

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

DANNY SMITH,)
)
 Plaintiff,) District Court
v.) Case No.
) 15-1304
MILLENNIUM RAIL, INC. And)
MARK BAUMGARDNER,)
)
 Defendant.)

TRANSCRIPT OF EXCERPT OF JURY TRIAL
TESTIMONY OF DARIN HARVEY AND CONVERSATION REGARDING
DEPOSITION DESIGNATIONS

On the 31st day of May, 2017, came on to be heard proceedings in the above-entitled and numbered cause before the HONORABLE ERIC F. MELGREN, Judge of the United States District Court for the District of Kansas, sitting in Wichita, commencing at 8:34 A.M. Proceedings recorded by machine shorthand. Transcript produced by computer-aided transcription.

APPEARANCES:

The plaintiff appeared by and through:

Mr. Sean M. McGivern
Graybill & Hazlewood, LLC
218 North Mosley Street
Wichita, Kansas 67202

The defendants appeared, Mr. Baumgardner in person, and by and through:

Mr. Anthony B. Byergo
Ms. Stacy M. Bunck
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4520 Main Street
Suite 400
Kansas City, Missouri 64111

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14:36:25 1

14:36:25 2

DARIN HARVEY,

14:36:25 3

having been first duly sworn to testify the truth, the whole

14:36:30 4

truth, and nothing but the truth, testified as follows:

14:36:47 5

THE COURT: Ms. Bunck, you may inquire.

14:36:49 6

DIRECT EXAMINATION

14:36:49 7

BY MS. BUNCK:

14:36:50 8

Q. Could you please state your name for the record.

14:36:51 9

A. Darin Harvey.

14:36:53 10

Q. And by whom are you employed, Mr. Harvey?

14:36:55 11

A. Currently?

14:36:56 12

Q. Yes.

14:36:57 13

A. The Atlas Group here in Wichita.

14:36:59 14

Q. Were you previously employed by Watco?

14:37:01 15

A. Yes.

14:37:02 16

Q. And why did that employment end?

14:37:05 17

A. Travel. I was doing a lot of travel. I had nine

14:37:08 18

plants throughout the United States and have a 13-year-old boy,

14:37:10 19

so decided I needed to stay home a little bit more.

14:37:14 20

Q. What was your title when you worked at Watco?

14:37:17 21

A. Regional HR manager.

14:37:19 22

Q. And what were your responsibilities in that position?

14:37:21 23

A. As a regional HR manager, like I said, I had nine

14:37:25 24

plants throughout the United States, just to coaching,

14:37:28 25

organizational development, leadership development, as well as,

JOHANNA L. WILKINSON, CSR, CRR, RMR

U.S. District Court, 401 N. Market, Wichita, KS 67202

(316) 315-4334

14:37:32 1 you know, all the HR functions that go along with that. We did
14:37:35 2 have a corporate team in Pittsburg, Kansas, as well that helped
14:37:39 3 us with a lot of the ins and outs of the duties of HR as well.

14:37:45 4 Q. And what is your educational background? Could you
14:37:48 5 explain that to the jury, please.

14:37:49 6 A. I have a bachelor's degree in general studies from
14:37:52 7 Wichita -- or from Fort Hays State University.

14:37:55 8 Q. And based on your experience in the time at Watco, are
14:37:59 9 you familiar with whether the company has an internal complaint
14:38:02 10 reporting process if an employee has a concern?

14:38:07 11 A. Yes, it is an employee handbook.

14:38:09 12 Q. And I'd like to show you what has been previously
14:38:14 13 marked as Exhibit 404 -- just a moment -- and previously
14:38:22 14 admitted. And do you recognize on the screen the dispute
14:38:37 15 resolution policy as an excerpt from the handbook?

14:38:41 16 A. Yes.

14:38:41 17 Q. And could you just briefly explain to the jury what the
14:38:46 18 dispute resolution policy is?

14:38:48 19 A. Basically, if an employee has a dispute and wants to
14:38:51 20 dispute it, they have the opportunity to discuss this with
14:38:53 21 their immediate supervisor. They also have an opportunity to
14:38:56 22 come to me as an HR individual. And they also, with the
14:39:03 23 Neodesha facility, it was a union facility, so they also had
14:39:09 24 that opportunity to file a grievance with their union steward.

14:39:13 25 Q. And during your tenure at Watco as the regional human

14:39:18 1 resources director, did Mr. Smith ever come to you to raise any
14:39:23 2 concerns under the dispute resolution process?

14:39:25 3 **A. No.**

14:39:25 4 Q. Did he come to you, to your knowledge, through the
14:39:28 5 grievance process through the collective bargaining agreement
14:39:30 6 to raise any concerns?

14:39:31 7 **A. No.**

14:39:35 8 Q. Are you also, as the former regional HR director for
14:39:40 9 Watco, familiar with Watco's policy regarding retaliation?

14:39:43 10 **A. Yes.**

14:39:43 11 Q. Let me hand you what -- or I'm going to put up on the
14:39:47 12 screen what's been previously marked and preadmitted as
14:39:50 13 Exhibit 407. Do you recognize this to be the anti-retaliation
14:39:56 14 policy?

14:39:56 15 **A. Yes.**

14:39:56 16 Q. And what is the company's policy regarding retaliation?

14:39:59 17 **A. Basically any team member, as it says, who believes a**
14:40:03 18 **retaliation is occurring is encouraged to report that matter to**
14:40:07 19 **Watco Companies, either to their immediate supervisor or bring**
14:40:09 20 **it up with HR.**

14:40:12 21 Q. And at any point in time did Mr. Smith raise any
14:40:17 22 concerns to you of retaliation?

14:40:19 23 **A. No.**

14:40:21 24 Q. Now, as the regional HR director, did you have any
14:40:25 25 responsibility for managing FMLA?

14:40:28 1 **A. No, I did not.**

14:40:29 2 Q. And to your knowledge, how was that handled or by whom
14:40:34 3 was that handled generally at Watco?

14:40:35 4 **A. That would generally be our corporate office in
14:40:38 5 Pittsburg, Kansas.**

14:40:41 6 Q. Did you have any personal responsibility in your role
14:40:44 7 for Watco in sending out FMLA correspondence?

14:40:47 8 **A. No, I did not.**

14:40:48 9 Q. Do you know generally how that process worked at the
14:40:52 10 shop level, if FMLA paperwork came in what the expectation was
14:40:56 11 to be done with that?

14:40:57 12 **A. Basically the expectation was, when the FMLA paperwork
14:41:01 13 did come in, that it was sent to the corporate office and they
14:41:04 14 managed that.**

14:41:06 15 Q. As the regional HR director, did you have any
14:41:09 16 responsibility for managing workers' compensation claims?

14:41:12 17 **A. No. That also was our corporate office.**

14:41:16 18 Q. The jury just heard some testimony from a
14:41:19 19 Dr. Schwerdtfeger. Were you involved in any capacity in the
14:41:23 20 referral of Mr. Smith to Dr. Schwerdtfeger?

14:41:26 21 **A. No, I was not.**

14:41:33 22 Q. I'd like to show you what has been preadmitted and is
14:41:36 23 marked as Exhibit 8 and ask if you can identify Exhibit 8 as --
14:41:49 24 is this an email to which you were a party?

14:41:51 25 **A. Yes.**

14:41:51 1 Q. And I'm actually going to bring up a copy here so
14:41:54 2 you've got it.

