

Plaintiff contends that, in June or July of 2007, prior to the job requisition being opened, she had been "promised" the position by Kathy Sade. (Aplee. Supp. App. 22 [Depo. p. 118, ll. 1- p. 119, ll. 23]). Sade denies that she ever promised plaintiff a promotion. (Aplee. Supp. App. 89 [Depo. p. 28, ll. 4-21]).

Plaintiff contends that she was denied the promotion to the position for which John Beasley was hired due to her complaints about Teresa Cole. (Aplt. App. 44, at ¶ 6(a)(3)). However, the conversation between plaintiff and Cindy Ealey in late 2007 or early 2008, regarding whether Teresa Cole was allowed to use unscheduled vacation, occurred after John Beasley was hired. (Aplt. App. 32 [Depo. p. 171, ll. 2 – 16]).

Plaintiff's Violation of Defendant's Computer Use Policies

While she was employed by HBC, plaintiff had a company-owned computer with which to perform her work. (Aplt. App. 11 [Depo. p. 52, ll. 16-20]).

HBC's policies regarding computer use provide that employees may use company computers for limited personal purposes, such as occasional e-mails to home, friends, school, doctor, etc.; accessing travel information, forms or information on the intranet or Internet, checking the company stock quotes and benefit information, and the like. Employees are not authorized to "surf the net." (Aplee. Supp. App. 102-05, at ¶ 5). Employees are not permitted to access or transmit materials that may be considered disruptive or offensive to others, including sexual images, messages, and other content that would reflect negatively on the company. (*Id.* at ¶ 5.2.3). Employees are to limit personal use to nonchargeable time, and such use is to be of reasonable duration and frequency, and must not interfere with the employee's or anyone else's job performance. (*Id.* at ¶ 5.1.2). Employees who violate the company's policy concerning computer use are subject to disciplinary action, up to and including termination. (*Id.* at ¶ 2.7).

After plaintiff was terminated, the computer she had been using was discovered to have inappropriate materials on it. For example, plaintiff had downloaded several nude photographs. (Aplee. Supp. App. 12, 18, 19 [Depo. p. 55, ll. 3 – 24, p. 83-86, 88]). She also used her work computer to pay her personal bills, check the court docket for the Sedgwick County courts, check for arrest warrants and criminal records pertaining to her ex-fiancé's

current girlfriend, prepare personal documents, search for real estate that was in foreclosure, apply for home loans, create birthday and Christmas cards, look for other jobs, and do legal research. (Aplee. Supp. App. 12-15, 17 [Depo. p. 57-67; p. 74; 75]).

Plaintiff also exchanged numerous instant messages with Nigel Gray, who was in her supervisory chain of command. (Aplee. Supp. App. 16 [Depo. p. 73, ll. 5-15]). The messages with and about Nigel Gray contained inappropriate content. (Aplee. Supp. App. 135-50).

Plaintiff contends that her computer use was within the "limited personal use" permitted by the company's policy. (Aplee. Supp. App. 16 [Depo. p. 71, ll. 14-16]). Plaintiff also alleges that she conducted all of the personal computer use during her half-hour lunch period, and her two fifteen-minute daily breaks. (Aplee. Supp. App. 14 [Depo. p. 62, ll. 19 – p. 63, ll. 10]). Plaintiff also testified, however, that she used her daily breaks for taking smoke breaks outside. (Aplee. Supp. App. 34 [Depo. p. 188, ll. 10 – p. 189, ll. 11]).

Plaintiff acknowledges that the "limited personal use" of company computers had to be use that would not violate the company's sexual harassment policy. (Aplee. Supp. App. 16 [Depo. p. 71, ll. 17-21]).

Plaintiff never asked any of her supervisors, or the company's IT department, or the Human Resources department whether it was appropriate to have sexually explicit photographs on her work computer. (Aplee. Supp. App. 12 [Depo. p. 56, ll. 9 – p. 57, ll. 9]). Plaintiff was aware that other HBC employees were terminated for inappropriate use of the company's computers. (Aplee. Supp. App. 18 [Depo. p. 84, ll. 13-21]).

According to plaintiff, she downloaded the nude photographs approximately a year or eighteen months prior to her termination. (Aplee. Supp. App. 17 [Depo. p. 77, ll. 13-22]). The inappropriate instant messages with Nigel Gray were transmitted some time prior to June, 2006, when he died. (Aplee. Supp. App. 41 [Depo. p. 249, ll. 12-21]).

Had the company known at the time that plaintiff was utilizing her computer for such purposes, she would have been terminated. (Aplee. Supp. App. 68-69).

Plaintiff's Use of FMLA Leave in 2008

On February 19, 2008, plaintiff submitted a request for FMLA leave, which was to begin the next day, February 20, 2008. (Aplee. Supp. App. 152). Plaintiff's supervisor had to remind her to turn in her FMLA request. (Aplee. Supp. App. 38 [Depo. p. 235, ll. 19 – p. 236, ll. 9]).

Plaintiff's request asked for FMLA leave from February 20 through April 17, 2008. (Aplee. Supp. App. 152).

The physician's certification submitted along with the request for leave identified the diagnosis as "bunion right foot." Dr. Lickteig stated that the probable duration of the condition was three months. (Aplee. Supp. App. 154-55).

When asked to describe the medical facts supporting the request for leave, Dr. Lickteig stated, "surgery to correct bunion with post-op recovery necessary i.e., non-wt. bearing etc. See [¶] 11 & 12." (Aplee. Supp. App. 154-55).

In paragraph 11 of the certification, where Dr. Lickteig was asked to describe the regimen of continuing treatment, he stated, "rest elevation ice pain meds crutches dressings." (Aplee. Supp. App. 155, ¶ 11).

Paragraph 12 of the certification form states: "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 responded, "Can preform [sic] only non-wt. bearing work." (Aplee. Supp. App. 155, ¶ 12).

In paragraph 12 (b), when asked to identify any of her essential job functions which plaintiff was unable to perform, Dr. Lickteig left the answer blank. (Aplee. Supp. App. 155, ¶ 12 (b)).

First FMLA Approval Notice (Through February 29, 2008)

On February 21, plaintiff was notified that she was approved for FMLA leave from February 20 through February 29, 2008. (Aplee. Supp. App. 157). The notice was sent both to plaintiff's department at work and to the home address plaintiff had listed on her FMLA request. (Aplee. Supp. App. 63 [Depo. p. 12, ll. 1-14]).

Plaintiff had a desk job and did not perform weight-bearing work. (Aplee. Supp. App. 39 [Depo. p. 239, ll. 24 – p. 240, ll. 5]). With the use of e-mail and telephone, she could avoid most of the walking necessitated by her job. (Aplee. Supp. App. 39-40 [Depo. p. 240, ll. 6-13; p. 242, ll. 11-20]). The company could accommodate a restriction for plaintiff to have non-weight-bearing work. (Aplee. Supp. App. 55 [Depo. p. 11, ll. 1-12]).

