

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN DISTRICT OF VIRGINIA**

Linda Magwood,)	
)	Civil Action No. 1:09-cv-109
Plaintiff,)	
)	
v.)	
)	
First Transit, Inc.)	
)	

**REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

I. Overview

Despite its repeated stated intent to file its own *Motion for Summary Judgment*, ultimately, Defendant failed to do so. For the same reasons it failed to file its own dispositive motion, it failed to offer evidence to dispute nearly all of Plaintiff’s factual representations. The reason, in both cases, is the same: *there are no genuinely disputed material facts for a jury to determine*. Defendant’s own managers have admitted them to be true and/or its own business records document the events as Ms. Magwood asserted them.

As stated in *Plaintiff’s Motion for Summary Judgment*, this case involves straightforward violations of the Family and Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”). These facts are set forth, with citations to the record, in Plaintiff’s *Statement of Material Undisputed Facts*, which accompanied her *Motion for Summary Judgment*. Defendant has not been able to refute, rebut or offer any admissible, credible evidence to refute the basic facts that require summary judgment for Linda Magwood.

Ms. Magwood applied for FMLA leave to receive further testing and treatment for one or

more ongoing, serious illnesses, which had been “presumptively” diagnosed by her primary physician as hyperthyroidism, a thyroid goiter and sleep apnea. She had discussed her medical problems with her supervisor, Mr. Collins, on numerous occasions and had provided him with proof of medical records stating her diagnoses as hyperthyroidism, a thyroid goiter and sleep apnea, as well as some additional physical problems.¹

On January 25, 2006, while out sick, Ms. Magwood called Mr. Collins, discussing her ongoing medical problems and her need for time off for further testing and treatment. It was actually Mr. Collins who suggested that she take FMLA leave. She retrieved the FMLA application, on Monday, January 30, 2006, from First Transit. She submitted the form to her primary physician, for medical certification on the same day.

As even First Transit’s own FMLA application form itself states, the applicant is entitled to at least 15 days from the date she receives the application, to obtain the medical certification **Exhibit A** of this *Reply*, ¶ 2); yet, Mr. Collins scheduled a meeting for February 6, 2006, requiring her to have the certification completed. On February 6, 2006, Ms. Magwood presented a note from Kaiser, her health care provider, stating that it would take 7-10 days for her to obtain the certification; but Mr. Collins did not honor the 15 day requirement or Kaiser’s policy of production in 7-10 days. Instead, he demanded that she return with the certification in two days.

Despite whether Mr. Collins said “within 48” hours or “in 48 hours” or whether it was closer to 10:00 or 10:30 when he said it, he had absolutely no right to require Ms. Magwood to produce the medical certification before the 15 days permitted by law and by its own policy. The inescapable conclusion is that Mr. Collins violated the FMLA when he denied Ms. Magwood the 15 days to obtain medical certification to complete her FMLA application.

When Ms. Magwood *did* obtain the medical certification within 48 hours of the February

¹ See II, C, below, discussing the October 19, 2009 Affidavit of Timothy Collins.

6, 2006 meeting, Mr. Collins refused to accept them and handed her a termination letter *which he had already written*. Mr. Collins attempted to justify terminating her by stating that he had explicitly set the meeting for half an hour earlier. In order to have the letter written, printed and waiting for Ms. Magwood at 10:30 a.m., Mr. Collins admitted that he had to have begun writing it no later than 10:15 or 10:20, and that he may even have begun it before 10:00 a.m. – *the time he claimed the meeting was scheduled*.

Defendant actually argues that it is “irrelevant” whether Mr. Collins began writing the termination letter *before or after 10:00 a.m.* It can only be irrelevant if Mr. Collins had decided to terminate Ms. Magwood when she showed up for the scheduled February 8, 2006 “meeting,” no matter what documents she presented to him. The only way Mr. Collins could have begun a letter *before 10:00*, stating that Ms. Magwood did not show up for a meeting *at 10:00*, is if he *knew* that she would not show up at 10:00. The only way he could have known that was if he was fully aware that he had led her to believe that the meeting was sometime after 10:00.

For the same reasons that First Transit violated the FMLA, it violated the ADA. The same facts establish that First Transit failed to engage Ms. Magwood in the interactive process of determining whether she needed a reasonable accommodation to perform her job at First Transit. Reasonable accommodations can include time off to address a disability and/or modified duties on a permanent or temporary basis, as long as it does not pose an undue hardship on the employer. Since First Transit did not engage in this process, there was no examination of possible accommodations of light duty work. Ms. Magwood was entitled to explore these possibilities with her employer, but was denied that right. Even if light duty would have imposed an undue burden on First Transit, leave without pay would not; in fact, the Collective Bargaining Agreement specifically allowed for up to 60 days off due to illness.

II. Defendant's Attempt to Change Testimony at the "Eleventh Hour"

A. Sandra Anderson, Union Representative, Refused to Sign the Affidavit that First Transit Prepared, Containing False Statements that Contradicted her Actual Knowledge of the Facts and Beliefs about the Case

As recently as *yesterday*, First Transit attempted to coerce Sandra Anderson, union representative, into signing an *Affidavit*, prepared by First Transit's attorneys, without her knowledge, input or consent, that contradicts her January 10, 2007 *Affidavit* in support of Ms. Magwood. See **Exhibit B** of this *Reply*, *October 19, 2009 Affidavit of Sandra Anderson*. Ms. Anderson's January 10, 2007 *Affidavit* has been cited repeatedly in Court filings and was a material piece of evidence for the EEOC in its determination that there was "probable cause" to believe that First Transit had discriminated against Ms. Magwood in violation of the ADA. See MSJ² **Exhibit A**. First Transit's attorneys drafted a new *Affidavit* in Ms. Anderson's name, including statements that are *false* and which she never told them. **Exhibit B** of this *Reply*, *October 19, 2009 Affidavit of Sandra Anderson*. Ms. Anderson's supervisor handed it to her and directed her to sign it, without offering her any opportunity to add or delete anything from it. *Id.* Ms. Anderson did not sign First Transit's *Affidavit* and is concerned about possible retaliation for her refusal to lie for her employer to defeat Ms. Magwood's claims in this case. *Id.*

B. Affidavit of Robert Howell

First Transit General Manager Robert Howell did submit a "last minute" *Affidavit*, dated the day that Defendant's *Opposition* was due, October 14, 2009. See Defendant's Exhibit I. Mr. Howell's *Affidavit*, ¶5, states that, when Ms. Magwood was employed by First Transit, Mr. Dell was "misapplying" the Collective Bargaining Agreement's provision and that attendance points should have been assessed against employees who called in sick at least *72 hours in advance of the time they needed to be out due to illness*. Not only is this an illogical, impractical and unjust

interpretation of the Contract,³ but Mr. Howell's current interpretation and implementation of the Contract are completely *irrelevant* to the manner in which Mr. Collins and Mr. Dell interpreted and implemented it in 2003-February 2006, when Linda Magwood was supervised by them. Certainly, Ms. Magwood cannot now be retroactively assessed attendance points for 2005 and 2006 based on a policy that a future manager adopted *two years later*. Mr. Collins and Mr. Dell both testified that no attendance points were assessed against an employee for calling in sick as long as it was at least one hour before his/her shift. That is the standard that all employees were held to in 2005- February, 2006. It is therefore the standard that applies to Ms. Magwood's attendance in this case.