14:42:02 3 And can you refresh the jury -- I think they've heard
14:42:05 4 her name a bit -- but who is Susan McManus?

14:42:08 5 **A. She is the receptionist and does some HR admin work**
14:42:13 6 **there in the Neodesha plant.**

14:42:16 7 Q. And in Exhibit 8 there -- is Susan McManus a party to
14:42:22 8 that email?

14:42:22 9 **A. Yes.**

14:42:22 10 Q. And as the receptionist and HR coordinator at the
14:42:28 11 Neodesha shop, would she have any responsibility for approving
14:42:32 12 FMLA requests?

14:42:33 13 **A. No, she would not.**

14:42:34 14 Q. Let me come back and get that document so I can show it
14:42:37 15 to the jury.

14:42:41 16 Now, there is also a reference to a Dawn Clark. Are
14:42:46 17 you familiar generally with an individual by the name of Dawn
14:42:51 18 Clark who worked from corporate?

14:42:52 19 **A. Yes, she worked at our corporate office in HR.**

14:42:56 20 Q. And, additionally, there's reference to a Sofrona
14:43:01 21 Howard. Do you know generally the nature of her employment as
14:43:04 22 well?

14:43:04 23 **A. Yes, she was -- in HR as well at the corporate office.**

14:43:10 24 Q. And at the top of this email -- well, let's go back.
14:43:14 25 It says -- it has to do with -- you're not on the initial

14:43:21 1 emails but it's a question of whether Danny Smith FMLA request
14:43:25 2 had been approved. Do you see that?

14:43:27 3 **A. Yes.**

14:43:28 4 Q. And then it gets forwarded up to you. It says, "Darin,
14:43:33 5 can you tell me if this has been approved." And that's on
14:43:35 6 March 31st; correct?

14:43:36 7 **A. Correct.**

14:43:37 8 Q. And then Susan -- you respond, "Susan, can you send me
14:43:41 9 his paperwork, I've not seen it yet"; correct?

14:43:43 10 **A. Correct.**

14:43:44 11 Q. And then you receive it, it appears, on April 1st. It
14:43:47 12 says, "Here it is," and there's an attachment, pdf Danny Smith?

14:43:51 13 **A. Yes.**

14:43:51 14 Q. And I'll represent that the attachment is a
14:43:56 15 certification of health care provider that the jury has seen
14:43:59 16 from nurse-practitioner Jessica Evans.

14:44:02 17 **A. Right.**

14:44:03 18 Q. Were you aware, as of April 1st, 2014, that Mr. Smith
14:44:08 19 had requested FMLA?

14:44:10 20 **A. Prior to that?**

14:44:12 21 Q. Upon receipt of this email. Was this your first
14:44:15 22 knowledge --

14:44:15 23 **A. Yes.**

14:44:16 24 Q. -- that he had --

14:44:17 25 **A. That would have been my first knowledge of seeing it.**

14:44:19 1 Q. Okay. And there's been some testimony before the jury
14:44:25 2 as to the time records that are maintained regarding absences.
14:44:29 3 Are you familiar generally with records that are maintained at
14:44:34 4 the shop level regarding attendance?

14:44:37 5 **A. Yes.**

14:44:37 6 Q. And I'm going to show you what's marked and been
14:44:40 7 previously admitted as 426. Looking at this, can you identify
14:44:47 8 from the top of this for which employee this is the time card
14:44:51 9 and absence report summary?

14:44:53 10 **A. Yeah, it says Danny Smith and his employee number.**

14:44:56 11 Q. And are these, in your experience, maintained on each
14:44:59 12 hourly employee?

14:45:00 13 **A. Every hourly employee, yes.**

14:45:02 14 Q. And do you know generally who maintains them?

14:45:04 15 **A. That would be Susan.**

14:45:05 16 Q. And that would again be Susan McManus?

14:45:09 17 **A. Correct.**

14:45:09 18 Q. Okay. And according to this exhibit, if you could
14:45:15 19 look, so you just testified that you are aware as of April 1st
14:45:19 20 that Mr. Smith had requested FMLA. Do you recall that
14:45:22 21 testimony?

14:45:22 22 **A. Yes.**

14:45:26 23 Q. If you could look at this exhibit, how was his -- how
14:45:33 24 were his absences being coded starting on March 24, 2014,
14:45:40 25 according to this exhibit?

14:45:42 1 **A. FMLA pending.**

14:45:44 2 Q. And that was from what dates, from when to when?

14:45:48 3 **A. 3-24 to 4-4.**

14:45:53 4 Q. Okay. And were there any points assessed during that
14:45:56 5 FMLA pending?

14:45:58 6 **A. No points.**

14:45:59 7 Q. And then what happened on 4-4?

14:46:02 8 **A. Returned 4-4.**

14:46:07 9 Q. And so was he -- there's a points return. Do you know
14:46:10 10 what that's in reference to?

14:46:11 11 **A. I'm not right offhand, no.**

14:46:13 12 Q. Well, if you look and his point total goes from 11.5 to
14:46:17 13 10.5; do you see that?

14:46:19 14 **A. Yes.**

14:46:19 15 Q. Do you recall there being something under the
14:46:22 16 collective bargaining agreement that said that points rolled
14:46:24 17 off after a year?

14:46:25 18 **A. Yeah, I do recall that. I don't know all the details
14:46:27 19 for sure of it.**

14:46:28 20 Q. Okay. And then if you could look, what is he coded on
14:46:32 21 from 4-5-14 through 5-2-14?

14:46:37 22 **A. FMLA.**

14:46:38 23 Q. And is he assessed any points for that?

14:46:40 24 **A. No.**

14:46:48 25 Q. I'd like to ask you some questions regarding an email

14:46:52 1 that the jury has seen in part. And specifically I'd like to
14:46:58 2 bring it up to you. It's Exhibit 425, which has been
14:47:02 3 preadmitted, and you were a party to a portion of that email.

14:47:16 4 Have you seen Exhibit 425 before?

14:47:20 5 **A. Yes.**

14:47:26 6 Q. And there are several occasions in this email chain
14:47:31 7 where you're corresponding with Jamie Wilson, asking about
14:47:35 8 bringing Mr. Smith back to work light duty. Do you see that?

14:47:39 9 **A. Yes.**

14:47:39 10 Q. Why were you asking Ms. Wilson about bringing Mr. Smith
14:47:43 11 back to work light duty?

14:47:45 12 **A. It was pretty common that if someone had some light**
14:47:48 13 **restrictions, that we could bring 'em back to work for light**
14:47:52 14 **duty, to, you know, keep 'em busy, keep 'em working, 'cause**
14:47:56 15 **Neodesha, Kansas, is hard to find good people sometimes. We**
14:47:59 16 **want to make sure we don't want to lose anybody. So that was**
14:48:02 17 **kind of the reason, you know, that I kept asking 'em, let's**
14:48:05 18 **bring him back, let's bring him back, can we bring him back for**
14:48:09 19 **light duty.**

14:48:10 20 Q. And can you remind the jury, they'll hear from her
14:48:12 21 later, but who is Jamie Wilson and why are you asking Jamie
14:48:15 22 Wilson this question?

14:48:17 23 **A. She is the management for our workers' comp claims.**

14:48:23 24 Q. And as of the date that you were asking these
14:48:29 25 questions, was it your understanding from Jamie that Mr. Smith

14:48:31 1 had submitted a workers' comp claim?