The company anticipated that, if plaintiff needed additional time off beyond February 29, 2008, she and her doctor would provide additional

information. (Aplee. Supp. App. 56-57 [Depo. p. 14, ll. 25 – p. 15, ll. 7; p. 16, ll. 17 – p. 17, ll. 1]).[2]

After her bunion was removed, plaintiff went to her parents' home to recover. (Aplee. Supp. 40 [Depo. p. 243, ll. 13 – p. 244, ll. 5]). She stayed there for a week or ten days. (*Id.*). Plaintiff's parents only live a few blocks from plaintiff's home, and plaintiff made arrangements to pick up her mail each day. (Aplee. Supp. App. 42 [Depo. p. 250, ll. 6-17]).

Plaintiff contends that she did not receive the notice dated February 21, 2008. (Aplee. Supp. App. 42 [Depo. p. 250, ll. 3-5]). However, 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. Supp. App. 42-43 [Depo. p. 251, ll. 1-10; p. 253, ll. 5 – p. 254, ll. 17]).

Plaintiff told Ealey not to worry about it, that she was sure the leave would be extended when she went back to the doctor on February 28, 2008. (Aplee. Supp. App. 48-49).

Plaintiff's Use of Short Term Disability Benefits

Plaintiff applied for short term disability benefits through Met Life. (Aplee. Supp. App. 42 [Depo. p. 252, ll. 7-16]).

[2] February 29, 2008 was a Friday, so plaintiff actually would not have been expected to be back at work until Monday, March 3, 2008. (Aplee. Supp. App. 159).

Second FMLA Approval Notice (Through April 1, 2008)

On March 14, 2008, Met Life notified HBC via e-mail that it had approved plaintiff for short term disability benefits through April 1, 2008. (Aplee. Supp. App. 161).

If an employee who has applied for FMLA is approved for STD benefits, the company's practice is to approve FMLA leave for the same period of time. (Aplee. Supp. App. 57 [Depo. p. 17, ll. 2-23]).

By memorandum dated March 14, 2008, plaintiff was notified that she was approved for FMLA leave through April 1, 2008. (Aplee. Supp. App. 163). The notice was sent to her department and to her home address. (Aplee. Supp. App. 64 [Depo. p. 57, ll. 6-9]).

Plaintiff claims that she did not receive either of the mailed notices informing her that she was approved for FMLA leave through February 29, and then later through April 1, 2008. (Aplee. Supp. App. 46 [Depo. p. 275, ll. 17-25]). 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. Supp. App. 45 [Depo. p. 270, ll. 11 – p. 271, ll. 4]).

Plaintiff was in contact with Met Life, and was aware that it was awaiting information. (Aplee. Supp. App. 43 [Depo. p. 255, ll. 10 – p. 256, ll. 15]).

Other than a telephone conversation with Amber Cotton on March 4, and an e-mail to her co-workers on March 18, 2008, plaintiff had no communication with anyone at HBC between February 28, 2008 and her termination on April 7, 2008. (Aplee. Supp. App. 45 [Depo. p. 270, ll. 11 – p. 271, ll. 4]).

Plaintiff's Failure to Return to Work

Plaintiff was expected to return to work on Wednesday, April 2, 2008. (Aplee. Supp. App. 165). She did not. (Aplee. Supp. App. 44 [Depo. p. 266, ll. 20-23]). Likewise, plaintiff did not call her supervisors to explain her absences. (Aplee. Supp. App. 46 [Depo. p. 274, ll. 4-7]).

Plaintiff's absences on April 2, 3, and 4, 2008 constituted absences on three consecutive working days without proper notification. (Aplee. Supp. App. 68-69).

Amber Cotton checked with Met Life to see if plaintiff's STD benefits had been extended. (Aplee. Supp. App. 65 [Depo. p. 68, ll. 25 – p. 69, ll. 10]). She found that plaintiff had not requested that the STD benefits be extended past April 1, 2008, and that benefits ended on that date. (*Id.*).

Plaintiff's Termination Letter

On April 7, 2008, Kathy Sade sent plaintiff a certified letter, notifying her that she was terminated for violation of Rule of Conduct No. 1. (Aplee. Supp. App. 167).

The Post Office first attempted delivery of the certified letter on April 9, 2008. (Aplee. Supp. App.169). Plaintiff eventually picked up the certified letter on April 17, 2008. (Aplee. Supp. App. 171-72; 44 [Depo. p. 267, ll. 16 – p. 268, ll. 25]).

Plaintiff's Contact on April 15, 2008

After plaintiff was notified that someone was trying to send her a certified letter, on April 15, 2008, she e-mailed Cindy Ealey and told her that she planned to return to work on April 21, 2008. (Aplee. Supp. App. 174).

Cindy Ealey and Kathy Sade let Candye Daughhetee know that plaintiff had e-mailed regarding returning to work. (Aplee. Supp. App. 176-77). Candye Daughhetee called and e-mailed plaintiff. (Aplee. Supp. App. 179). Daughhetee asked plaintiff to contact her right away. (*Id.*).

Met Life's Closing File Due to Insufficient Information

By letter dated April 16, 2008, Met Life notified plaintiff that, due to her failure to provide requested information regarding her status, the claim

for benefits was closed effective April 1, 2008. (Aplee. Supp. App. 181). That same date, Met Life informed HBC that it had closed the file because no medical information was received. (Aplee. Supp. App. 183-84).

Plaintiff's Contacts With HBC

On April 17, 2008, plaintiff contacted Candye Daughhetee, who explained that plaintiff had been terminated. (Aplee. Supp. App. 45-46 [Depo. p. 270, ll. 4-8; p. 274, ll. 15-24]).

Plaintiff Was Not Incapacitated

Throughout her absence, plaintiff was regularly engaging in shopping activities in Derby, Wichita, Mulvane, Emporia, and Haysville, starting on the date of her surgery and continuing through her termination date. (Aplee. Supp. App. 188-99).

Plaintiff's Complaint Filed With the Department of Labor

After plaintiff was terminated, she submitted a complaint the Department of Labor. (Aplt. App. 231).

Plaintiff Has Not Reapplied With Defendant

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. Supp. App. 308-09 [Depo. p. 309, ll. 14 – p. 310, ll. 25]).

ARGUMENT AND AUTHORITIES

I. The District Court Did Not Err in Granting Summary Judgment

A. Standard of Review

Appellate courts review a district court's grant of summary judgment *de novo*, applying the same legal standards to be used by the district court. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006). Summary judgment should be affirmed if the record presents no genuine issues of material fact and if the moving party is entitled to a judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(c)).

B. Location in the Record

Defendant's Motion for Summary Judgment is located at Aplt. App. 68-118. Plaintiff's response is at Aplt. App. 154-84. Defendant's reply brief is at Aplee. Supp. App. 201-98. The district court's Memorandum and Order granting Defendant's Motion for Summary Judgment is at Aplt. App. 235-54. The Notice of Appeal is at Aplt. App. 256-57.