In his deposition, Mr. Howell admitted that he had no personal knowledge of any of the events pertaining to this case; yet, he signed the *Verification* of First Transit's *Third Supplemental Answers to Interrogatories*, certifying that the information provided was true, based on his information and belief. When questioned about this verification, Mr. Howell explained that he did *not* actually interview people with personal knowledge of the facts, nor did he review any documents relevant to the case; rather, Mr. Howell stated that he relied on "the attorneys," whom he "believed to be a reliable source," for the information. **Exhibit B** of this *Reply*, Howell depo at 68:7-73:3. In other words, rather than First Transit's attorneys obtaining the facts from the person verifying the facts as true, the attorneys drafted the answers based on some undisclosed method of fact assessment and instructed a manager who had nothing to do with any of it to sign a verification of facts *that he could not verify*. Mr. Howell's new affidavit is meaningless, as his purported verification of First Transit's *Answers to Interrogatories*. It is clear that Mr. Howell will sign whatever self-serving document his employer's attorneys place in

² "MSJ Exhibits" refer to the Exhibits attached to *Plaintiff's Motion for Summary Judgment*.

front of him; but even if he were to be believed, his statements cannot help First Transit because he has no information personal knowledge of any of the relevant information dating back to Ms. Magwood's employment with First Transit.

C. Affidavit of Timothy Collins

First Transit's October 14, 2009 self-serving Affidavit, signed by Mr. Collins (Defendant's Exhibit H), cannot save it from summary judgment in light of the overwhelming evidence contradicting it. Mr. Collins' contradicts his deposition testimony, which Plaintiff has properly cited, page by page and line by line, in her *Motion for Summary Judgment*. More importantly, it contradicts his own February 8, 2006 letter to Ms. Magwood, terminating her and stating his reason as: "job abandonment" for her purported failure to show up to a meeting scheduled for 10:00 a.m., on February 8, 2006. MSJ **Exhibit V**.

Mr. Collins' February 8, 2006 letter never mentions any excess number of absences, attendance points or any failure to provide medical documentation for previous absences as a reason for termination. The Collective Bargaining specifies that this very precise attendance point system is the to be used to determine whether employees are disciplined, even to the point of termination for attendance points exceeding 20, or rewarded with attendance bonuses for accumulating less than 6 attendance points in a six month period. Surely, if attendance had been a reason for Ms. Magwood's termination, the letter would have stated the number of attendance points assessed against her. It did not state it because Ms. Magwood had not exceeded 20 attendance points.

Although Defendant now seeks to disavow Mr. Collin's knowledge of Ms. Magwood's medical conditions in a self-serving affidavit, **Mr. Collins has already admitted that Ms.**

³ People do not generally know, *three days in advance* in advance that they will have the flu, a sore throat, stomach virus, etc.

Magwood did discuss some of her medical conditions with him and that he specifically recalls Ms. Magwood telling him that her medical problem involved her thyroid gland. MSJ Exhibit E, Collins depo at 139:15-20. He also testified that he recalls that she had a condition that affected her ability to sleep. MSJ Exhibit E, Collins depo at 141:9-15. He also admitted that, based on her description of her ongoing medical problems to him in their telephone conversation of January 25, 2006, he suggested to her that she apply for FMLA leave. MSJ Exhibit B, Linda Magwood Affidavit ¶ 18; MSJ Exhibit E, Collins depo at 126:24-128:11.

First Transit's own February 15, 2007 *Position Statement* to the EEOC includes numerous medical records that Ms. Magwood submitted to Mr. Collins to explain to him her ongoing medical conditions and to excuse her absences due to illness. In particular, First Transit's "Exhibit E" of its *Position Statement* includes medical records that specifically list Ms. Magwood's diagnoses as hyperthyroidism, a thyroid goiter and sleep apnea. See pages Bates Stamped by First Transit as FT 1063 (dated 12/16/05), 1032 (dated 7/19/04), 1034 (7/23/04) and 1044 (5/4/05). Clearly, First Transit could not have had these records, as of February 15, 2007 – two years before this lawsuit was instituted – unless Ms. Magwood had given it to her supervisor while she was employed by it.

In light of Defendant's admissions, Mr. Collins' admissions, Ms. Magwood's testimony that she discussed these conditions with Mr. Collins, First Transit's pre-litigation possession of medical documents documenting Ms. Magwood's conditions as hyperthyroidism, a thyroid goiter and sleep apnea, no reasonable juror could conclude that Mr. Collins did not "regard" or "perceive" Ms. Magwood as having these diagnosed conditions – even though we have since learned that the doctors did not definitely diagnose them and even if, in the future, we learn that

these diagnoses were made in error. The *symptoms* of these illnesses are what cause the limitations of major life activities, even if the disease has a different name than first believed.

D. Affidavit of David Dell

First Transit had David Dell sign an affidavit that states that the Dispatch Records it submitted are “true and correct copies of the logs maintained by First Transit’s dispatchers.” Defendant’s Exhibit A, Dell Affidavit ¶ 5. Mr. Dell is *not* the custodian of the records. *He* does not *maintain* the records. He did not create the records. He does not even supervise the dispatch operators. This record is hearsay and inadmissible, as are Mr. Dell’s comments about these records.

First Transit had Mr. Dell swear that Ms. Magwood was absent “some 34 days in 2004” and 54 days in 2005. Mr. Dell does not claim that he personally kept any record of Ms. Magwood’s absences, or that he personally recalls the number of days she was absent. To the contrary, Mr. Dell testified repeatedly that he recalled very little about Ms. Magwood’s employment at First Transit, despite working with her and supervising her for three years.

Exhibit H, Dell depo.

In its filings and discovery responses, First Transit had admitted that it does not have accurate records of Ms. Magwood’s attendance. In its *Third Supplemental Answers to Interrogatories* ¶ 7, it stated that Ms. Magwood was absent “approximately” 34 days 2004 and “approximately” 54 days in 2005.” *See also* MSJ **Exhibit H**, Dell depo at 42:6-45:4. Mr. Dell explained that he read the dispatch log books and notified employees when they had been assessed attendance points for their absences, informing them that they should come in and speak to them if they disputed the points. *Id.* He acknowledged that he may have removed attendance points assessed from an employee’s records where the employee demonstrated the points were

assessed in error.

In fact, First Transit's claim that Ms. Magwood was absent 54 days in 2005 is blatantly false, based on First Transit's own exhibits. The chart submitted by First Transit to the EEOC purporting to summarize her absences (**Exhibit C** of this *Reply*). This document is already in the record under Plaintiff's MSJ **Exhibit EE**, *First Transit's EEOC Position Statement*, Exhibit E; however, notes are made on the chart in this *Reply* to highlight the 8 absences for January of **2006** that Defendant improperly added into Ms. Magwood's absences for **2005**. **This glaring error alone reduces Defendant's count of 54 absences in 2005 to 46 absences.**

In addition, there are 6 other purported absences listed for 2005 in First Transit's chart for the EEOC that are not listed in Dispatch logs that First Transit has submitted as an exhibit and which it *now* claims is the most reliable record of Ms. Magwood's absences. These are the Dispatch log that First Transit now claims is the real and true accounting of Ms. Magwood's absences – though, it admits, **not a record of her attendance points**. Since Defendant has not provided Dispatch log records for these six absences, this reduces the number from 46 absences to **40** absences.