14:48:34 2 **A. Yes.**

14:48:34 3 Q. And so were you reaching out to her to just understand
14:48:37 4 her opinion from a workers' comp standpoint?

14:48:39 5 **A. Correct.**

14:48:40 6 Q. Now, if you look at the top of Exhibit 425, and it says
14:48:45 7 on here -- the top email, can you read that aloud for the jury,
14:48:50 8 please.

14:48:50 9 **A. "I guess I didn't realize we had a full release to come
14:48:54 10 back. Mark, is there any reason we shouldn't bring him back?
14:48:57 11 We have not terminated him. Correct? Jamie, earlier in the
14:49:02 12 email I asked if we should bring him back for light duty and
14:49:05 13 you said no. Has anything changed?" (As read.)**

14:49:08 14 Q. And so you're talking about on April 8th, 2014, you're
14:49:11 15 saying, "I didn't realize we had a full release to come back,"
14:49:14 16 and that was you were made aware that Mr. Smith had been
14:49:17 17 released to return to work from what you'd heard from
14:49:20 18 Ms. Wilson; is that correct?

14:49:21 19 **A. That is correct.**

14:49:21 20 Q. And when you were made aware that he was fully released
14:49:26 21 to return to work, what steps did you take?

14:49:28 22 **A. Well, basically I reached out to Mark and to have the
14:49:32 23 conversation of bringing him back. There was some -- I think
14:49:36 24 there's communication that was trying to reach Mr. Smith. We
14:49:41 25 did not hear anything, so Mark and I put a letter together and**

14:49:45 1 **sent it off to him, a certified letter, for him to come back on**
14:49:49 2 **a certain date.**

14:49:51 3 Q. You do not have a medical degree; is that correct?

14:49:54 4 **A. No, I do not, which --**

14:49:56 5 Q. When -- when you receive information from medical
14:50:00 6 providers on behalf of Watco employees, what weight do you
14:50:04 7 place on the information provided by medical providers, given
14:50:07 8 your lack of medical background?

14:50:09 9 **A. Well, as HR, we rely on it pretty much a hundred**
14:50:13 10 **percent. Again, I'm not a medical doctor. So when we get a**
14:50:16 11 **release from a doctor, that's a release that says they can come**
14:50:19 12 **back to work 100 percent, so we acknowledge that and try to get**
14:50:23 13 **them back to work as soon as possible.**

14:50:27 14 Q. And when you were made aware that Mr. Smith had
14:50:33 15 requested FMLA, were you aware in the certification that the
14:50:41 16 certification requested FMLA for an unknown period of time?

14:50:43 17 **A. Correct.**

14:50:45 18 Q. If someone is on FMLA leave for an unknown period of
14:50:49 19 time --

14:50:49 20 THE COURT: Counsel, we addressed this in the
14:50:52 21 limine conference. Move to your next topic.

14:50:55 22 BY MS. BUNCK:

14:50:55 23 Q. As of April 8th, 2014, what was your goal as it related
14:50:59 24 to Mr. Smith?

14:51:00 25 **A. Bring him back to work.**

14:51:03 1 Q. Did you have any intention to fire Mr. Smith as of
14:51:06 2 April 8th?

14:51:07 3 **A. No.**

14:51:09 4 Q. And in response to your email of April 8th, did
14:51:14 5 Mr. Baumgardner identify any reason why Watco should not bring
14:51:19 6 Mr. Smith back to work?

14:51:20 7 **A. No. That's why we sent him the letter.**

14:51:24 8 Q. If he had, would -- or I'm sorry, strike that. So what
14:51:29 9 happened next with respect to Mr. Smith after you have this
14:51:32 10 email exchange on April 8th?

14:51:36 11 **A. I met with Mark and we sent a letter out to him, a**
14:51:41 12 **certified letter, and then we waited for that date to come, for**
14:51:45 13 **him to come back to work.**

14:51:46 14 Q. I'm going to show you what's been preadmitted as
14:51:49 15 Exhibit 427. And do you recognize this as the letter that was
14:51:53 16 sent to Mr. Smith on April 10th, 2014?

14:51:57 17 **A. Yes.**

14:51:57 18 Q. Did you assist in drafting this letter?

14:52:00 19 **A. Yes.**

14:52:01 20 Q. And, again, what was the intent of this letter?

14:52:04 21 **A. It was to basically bring him back to work, for full**
14:52:09 22 **duty, as it says, Wednesday, April 16th.**

14:52:13 23 Q. And as of the date of this letter, did you have an
14:52:19 24 opinion as to Mr. Smith's ability to work?

14:52:22 25 **A. We had the 100-percent release, that he could go back**

14:52:25 1 **to full duty, so that's what I took from the doctor.**

14:52:27 2 Q. And at any point after you sent out this letter or
14:52:31 3 assisted with this being sent out, did you ever receive a
14:52:34 4 subsequent medical opinion from Mr. Smith that said that he was
14:52:38 5 physically unable to work?

14:52:40 6 **A. No.**

14:52:41 7 Q. Did Mr. Smith ever reach out to you as the regional HR
14:52:45 8 director in response to this letter to say that he wanted to
14:52:48 9 remain employed?

14:52:49 10 **A. No.**

14:52:49 11 Q. Did he ever reach out to you to say he was physically
14:52:53 12 not able to return to work?

14:52:54 13 **A. No.**

14:52:55 14 Q. Did he ever reach out to you in any capacity for any
14:52:58 15 reason?

14:52:59 16 **A. No.**

14:53:00 17 Q. Now, after this letter was sent to him, he's instructed
14:53:03 18 to return on April 16th, 2014. And to your knowledge, was he
14:53:10 19 still active in the system after he was instructed to return to
14:53:14 20 work for a period of time?

14:53:15 21 **A. Yeah, he was still active.**

14:53:17 22 Q. And do you have any understanding as to why he still
14:53:22 23 showed here as active?

14:53:25 24 **A. Typically, sometimes on situations like this when we
14:53:27 25 bring someone back to work, we might, you know, give them some**

14:53:31 1 leeway sometimes if, you know, maybe he couldn't -- maybe he
14:53:34 2 was out of town on the 16th and he couldn't -- maybe he had to
14:53:37 3 do it the next week. But typically we like to get some type of
14:53:40 4 communication to let us know that. So that was relayed to
14:53:44 5 Susan as well in conversations about Mr. Smith.

14:53:49 6 Q. And that would be Susan McManus?

14:53:51 7 **A. Yes.**

14:53:51 8 Q. And, indeed, after 4-16, 2014, he still showed up on --
14:53:59 9 as being coded as FMLA by Ms. McManus; is that correct?

14:54:02 10 **A. Correct.**

14:54:05 11 Q. During those -- the time after you sent the letter
14:54:09 12 asking him to return to work until May 2nd, 2014, did he reach
14:54:13 13 out to you in any capacity about his intent to remain employed?

14:54:17 14 **A. No.**

14:54:28 15 Q. I'm going to show you what's been preadmitted as
14:54:31 16 Exhibit 11 and ask if you recall receiving an email from Susan
14:54:35 17 McManus regarding termination paperwork from Chuck.

14:54:41 18 **A. Yes.**

14:54:41 19 Q. And for the record, who is Chuck?

