No. 16-3391

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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| LaWanda King, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | Appeal from the U.S. District Court |
| | ) | for the Northern District of Illinois |
| v. | ) | |
| | ) | No. 1:13-cv-07967 |
| Ford Motor Company, | ) | |
| | ) | The Honorable |
| Defendant-Appellee. | ) | John Z. Lee |
| | ) | |
| | ) | |

# REPLY BRIEF OF APPELLANT


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**ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE(S)



RULES

## ARGUMENT

### I. Ford's Cry of Prejudice Regarding Morton Rings Hollow.

Ford evades the gravity of what Grant Morton says, as it must. Morton's exposé of management's machinations is the type of smoking gun that devastates an employer's case. Reinforcing what King suspected all along, Morton confirms that Ford retaliates against female employees who object to harassment and to employees who take FMLA leave. As such, Ford must keep Morton's testimony buried.

Ford first argues that King "contends in passing that she did not violate Rule 26," and thus her contention is waived. Response at 17. Ford misconstrues King's argument. The premise of the argument is that King complied with Rule 26 when she sent Ford a letter supplementing the interrogatory responses. *See* Doc. 91-3. Ford further notes that when a party learns its disclosure is incomplete, it "must supplement or correct its disclosure." Fed. R. Civ. P. 26(e)(1)(A). King did just that. She supplemented her Rule 26 disclosures with the interrogatory responses identifying Morton. Doc. 60-5 at 911, 916; Doc. 91-3.

Ford claims it was prejudiced by King's late disclosure since Morton's testimony was a surprise. This, despite:

1. Morton being a Ford employee and union chair.

2. Morton interacting with Labor Relations staff, some who King deposed and some who handled King's grievances.
3. King testifying in her deposition that Morton told her she was disciplined for taking medical leave.
4. King's interrogatory responses identifying Morton.
5. King supplementing her Rule 26 disclosures with those interrogatory responses.

Ford disregards most of these points. When it does consider them, they are isolated and their force diluted. But when combined, these five points establish King's FMLA and Title VII rights are being forfeited on the basis of ersatz prejudice.

Ford argues King never disclosed Grant Morton "during the discovery process." Response at 16. This is false. King supplemented her Rule 26 disclosures with her interrogatory answers. Doc. 91-3. Ford then constructs a straw man: "Plaintiff contends that, despite her belated disclosure of Morton, Ford was not prejudiced because it could have read the tea leaves of discovery, divined Plaintiff's intent, and deposed Morton before discovery closed." Response at 18. No divining was necessary. Ford employee Morton was mentioned by two different deponents and also referenced in the interrogatory responses with which King supplemented her Rule 26 disclosures.

The Opening Brief emphasized King's letter supplementing her Rule 26

disclosures. Opening at 16, 18-20. Yet Ford downplays it because "those responses mentioned [Morton] only twice and only in passing." Response at 18. This sentence is all Ford can muster in response to the letter. And while the interrogatory responses "only" mentioned Morton twice, he was, in fact, mentioned. In conjunction with the other points listed above, this was enough to apprise Ford that Morton had discoverable information. King's letter supplementing the disclosures proves compliance with Rule 26, and Ford's inability to address it with any sense of proportion is telling. Further, in barring Morton, the district court ignored King's letter. Ford does not defend this omission.

Given the evidence that Ford was on notice of Morton, Ford tries to reframe the case with inapposite authority. Response at 20. Its cases are unhelpful because none involve a witness barred despite being included in supplemental disclosures. For example, Ford cites *Hassebrock v. Bernhoft*, 815 F.3d 334 (7th Cir. 2016). Response at 20. But *Hassebrock* is distinguished because it held that if a party does not make a proper expert-witness disclosure, "the expert's testimony ordinarily can't be presented at trial." 815 F.3d at 341-42. An expert witness is a far cry from one's own employee.

Finally, Ford treats the substance of Morton's damaging testimony like the third rail. Ford only pauses to dismiss its content as "totally beside the point." Response at 21. It is not. If the excluded evidence impacts the outcome,

reversal is needed. *See Collins v. Kibort*, 143 F.3d 331, 339 (7th Cir. 1998). Morton's testimony fits that bill, and the court erred in barring him on an unduly narrow reading of Rule 26.

"Justice is dispensed by the hearing of cases on their merits." *Schilling v. Walworth County Park and Planning Comm'n,* 805 F.2d 272, 275 (7th Cir. 1986). As King's FMLA and Title VII rights hang in the balance, the Court should reverse.

## II. Ford Deflects on The Material Issues of Fact Pervading FMLA Eligibility And FMLA Interference.

### A. Ford foists an unreasonable burden on King to show FMLA eligibility.

Similar to Morton's testimony, Ford's strategy on FMLA interference is to escape the merits through a technical point. Hence, Ford's emphasis on FMLA eligibility. While a threshold requirement, the prosaic nature of King's hours is far more amenable for Ford than the flagrant FMLA interference and retaliation she encountered. Nevertheless, an issue of fact exists on FMLA eligibility because King was FMLA eligible during her employment, she testified to working enough hours, and Ford's altered timekeeping was a mess.