Defendant has been repeatedly *flaunting the misrepresentation* that Ms. Magwood was absent 54 times in 2005, when, in fact, its own records clearly reflect that 8 of those absences are from 2006. It is *unconscionable* that *none of First Transit's many lawyers or supervisors have counted them before flaunting them in court proceedings*, or even *noticed* that the chart that it created and submitted to the EEOC consisted of 13 months – not twelve, including separate months of January for both 2005 and 2006.

As discussed in *Plaintiff's Motion for Summary Judgment*, the Dispatch log records also conflict with *First Transit's EEOC Position Statement* (MSJ **Exhibit EE**), pages 2-3, wherein

First Transit misrepresented to the EEOC that Ms. Magwood was a “no call/no show” for four days during the week of January 23-27th, when, in fact, the Dispatch log, in conjunction with Mr. Collins’ admission that she called and spoke to him directly on January 25th, demonstrates that she called in every day except January 27th.

The inconsistencies in these purported attendance records demonstrate that First Transit *cannot* (or will not) tell this Court or Plaintiff *how many attendance points Ms. Magwood had accumulated at the time of her termination*. First Transit has presented *absolutely no evidence* that Ms. Magwood did exceed these points and has admitted. To the contrary, in its *Third Supplemental Answers to Interrogatories* ¶ 7, and its *Answer to the Amended Complaint* ¶ 112, that it does not know how many attendance points Ms. Magwood had at the time of her termination. *See also* MSJ **Exhibit H**, Dell deposition at 47:13-66:21. First Transit claimed that it asked Mr. Dell to *speculate* about whether Ms. Magwood did or did not receive attendance points for each of her absences, with limited information about those absences (Id.) Indeed, as explained above, even the purported absences that First Transit had Mr. Dell speculate about were based on unreliable information about whether she was actually absent on those days.

E. Defendant’s Last Minute Affidavits cannot Save it from Summary Judgment

Since September 11, 2009, when Defendant received Plaintiff’s original *Motion for Summary Judgment*, its managers and/or attorneys have been desperately grasping at straws to defeat Plaintiff’s *Motion for Summary Judgment*. Defendant used the additional time it was granted, purportedly, to assess the file and make its factual and legal arguments already on the record, to draft affidavits that might create an illusion that the material facts are genuinely disputed, based on some evidence that they might produce at trial.

As discussed above, *none* of the affiants do not have personal knowledge of Ms.

Magwood's absences or attendance points – nor can they identify documents that can accurately do so. If they cannot do so now, three years after Ms. Magwood's termination, with a major law firm, inside counsel, First Transit managers and even an outside temp service collecting documents in response to discovery responses, *certainly*, Mr. Collins did not know how many attendance points Ms. Magwood had accumulated as of February 8, 2006; accordingly, he *could not have* fired her based on attendance violations, pursuant to the Collective Bargaining Agreement and First Transit's personnel policies and procedures. First Transit's purported legitimate, non-discriminatory/retaliatory reason for her termination is therefore clearly *false and pre-textual*. First Transit had produced absolutely no evidence to support it and has admitted that it cannot do so. Moreover, the February 8, 2006 termination letter (MSJ **Exhibit V**), *on its face*, constitutes an admission that Ms. Magwood was not fired for exceeding attendance points, since it omits any reference to her attendance points or any past absences. It explicitly states:

On February 6 we met to discuss your availability to continue working as a bus operator for First Transit. At that time you agreed to meet again on February 8 at 10:00. You did not appear for that meeting. (Emphasis added)

First Transit has concluded that you have abandoned your job. Accordingly, your employment with First Transit is terminated.

We wish you success in your future endeavors.

Sincerely,

Timothy Collins
General Manager

In light of Mr. Collins' admission, in writing, at the time of the termination, no reasonable juror could conclude that Mr. Collins scheduled the February 8, 2006 meeting for the purpose of having Ms. Magwood justify her absence during the week of January 23- 27, 2006. Clearly, the letter states that they were to discuss Ms. Magwood's *future* ability to work, not her

past ability to work. Moreover, as Defendant pointed out, Ms. Magwood had already provided him with a doctor's verification of treatment for conjunctivitis⁴ and back pain, on January 26, 2006, with the doctor's directive for her not to return to work until January 28, 2006. Since January 28, 2006 was a Saturday, when neither Ms. Magwood nor Mr. Collins worked, the first date that Ms. Magwood could return to the workplace to speak with Mr. Collins was Monday, January 30, 2006. That is when she picked up her FMLA form. That is also when she met briefly with Mr. Collins and he scheduled the next meeting for February 6, 2006, for her to bring in the medical certification that would complete the FMLA application.

Mr. Collins' Affidavit ¶ 14 is nothing short of ridiculous. He stated that, if Ms. Magwood had told him, "within 48 hours" from February 6, 2006, at 10:00, that she needed more time to obtain her medical records from Kaiser, he would have allowed her more time. In fact, on February 6, 2006, she provided him with a statement from Kaiser, stating that it would take 7-10 days for her to obtain her medical certification and records. Even so, in light of his mandate that she have them at the meeting that would take place "in 48 hours" -- she begged her doctor to fill out the forms on February 7, 2006, and did, in fact, have them with her on February 8, 2006, at 10:30, when she was standing in front of him, fully compliant and trying to submit the documents to him.

First Transit cannot defend itself by saying that Mr. Collins never saw the FMLA application when this is only true because *he refused* to accept it. Dr. Hopkins testified that he did complete the certification on February 7, 2006. He also wrote a letter to accompany it, on February 7, 2006. Ms. Anderson saw the documentation on February 8, 2006 and, along with Ms. Magwood, urged Mr. Collins to look at it. He refused. This refusal is a blatant, *per se* violation of the FMLA and the ADA, as discussed in Plaintiff's *Motion for Summary Judgment*.

⁴ Conjunctivitis, or "pink eye," is contagious.

In light of Mr. Collins' admission, in writing, at the time of the termination, no reasonable juror could conclude that Ms. Magwood was to meet with him at any point "within" 48 hours of the February 6, 2006 meeting, as First Transit now alleges. The termination letter clearly states that there was a precise time set for a meeting on February 8, 2006. Mr. Collins has repeatedly admitted that he never actually told Ms. Magwood or Ms. Anderson that the meeting would be for 10:00, but he did use the term "48 hours." These admissions support the consistent statements of both Ms. Magwood and Ms. Anderson, that on February 6, 2006, Mr. Collins told them to return for a meeting "in 48" hours. All parties agree that the February 6, 2006 meeting began at 10:00 a.m. Ms. Anderson has stated, both from memory and based on the notes she took during the meeting and provided to Ms. Magwood on February 6, 2006, that Mr. Collins set the time for the February 8, 2006 meeting at the end of their February 6, 2006 meeting, which ended at 10:30 a.m. No reasonable juror could believe that the February 6, 2006 meeting both *began* and ended at 10:00. That would mean that there was no meeting, no conversation, no opportunity for Ms. Anderson to take notes and no time for Mr. Collins to explain to Ms. Magwood what documents he wanted from her. Since all parties agree that the meeting took place, a reasonable juror would have to conclude that the time it ended was closer to 10:30 than to 10:00.