14:54:43 20 **A. Chuck is a second-shift lead supervisor.**

14:54:48 21 Q. And did you have any discussions or provide any
14:54:52 22 direction to Chuck Rogers as to how to complete termination
14:54:57 23 paperwork regarding Mr. Smith?

14:54:58 24 **A. No, I did not.**

14:55:01 25 Q. Do you have any knowledge of anyone directing

14:55:05 1 Mr. Rogers how to complete that paperwork?

14:55:07 2 **A. Not that I'm aware of, no.**

14:55:12 3 Q. And then I'm going to hand you or, rather, show you
14:55:15 4 what has been preadmitted as Exhibit 12. And can you explain
14:55:19 5 to the jury what an exit checklist is at Watco.

14:55:24 6 **A. An exit checklist is just a -- it's for our HRIS
14:55:29 7 system, our human resource system, to keep track of people,
14:55:33 8 their dates of hire, last day worked; for reporting purposes,
14:55:36 9 if they had a credit card or a cell phone, anything like that.**

14:55:39 10 Q. And can you tell from the second page of this exhibit
14:55:45 11 who would have created and populated this information?

14:55:48 12 **A. Susan would have.**

14:55:49 13 Q. And what is that typically based on, the population of
14:55:53 14 the exit checklist?

14:55:54 15 **A. It's usually based on the termination papers that
14:55:59 16 Mr. Rogers filled out. That's typically what she goes by.**

14:56:02 17 Q. And when someone abandons their employment, does the
14:56:05 18 company still process the termination of their employment?

14:56:08 19 **A. Yes.**

14:56:09 20 Q. And why is that?

14:56:11 21 **A. Just so we have record of, you know, when they ended,
14:56:15 22 general information, if they wanted to be rehired, anything
14:56:19 23 like that, just so we have a record on file.**

14:56:21 24 Q. And can you tell from this exhibit when Ms. McManus
14:56:27 25 completed the exit checklist?

14:56:30 1 **A. 5-2 of '14, 1:29.**

14:56:35 2 Q. And if you look to the first page of this, what does it
14:56:39 3 show as the date of termination?

14:56:42 4 **A. 4-17.**

14:56:44 5 Q. And that -- did you have any discussion with
14:56:49 6 Ms. McManus or Chuck Rogers as to why that date was selected?

14:56:53 7 **A. No.**

14:56:53 8 MS. BUNCK: I have no further questions.

14:56:54 9 THE COURT: Cross-examination, Mr. McGivern.

14:56:58 10 CROSS-EXAMINATION

14:56:58 11 BY MR. MCGIVERN:

14:56:59 12 Q. You say you went to Fort Hays State?

14:57:01 13 **A. Yes, sir.**

14:57:01 14 Q. Did you go from 1991 to 1993?

14:57:04 15 **A. Yes.**

14:57:05 16 Q. Can you give me your vocational background since then.

14:57:09 17 **A. Since then I've went to Butler County Community**
14:57:15 18 **College. I was assistant men's basketball coach there for**
14:57:18 19 **about three years and then got into recruiting. And after that**
14:57:23 20 **I went to manpower, which is a temp agency, and I ran the temp**
14:57:29 21 **agency there. Moved from there to Agco Corporation as an HR**
14:57:34 22 **representative, and then to Hawker Beechcraft as an HR leader**
14:57:38 23 **in their engineering department, and then on to Watco**
14:57:42 24 **Companies.**

14:57:42 25 Q. When did you -- what years did you work for Hawker

14:57:45 1 Beechcraft?

14:57:47 2 **A. 2011 to '13.**

14:57:51 3 Q. When did you start working for Watco?

14:57:54 4 **A. 2013. Right after I left Beech, I went to Watco.**

14:58:01 5 Q. Did you have any other jobs while you worked for Watco?

14:58:04 6 **A. No, I did not.**

14:58:07 7 Q. And as an HR professional, you understand the

14:58:09 8 importance of following policies; right?

14:58:11 9 **A. Yes.**

14:58:14 10 Q. By the way, you said you didn't have responsibility for

14:58:18 11 the FMLA at Watco. Is that right?

14:58:21 12 **A. Approving it, correct, yes.**

14:58:23 13 Q. Mr. Baumgardner said he didn't. Did anybody at Watco

14:58:26 14 have responsibility for enforcing its FMLA policies?

14:58:29 15 **A. Yes, our corporate office did.**

14:58:31 16 Q. Who?

14:58:34 17 **A. At the time, I'm not sure. The name's changed. Titles**

14:58:38 18 **change. So I'm not sure, but our corporate office handled the**

14:58:41 19 **FMLA.**

14:58:42 20 Q. And what was your title with the company?

14:58:44 21 **A. Regional HR manager.**

14:58:46 22 Q. Did you interact with people at corporate?

14:58:49 23 **A. Yes, quite frequently.**

14:58:52 24 Q. You were shown an email, an April 7th email, with FMLA

14:58:59 25 paperwork. Did that prompt you to do anything about it?

14:59:02 1 **A. No, 'cause I knew it was handled by the corporate**
14:59:05 2 **office.**

14:59:05 3 Q. Okay. But you went ahead and you approved the
14:59:11 4 termination, though; right?

14:59:13 5 **A. I don't know if it's approved, but yes, we went through**
14:59:16 6 **and we sent the letter out to them to let him know that he**
14:59:20 7 **needed to return to work or he would be voluntary terminated.**

14:59:24 8 Q. And when you sent that -- you assisted Mr. Baumgardner
14:59:29 9 in preparing that letter, didn't you?

14:59:31 10 **A. Correct.**

14:59:33 11 Q. And when you assisted him in preparing that letter, you
14:59:36 12 knew that Danny Smith had turned in FMLA paperwork; correct?

14:59:40 13 **A. Correct.**

14:59:40 14 Q. And you knew that the Travelers Insurance doctor had a
14:59:46 15 different opinion than Danny's doctor?

14:59:48 16 **A. I did not know that. The stuff that I had said that he**
14:59:51 17 **had a 100-percent release to go back to work, and that's the**
14:59:55 18 **information that I received.**

14:59:55 19 Q. But you also knew that he had just turned in paperwork
14:59:59 20 saying no grinders, no hammers?

15:00:02 21 **A. I was not aware of that.**

15:00:05 22 Q. Are you sure?

15:00:10 23 **A. As what I can recall, yes. I knew that he had FMLA**
15:00:15 24 **paperwork that was filled out, but I also knew that he had**
15:00:19 25 **100-percent release to go back to work.**

15:00:22 1 Q. What is -- do you know what the FMLA is?

15:00:24 2 **A. Yes.**

15:00:24 3 Q. What is it?

15:00:25 4 **A. It's the Family Medical Leave Act.**

15:00:28 5 Q. What does it provide for?

15:00:29 6 **A. It holds employees -- holds their job while they're off**
15:00:33 7 **on a medical condition.**

15:00:34 8 Q. Such as if they're unable to use hammers and grinders
15:00:37 9 and they're working as a repairman?

15:00:39 10 **A. Until they get 100 percent released from a doctor.**

15:00:42 11 Q. Okay. By the way, how did your employment with Watco
15:00:50 12 end? Was it a termination or a resignation?

15:00:53 13 **A. Resignation.**

15:01:01 14 Q. Here's an April 1, 2014, email. It's from Susan
15:01:06 15 McManus. And is that you (indicating)?