C. The District Court Properly Granted Summary Judgment on Plaintiff's Claim Brought Pursuant to 42 U.S.C. § 1981

1. Summary of the Argument

Plaintiff, who is Caucasian, claims that defendant unlawfully retaliated against her because she objected to what she perceived to be ill

treatment of an African-American co-worker, Teresa Cole. According to plaintiff, the unlawful retaliation was manifested in defendant's failure to promote her in the fall of 2007, and when it terminated her employment in April of 2008. The district court properly granted defendant's dispositive motion because plaintiff failed to prove the elements of a *prima facie* case, because defendant has offered legitimate, nondiscriminatory and nonretaliatory reasons for its actions, and because plaintiff failed to show that defendant's reasons for its actions were pretextual.

2. Plaintiff's § 1981 Claim

Although the language of 42 U.S.C. § 1981 does not expressly include a retaliation claim, the United States Supreme Court has recently held § 1981 to encompass retaliation claims. *CBOS West Inc. v. Humphries*, 553 U.S. 442, 457 (2008). This court has held that a non-minority employee can bring a cause of action under 42 U.S.C. § 1981 for retaliation precipitated by the plaintiff's efforts to vindicate the rights of minority employees. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988).

Plaintiff claims that she was unlawfully retaliated against because she protested her supervisors' treatment of Teresa Cole. Specifically, plaintiff contends that defendant refused to promote her in the fall of 2007, and

terminated her employment on April 7, 2008 because of her complaints regarding Teresa Cole. (Aplt. App. 44, at ¶ 6 (a)(3); 46, at ¶ d). Defendant contends that plaintiff cannot prove this claim.

3. Burden and Allocation of Proof

The parties disagree as to the analytical framework to be used in assessing plaintiff's § 1981 retaliation claim. Defendant contends that retaliation claims brought pursuant to 42 U.S.C. § 1981 are properly analyzed under the three-part test delineated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Somoza v. Univ. of Denver*, 513 F.3d 1206, 1211 (10th Cir. 2008). Plaintiff apparently agreed with that position at the time the parties prepared the pretrial order in the case.

When plaintiff responded to defendant's summary judgment motion, she contended, for the very first time, that her § 1981 claim should be analyzed under a "mixed motive" theory of recovery, and that the *McDonnell Douglas* analysis does not apply. (Plaintiff's Response to Defendant's Motion for Summary Judgment, Aplt. App. 174-76).

In its summary judgment reply brief, defendant argued that the district court should disregard this argument, due to the fact that plaintiff did not preserve such an argument in the pretrial order (Aplee. Supp. App. 275-77). It is axiomatic that, unless a pretrial order is amended by the

court, it controls the course of the litigation. *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979). This Court has held that "claims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the complaint and, conversely, the inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim." *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002).

In this case, plaintiff's § 1981 claim was addressed on pages 14, 16, 19, 20, 25, 26, 28, and 29 of the pretrial order. (Aplt. App. 44-59). Plaintiff never included in any of those sections an argument that the § 1981 claim should be addressed under a "mixed motive" analysis. Rather, the parties set forth the elements and issues for analyzing the case under the *McDonnell Douglas* framework.

When it addressed the summary judgment motion, the district court considered this dispute as to the proper analytical framework, and concluded that plaintiff had not preserved in the pretrial order any contention that the case should be analyzed as a "mixed motive" claim. Accordingly, the district court concluded that utilizing that analysis would be both inappropriate and unnecessary. (Aplt. App. 242-43).

On appeal, plaintiff makes the "mixed motive" argument again, without addressing either her failure to include such a theory in the pretrial order, or any argument as to why the district court erred in refusing to analyze the § 1981 claim under that theory. As this Court stated in *Hullman v. Bd. Of Trustees of Pratt Cmty. Coll.*, 950 F.2d 665, 668 (10th Cir. 1991):

> The pretrial order supersedes the pleadings and controls the subsequent course of litigation. Fed. R. Civ. P. 16(e). The trial court has the discretion to exclude from trial those issues and claims not found in the pretrial order. *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1072 (11th Cir.1986), *modified on other grounds*, 798 F.2d 425 (1986), *cert. denied*, 479 U.S. 1032, 107 S. Ct. 878, 93 L.Ed.2d 833 (1987). A plaintiff cannot escape the binding effect of the pretrial order by raising new issues in a response to the defendant's motion for summary judgment. *Bieber v. Associated Collection Services, Inc.*, 631 F. Supp. 1410, 1414 (D. Kan. 1986).

The Court went on to affirm the district court's dismissal of Hullman's claim, stating that "rulings on the exclusion of [matters] not grounded in the pretrial order are matters resting in the sound discretion of the trial court, and will not be disturbed absent an abuse of that discretion. *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), *cert. denied*, 450 U.S. 918, 101 S. Ct. 1363, 67 L.Ed.2d 344 (1981).

In *Hullman*, the plaintiff argued on appeal that the district court abused its discretion in refusing to permit a claim that was not included in the pretrial order. Plaintiff in this case makes no such argument. Instead, she just presents her case as one brought under a "mixed motive" theory, urging this Court to accept that analysis. The Court should decline that invitation to error, as "[t]he Pretrial Order measures the dimensions of the lawsuit, both in the trial court and on appeal." *Hullman*, 950 F.2d at 668. No mixed motive claim was preserved in the pretrial order, and it should therefore not be considered at this point.

4. The Correct Analysis of the Claim

Plaintiff's § 1981 retaliation claim should be analyzed through the burden-shifting framework of *McDonnell Douglass*. Under that analysis, the plaintiff must establish a *prima facie* case, by showing that: (1) she engaged in protected opposition to discrimination; (2) a reasonable employee would have found the challenged action materially adverse, which in this context means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination; and (3) a causal connection existed between the protected opposition and the materially adverse action. *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1211 (10th

Cir.2008)(Title VII and § 1981); *Carney v. City and County of Denver*, 534 F.3d 1269, 1276 (10th Cir. 2008).

If the plaintiff can establish a *prima facie* case, then the employer must provide a legitimate and facially nondiscriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802. Finally, if the employer satisfies this burden, the plaintiff must establish that the defendant's reasons were a pretext for discrimination. *Id.* at 804.

a. Plaintiff Cannot Prove the Elements of a *Prima Facie* Case

Under the *McDonnell Douglas* analysis, plaintiff must first prove that she engaged in protected opposition to discrimination, that a reasonable employee would have found the challenged action materially adverse, and that the adverse actions were causally connected to the protected opposition. In this case, defendant admits that not being promoted and being terminated are adverse job actions. However, plaintiff cannot prove the other two *prima facie* case elements.

(1). Plaintiff Cannot Prove That She Engaged in Protected Activity

Plaintiff cannot prove that she engaged in protected activity. Plaintiff alleges that she told her supervisor, Nigel Gray, in approximately 1996, that she had heard Pat Tos say that she believed that African American

employees were lazy. This report came more than eleven years prior to the adverse job actions in question, and because Nigel Gray died and Pat Tos retired before either of those actions, plaintiff's complaint to Gray is unconnected to the adverse actions.