King asserted she "met the minimum number of hours worked to be eligible for FMLA leave, if Defendant removed improper disciplines and AWOLS." Ford's Short Appendix 113 at ¶ 16. This is not enough for Ford: "She produced no evidence of how many hours she actually worked, which

'improper' disciplines should be removed, why these disciplines and absence-without-leave determinations were improper. . . ." Response at 23. Instead, Ford seeks "specific, concrete facts" indicating she worked the requisite hours. Response at 24.

While Ford attacks what King presented as insufficient, it never specifies what she should have presented instead. Certainly, it is not Ford's burden to do so, but its argument would be stronger if it offered more than generalities. Ford does not specify because it cannot. King's testimony sufficed. "Relying on the employee's recollection [of hours worked] is permissible given the un-likelihood that [she] would keep . . . records." *Melton v. Tippecanoe Cnty.*, 838 F.3d 814 (7th Cir. 2016). King was in the best position to know which days she worked and for how many hours. This is further accentuated by Ford's error-riddled timekeeping. Doc. 60-15; Doc. 66 at 1435; Doc. 46-15 at 341. Ford also backtracked on many of King's AWOLs and used AWOLs as leverage to evade the EEOC. A 20. Ford is silent in response.

As for the more than 30 days King was not paid for, Ford argues "there is no record evidence to support her assertion." Response at 25. Ford deems King's state wage claim insufficient because it contains allegations. *Id*. Yet this claim was good enough for Ford to submit at summary judgment. Doc. 46-25 at 387. This inconsistency aside, simply because the testimony concerning

the unpaid days derives from King does not sink it. *See Melton*, 838 F.3d 814.

Next, Ford contends King's chart establishing over 1,250 hours cannot create an issue of fact on FMLA eligibility because "an employee relying on his own recollection" to establish eligibility "must have a reasonably reliable story." Response at 26, quoting *Melton*, 838 F.3d at 819. According to Ford, "that is simply not the case here." Response at 26.

In so arguing, Ford pays no heed to the summary judgment axiom that the Court views the evidence and all reasonable inferences for King. *See Malin v. Hospira,* 762 F.3d 552, 554 (7th Cir. 2014). Ford further disregards that factual disputes cannot be resolved via summary judgment. *See id*. But whether an employee has a "reasonably reliable story" is a quintessential fact question. And whether King or Ford has the correct number of hours is ill-suited for summary judgment because it turns on witness credibility and whether Ford siphoned King's hours. Additionally, Ford's employee attendance process hardly inspires confidence. The Medical Department had a history of mishandling King's leave paperwork. Doc. 66 at 1432-34. Ford marked King AWOL when she was on FMLA leave and did not correct its records even after King filed grievances. Doc. 60-14; Doc. 66 at 1435-40; Doc. 60-20. King testified to the improper AWOLs and not being paid for days worked. Doc. 66 at 1432, 1491, 1497; Doc. 60-8; Doc. 60-5 at 911. Ford shrugs off these inconvenient facts.

If the chart establishing King worked 1,250 hours is accepted, a triable issue exists. But even if not, King's state wage claim, her testimony, and Ford's unreliable timekeeping create an issue of fact on FMLA eligibility. Reviewed *de novo*, the Court should reverse.

B. King endured textbook FMLA interference.

As for FMLA interference, Ford provides a page and half of argument and then retreats. Response at 27-28. The bulk of King's arguments on this issue thus remain intact. Opening at 26-29.

Ford's argument has one theme—King's failure to follow "Ford's customary practices for obtaining leave." Response at 27. According to Ford, King had to notify Labor Relations of her intent to take FMLA via Form 5170. Response at 28. But King never saw, let alone submitted Form 5170. Doc. 66 at 1402.

Instead, King contacted Unicare on March 7, 2013 to initiate medical leave. Doc. 66 at 1467-70; Doc. 63-4. King then submitted Form 5166 to the Medical Department, dated March 7, 2013. Doc. 46-35. One version of Form 5166 requests information regarding "FMLA eligibility," while another version states the form is submitted to "retain the benefit of FMLA protection." Doc. 63-1; Doc. 63-2. Regardless, King's actions apprised Ford that she may qualify for FMLA leave. In fact, Medical Department clerk Rose Mary Campbell told King the March 21 Notice was in error and her leave was justified through

March 28. Doc. 66 at 1476-1482. Unicare representative Ruby Hernandez also told King her leave continued through March 28. Doc. 50 at 528; Doc. 60-5; Doc. 66 at 1482-83. Ford's claim that King failed to comply with company policy is thus belied by the record.

FMLA interference includes even the threat of adverse consequences. *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 818 (7th Cir. 2015). King was subjected to much more than threats; she experienced pernicious interference including the refusal of FMLA leave, tougher assignments, unfounded AWOLs, and termination. Because King presents evidence on which the jury could find FMLA interference, summary judgment was improper.