15:01:09 16 **A. Yes.**

15:01:09 17 Q. Okay. And she says, "Here it is." And it says,
15:01:14 18 "DannySmith.pdf." Do you see that?

15:01:17 19 **A. Yes.**

15:01:17 20 Q. I'm going to show you the second page with the
15:01:20 21 attachment. I'd like to give you a chance to correct your
15:01:26 22 testimony.

15:01:27 23 Did you see Danny Smith's FMLA paperwork before you
15:01:31 24 helped Mr. Baumgardner write that letter?

15:01:33 25 **A. Yes, I saw -- I had the paperwork, yes, I did. But I**

15:01:36 1 **also had 100-percent release for him to go back to work, I was**
15:01:40 2 **told.**

15:01:41 3 Q. Okay. Not from his doctor; right?

15:01:43 4 **A. I was told from our workers' comp individual at our**
15:01:48 5 **corporate office.**

15:01:50 6 Q. Okay. Under the FMLA -- as an HR professional,
15:01:57 7 what's -- what's supposed to happen when you've got two
15:01:59 8 different opinions from medical providers? When the
15:02:04 9 patient's -- the employee's given one and in this case the
15:02:08 10 Travelers Insurance doctor gave one, what happens next?

15:02:13 11 MS. BUNCK: Your Honor, may we approach?

15:02:18 12 (Discussion at the bench with Court and counsel.)

15:02:23 13 MS. BUNCK: He's asking for a legal opinion.

15:02:26 14 THE COURT: He's asking for an opinion under human
15:02:28 15 resources, which this guy has said that he held a position of.
15:02:31 16 And you asked him a lot of questions about FMLA. And as an HR
15:02:35 17 director, he should know the HR policies provide for FMLA.
15:02:39 18 It's not a legal opinion. I'm going to let him ask it.

15:02:41 19 (Thereupon, the following proceedings continued in the hearing
15:02:49 20 of the jury, with the defendant present.)

15:02:49 21 BY MR. MCGIVERN:

15:02:50 22 Q. So to be clear, you did, in fact, have -- on April 1st
15:02:53 23 of 2014, you did have Danny Smith's paperwork showing various
15:02:59 24 visits over time for his wrists; correct?

15:03:04 25 **A. Correct.**

15:03:05 1 Q. And you knew he was trying to get approval to see a
15:03:08 2 surgeon; correct?

15:03:09 3 **A. Correct.**

15:03:10 4 Q. And you knew he was unable to perform, at least
15:03:14 5 according to nurse Evans, nurse-practitioner Evans, that he was
15:03:17 6 unable to perform grinding, hammering, and power tools;
15:03:20 7 correct?

15:03:21 8 **A. Correct.**

15:03:21 9 Q. Okay. But somebody in the work comp department told
15:03:26 10 you there was a hundred percent release; right?

15:03:28 11 **A. Correct.**

15:03:28 12 Q. So in your professional opinion, did that hundred
15:03:32 13 percent release override what Danny had provided you?

15:03:35 14 **A. We had a release from a doctor to go back to work, so
15:03:38 15 yes.**

15:03:38 16 Q. All right. So back to the question I was asking you.
15:03:46 17 When you got -- under Watco's -- and, obviously, you were
15:03:49 18 familiar with Watco's FMLA policy, weren't you?

15:03:51 19 **A. Uh-huh.**

15:03:51 20 Q. And what does that policy say when, on the one hand,
15:03:55 21 you've got a nurse-practitioner that says "can't do the job
15:03:58 22 presently, needs FMLA," and you got this other doctor that says
15:04:04 23 a hundred percent release? What does Watco's policy call for
15:04:08 24 under those circumstances?

15:04:10 25 **A. I couldn't answer that. I'm not sure.**

15:04:13 1 Q. I'm going to show you the policy to help refresh your
15:04:17 2 recollection; okay?

15:04:17 3 **A. Okay.**

15:04:32 4 Q. Okay, do you see here where I put that dot, "If the
15:04:37 5 certification form is incomplete or insufficient, the team
15:04:39 6 member will be given written notification of the information
15:04:41 7 needed and will have 7 days after receiving such written notice
15:04:45 8 to provide the necessary information." Correct?

15:04:49 9 **A. Yes.**

15:04:49 10 Q. Okay. And you would agree with me that neither you nor
15:04:54 11 anybody from the Watco work comp department nor anybody else
15:04:57 12 told Danny Smith there were problems with that certification
15:05:00 13 that he had provided?

15:05:02 14 **A. I did not have that conversation with Danny, no.**

15:05:05 15 Q. You're not aware of anybody having had that
15:05:07 16 conversation?

15:05:07 17 **A. I can't speak for anybody else, but no, I did not.**

15:05:10 18 Q. Okay. Now, step two. "If there is reason to doubt the
15:05:16 19 validity of that medical certification, a second opinion at the
15:05:20 20 expense of the company related to the health condition may be
15:05:23 21 required"; right? And in this case I understand the company is
15:05:26 22 treating Dr. Schwerdtfeger's opinion as that second opinion;
15:05:30 23 right?

15:05:31 24 **A. Yes.**

15:05:33 25 Q. Okay. Read to the jury that third sentence of the FMLA

15:05:36 1 policy.

15:05:37 2 **A. "If there is reason," that sentence?**

15:05:40 3 Q. The "If the original."

15:05:42 4 **A. Oh. "If the original certification and the second**
15:05:51 5 **opinion differ, a third opinion, at the expense of the company,**
15:05:53 6 **may be required."**

15:05:54 7 Q. Keep reading.

15:05:55 8 **A. "The opinion of the third health care provider, which**
15:05:58 9 **the company and the team member jointly select, will be the**
15:06:02 10 **final and binding decision."**

15:06:04 11 Q. Do you know if Watco ever endeavored to obtain a third
15:06:10 12 opinion?

15:06:10 13 **A. I do not know that, no.**

15:06:12 14 Q. And as a regional HR person at Watco, can you tell me
15:06:17 15 why that wasn't done?

15:06:18 16 **A. 'Cause it was handled at our corporate office.**

15:06:21 17 Q. Okay. What was the name of the person in the work comp
15:06:24 18 department?

15:06:25 19 **A. Jamie Wilson.**

15:06:26 20 Q. Okay. So you knew the name of the person in the work
15:06:29 21 comp department. Did you know the name of the actual human who
15:06:32 22 handled FMLA?

15:06:33 23 **A. Yes, Danny Smith.**

15:06:34 24 Q. Danny Smith. Say that again.

15:06:38 25 **A. Danny Smith.**

15:06:39 1 Q. Okay. So you do know the person at corporate who
15:06:42 2 handled FMLA?

15:06:43 3 **A. Yes.**

15:06:43 4 Q. Okay. And is there an email of you reaching out to
15:06:46 5 Danny Smith about this situation?

15:06:48 6 **A. No.**

15:06:48 7 Q. And why is that?

15:06:50 8 **A. That's handled by our corporate office, the FMLA is.**

15:06:54 9 Q. I mean, where was your office?

15:06:57 10 **A. I had nine offices, I had nine plants, so I'd be there**
15:07:02 11 **for a week, two days, three days at a time, and travel to the**
15:07:06 12 **next plant and travel to the next plant.**

15:07:07 13 Q. How about Danny Smith, where was his office?

15:07:10 14 **A. In Neodesha.**

15:07:11 15 Q. In Neodesha?