Plaintiff also claims that she told Cindy Ealey, in early 2007 and later that year, that she believed that Teresa Cole was being mistreated by Sharon Schlegel. At her deposition, plaintiff was unable to recall whether she alleged that the mistreatment she perceived to be directed toward Teresa Cole was racially-motivated.

Complaining about some issue that happens to involve a minority employee is not the same as complaining that a minority employee's rights are being infringed due to their race. See *Hinds v. Sprint/United Management Co.*, 523 F.3d 1187, 1202 (10th Cir. 2008). Futhermore, as this court noted, in *Anderson v. Academy School. Dist. 20*, 122 Fed. Appx. 912, 916 (10th Cir. 2004), "[a] vague reference to discrimination and harassment without any indication that the misconduct was motivated by [age] does not constitute protected activity and will not support a retaliation claim."

There is no evidence in the record suggesting that plaintiff ever stated that she believed that Sharon Schlegel was mistreating Teresa Cole due to

her race. Because plaintiff did not, even by her own testimony, attribute any perceived mistreatment of Teresa Cole to Cole's race, she cannot prove the *prima facie* element of participation in protected activity.

(2). Plaintiff Cannot Prove a Causal Connection

While being terminated and not being promoted likely qualify as materially adverse job actions, plaintiff cannot prove that those two events were causally connected to her complaints regarding Teresa Cole. First, the alleged complaint to Nigel Gray in 1996 occurred so long before either of the two adverse job actions that it cannot be connected. *McGowan v. City of Eufala*, 472 F.3d 736, 744 (10th Cir. 2006)("[T]he required link between the protected activity and subsequent adverse employment action can be inferred if the action occurs within a short period of time after the protected activity."); *Argo v. Blue Cross & Blue Shield of Kan.,* Inc., 452 F.3d 1193, 1202 (10th Cir. 2006) (finding 24-day period "sufficient to allow an inference that a causal connection existed" between the internal grievance and the challenge action); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir.1999) (comparing cases where six-week period gave rise to inference of a causal connection, but three-month period did not).

Furthermore, Nigel Gray died on June 1, 2006, more than a year before the job requisition was opened, and almost two years prior to plaintiff's termination. Since Gray was obviously not involved in either of the adverse job actions, and there is no evidence that either plaintiff or Gray reported her 1996 complaint to anyone else, it is impossible to connect the 1996 complaint with the job actions.

The complaints to Cindy Ealey in 2007 are closer in time to the promotion decision, and the termination in April of 2008. However, it is undisputed that the Human Resources department – not plaintiff's supervisors – determined the educational background needed for the job for which John Beasley was hired. Since there is no testimony that either Cindy Ealey or plaintiff ever mentioned to Human Resources plaintiff's vague and ambiguous allegations of mistreatment of Teresa Cole, plaintiff again cannot establish that her complaints were causally connected to her failure to be promoted. Furthermore, plaintiff did not possess the educational qualifications preferred for the position that went to John Beasley. She had been told by her supervisors for years that, if she wanted to be promoted, she needed to further her education beyond her high school diploma.

Likewise, it is also undisputed that Human Resources approved the decision to terminate plaintiff's employment after she failed to return to work following the conclusion of her approved FMLA leave. Plaintiff's supervisors' only involvement was communicating with Human Resources about plaintiff's continued absences, and asking what action they should take. There is no evidence to suggest that the Human Resources personnel who were involved in the termination decision had any knowledge of plaintiff's complaints to Cindy Ealey in 2007. It is well-settled that a retaliation claim is fatally flawed if the decision-maker had no knowledge of the participation in protected activity at the time the adverse job action was taken. *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1235 (10th Cir. 2000). The termination decision was due to plaintiff's continued absence from work after her FMLA leave ended – not to her complaints to Cindy Ealey, the earliest of which was almost a year before.

b. Plaintiff Cannot Prove Pretext

This Court held in *Patel v. Univ. of Kansas Hospital Authority*, 2009 WL 2837497, 345 Fed. Appx. 343, 345 (10th Cir. 2009)(*citing Kendrick v. Penske Transportation Services, Inc.,* 220 F.3d 1220, 1230 (10th Cir. 2000)), that evidence of pretext "may take a variety of forms," including

evidence tending to show "that the defendant's stated reason for the adverse employment action was false" and evidence tending to show that the defendant acted contrary to a written policy or practice. When analyzing a contention of pretext, we examine "the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick*, 220 F.3d at 1231. "[T]he relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006).

In this case, plaintiff cannot prove pretext. With regard to the allegation that she did not get the position which John Beasley was hired for, it is undisputed that Human Resources determined the educational and experience qualifications – not plaintiff's supervisors. Plaintiff admits that she never mentioned her complaints about how Teresa Cole was treated to anyone in Human Resources. Likewise, it is clear from the performance reviews that plaintiff received in 2001 and 2005 – years before her Cole-related complaints – that her supervisors informed her that she would need to improve her educational qualifications in order to be promoted. It is also clear from the documentation pertaining to the interview process that other qualified candidates were ranked higher than

plaintiff by the interview team, including one candidate with a master's degree. There is no evidence that any of those rejected candidates ever made complaints about how Teresa Cole's time was counted, or whether she was permitted to use unscheduled vacation, but they were not hired for the position, just as was true with plaintiff.

Plaintiff also cannot prove pretext with regard to her allegation that she was terminated in April of 2008 for having complained as early as 2007 about how Teresa Cole's time was handled and whether she was entitled to use unscheduled vacation. The documentation concerning the facts leading to plaintiff's termination is undisputed. Plaintiff was approved for FMLA leave in accordance with her approval for STD benefits. Both of those ended on April 1, 2009. Plaintiff did not return to work and did not call regarding her status. As a result, she was terminated after being absent for three consecutive work days without proper notification.

Plaintiff now claims that she did not receive the notifications from Human Resources advising her that her approved FMLA leave ended on April 1, 2008. She denies that she received notification from Met Life as to the duration of her STD benefits. However, as the Court noted in *Patel*, it is important that to analyze the facts as they appeared to the persons

making the termination decision. The people who made the termination decision believed that plaintiff had been notified that her leave ended on April 1, 2009. The people who made the decision also reviewed the contacts they had with plaintiff, and knew that she had not been in touch with them about the status of her leave since they informed her that it was only approved through February 29, 2008.

Plaintiff contends that the evidence which would be adduced to support the contention that defendant was motivated by a desire to retaliate includes: (1) the company offered a false explanation as to the reasons for termination; (2) the temporal proximity between protected activity and adverse job actions; (3) inconsistency in the explanation for the termination decision; and (4) procedural irregularities. (Plaintiff's Brief, at 24-27).[3] An analysis of each of these arguments shows that plaintiff is unable to prove pretext.