## III. Ford Masks Its FMLA Retaliation With Its Opaque 5-Day Quit Process.

Ford rejects King's FMLA retaliation claim because "the undisputed evidence shows that she did not comply with the Five-Day Quit Process and that this noncompliance caused her termination." Response at 31. Because the evidence is anything but undisputed, Ford's position falters.

King made a flurry of calls to Ford to ensure compliance with the 5-Day Quit Notice. Ford devalues the voice messages King left with three different Labor Relations representatives. Specifically, because King "failed to produce evidence regarding the content of these voicemail messages, one can only

speculate as to whether they provided a 'satisfactory reason' for Plaintiff 's 'continued absence.'" Response at 31. Ford forgets this never produced evidence was in its control. But more troubling, Ford asks the Court to infer that King's voice messages could have been about the weather, Ford's stock price, or any other innocuous topic—anything except King preserving her livelihood.

Vindicating King once again are the facts. A 5-Day Quit Notice was sent to King on March 7, 2013, which she responded to. Doc. 60-15; Doc. 60-3 at 857. She was sent another Notice two weeks later instructing her to respond "in writing or by telephone" to Labor Relations. Doc. 60-10. On April 1, 2013, King left three messages with Labor Relations representatives Alex, Nikita, and Aaron Wynn. Doc. 67-1 at 251-54; Doc. 60-5; Doc. 66 at 1475-83. King also contacted the Medical Department, where Ford employee Campbell told King the March 21 Notice was in error and her leave was justified through March 28. Doc. 66 at 1476-1482. Unicare rep Hernandez also told King her leave continued through March 28. Doc. 50 at 528; Doc. 60-5; Doc. 66 at 1482-83. Finally, King's doctor informed Ford that King was under her care and leave needed to be extended. Doc. 60-11. A reasonable jury could find that all of this conduct constituted a satisfactory response to the 5-Day Quit Notice.

Ford's challenge to Ford employee Rose Mary Campbell is another straw man. Ford contends there is no evidence that Campbell "was motivated by

retaliatory animus when she allegedly told Plaintiff on April 1 that she was in compliance with the requirements of the Five-Day Quit Notice." Response at 35. King never alleged she was. Rather, Campbell is dispositive because she confirmed King's response was satisfactory, eviscerating Ford's entire argument. Put simply, King's response to the Notice was satisfactory because Campbell told her it was.

In sum, King did everything she could to respond to the 5-Day Quit Notice and Ford did everything it could to stymie that response. Now Ford seeks to capitalize on its own dereliction of duty. And while the Response Brief portrays Aaron Wynn as following the checklist of an objective 5-Day Quit Process, this clinical depiction is far removed from reality. Response at 32-33. Even without Morton's declaration unmasking the ugly truth, it is not difficult to discern what happened—Ford deliberately stood down to run out the clock on the gadfly King, the FMLA be damned.

## IV. Ford Evades Its Title VII Retaliation by Invoking a Calendar.

Ford argues the district court correctly granted summary judgment on the retaliation claims because the retaliatory conduct occurred before King engaged in protected activity. Response at 36. Ford provides a timeline of events and concludes that because King was subject to "adverse employment action prior to engaging in protected activity [it] negates any inference that the adverse employment action taken after Plaintiff's protected activity was

motivated by retaliatory animus." Response at 36-37.

Repeating the flaws of the district court, Ford disregards King's consistent pattern of protected activity and the ensuing retaliation. Most of King's protected activity occurred while she was eligible for leave. And while Ford tries to compartmentalize the events, reality is not so neat. The retaliation occurred throughout her employ. Similarly, King took and requested FMLA leave throughout. She was denied overtime and reassigned to tougher jobs. This retribution intensified when King raised the specter of an EEOC complaint. Doc. 60-5 at 913; Doc. 66 at 1423-27; Doc. 60-21 at 2. She went unpaid, was wrongly disciplined, punished for petty offenses, and wrongly deemed AWOL. Her grievances regarding the unfair treatment were ignored, prompting three EEOC complaints. Yet Ford minimizes this retaliation because it supposedly occurred before King engaged in protected activity.

Ford ignores the big picture. Its position also immunizes an employer from liability for retaliation if it is on record reprimanding an employee prior to such retaliation. That is inherently at odds with the remedial purpose of Title VII. The Court should reject it.

## CONCLUSION

Because King complied with Rule 26, it was an abuse of discretion to bar the witness to blatant FMLA and Title VII violations. Additionally, viewing the facts in King's favor, summary judgment was improper because the record is rife with issues of fact.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 2,644 words according to the Microsoft word count function.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Christopher Keleher, hereby certify that fifteen paper copies of the Appellant's Brief and Required Short Appendix were sent within 7 days of filing on the Court's ECF system via hand delivery to:

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This is to certify that I have served a copy of the Appellant's Reply Brief upon the party listed herein, by February 1, 2017, to:

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CIRCUIT RULE 30(d) STATEMENT

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 30(d), versions of the brief that are available in non-scanned pdf format.

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