15:07:12 16 **A. He didn't have an office but --**

15:07:14 17 Q. Where'd he work? Not Danny Smith. I'm talking the
15:07:21 18 human being at Watco corporate who handled FMLA.

15:07:24 19 **A. He worked in Neodesha.**

15:07:26 20 Q. Okay. Did he have access to email?

15:07:30 21 **A. That I do not know.**

15:07:32 22 Q. Do you have any reason to doubt that he did?

15:07:34 23 **A. No.**

15:07:35 24 Q. All right. As a human resources professional, I'm sure
15:07:41 25 you've dealt with absences and points and all that business;

15:07:45 1 right?

15:07:46 2 **A. Yes.**

15:07:50 3 Q. And you see this paperwork right here, this termination
15:07:54 4 paperwork, it says Danny Smith, the explanation of his
15:07:58 5 termination is missing too much work and not working
15:08:01 6 efficiently on cars; right?

15:08:02 7 **A. Yes.**

15:08:05 8 Q. And I'm going to represent to you, sir, this is a page
15:08:08 9 out of the collective bargaining agreement. It's part of
15:08:12 10 Exhibit 405, page Watco 114. And you're familiar with the
15:08:19 11 Watco point system for its unionized team members, aren't you?

15:08:24 12 **A. Vaguely, yes. But yeah, been awhile.**

15:08:27 13 Q. And step one is six points; right? That's a verbal
15:08:32 14 warning?

15:08:37 15 **A. Yes, sorry.**

15:08:38 16 Q. Step two, that's a written warning; right?

15:08:41 17 **A. Yes.**

15:08:41 18 Q. At ten points, that's step three, that's a final
15:08:44 19 written; right?

15:08:45 20 **A. Yes.**

15:08:45 21 Q. But you don't get fired until 12 points; correct?

15:08:48 22 **A. Correct.**

15:08:53 23 Q. How many points did Danny Smith have, according to the
15:08:57 24 company's official records, when his employment ended?

15:09:05 25 **A. Ten and a half.**

15:09:05 1 Q. So he didn't have enough points to be discharged;
15:09:08 2 correct?

15:09:08 3 **A. Correct.**

15:09:09 4 Q. Is this common practice at Watco, to terminate people
15:09:13 5 for missing work when they don't have enough points to be
15:09:17 6 terminated for missing work?

15:09:18 7 **A. No.**

15:09:18 8 Q. Is this a unique situation?

15:09:21 9 **A. No.**

15:09:23 10 Q. Well, how would you describe it?

15:09:25 11 **A. Well, it's not a typical thing to happen, to have, you**
15:09:31 12 **know, all the FMLA and 10 and a half points.**

15:09:35 13 Q. Would you agree with me that Danny Smith should not
15:09:38 14 have been terminated over his attendance?

15:09:43 15 **A. Yes.**

15:09:46 16 Q. Would you agree with me that terminating Danny Smith
15:09:52 17 because of his leave when he's on FMLA violates the FMLA?

15:09:57 18 **A. What I was given was that he was 100 percent fully**
15:10:02 19 **capable of going back to work, so that's why we put him back to**
15:10:05 20 **work.**

15:10:05 21 Q. This is an official company record, sir; correct?

15:10:08 22 **A. Yes.**

15:10:08 23 Q. You're an HR professional; correct?

15:10:12 24 **A. Yes.**

15:10:15 25 Q. As an HR professional we got to rely on company

15:10:18 1 documents, don't we?

15:10:19 2 **A. Yes.**

15:10:19 3 Q. Would you agree with me that Danny Smith's termination
15:10:23 4 violated the FMLA?

15:10:24 5 **A. Yes.**

15:10:24 6 MR. MCGIVERN: No further questions.

15:10:28 7 THE COURT: Redirect.

15:10:30 8 MS. BUNCK: Yes, sir.

15:10:31 9 REDIRECT EXAMINATION

15:10:32 10 BY MS. BUNCK:

15:10:32 11 Q. Mr. Harvey, when opposing counsel was showing you the
15:10:49 12 chart with respect to absences and attendance, I'd like to show
15:10:54 13 it back for your reflection. Does this reflect whether or not
15:11:01 14 Mr. Smith was on FMLA as of 4-5-14?

15:11:08 15 **A. No.**

15:11:09 16 Q. What is the reference here to FMLA?

15:11:14 17 **A. It's just a reason, a coding reason, that Susan would**
15:11:17 18 **put in there.**

15:11:18 19 Q. Okay. And as of April of 2014, to the best of your
15:11:26 20 knowledge, Mr. Smith had submitted the FMLA paperwork. Is that
15:11:29 21 correct?

15:11:29 22 **A. Correct.**

15:11:30 23 Q. And he was permitted to be off work; is that correct?

15:11:34 24 **A. Correct.**

15:11:35 25 Q. And his time was being coded as FMLA; is that correct?

15:11:38 1 **A. Correct.**

15:11:40 2 Q. And when you were asked about whether Dr. Schwerdtfeger
15:11:47 3 was a second opinion, did you have any involvement in sending
15:11:51 4 Mr. Smith to Dr. Schwerdtfeger?

15:11:53 5 **A. No.**

15:11:53 6 Q. Did you have any involvement in deciding why he was
15:11:56 7 being sent to Dr. Schwerdtfeger?

15:11:58 8 **A. No.**

15:11:59 9 Q. And so whether or not that's a second opinion, is that
15:12:02 10 something you can speak to?

15:12:03 11 **A. No, I cannot.**

15:12:04 12 Q. That's something that's outside of your realm, handled
15:12:08 13 by corporate; is that correct?

15:12:09 14 **A. Correct.**

15:12:10 15 Q. And when counsel asked you, with respect to the
15:12:16 16 termination of his employment, was he terminated for being at
15:12:20 17 10.5 points?

15:12:23 18 **A. No, he was not.**

15:12:24 19 Q. Why was he -- why was he being processed for
15:12:30 20 termination? Why is he no longer there, from your perspective
15:12:33 21 as the HR director?

15:12:34 22 **A. As the HR director, we wanted to get him back to work.
15:12:39 23 We had a release. I was told that he had -- was 100 percent
15:12:43 24 able to go back to work. We wanted him back to work. We did
15:12:46 25 not hear from him, so we sent him a letter, saying we want you**

15:12:49 1 **back to work on this day, and that's the reason for his**
15:12:52 2 **termination.**

15:12:52 3 Q. And did you have an understanding, as of April 10th of
15:12:57 4 2014, whether he still had a serious health condition?

15:13:02 5 **A. I'm not sure if he -- I don't know. I wasn't involved**
15:13:07 6 **in any of that, so I don't know.**

15:13:09 7 Q. Would the representation to you that he was fully
15:13:13 8 released to return to work, what was your understanding about
15:13:16 9 his -- whether or not he had a serious health condition?

15:13:18 10 **A. Well, according to a doctor that said he had a**
15:13:21 11 **100-percent release, so according to that, that would mean to**
15:13:25 12 **me that he has no restrictions and can do the work without any**
15:13:30 13 **restrictions.**

15:13:30 14 Q. And I believe you testified earlier that your
15:13:35 15 understanding of FMLA is that you have it until the person no
15:13:37 16 longer has a serious health condition; is that correct?