Plaintiff first claims that the company offered a false explanation as to the reason it terminated her employment. (Plaintiff's Brief, at 25-26). According to plaintiff, the termination letter stated that plaintiff was being terminated because she did not report for work or contact the company for

[3] At the summary judgment stage, plaintiff contended that one item of evidence indicating a retaliatory motive was that defendant had given a false explanation as to its reasons for selecting John Beasley instead of plaintiff. (Plaintiff's Reply to Defendant's Motion for Summary Judgment, Aplt. App. 177). Plaintiff has apparently abandoned that contention on appeal.

three consecutive days, but, according to plaintiff, Cindy Ealey had approved an "out of office" e-mail that stated plaintiff would be out of the office until approximately April 28, 2008. (*Id.*). Plaintiff also contends that, when plaintiff spoke by telephone to April Cotton on March 4, 2008, Ms. Cotton had told plaintiff that "everything was taken care of." (*Id.*).

These contentions are belied by the record. The Court should note that the only evidence proffered by plaintiff to support the contention that Cindy Ealey had approved the "out of office" e-mail is plaintiff's own affidavit. (Aplt. App. 186-87). She has not provided any evidence to indicate that Cindy Ealey either saw or approved an "out of office" message stating that plaintiff would be out until April 28, 2008. Furthermore, FMLA requests are approved or denied by the company's Human Resources department – not an individual employee's supervisor. Plaintiff's affidavit indicates that Ealey approved the "out of office" message prior to plaintiff's surgery. There had been no determination regarding plaintiff's FMLA request, which was not even received until the day preceding the surgery, at that time.

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. On March 4, 2008, plaintiff had only been

approved for FMLA leave through February 29, 2008. Although plaintiff had applied for STD benefits, that application was not approved until March 14, 2008.

Plaintiff also cites as important evidence the temporal proximity between her alleged protected activity and the adverse job actions. Setting aside the complaint to Nigel Gray in 1996, plaintiff's other two complaints were made to Cindy Ealey in early 2007 and in late 2007 or early 2008. As defendant previously noted, the second complaint to Ealey was apparently made after John Beasley was hired in October of 2007, and thus the hiring decision could not be causally connected to plaintiff's complaint in late 2007 or early 2008. The complaint in early 2007 predated the decision to hire Beasley in October of 2007 by several months – not the two or three month period that this Court has found probative. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)(six week period gave rise to inference of causal connection, but three month period did not).

Plaintiff's reliance on temporal proximity is misplaced with regard to the first complaint to Cindy Ealey and the hiring of John Beasley. The termination in April 2008 was even more remote from the complaint in early 2007, and there should be no inference of causal connection.

The second complaint to Cindy Ealey – which reportedly came in late 2007 or early 2008 is closer in time to plaintiff's termination. However, even when participation in protected activity is relatively close in time to an adverse job action, courts must examine the intervening events. Engaging in protected activity does not cloak an employee with immunity for her own shortcomings. As the First Circuit Court of Appeals noted in *Mesnick v. General Electric Co.*, 950 F.2d 816, 828 (1st Cir. 1991), knowledge that an employee has engaged in protected activity, "without more, cannot itself be sufficient to take a retaliation case to the jury. Were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing, or threatening to file, a discrimination complaint." The First Circuit went on to note that "[w]hile statutes such as the ADEA bar retaliation for exercising rights guaranteed by law, they do "not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers." In this case, there were significant intervening events between plaintiff's second complaint to Cindy Ealey and her termination. Plaintiff

did not return to work after her approved FMLA leave, and thus was in violation of defendant's Rules of Conduct.

Furthermore, it is undisputed that plaintiff's supervisors did not unilaterally make the decision to terminate her employment. That direction came from the Human Resources department, which was unaware of plaintiff's complaints about how Teresa Cole was treated.

Plaintiff alleges that the company has provided inconsistent explanations for the decision to terminate plaintiff's employment. According to plaintiff, Kathy Sade testified that plaintiff was terminated for poor performance – not her continuing absences after her FMLA leave concluded. (Plaintiff's Brief, at 26). That argument substantially misstates Sade's testimony. Sade testified that when plaintiff returned from FMLA leave, she would be put on a performance improvement plan. (Aplee. Supp. App. 314-15). Sade did not testify that plaintiff was terminated for poor performance. The explanation offered by defendant for plaintiff's termination has always been consistent. Plaintiff was approved for FMLA leave through April 1, 2008, and when she did not return to work following that date, she was in violation of company attendance policies.

Plaintiff contends that the fourth and final piece of evidence indicating a retaliatory motive is that there were "procedural

irregularities." (Plaintiff's Brief, at 27). She contends that defendant departed from its usual practice of approving FMLA leave for the same period of time that the employee received short term disability benefits. This argument ignores the sequence of events that occurred in this case. Plaintiff was approved for FMLA leave through April 1 – the same date that her short term disability benefits ended. When plaintiff did not return to work on April 2, the company contacted Met Life to see if the STD benefits had been extended. They had not. As a result, plaintiff was notified that her employment was terminated. More than a week later, HBC was notified that plaintiff had also not cooperated with Met Life, and that it was closing its file because the requested medical information had not been received. Defendant followed its usual practice of having FMLA dovetail with STD benefits. Plaintiff has not provided any evidence to suggest that, in other cases, defendant has retracted terminations if STD benefits are reinstated following termination. Because plaintiff cannot prove pretext, her § 1981 retaliation claim must fail.

There is no evidence that either the termination decision or the decision to hire John Beasley were motivated by the fact that plaintiff had complained to her supervisor about how another supervisor was treating

Teresa Cole. The district court properly held that Defendant was entitled to summary judgment on Plaintiff's § 1981 retaliation claim.

D. The District Court Properly Granted Summary Judgment on Plaintiff's FMLA Claims

1. Summary of the Argument

Plaintiff asserts both a discrimination/retaliation claim and an interference/entitlement claim under the FMLA. Defendant contends that the district court properly granted summary judgment on the discrimination/retaliation claim because plaintiff cannot prove a *prima facie* case, and cannot prove that the legitimate, nonretaliatory reasons offered by defendant for its actions are pretextual.

Defendant contends that the district court properly granted summary judgment on the interference/entitlement claim because plaintiff cannot prove that she was entitled to leave after April 1, 2008, when she was not incapacitated, or that there was a denial of substantive rights, or that any causal connection existed between defendant's adverse job action and plaintiff's use of FMLA leave.

2. Plaintiff's FMLA Claims

The FMLA requires covered employers to allow qualified employees up to twelve weeks of unpaid leave annually for the employee's own serious

health condition, to care for a family member who has a serious health condition, or for the birth or adoption of a child. 29 U.S.C. § 2612(a)(1).