In any case, Ms. Magwood's claims do not rise or fall on the questions of whether Mr. Collins' words are interpreted to mean that he set the February 8, 2006 meeting, or set a deadline for Ms. Magwood to produce the medical certification at 10:00 or 10:30; the point is that he had no right to set a deadline of February 8, 2006 *at any time of day*. This issue is a red-herring that should not distract this Court or a jury. Similarly, the number of Ms. Magwood's absences is a non-issue since Mr. Collins never calculated them, or her attendance points, at the time of her

termination, or told her that she was being terminated for excessive absences or having more than 20 attendance points. In fact, Mr. Dell's December 27, 2005 letter to Ms. Magwood (MSJ **Exhibit D**) specifically informed Ms. Magwood that she had accumulated some attendance points and should speak to him because she was in danger of losing her *attendance bonus*! In other words, slightly more than a month before Ms. Magwood was terminated, First Transit was informing her that she could still obtain *a bonus for good attendance*!

Mr. Dell's December 27, 2005 letter also states that he is preparing a an "Attendance Bonus Report" (**Exhibit D**). In its *Answer to the Amended Complaint* ¶ 105, Defendant admitted that Ms. Magwood "may have" received an attendance bonus at some point during her employment at First Transit. Ms. Magwood's paystubs include numerous bonuses per year. Most of bonuses are not labeled, so it is not possible for her to identify which ones are attendance bonuses, but First Transit should certainly have these records. Pursuant to the adverse inference rule, Local Rule 56(B) and Fed. Civ. R. P. 26(h), First Transit's failure to produce the records that should be in its possession as part of its business records should be construed against it to conclude that Ms. Magwood did receive attendance bonuses in 2003, 2004 and 2005.

Any personnel or employment record made or kept by an employer ... shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later Where a charge of discrimination has been filed... against an employer under Title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person....

EEOC Regulation 29 C.F.R. § 1602.14.

It is undisputed that Ms. Magwood received attendance bonuses in 2003, although, in these proceedings, Defendant has characterized Ms. Magwood's attendance during her entire

tenure with First Transit as “atrocious” and even called her “lackadaisical.” In its Answers to Interrogatories, this characterization of Ms. Magwood was attributed to Mr. Collins, but Mr. Collins denied that characterized Ms. Magwood as “lackadaisical.”⁵ The fact that First Transit admits that she may have received *any* attendance bonus while employed there demonstrates that her attendance could not have been consistently “atrocious,” as Defendant alleges.

It is totally unreasonable to believe that Ms. Magwood could not have gone from being eligible for an attendance bonus on December 27, 2005, and a month later, be terminated for bad attendance. The only difference between Ms. Magwood’s status on December 27, 2005 and January 27, 2006, was that she informed her supervisor, on January 25, 2006, that she needed FMLA leave to address her ongoing illness. First Transit’s new claim, that the conversation took place on January 27, 2007, is contradicted by Mr. Collins’ own admissions in his depositions.

The Affidavits of Mr. Howell and Mr. Dell contain statements about which they do not have personal knowledge and represent that documents are accurate when they were not even the custodians of the records at issue. Moreover, Mr. Dell’s Affidavit has him swearing, under oath, that the Dispatch records accurately recorded Ms. Magwood’s attendance; however, this statement is in direct conflict with Mr. Dell’s deposition testimony that he did *not* have access to any records that could accurately reflect the number of days that Ms. Magwood had been absent, or which of those days had been excused, since this information was lost in a computer crash in 2007, as earlier discussed.

If Defendant could not state the precise number of days that Ms. Magwood was absent in 2005 in its July 24, 2009 “*Third Supplemental Answers to Interrogatories*” – which it *never*

⁵ In fact, Defense counsel used the same word, “lackadaisical,” to characterize Plaintiff’s counsel, Ms. Martin, in its Opposition to Plaintiff’s Motion for a three week extension of discovery. Apparently, this disrespectful, insulting word is one that Defense counsel does not hesitate to use – at least with respect to certain groups of people.

amended, it cannot assert now, for the first time, in summary judgment proceedings, that it has the precise number now. It must be bound by its July 24, 2009 discovery responses, which it amended *three* times.

In any case, the alleged prior absences are completely irrelevant to her termination in the midst of applying for FMLA leave and seeking an leave to obtain medical treatment. Mr. Collins was not concerned about Ms. Magwood's past absences, or her attendance points, except to the extent that they reflected the fact that she had an ongoing illness. He was only concerned about what accommodations she might need in the *future* to continue with First Transit; and, as he told Ms. Magwood and her husband *directly*, on February 13, 2006, he did not want to "deal with sick people" while he had a "bus company to run." The *problem for First Transit* is that the FMLA and the ADA specifically require that their managers deal with "sick people" in a manner that is compassionate, cooperative and reasonable. The employer need not shut down or pay employees for work not performed; but they must make *reasonable accommodations* to allow people to keep their jobs if they are otherwise qualified for them. Employers must permit employees with serious illnesses time to address those illnesses, in accordance with the specific leave policy set forth in the FMLA.

First Transit had a legal obligation to permit Ms. Magwood the leave she needed to have her conditions treated so that she could once again safely operate a bus and earn a decent living. Instead, it fired her for her FMLA application and request for temporary, light duty accommodation while healing. First Transit flagrantly violated Ms. Magwood's statutory rights under the FMLA and ADA. She is therefore entitled to summary judgment.

III. Facts Alleged by Plaintiff that should be Deemed Conceded, Pursuant to Local Rule 56(B), due to Defendant's Failure to Address them

Defendant's *Opposition* does not address the basic facts of the case until the end of its

document, on pages 31 through 42; yet, it is the starting place for determining whether there are genuinely disputed material facts that should be decided by a jury or whether there is no genuine disagreement as to material facts. Defendant stated that there were many facts that it disputes that it did not address in its motion; however, Local Rule 56(B) does not permit it Defendant to simply assert a general denial to Plaintiff's asserted facts. The party opposing a *Motion for Summary Judgment* must specifically identify each alleged fact that it denies and provide citations to the record to support its own assertion that the allegation is false. If it fails to do so, the Court has every right to deem it conceded. Where First Transit has offered no admissible, credible evidence to rebut Ms. Magwood's factual assertions, these facts should be deemed conceded by First Transit, pursuant to Rule 56(B).

As required by Fed. R. Civ. Pr. 56 and Local Rule 56(B), Plaintiff included a detailed *Statement of Undisputed Material Facts*, with each fact in a separately numbered paragraph, as part of her *Motion for Summary Judgment*. Plaintiff also recited these facts as a narrative in the body of her *Memorandum in Support of her Motion for Summary Judgment*. Fed. R. Civ. P. 56(e)(2), entitled, "*Opposing Party's Obligation to Respond*," states as follows.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Where Defendant did address the material facts asserted by Plaintiff, it failed to present this Court with evidence that would allow a jury to make factual determinations consistent with Defendant's factual assertions. Defendant cannot genuinely dispute a factual allegation that it has admitted, either through its own witness, its own business records, its own *Answer to the Complaint*, *Answers to Interrogatories* or other Court filing. In some cases, First Transit has

presented the Court with absolutely no evidence that the fact it asserted occurred at all; rather, its factual assertion appears to be concocted out of thin air, finding no support in the testimony of any witness or any document that could constitute admissible evidence of the asserted fact. In other cases, it did not offer evidence to dispute the factual statement as worded, but added other alleged facts of its own to try to change the statement as it was worded.⁶

Defense counsel was granted a 15 day extension of time, in addition to the 11 days granted by this court's local rules and the six days gained it gained by objecting to Plaintiff's *Motion to Exceed the Page Limit*, which delayed the docketing of *Plaintiff's Motion for Summary Judgment*. In addition, the Court granted Defendant's uncontested motion to exceed the page limit, to file a 42 page *Opposition to Plaintiff's Motion for Summary Judgment*. Even with 32 days to respond to the motion and 42 pages available to it, Defendant failed to rebut the material factual assertions made by Plaintiff.