15:13:40 17 **A. Correct.**

15:13:40 18 Q. And according to the records that you've reviewed, was
15:13:43 19 he provided FMLA leave up until -- well, actually, past the
15:13:51 20 date, it's coded as past the date that you asked him to return
15:13:54 21 to work. Is that correct?

15:13:56 22 **A. Yes.**

15:13:56 23 Q. And at the time you asked him to return to work, it was
15:14:00 24 your understanding he no longer had a serious health condition?

15:14:04 25 **A. Excuse me, yes, that is correct.**

15:14:05 1 Q. Okay. And in your understanding then, as of the date
15:14:08 2 he sent the letter, is you're asking him to return to work
15:14:11 3 because there's no reason he needs to be on leave; is that
15:14:14 4 correct?

15:14:14 5 **A. Correct.**

15:14:20 6 Q. And I believe you also talked again about -- counsel
15:14:24 7 asked you, "Well, he's not at 12 points, he shouldn't be termed
15:14:28 8 for that." But, again, when you sent him the letter, what did
15:14:31 9 you want him to do?

15:14:32 10 **A. Return to work.**

15:14:44 11 Q. Does the company have an expectation as to
15:14:51 12 communication by employees while they're out and whether they
15:14:56 13 can just be gone without communicating with the company?

15:14:59 14 **A. No, they would need to call and let their supervisor
15:15:02 15 and manager know that they wouldn't be at work, or when they
15:15:06 16 would be returning, or why they were off work and so on.**

15:15:08 17 Q. And do you have a policy at Watco of whether someone is
15:15:15 18 absent for multiple days, do they -- can they just be gone
15:15:19 19 indefinitely without reporting?

15:15:20 20 **A. No. If I remember correctly, I think it was a
15:15:23 21 three-day no-call/no-show, that would -- is a termination.**

15:15:28 22 Q. And here you had asked him to return to work or you
15:15:32 23 were involved in a letter being sent to him asking him to
15:15:35 24 return to work by mid-April; correct?

15:15:37 25 **A. Correct.**

15:15:40 1 Q. And he never returned to work; correct?

15:15:42 2 **A. Correct.**

15:15:42 3 Q. And then he still is on the payroll system, is active
15:15:48 4 for a few weeks; is that correct?

15:15:49 5 **A. Yes.**

15:15:49 6 Q. And then ultimately did you let him stay on payroll for
15:15:54 7 the next three years?

15:15:55 8 **A. No.**

15:15:55 9 Q. And what happened?

15:15:56 10 **A. He was terminated.**

15:15:57 11 Q. And terminated from the system?

15:16:01 12 **A. Yes. Yes, terminated from the system.**

15:16:03 13 Q. And why was that termination? Why was he being
15:16:07 14 terminated from the system?

15:16:08 15 **A. Because we hadn't heard from him. We hadn't -- we gave
15:16:11 16 him the certified letter to come back and he didn't come back
15:16:13 17 and we didn't hear anything from him.**

15:16:16 18 MS. BUNCK: I have nothing further.

15:16:18 19 THE COURT: Mr. McGivern?

15:16:22 20 MR. MCGIVERN: Very quickly.

15:16:23 21 RECROSS-EXAMINATION

15:16:23 22 BY MR. MCGIVERN:

15:16:24 23 Q. Would you agree with me that Danny's separation was
15:16:26 24 initiated by the company in the sense that letter was sent?

15:16:31 25 **A. Yes.**

15:16:31 1 Q. I want you to read to the jury the definition of an
15:16:33 2 involuntary separation under Watco's handbook. Just that one
15:16:38 3 sentence.

15:16:38 4 THE COURT: You want to identify the exhibit this
15:16:40 5 is from, Mr. McGivern?

15:16:41 6 MR. MCGIVERN: It's from the Watco employee
15:16:43 7 handbook, page Watco 7. It's like 405ish.

15:16:52 8 THE COURT: All right. You've identified the
15:16:54 9 document, at least not the exhibit number. Go ahead and have
15:16:57 10 the witness read the selection.

15:16:58 11 BY MR. MCGIVERN:

15:16:59 12 Q. Read for the jury what Watco defines the involuntary
15:17:02 13 separation is.

15:17:02 14 **A. An involuntary separation is a determination which has**
15:17:05 15 **been initiated by the company.**

15:17:06 16 MR. MCGIVERN: No further questions.

15:17:08 17 THE COURT: Mr. Harvey, you may step down. You're
15:17:13 18 excused from the court.

15:17:13 19 (Witness excused from the witness stand.)

15:17:13 20 (End of first requested excerpt.)

15:17:13 21 (The following proceedings were held outside the
15:19:05 22 presence of the jury.)

15:19:05 23 THE COURT: You may be seated. Defendants, there
15:19:10 24 are a few matters I'm unhappy about. First of all, Mr. Byergo,
15:19:14 25 Mr. McGivern asked you twice today if you had incorporated his

15:19:17 1 deposition designations, and the second time he asked you you
15:19:20 2 became visibly and verbally irritated. And yet, when that
15:19:24 3 deposition excerpt was played, not only was it played out of
15:19:28 4 order, which was not only obvious from the time stamps, which
15:19:31 5 is why I first noticed it, but obviously in the obvious flow of
15:19:34 6 the narrative you had patched it together in God knows what
15:19:37 7 fashion; and secondly, you excluded portions of what
15:19:40 8 Mr. McGivern had asked you, to your own irritation, to ensure
15:19:44 9 it was included in the representation. I think, at a minimum,
15:19:47 10 you misled the plaintiffs, and I'm not so sure but what they
15:19:50 11 were sandbagged, and I will not tolerate that sort of --

15:19:54 12 MR. BYERGO: Your Honor, that's absolutely untrue.

15:19:55 13 THE COURT: Well, it's exactly what happened in
15:19:57 14 this court, Mr. Byergo. You made a representation to
15:19:59 15 Mr. McGivern, with great irritation, that you had taken care of
15:20:01 16 his request, and, in fact, his request was not taken care of.
15:20:05 17 True or false?

15:20:06 18 MR. BYERGO: Because I believed the request had
15:20:08 19 been taken care of.

15:20:08 20 THE COURT: Whose responsibility was it?

15:20:10 21 MS. LIMBACK: It was mine.

15:20:11 22 MR. BYERGO: I got the request at 6:00 A.M. this
15:20:13 23 morning.

15:20:13 24 THE COURT: No, it is not yours because you are
15:20:15 25 not licensed to practice in this court, nor are you entered in

15:20:18 1 this case. Mr. Byergo and Ms. Bunck are the ones who have
15:20:21 2 entered in this case, and they're the ones I've relied on to
15:20:24 3 make representations that are true.

15:20:25 4 MR. BYERGO: Your Honor, and my issue is this: We
15:20:26 5 got the request at 6:00 A.M. this morning that he wanted us to
15:20:29 6 take care of putting in his deposition designations and
15:20:34 7 recording them so they could be played.

15:20:36 8 THE COURT: That's how deposition designations are
15:20:38 9 always done.

15:20:39 10 MR. BYERGO: Not necessarily, Your Honor. I have
15:20:41 11 done them in many courts where we take care of our
15:20:44 12 designations, we play our designations, and they play theirs.

15:20:47 13 THE COURT: Well, Mr. Byergo, you had two choices:
15:20:49 14 You could tell Mr. McGivern, "No, I'm not going to do it," and
15:20:53 15 he could do it himself or you could tell him he could rely on
15:20:57 16 you to do it. You chose the latter.