Section 2615(a) of the FMLA provides two separate FMLA causes of action. *Dry v. Boeing Co.*, 92 Fed. Appx. 675, 679, 2004 WL 309323 (10th Cir. 2004); *Smith v. Diffee Ford-Lincoln-Mercury*, 298 F. 3d 955, 960 (10th Cir. 2002). The first is based on a discrimination/retaliation theory. *Dry v. Boeing Co.*, 92 Fed. Appx. 675, 678 (10th Cir. 2004). That cause of action is premised on subsection 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer "to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." The second theory is known as the interference/entitlement theory. It is based on an interference with a qualified employee's right to FMLA leave, and derives from 29 U.S.C. 2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."

In this case, plaintiff alleges both types of FMLA claims. (Aplt. App. 44). Defendant contends that the district court properly granted summary judgment on both claims.

3. Defendant Is Entitled to Summary Judgment on Plaintiff's FMLA Discrimination/Retaliation Claim

a. Burden and Allocation of Proof

The parties are in dispute with regard to the applicable analysis of proof for this claim. As was true of the § 1981 claim, plaintiff's response to defendant's summary judgment motion asserted, for the very first time, that the claim should be analyzed via the "mixed motive" analysis. (Aplt. App. 182). Defendant contended that plaintiff had failed to preserve that argument in the pretrial order. (Aplee. Supp. App. 290). The district court agreed. (Aplt. App. 242-44). Plaintiff has not contended that the district court abused its discretion in refusing to allow a new theory to be asserted after defendant had filed its dispositive motion, and such an argument would be contrary to this Court's well-settled holdings that the pretrial order controls the course of litigation in both the district court and on appeal. *Hullman v. Bd. Of Trustees of Pratt Cmty. Coll.*, 950 F.2d 665, 668 (10th Cir. 1991).

When analyzing FMLA discrimination/retaliation claims, courts apply the burden shifting framework delineated in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973). *See Morgan v. Hilti*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Metzler v. Fed. Home Loan Bank*, 464 F.3d 1164, 1170 (10th Cir. 2006); *Doebele v. Sprint/United Mgmt. Co*, 342 F.3d 117, 1135 (10th Cir. 2003). Under this analysis, the plaintiff must first establish

a *prima facie* case of retaliation. If the plaintiff does so, then the defendant must offer a legitimate, nondiscriminatory reason for its actions. Plaintiff then bears the ultimate burden of proving that the explanation proffered by defendant is pretextual.

b. Plaintiff Cannot Prove a *Prima Facie* Case of FMLA Discrimination/Retaliation

Under an FMLA discrimination/retaliation claim, the elements of a *prima facie* case are: (1) that plaintiff engaged in protected activity; (2) that a reasonable employee would have found defendant's action materially adverse; and (3) a causal connection between the protected activity and the adverse job action. *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006).

According to the pretrial order, plaintiff claims that defendant retaliated against her by refusing to promote her, terminating her employment, and refusing to rehire her because she requested leave under the FMLA and filed a complaint with the Department of Labor. (Aplt. App. 44, ¶ 6 (a)(2)). On appeal, plaintiff contends that her FMLA retaliation claim is based on her termination, Kathy Sade's refusal to retract her termination, and Nita Long's refusal to reinstate plaintiff on October 20, 2008, after a conference with the Department of Labor investigator.

(Plaintiff's Brief, at 33-34). As stated above, unless a pretrial order is amended by the court, it controls the course of the litigation. *Trujillo v. Uniroyal Corp.*, 608 F.2d 815, 818 (10th Cir. 1979). Therefore, plaintiff's claims should be confined to those preserved in the pretrial order.

While defendant acknowledges that plaintiff's use of FMLA leave in 2008 was protected activity, and that failure to promote, termination, and failure to rehire are all adverse job actions, plaintiff cannot prove the causal connection, which is the third element of the *prima facie* case under the *McDonnell Douglas* burden-shifting framework. *Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1290 (10th Cir. 2006).

Plaintiff's first theory – that she was not promoted because she used FMLA leave – is logically flawed because the promotion decision occurred in October of 2007, well before plaintiff commenced her FMLA leave.[4] The sequence of events belies any causal connection.

Similarly, plaintiff'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.

[4] Plaintiff also used FMLA leave in 2004, for her tummy tuck and liposuction, but that occurred three years prior to the promotion decision, and is quite remote in time.

Plaintiff's second claim, that she was retaliated against for using FMLA leave by being terminated, also lacks the requisite causal connection. Defendant terminated plaintiff for violation of Rule of Conduct No. 1. That rule states that, if an employee is absent for three consecutive workdays without proper notification, then termination is the discipline on the first offense. The decision to terminate plaintiff was unrelated to plaintiff's use of FMLA leave. See *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 (10th Cir. 1998) (stating that an employee "who requests FMLA leave would have no greater protection against his or her employment being terminated for reasons not related to his or her FMLA request that he or she did before submitting the request"). Plaintiff has not identified any other employee who violated Rule No. 1 of the Rules of Conduct by failing to report for work for three days without a call to the supervisor, but was treated more leniently. *Medina v. Coors Brewing Co.*, 232 F.3d 901 (10th Cir. 2000)(employee who did not return to work at end of FMLA leave terminated for excessive absenteeism; summary judgment for employer affirmed).

Even if an employee has requested FMLA leave, he or she is still obligated to comply with the employer's attendance and reporting requirements. Employees are not excused from compliance with the

employer's attendance and reporting policies simply because they believe that their absences might qualify for FMLA leave. *See, e.g., Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088 (10th Cir. 2005).

Plaintiff contends that she should have continued on FMLA leave following the end of her STD benefits, and following notification by Met Life that plaintiff's claim for benefits was being closed because she had not provided necessary medical information. As stated in *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1233 (10th Cir. 2000): "A company must be allowed to exercise its judgment in determining how severely it will discipline an employee for different types of conduct. 'Our role is to prevent unlawful . . . practices, not to act as a super personnel department that second guesses employers' business judgments.'" 220 F.3d at 1233 (citation omitted). Furthermore, if defendant was opposed to plaintiff using FMLA leave, it would have rejected her untimely application submitted one day in advance of her surgery, which had been scheduled for weeks. The FMLA requires employees to give thirty days' advance notice to their employers, when possible. If that notice period is not practicable, then the employee is to provide advance notice of the need for leave as soon as practicable. 29 C.F.R. § 825.302.

Plaintiff's third theory – that she was retaliated against by not being rehired – is also missing a causal connection. Plaintiff admits that she was not a union employee, and had no recall rights. She admits that, since her termination, she never reapplied with HBC. She also acknowledges that the department where she worked has suffered the same cuts during the economic downturn as have other departments.

c. Defendant Has Offered Legitimate, Nondiscriminatory and Nonretaliatory Reasons for Its Actions

John Beasley was hired for the new position, rather than plaintiff being promoted into it, because he had the educational background that Human Resources desired. Plaintiff, who has a high school diploma, was not selected, but there were several other applicants in the group who were also not selected, and they had not used FMLA leave.