The first step in determining whether the case should proceed to a jury is to isolate the factual representations in *Plaintiff's Statement of Undisputed Material Facts* that the Defendant does not specifically challenge. They should be deemed conceded, pursuant to Local Rule 56(B). The second step is to examine the factual statements that Defendant has specifically challenged. Since First Transit cannot offer admissible, credible evidence that contradicts Plaintiff's supported factual allegations, again, it is appropriate for the Court to make the factual determinations in favor of Ms. Magwood. Factual determinations made in summary judgment proceedings remain the conclusions of fact throughout this litigation. Fed. R. Civ. P. 56(d)(1).

Fed. R. Civ. P. 56(e)(1) states:

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated....

⁶ Defendant also improperly used this tactic in its *Answer to the Amended Complaint*.

After they struggled to write *Defendant's Opposition to Plaintiff's Motion for Summary Judgment*, First Transit's attorneys drafted affidavits for persons who had already testified in this case, or provided sworn statements. Then Defendant used the weight of its status as their employer⁷ to coerce its employees into making statements that contradicted their former statements of record.

Plaintiff included a narrative of the facts in the body of her motion, as the first section of her motion. In addition, to allow the Court and the parties to easily identify the facts in dispute, Plaintiff submitted a separate *Statement of Undisputed Material Facts*, with conveniently numbered paragraphs; however, Defendant did not address *Plaintiff's Statement of Material Undisputed Facts* or use the paragraph numbers assigned to each fact. Plaintiff has therefore had to match Defendant's disputed statement with the numbered paragraphs in her *Statement of Material Undisputed Facts*. Plaintiff has therefore listed each statement, with its original paragraph number, that the Defendant did not address or dispute in its *Statement of Disputed Facts* in the Appendix attached to this *Reply*. Defendant often merged several paragraph numbered points into one paragraph, disputing some, but not all of the factual representations in the combined paragraph, as reflected in the *Appendix*.

IV. Plaintiff's Dispute of Defendant's Stated Facts

On pages 1-3 of its *Opposition*, Defendant lists its own version of the "facts" that it claims led to Ms. Magwood's termination. Defendant used "bullet points" rather than numbered paragraphs, so Plaintiff has identified them #s1-14, in the order that they are listed. (See Appendix, *Defendant's Purported Undisputed Facts*.)

⁷ In the case of Mr. Collins, First Transit is his former employer; however, former employees do rely on their past employers for references and are reluctant to "burn bridges" with them. In addition, since Mr. Collins continues to be a manager in a transportation company, it would not serve his personal interests to alienate other powerful members of that industry, such as First Transit.

A. “I Don’t Recall” is not a “Serious Challenge” to Ms. Magwood’s Factual Assertion that Mr. Collins Told her that he did “not have Time for Sick People

First Transit claims that Mr. Collins’ direct statement indicating animus against persons with disabilities, or serious illnesses, is “highly disputed.” *Def’s Opposition*, at 41. Both Ms. Magwood and her husband, Thaddeus Magwood, have sworn that Mr. Collins told them “I have a bus company to run” and “I don’t have time for sick people.” Mr. Collins *does not* directly dispute it. He simply testified that he did “*not recall*” making that statement and that it would be “out of character” for him to say it. *Def’s Opposition*, at 41, fn. 23.⁸ What Mr. Collins did not say is, “No, I certainly did not say that.”⁹ That would make it a “highly disputed” fact.

“I don’t recall saying it” is an admission that it is *possible* that he did say it. Mr. Collins also said that he did “not recall” talking to Patricia Jones, in Dispatch, about the January 30th, 2006 entry in the log book stating that Ms. Magwood should not be scheduled for work until she meets with Mr. Collins, but he acknowledged that he must have had a conversation with her based on the note in the log. MSJ **Exhibit E**, Collins depo at 177:7-178:13.

Where a witness responds to a material question by stating, “*I don’t recall*,” this response “*is not a serious challenge*” to the allegation asserted. *Moodie v. Federal Reserve Bank of New York*, 862 F.Supp. 59, 66 (S.D.N.Y.1994). The response of “I don’t recall” on material issues that the witness should be able to recall is evasive. *Teano v. Electrical Const. Co.*, 849 So.2d 714, (1 Cir. 2003); *SS&J Morris, Inc. v. I. Appel Corp.*, 2000 WL 1028680 (S.D.N.Y. 2000) (court found witnesses’ five “I don’t recall” answers were insincere and deliberately “evasive or incomplete” within the meaning of Rule 37(a)(3)). *Calmelet v. Eluhu*, 2006 WL 2091385 (Tenn.

⁸ Both Sandra Anderson and Dave Dell stated that they were surprised that Mr. Collins terminated Ms. Magwood and that this act seemed out of character for him. Clearly, then, Mr. Collins is capable of acting in a manner that is “out of character.”

⁹ Certainly, in a race case, if a plaintiff falsely alleged that his supervisor called him the “n” word, we would expect the supervisor to testify, “No, I did not say that! I would never say that!”

Ct. App. 2006); *Com. v. Saint Louis*, 59 Mass. App. Ct. 928, 798 N.E.2d 333, 336, fn. 3 (Mass. 2003) (numerous “I don’t recall” responses perceived as evasive); *In re Kids Creek Partners, L.P.* 212 B.R. 898. 906 (Bkrcty.N.D.Ill. 1997); *In re Donald Sheldon & Co., Inc.*, 191 B.R. 39, 44 (Bkrcty. S.D.N.Y. 1996). In his deposition, Mr. Collins responded with the Answer “I don’t recall” in response to no less than twenty material questions.

Whether or not Mr. Collins honestly does not recall these material facts or was being evasive, his denied recollection is “*not a serious challenge*” to the facts asserted by Plaintiff based on the testimony of witnesses that *do recall* these facts.

B. Alleged Absences are Irrelevant to Termination

Defendant’s purported Facts numbered 1-6 are immaterial and irrelevant to Ms. Magwood’s FMLA and ADA claims, as discussed in Plaintiff’s pending *Motion in Limine to Exclude Certain Witnesses and Exhibits Offered by Defendant*, incorporated by reference, herein. As discussed above and in Plaintiff’s *Motion in Limine*, Defendant persists in distracting the Court with the irrelevant – and grossly inaccurate – “red herring” of purported attendance violations.

C. Defendant’s Allegations Regarding the Reasons for Ms. Magwood’s January 23-27th Absences are False

Defendant’s purported Fact number 7 alleges that Ms. Magwood was absent from work during the week of January 23-27, 2006, due to back pain, shoulder pain, and “pink eye,” or conjunctivitis -- reasons unrelated to sleep apnea and thyroid problems; however, as stated in Defendant’s fact # 8, and as Mr. Collins purportedly documented, Ms. Magwood called him personally, on January 25, 2006.

It was not until the next day, January 26th, 2006, that Ms. Magwood went to the doctor

regarding the symptoms that were disabling her at that time.¹⁰ Ms. Magwood had ongoing symptoms of headaches, blurred vision, inability to sleep, fatigue, and back pain. She often had red eyes due to lack of sleep. Ms. Magwood believed that these symptoms were due to sleep apnea and hyperthyroidism, since her primary physician, Dr. Hopkins, had “presumptively diagnosed,” her with these conditions. Ms. Magwood *did not even know* that she had “pink eye,” or conjunctivitis, when she discussed her need for FMLA leave with Mr. Collins on January 25, 2009. It was only when she was diagnosed with it, on January 26th, 2009, that she received medicine for “pink eye.” She had already been taking medication for headaches, which is one of the symptoms of hyperthyroidism.