15:20:59 17 MR. BYERGO: What I told him was if Amy had time
15:21:01 18 this morning to do that, she would put them in. My
15:21:04 19 understanding is it was done. It was mistaken -- much like any
15:21:07 20 other exhibits have come in that then there was -- Mr. McGivern
15:21:11 21 today corrected an exhibit that he had put in earlier because
15:21:15 22 something had not been redacted that he wanted redacted in his
15:21:18 23 own exhibits. It was merely a mistake. But there was clearly
15:21:22 24 no intent to sandbag. I got the request this morning. We
15:21:25 25 asked Amy to do it. Amy attempted to do it, the last minute,

15:21:29 1 in trying to get the stuff together. But had the request come
15:21:34 2 in at some other time, we were prepared to play our own
15:21:36 3 designations yesterday.

15:21:38 4 Mr. McGivern had already put them in, so we said,
15:21:41 5 "I guess, that's fine." We would have preferred to present
15:21:43 6 them in the way that we present them. But for the sake of
15:21:47 7 economy, we did it. But there was no intent to sandbag anyone,
15:21:51 8 Your Honor.

15:21:51 9 THE COURT: Secondly, I've told you, as
15:21:54 10 defendants, twice that the matter of his request of indefinite
15:21:58 11 leave on FMLA is not an issue in this trial. I told you that
15:22:01 12 in my written order pretrial. That came up again in the limine
15:22:05 13 conference, and I told you that again. And yet, Ms. Bunck, you
15:22:08 14 were trying to examine on that matter this afternoon with this
15:22:11 15 witness. I will not tolerate you trying to bring matters up
15:22:14 16 that I have instructed you repeatedly is no longer at issue in
15:22:17 17 this case.

15:22:18 18 MR. BYERGO: Well, Your Honor --

15:22:19 19 THE COURT: Do you have a response to that as
15:22:20 20 well?

15:22:21 21 MR. BYERGO: Your Honor, I think there are some
15:22:22 22 fundamentally different theories here.

15:22:24 23 THE COURT: Well, you know what, my theory's the
15:22:26 24 one that counts, because I'm the one appointed by the president
15:22:29 25 as the judge in this case. You may not like my theories, but

15:22:32 1 that's the law of the case, whether you like it or not,
15:22:34 2 Mr. Byergo. And I've ruled that his indefinite request for
15:22:39 3 leave under FMLA, which you think excused him from having made
15:22:42 4 a valid FMLA request --

15:22:44 5 MR. BYERGO: No.

15:22:44 6 THE COURT: -- is at issue, and I've ruled that it
15:22:46 7 is not.

15:22:47 8 MR. BYERGO: No, Your Honor. Then you
15:22:49 9 fundamentally misperceive our theory. Our theory is not that
15:22:52 10 the initial FMLA request was somehow invalid. The records
15:22:57 11 reflect it was taken at face value, he was given FMLA time off,
15:23:01 12 and then there was subsequent medical information that simply
15:23:05 13 updated it.

15:23:06 14 THE COURT: So what does the -- what does the
15:23:08 15 reference to the indefinite leave have to do with that?

15:23:11 16 MR. BYERGO: Because when it says "unknown" and
15:23:13 17 then some -- another treating physician comes back and says,
15:23:18 18 two weeks later, I think he's able to return to work, he's not
15:23:22 19 presenting symptoms now, maybe surgery's not necessary, maybe
15:23:25 20 it's been reconsidered, it's simply an update as to what the
15:23:29 21 status is.

15:23:29 22 THE COURT: Well, I understand that you have a
15:23:31 23 theory as to what why my ruling shouldn't apply, but it doesn't
15:23:35 24 change the fact it is my ruling.

15:23:37 25 MR. BYERGO: Well, it is not a question as to the

15:23:39 1 validity of the certification. The certification was not
15:23:41 2 challenged. The medical information was updated. We do not
15:23:46 3 view it as a first opinion/second opinion competing.

15:23:50 4 THE COURT: Didn't we discuss this in the limine
15:23:52 5 conference when you talked about the indefinite leave and I
15:23:55 6 said we are not going to get into that?

15:23:56 7 MR. BYERGO: The only conversation relative to
15:24:00 8 that Your Honor said you cannot challenge the validity of the
15:24:02 9 certification.

15:24:03 10 THE COURT: That's not what I said. I said I've
15:24:05 11 ruled that the indefinite leave is not an issue in this case,
15:24:09 12 and that happens to still be my ruling.

15:24:11 13 Finally, in the interests of trying to put this
15:24:13 14 case on schedule -- which despite your representations to me
15:24:16 15 that we are, I have grave concerns about -- this matter is
15:24:19 16 going to the jury tomorrow. It has to go to the jury tomorrow,
15:24:22 17 if we're here till 9:00 o'clock.

15:24:25 18 I'm going to encourage defendants to try to be
15:24:32 19 more efficient in your examination. Half of the questions that
15:24:35 20 you asked this last witness, "Did you have any involvement in
15:24:38 21 this?" "No." "Did you have any involvement in that?" "No."
15:24:40 22 If he has no involvement in it, don't spend our time on it.
15:24:44 23 You asked him about matters he said weren't his responsibility.
15:24:47 24 You showed him an email that said, "Someone asked you for your
15:24:51 25 opinion on this, did you give an opinion?" He said, "No, I

15:24:53 1 didn't." So I don't know why we're spending time on matters --
15:24:56 2 this isn't discovery. It's your witness. I hope it's not
15:24:59 3 discovery. I don't know why we're spending time, which we have
15:25:02 4 not been good stewards of today, in my opinion, on matters that
15:25:07 5 have no evidentiary value. And although I've not intervened
15:25:13 6 other than on this indefinite-leave issue before, I will do so
15:25:16 7 tomorrow in an attempt to keep us on track.

15:25:18 8 I've this 3:30 criminal matter. I believe it
15:25:24 9 should not take any longer than 45 minutes. I told you earlier
15:25:27 10 to be back at 4:30. I'm going to instruct you now to be back
15:25:30 11 at 4:15. We'll take up defendant's motion that they preserved
15:25:33 12 at the close of plaintiff's case, then we'll take up
15:25:36 13 instructions. I've notified court security that we'll be here
15:25:38 14 as long as it takes.

15:25:39 15 Is there anything else we need to take up before
15:25:41 16 we get to that point?

15:25:42 17 MR. BYERGO: No, Your Honor.

15:25:42 18 MR. MCGIVERN: No, Your Honor.

15:25:43 19 THE COURT: We're in recess.

15:25:44 20 CLERK KUHLMAN: All rise.

15:25:47 21 (End of requested excerpts.)

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C E R T I F I C A T E

I, Johanna L. Wilkinson, United States Court Reporter in and for the District of Kansas, do hereby certify:

That the above and foregoing proceedings were taken by me at said time and place in stenotype;

That thereafter said proceedings were transcribed under my direction and supervision by means of computer-aided transcription, and that the above and foregoing constitutes a full, true and correct transcript of said proceedings;

That I am a disinterested person to the said action.

IN WITNESS WHEREOF, I hereto set my hand on this the 21st day of June, 2017.

s/ Johanna L. Wilkinson
Johanna L. Wilkinson, CSR, CRR, RMR
United States Court Reporter