Defendant terminated plaintiff for violation of Rule of Conduct No. 1. That rule states that, if an employee is absent for three consecutive workdays without proper notification, then termination is the discipline on the first offense. Plaintiff was absent on April 2, 3, and 4, 2008, and she made no attempt to contact either her supervisors or Human Resources to explain her continuing absence, or to get clarification as to when her leave ended. Employees are not excused from compliance with the employer's

attendance and reporting policies simply because they believe that their absences might qualify for FMLA leave. *See, e.g., Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088 (10th Cir. 2005).

Plaintiff has not been rehired, and it is pretty easy to ascertain why. The aviation industry is in a severe downturn, people are being laid off rather than being hired, and plaintiff has not reapplied. Furthermore, when she was employed, as discussed by her supervisors, she was often tardy, and refused to comply with the directive to log onto the Telephony at Work system. As Kathy Sade noted, during plaintiff's absence, it was determined that, when plaintiff returned to work, she would be put on a performance improvement plan. As it turned out, plaintiff did not return to work because of her disregard for defendant's attendance rules.

Defendant had legitimate, nondiscriminatory and nonretaliatory reasons for its action, and plaintiff was not terminated for having used FMLA leave.

d. Plaintiff Cannot Prove Pretext

In order to sustain her ultimate burden of proof, plaintiff must prove that the reason offered by defendant – plaintiff's failure to return to work following the expiration of her approved FMLA leave and violation of Rule

of Conduct No. 1 – was merely a pretext for what is actually unlawful discrimination or retaliation. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1113 (10th Cir. 2007). To prove such pretext, plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Id.* (*citing Twilley v. Integris Baptist Med. Ctr., Inc.*, 16 Fed. Appx. 923, 925 (10th Cir. 2001)).

Proving pretext is usually accomplished by (1) showing that the defendant's legitimate reason is false, (2) showing that the defendant acted contrary to a written company policy describing the action to be taken by the defendant under the circumstances, or (3) showing that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000).

In this instance, plaintiff cannot provide any such evidence. The documentation shows that plaintiff was notified via mail and by her telephone conversation with Cindy Ealey that her FMLA leave was initially only approved through February 29, 2009. The company's documentation later shows that the leave was extended to April 1 in order to dovetail with

the approval of STD benefits. Although plaintiff claims not to have received this mailed notification, that claim was not asserted until plaintiff was deposed.[5] Courts in this district have held that a "challenge of pretext requires [the court] to look at the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *see also Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1220 (10th Cir. 2000) (explaining that "[t]he pertinent question in determining pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual"). "In making a pretext determination, a court looks at the facts as they appeared to the person making the employment decision, because it is the employer's 'perception that is relevant, not the [employee's] subjective evaluation of his own relative performance.'" *Vigil v. City of Albuquerque*, 210 Fed. Appx. 758, 764 (10th Cir. 2006)(citing *Kelley v. Goodyear Tire & Rubber Co.*, 220 F.3d 1174, 1177-78 (10th Cir. 2000)). A plaintiff's own subjective belief of discrimination is insufficient to preclude summary judgment. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1408 n. 7 (10th Cir. 1997).

[5] The argument seems illogical, in that, in order to accept plaintiff's version, the Court would have to conclude that she was told by Cindy Ealey that she was only approved for leave through February 29, 2008, and that she then, without receiving any written update, elected to stay off work for another six weeks.

Plaintiff cannot establish a material issue of genuine fact that the proffered reason for plaintiff's termination is pretextual. The district court properly held that defendant was entitled to summary judgment on plaintiff's discrimination/retaliation claim.

4. The District Court Properly Granted Summary Judgment on Plaintiff's FMLA Interference/Entitlement Claim

Plaintiff's single claim under the FMLA interference/entitlement theory is that defendant interfered with her FMLA rights by terminating her employment. (Aplt. App. 44, ¶ 6(a)(1)). This Court has held that, in instances where the plaintiff alleges an improper dismissal under an interference/entitlement theory, the plaintiff can prevail only if she demonstrates that the reason for dismissal was directly connected with her FMLA leave. *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 961 (10th Cir. 2002). A dismissal for reasons "insufficiently related" to FMLA leave will not support a claim of unlawful interference. *Id.*

In this case, plaintiff was not terminated for using FMLA leave. Rather, she was terminated for continued absences after her approved FMLA leave had expired and she had not contacted the company to offer any explanation as to why she did not return to work.

a. Plaintiff Cannot Sustain Her Burden of Proving FMLA Interference/Entitlement

This Court has held that "a *prima facie* case under an interference/entitlement theory requires a showing of FMLA leave entitlement, a denial of substantive rights under the FMLA, and a causal connection between the two." *Dry v. Boeing Co.*, 92 Fed. Appx. 675, 679, 2004 WL 309323 (10th Cir. 2004).

(i). Plaintiff Was Not Entitled to FMLA Leave After April 1, 2008

A qualified employee is entitled to FMLA leave if he or she has a "serious health condition that makes the employee unable to perform the functions of [her] position." 29 U.S.C. § 2612(a)(1)(D). The regulations define "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider. 29 C.F.R. § 825.114(a)(2). Such treatment includes a period of incapacity (i.e., inability to work) of more than three consecutive calendar days which also involves either treatment two or more times by a health care provider or a regimen of continuing treatment by a health care provider. *Id.* at § 825.114(a)(2)(i)(A)-(B).

An employer can only determine if FMLA leave is required if a proper physician's certification is provided by the employee. 29 C.F.R. § 825.305.

According to the FMLA regulations, an acceptable physician's certification must state, inter alia: that the employee has a "serious health condition," as that term is defined by the FMLA, and the medical facts meet the criteria of the definition (§ 825.306(b)(1)); the date the condition commenced, its probable duration, and the probable duration of the employee's present incapacity (§825.306(b)(2)(i)); and whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule (§825.306(b)(2)(ii)); if the condition is a chronic condition, whether the employee is presently incapacitated and the likely duration and frequency of episodes of incapacity (§825.306(b)(2)(iii)).

Under 29 C.F.R. § 825.114(a)(2), to establish a "serious health condition," one must be incapacitated for more than three consecutive calendar days, and have a continuing course of treatment within the period of incapacity. *See Jones v. Denver Public Schools*, 427 F.3d 1315, 1321 (10th Cir. 2005), where this Court noted:

> [T]the regulation instead frames the definition in terms of a "period of incapacity" that "involves" at least two treatments indicates that the timing of the treatments, and not just the need for treatments, is important. Indeed, structurally, the regulation consistently frames its alternative definitions as a set of conditions on a "period of incapacity." See 29 C.F.R. § 825.114(a)(2)(ii) ("[a]ny period of incapacity due to pregnancy, or for prenatal care"); id. § 825.114(a)(2)(iii) ("[a]ny period of incapacity

> or treatment for such incapacity due to a chronic serious health condition"); id. § 825.114(a)(2)(iv) ("[a] period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective"). This emphasis on the "period of incapacity" reinforces the view that the necessary treatments must be temporally linked to that period.