The fact that Ms. Magwood had “pink eye” during the week of January 23-27th does not negate the fact that she also had symptoms from her ongoing illnesses and needed time off to address them. A person is not immune from “pink eye,” the flu, a stomach virus or any other malady simply because they have other ongoing medical conditions, such as hyperthyroidism, a thyroid goiter, sleep apnea or any other long-term malady.

D. Mr. Collins Perceived Ms. Magwood as a Person with a Disability

As set forth in Plaintiff’s *Motion for Summary Judgment*, both of Ms. Magwood’s Kaiser Permanente doctors testified that Kaiser’s medical records do not allow doctors do state “presumptive,” “suspected” or “working” diagnoses, but only allow them to record suspected conditions as actual diagnoses; accordingly, Ms. Magwood, reading her own medical records, thought that these diagnoses had been confirmed, although she knew that she needed more tests to determine the appropriate treatment. Since Ms. Magwood could only convey to her supervisors what she understood to be true, and because she actually provided them with Kaiser records that listed her diagnoses as “sleep apnea” and “hyperthyroidism,” her supervisors,

¹⁰ Defendant’s Exhibit E, January 26, 2006 Verification of Medical Treatment.

particularly Mr. Collins, “regarded” or “perceived” her as a person with these conditions.

E. Ms. Magwood Discussed her Need for FMLA Leave with Mr. Collins on January 25, 2007

When Ms. Magwood called Mr. Collins personally, on January 25, 2006, it was to discuss more than her absence for that day or whether she would be in the next day. She was not obligated to speak directly to Mr. Collins when she was absent from work; she was only required to call into “Dispatch” at least one hour prior to her scheduled work shift. Mr. Collins acknowledged that, on January 25th, Ms. Magwood discussed with him her need for time off from work to address ongoing medical problems. Mr. Collins acknowledged that, at some point, Ms. Magwood did discuss with him some of her ongoing medical problems and that he recalls that she had a condition that affected her ability to sleep and a problem with her thyroid gland.

Despite Mr. Collins’ deposition testimony that he and Ms. Magwood discussed her illness and need for FMLA leave on January 25, 2006, Defendant now alleges, for the first time, that this conversation did not take place until January 27, 2006, *after* Mr. Collins wrote a January 27, 2007 termination letter. There is no support in the record for this factual assertion – not even in First Transit’s new Collins Affidavit! Moreover, the scenario conflicts with everything else that First Transit has previously asserted about this purported January 27, 2006 termination letter. First Transit has previously asserted, and appears to perhaps still maintain, that the January 27, 2006 letter was mailed by First Transit and received by Ms. Magwood. Mr. Collins acknowledged that he never gave it to her. He also acknowledged that when termination letters were mailed, it was by certified mail. First Transit has produced no evidence that this letter was ever mailed, certified or otherwise.

Now that First Transit claims that Mr. Collins wrote and decided to hold it in abeyance, on the same day, January 27, 2006, the best that this letter could qualify as is “a note to self.” If

he were holding it in abeyance, why would he mail it? If it was never mailed or otherwise delivered to Ms. Magwood – which the undisputed evidence demonstrates it was not – why was it placed in her personnel file? Or was it placed in her personnel file only after she filed her EEOC charge and First Transit attorneys/high level managers saw the February 8, 2006 termination letter and realized that it was facially *ridiculous*.

Faced with either re-hiring Ms. Magwood and providing her monetary compensating for violating her statutory civil rights, it appears that First Transit fabricated the January 27, 2006 letter, for purported “job abandonment,” alleging that she did not call in for two consecutive days during the week of January 27, 2006. Even in the purported January 27, 2006 termination letter, First Transit did not claim that Ms. Magwood was being terminated for excessive absences or exceeding 20 attendance points. “Job abandonment” was the only basis upon which it could try to justify Ms. Magwood’s immediate termination, in accordance with the Collective Bargaining Agreement. It appears that they counted on Ms. Magwood not being able to secure legal representation to file a lawsuit and obtain the discovery that would reveal that Ms. Magwood *did* call in to Dispatch during the week of January 23-27th, demonstrating that First Transit’s next line of defense was also obviously false and pre-textual.

Finally, on page 30 of its *Opposition*, Defendant claims that Ms. Magwood lied about being sick during the week of January 23-27th and was, in fact, at the funeral of her nephew, in New York. Defendant even includes Ms. Magwood’s EEOC Rebuttal Statement, filed by Ms. Martin, referring to an absence in January of 2006 for a funeral; however, Ms. Magwood testified that she believed that the funeral was earlier in January and consistently testified that she was sick during the week of January 23-27th, as proven by her medical Verification of Treatment on January 26, 2006.

Ms. Magwood's EEOC Rebuttal Statement similarly does not state that the funeral was during the week of January 23-27th, but states only that it was in January. The Rebuttal letter specifically also reiterates Ms. Magwood's request for the exact dates that First Transit claims Ms. Magwood was absent so that she could compare them against her pay stubs or other records to respond more specifically to First Transit's allegations regarding her attendance.

Conclusion

Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of October, 2009, I will electronically file the foregoing *Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment and the Accompanying Appendix Listing Undisputed and Disputed Facts*, through the electronic filing system of this Court, which will, in turn, electronically serve this document upon the following:

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APPENDIX

I. Facts Alleged by Plaintiff that should be Deemed Conceded, Pursuant to Local Rule 56(B), due to Defendant's Failure to Address them

The following facts, listed in *Plaintiff's Statement of Undisputed Material Facts* as part of her *Motion for Summary Judgment*, by the following numbered paragraphs, were not addressed or specifically disputed by Defendant in its *Opposition*, pages 31-42, wherein it purports to dispute Plaintiff's stated facts. These facts should be deemed conceded, pursuant to Local Rule 56(B).

- 3) First Transit Inc. ("First Transit") is a transportation company, operating in the Commonwealth of Virginia. The Woodbridge facility operated by First Transit provides bus services to the public in Prince William County, Virginia.¹
- 4) Plaintiff, Linda Magwood, was a bus operator, employed by First Transit, for nearly three years, beginning on April 9, 2003 and ending on February 8, 2006.²
- 4) Ms. Magwood demonstrated her willingness to work for upward mobility. She has been married to her husband since high school, had five children, and is helping to raise several grandchildren; yet, she made time to obtain her GED and has taken some college courses.³ She trained for and obtained her "CDL license" in 2003, to drive buses and immediately put her new license to work at First Transit.⁴ There, she found a job at which she excelled and enjoyed, interacting with the public and being outdoors, while using a skill she had earned.⁵ Along with her husband's income, the income that Ms. Magwood brought home contributed substantially to the family's household income and they came to depend upon it for

¹ Stipulated Facts ¶ 1.

² Stipulated Facts ¶ 2.

³ **MSJ Exhibit C**, Magwood depo at 21:1-22:4; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 3-11, 25-27.