Plaintiff's physician did not indicate that she was incapacitated from performing her regular duties. In fact, he authorized her to perform non-weight-bearing work.

If an employee fails to substantiate the existence of a serious health condition by submitting an appropriate physician's certification, then "the leave is not FMLA leave." 29 C.F.R. § 825.311(b). *See also Allender v. Raytheon Aircraft Co.*, 339 F. Supp. 2d 1196, 1205 (D. Kan. 2004)(plaintiff who failed to provide a certification substantiating a serious health condition properly denied leave), *aff'd,* 439 F.3d 1236 (10th Cir. 2006).

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 could perform her regular job functions, so long as she could do so in a sitting position. Plaintiff had a

desk job, and the company could have easily accommodated that limitation. Nonetheless, defendant approved FMLA leave for plaintiff for approximately six weeks following her surgery – until April 1, 2008.

It is well-settled that, even if an employee has requested FMLA leave, he or she is still obligated to comply with the employer's attendance and reporting requirements. Employees are not excused from compliance with the employer's attendance and reporting policies simply because they believe that their absences might qualify for FMLA leave. *See, e.g., Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088 (10th Cir. 2005). Plaintiff was notified of her FMLA approval through February 29, 2008, and then subsequently through April 1, 2008. Despite that notice, she elected to stay off work and did not make contact with her supervisors for more than two weeks, and until after she knew that a certified letter had been sent to her.

(ii). Plaintiff Cannot Prove a Denial of Substantive Rights

Plaintiff also cannot prove the second element of the *prima facie* case, the denial of substantive rights. There are essentially two substantive rights under the FMLA: an entitlement to leave and an entitlement to restoration of the same or an equivalent position following the leave. 29 U.S.C. §§ 2612, 29 U.S.C. § 2614. *See also Cooke v. C. Bean Transport,*

Inc., 72 Fed. Appx. 740, 743 (10th Cir. 2003). Plaintiff's interference claim alleges a denial of entitlement to leave. In order to be entitled to leave, an eligible employee must give timely notice of the need for leave and provide a health care provider's certification that establishes the existence of a serious health condition. 29 C.F.R. §§ 825.100(d); 825.112. 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.

(iii). Plaintiff Cannot Prove a Causal Connection

Plaintiff also cannot prove any causal connection between an entitlement to leave and the denial of a substantive right. As this Court noted in *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960-61 (10th Cir. 2002): "[U]nder FMLA, an employee who requests leave or is on leave has no greater rights than an employee who remains at work." *Gunnell*, 152 F.3d at 1262 (10th Cir. 1998) (citing 29 C.F.R. § 825.216(a)). . . . "[A]n employee who requests FMLA leave would have no greater protection against his or her employment being terminated for reasons not related to his or her FMLA request than he or she did before submitting the request." *Id.* (citing 29 C.F.R. § 825.216(a) and cases). *See also Stuart v. Regis Corp.*, 2006 WL 1889970, *3 (D. Utah. 2006) (It is well-established

in the Tenth Circuit that "[a] reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory").

Plaintiff, who used FMLA leave in 2004 without adverse consequences, cannot establish that she was terminated for FMLA use in 2008. Likewise, plaintiff used FMLA leave from February 20, 2008 through April 1, 2008 without adverse consequences. It makes little sense to suggest that an employer would willingly approve leave on some occasions, and then inexplicably interfere with an employee's ability to use leave on other dates.

b. Plaintiff Cannot Prove That Defendant's Proffered Reasons for Its Actions Are Pretextual

If a plaintiff asserting an FMLA interference claim can prove the elements of a *prima facie* case, then the burden shifts back to the employer to prove that the plaintiff would have been dismissed regardless of the request for FMLA leave. *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002). If plaintiff could prove a *prima facie* case, which defendant contends she cannot, her FMLA interference claim would still be fatally flawed because defendant has presented evidence showing

that plaintiff would have been terminated regardless of the request for FMLA leave.

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. It is well-established in this circuit that "[a] reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory." *Bones v. Honeywell International, Inc.*, 366 F.3d 869, 877-78 (10th Cir. 2004). Were this not the case, an employee could successfully avoid a completely justified termination simply by requesting FMLA leave. The district court properly held that defendant was entitled to summary judgment on plaintiff's interference/entitlement claim.

II. After-Acquired Evidence That Plaintiff Would Have Been Terminated for Reasons Unrelated to Her FMLA Use or Complaints About Teresa Cole

Because it granted defendant's dispositive motion, the district court did not reach the issue of plaintiff's misuse of the computer provided to her by the company. (Aplt. App. 254). If this Court affirms that judgment, it likewise does not need to address this issue. However, if the Court does not affirm, then defendant contends that any claim for damages by plaintiff is limited by the doctrine of after-acquired evidence.

Plaintiff misused the company computer system by engaging in time-wasting personal activities. What is more troubling are the inappropriate photographs she had downloaded and stored on her computer, depicting nudity and sexualized images which would be in violation of the company's sexual harassment policy.

It is well-settled that the discovery of after-acquired evidence will limit recovery of wages if an employer later learns of wrongdoing that would have led to a legitimate discharge had the employer known about it at the time it occurred. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995). In order to succeed on the affirmative defense of after-acquired evidence, a defendant must establish that (1) plaintiff was guilty of some misconduct of which defendant was unaware at the time plaintiff was discharged; (2) the misconduct would have justified discharge; and (3) if defendant had known of the misconduct, it would have discharged plaintiff. *Jackson v. Integra Inc.*, 1994 WL 379305, at **2, (10th Cir. 1994).

Plaintiff violated defendant's computer use policy by accessing sexually explicit images on her computer. The policy states that a violation of the computer use policy will subject an employee to disciplinary action, up to and including termination. Defendant was unaware that plaintiff was using her computer in this manner. Had it known of these activities, it

would have terminated plaintiff. Defendant has established the necessary elements for a defense of after-acquired evidence, and any damages claimed by plaintiff should be limited by this doctrine.

CONCLUSION

For the reasons stated herein, defendant requests that this Court affirm the district court's order granting summary judgment to defendant on each of plaintiff's claims.

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, defendant requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it is proportionally spaced and contains 13,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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s/ Terry L. Mann
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CERTIFICATE OF DIGITAL SUBMISSION
AND CERTIFICATE OF SERVICE

I hereby certify that: pursuant to the General Order filed August 10, 2007, I submitted, in digital format, on the 4th day of October, 2010, the foregoing Appellee's Brief to the Clerk of the Court via the Court's ECF system. As to this submission, I certify that:

(1) The document is an exact copy of the written document filed with the Clerk's office;
(2) all required privacy redactions have been made; and
(3) the Appellee's Brief has been scanned for viruses with Computer Associates eTrust Antivirus, version 36.1.0.0, updated on October 4, 2010, and, according to the program, is free of viruses.

A copy was furnished through ECF electronic service to:

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