⁴ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 2.

their basic living expenses.⁶

6) In October of 2004, Ms. Magwood was honored as “Employee of the Month.”⁷ Ms. Magwood repeatedly received “Safety Bonuses” – a monetary award for safe driving.⁸ She recruited other employees for First Transit.⁹

7) Ms. Magwood received a \$500.00 recruiting bonus.¹⁰

8) Ms. Magwood applied to, and was selected to, train new employees for First Transit.¹¹ She received additional pay as a trainer.¹²

9) Ms. Magwood was selected to be on a Committee with management to re-design the work facility and establish a Code of Conduct for employees.¹³

10) Ms. Magwood was selected to drive First Transit Board members and to give a presentation to students at Featherstone Elementary School, in Woodbridge, Virginia, regarding how the school bus operates.¹⁴ First Transit selected Ms. Magwood to demonstrate new bus features for passengers with disabilities to elementary school children.¹⁵

⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶¶ 2-8;

⁶ **MSJ Exhibit C**, Magwood depo at 160:14-16; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 5.

⁷ **MSJ Exhibit D**, Employee of the Month Award to Linda Magwood; **Def’s 9/11/09 Answer to Am. Compl. ¶ 13**; **MSJ Exhibit B, Linda Magwood Affidavit ¶ 3**; **MSJ Exhibit E**, Collins depo at 77:9-7-78:14.

⁸ **Def’s 9/11/09 Answer to Am. Compl. ¶15**; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 4; **MSJ Exhibit F**, paystubs of Linda Magwood showing safety bonuses.

⁹ **Def’s 9/11/09 Answer to Am. Compl. ¶¶16, 17**; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 5; **MSJ Exhibit F**, paystubs of Linda Magwood showing recruitment bonuses.

¹⁰ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 5; **MSJ Exhibit F**, paystubs of Linda Magwood showing recruitment bonuses; **Def’s 9/11/09 Answer to Am. Compl. ¶ 17**.

¹¹ **Def’s 9/11/09 Answer to Am. Compl. ¶ 18**; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 6; **MSJ Exhibit F**, paystubs of Linda Magwood showing training bonuses; **MSJ Exhibit DD**, letter from supervisor Pat Jones regarding application for training.

¹² **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 6; **MSJ Exhibit F**, paystubs of Linda Magwood showing training bonuses

¹³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 7; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 7.

¹⁴ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 9.

¹⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 10.

- 11) Ms. Magwood volunteered her personal time to refurbish the employee lounge.¹⁶
- 12) Prior to her illness, Ms. Magwood earned attendance bonuses for good attendance.¹⁷
- 13) Ms. Magwood worked “overtime” on numerous occasions.¹⁸ “Overtime” is defined as working more than 40 hours in one week.¹⁹
- 18) (in part)²⁰ Ms. Magwood called in sick to “Dispatch” and/or directly to her supervisor, Timothy Collins, on January 23, ... 25, and 26th, 2006.²¹
- 19) (in part)²² On January 25, 2006, Ms. Magwood spoke with Mr. Collins directly....²³
- 20) (in part)²⁴ Mr. Collins suggested that Ms. Magwood apply for Family and Medical Leave Act (FMLA) leave.²⁵
- 21) First Transit’s Employee Handbook, §7.01 states: “Employees must not operate a

¹⁶ **Def’s 9/11/09 Answer to Am. Compl. ¶ 19; MSJ Exhibit B**, Linda Magwood Affidavit ¶ 8.

¹⁷ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 9; **Def’s 9/11/09 Answer to Am. Compl. ¶¶105, 106, 107, 112** (Defendant’s claimed lack of information to admit or deny this allegation leaves the allegation undisputed; moreover, Plaintiff is entitled to an “adverse inference” regarding attendance records that Defendant should have in its possession as business records, but has not produced.

¹⁸ **Def’s 9/11/09 Answer to Am. Compl. ¶14; MSJ Exhibit F**, paystubs of Linda Magwood showing overtime; **MSJ Exhibit B**, Linda Magwood Affidavit ¶10.

¹⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶10.

²⁰ Defendant disputes that the dispatch log states that Ms. Magwood called in on January 24th, 2006, but admits that she called in on January 23rd, 25th and 26th, 2006. The Dispatch Log for January 24th, 2006 actually has a handwritten note, which is partially crossed out. The full original note reads “L. Magwood out did not call from yest;” but “did not call from yest” is crossed out, implying that it was crossed out because it was inaccurate, i.e., that she did call in that day.

²¹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 13; **MSJ Exhibit I**, First Transit Dispatch Records for January 23-30th, 2006; **MSJ Exhibit D**, Collins depo at 172:17-178:15.

²² Defendant admits that Ms. Magwood spoke to Mr. Collins directly, on January 25, 2006; however, it disputes that she told him that she needed additional time off for her medical conditions of hyperthyroidism and sleep apnea.

²³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 19; *see also* **MSJ Exhibit D**, Collins depo at 174:4-178:8, 176:6-8.

²⁴ Defendant does not dispute that Mr. Collins suggested that Ms. Magwood apply for FMLA leave, but does dispute that Ms. Magwood said that she would immediately begin the process of applying for it.

²⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 18; **MSJ Exhibit D**, Collins depo at 126:24-128:11.

transit vehicle when their ability and alertness is impaired because of fatigue, illness or any other cause to create a safety hazard.²⁶

22) Mr. Collins did not schedule Ms. Magwood for any bus operating duties from January 27th, 2006 until her termination on February 8, 2006.

23) Mr. Collins did not schedule Ms. Magwood to work after January 25, 2006.

24) (in part)²⁷ Mr. Collins did not schedule Ms. Magwood to work, pending their discussion of her medical condition, with medical documentation....²⁸

25) Ms. Magwood initially believed she would be well enough to meet with Mr. Collins to discuss her FMLA leave on Thursday, January 26, 2006, but she was not feeling well enough to travel to First Transit. When Ms. Magwood called Mr. Collins directly, she received a recorded message, so she called dispatch and left a message for him stating that she was still sick and would not be able to come to work.²⁹

26) First Transit's Woodbridge Dispatch log, dated January 30, 2006 (Monday), notes that Ms. Magwood is not to be scheduled for work until further notice from Mr. Collins.³⁰

28) Dr. Hines, an endocrinologist with Kaiser Permanente, saw Ms. Magwood as a referral from Dr. Hopkins, for testing and examination for suspected hyperthyroidism.³¹

30) Ms. Magwood underwent the ultrasound test that Dr. Hines prescribed to further

²⁶ **MSJ Exhibit Y**, First Transit Employee Handbook.

²⁷ Defendant does not dispute that Mr. Collins did not schedule Ms. Magwood to work after January 27th, if not January 25th, but it disputes that the medical documentation was to be brought in for purposes of assessing FMLA eligibility or any potential accommodation for her medical condition(s).

²⁸ **Def's 9/11/09 Answer to Am. Compl.** ¶¶ 57, 87; see also ¶¶ 35, 36, 40, 50, 55,

²⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 22; **MSJ Exhibit I**, First Transit's Dispatch Records, from January 23-30th, 2006.

³⁰ **MSJ Exhibit I**, First Transit's Dispatch Records, from January 23-30th, 2006.

³¹ **MSJ Exhibit K**, Hines depo at 16:20-18:1.

diagnose her thyroid condition.³² This ultrasound confirmed that she suffered from a thyroid goiter, including nodules (tumors) on her thyroid gland.³³

31) Thyroid problems, particularly the incorrect emission of the hormone TSH, can also affect brain function.³⁴

32) Sleep apnea is caused by an obstruction of the upper airway that interferes with sleeping at night and causes the individual to uncontrollably doze off during the day.³⁵

33) Due to some similar symptoms, sleep apnea can be confused with allergies or hay fever.³⁶

34) Ms. Magwood could not safely drive a bus with headaches, fatigue, dizziness, blurred vision and the inability to stay awake and alert.³⁷

35) Although Ms. Magwood's TSH tests results for January 18, 2006 indicated normal levels the hormone, and thus, are not indicative of a hyperthyroidism, Dr. Hines and Dr. Hopkins testified that earlier test results were indicative of the condition and that TSH hormone levels could fluctuate due to some environmental factors.³⁸

36) Sleep apnea is often associated with obesity; however, Ms. Magwood weighed only 178 pounds, standing approximately 5'6-5-7" tall.³⁹ She was therefore only "mildly

³² **MSJ Exhibit K**, Hines depo at 62:17-71:12; **MSJ Exhibit AA**, Dr. Hopkins' February 22, 2006 medical record entry confirming the diagnoses of thyroid goiter and nodules; **MSJ Exhibit BB**, Dr. Hopkins' February 22, 2006 letter to Ms. Magwood, informing her of the results of her ultrasound (Hopkins depo Ex. 29, FT0370)

³³ **MSJ Exhibit K**, Hines depo at 63:5-18; **MSJ Exhibit J**, Hopkins depo at 109:13-22.

³⁴ **MSJ Exhibit L**, Hines depo at 45:11-46:7.

³⁵ **MSJ Exhibit K**, Hopkins depo at 40:22-45:7; *Target Stores v. Labor and Industry Review Com'n*, 217 Wis.2d 1.

³⁶ *Target Stores v. Labor and Industry Review Com'n*, 217 Wis.2d 1.

³⁷ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 26; **Exhibits M and N**, printouts explaining the treatments and prognoses for hyperthyroidism and sleep apnea, respectively; **MSJ Exhibit K**, **Hopkins depo** at 88:12-99:3, 104:19-107:7; **MSJ Exhibit O**, Excerpted documents from medical records of Linda Magwood.

³⁸ **MSJ Exhibit K**, Hines depo at 19:16-22:1; **MSJ Exhibit J**, Hopkins depo at 121:20-125:19.

³⁹ **MSJ Exhibit J**, Hopkins depo at 126:17-129:1.

overweight,” particularly for a woman in her late forties.⁴⁰

37) Remedies for a thyroid goiter include surgery or radioactive iodine therapy, which destroys the thyroid or the thyroid nodules radioactively.⁴¹

38) There are two types of surgery for hyperthyroidism.⁴² One first type of surgery is to remove the entire thyroid gland.⁴³

39) A person *cannot live* without a functioning thyroid gland or synthetic hormone replacements for the thyroid gland, for the rest of the patient’s life, if it is removed.⁴⁴ Patients should stay out of work for approximately two weeks after having a thyroid gland, or part of a thyroid gland removed surgically.⁴⁵

40) A second type of remedial surgery for hyperthyroidism is to remove only the nodules on the thyroid gland, rather than the entire gland.⁴⁶ This may be possible, depending on the extent of the nodules and may or may not require the life-long hormone replacement necessary to stay alive.⁴⁷ The alternative treatment is iodine radiation therapy, or I-131 therapy, which requires the patient to be removed from other persons for three days because the radiation emitted from the patient may be harmful to others.⁴⁸

42) Dr. Hopkins is employed by Ms. Magwood’s then health care provider, Kaiser Permanente.⁴⁹ Kaiser Permanente’s computerized forms to enter their medical records and notes, do not allow for an entry of “working,” “presumed” and “suspected” diagnoses; accordingly, he

⁴⁰ MSJ Exhibit J, Hopkins depo at 129:1.

⁴¹ MSJ Exhibit K, Hines depo at 24:21-27:21.

⁴² MSJ Exhibit K, Hines depo at 27:11-21.

⁴³ MSJ Exhibit K, Hines depo at 27:11-15; 44:18-45:8.

⁴⁴ MSJ Exhibit K, Hines depo at 45:12-46:16.

⁴⁵ MSJ Exhibit K, Hines depo at 44:18-45:11; *see also Larson v. Endodontic and Periodontic Assoc.*, 2006 WL 2038600 at (N.D. Ill. 2006) at 1 (discussing treatment of thyroid disorders, particularly goiters).

⁴⁶ MSJ Exhibit K, Hines depo at 27:11-21; 46:17-47:17.

⁴⁷ MSJ Exhibit K, Hines depo at 47:6-17.

⁴⁸ MSJ Exhibit K, Hines depo at 26:1-27:10; 44:1-16.

recorded his “working,” “presumptive” and “suspected” diagnoses under the heading of “diagnosis.”⁵⁰

43) Ms. Magwood read these medical records and understood her doctors’ explanations as more definite diagnoses than “presumptive,” but she did understand that she had to undergo additional testing to refine her treatment options and make the best decision.

46) The FMLA requires that an employee applying for FMLA leave is entitled to fifteen (15) days from the date of his/her FMLA application to produce medical documentation to support his/her FMLA leave request.⁵¹

47) First Transit policy and procedures mirror the FMLA by expressly stating that an employee is entitled to fifteen (15) days from the date of her FMLA application to support it with medical documentation.⁵²

48) The Collective Bargaining Agreement, or “Union Contract,” between First Transit and The American Federation of State, County, and Municipal Employees (“AFSCME”), AFL-CIO, Article 32, § 8 expressly acknowledges that the employee has the right to take leave under the FMLA.⁵³

49) AFSCME represented employees of First Transit, which included Ms. Magwood, for the entire duration of her employment.⁵⁴

51) Ms. Magwood had not exceeded six months of leave to address any disability at

⁴⁹ **MSJ Exhibit J**, Hopkins depo at 11:4-6; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 48.

⁵⁰ **MSJ Exhibit J**, Hopkins depo at 65:5-67:3; 89:8-91:7; **MSJ Exhibit O**, Excerpted documents from medical records of Linda Magwood.

⁵¹ **EEOC Regulation**, 29 U.S.C. § 2613(a) at § 825.305(b); *Cooper v. Fulton County, Ga.*, 458 F.3d 1282, 1285 (11th Cir. 2006).

⁵² **MSJ Exhibit Q**, Baccille depo at 41:10-17, 42:12-44:7.

⁵³ **MSJ Exhibit G**, union contract.

⁵⁴ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 55.

the time of her termination.⁵⁵

52) On January 30, 2006, in order to support her FMLA leave application, Ms. Magwood requested her medical records from Kaiser Permanente, but was told that it would be 7-10 days before she would receive them.⁵⁶

53) On January 31, 2006, Ms. Magwood also saw Dr. Daniela Hines, an endocrinologist, to further diagnose and treat the condition which her primary care physician, Dr. Hopkins, had preliminarily diagnosed as hyperthyroidism.⁵⁷

54) (in part)⁵⁸ On February 6, 2006, Ms. Magwood, accompanied by her union representative, Sandra Anderson, met with Mr. Collins... .

55) (in part)⁵⁹ Ms. Magwood explained to Mr. Collins that she had requested her medical records to support her FMLA leave request, but that she had not yet received them.⁶⁰

Mr. Collins told Ms. Magwood to return to his office with the required medical records “[Defendant disputes that the word was “in” and claims it was “within”] 48 hours.”⁶¹ At the time that he made this statement, it was approximately [Defendant appears to dispute that it was

⁵⁵ **Def’s 9/11/09 Answer to Am. Compl.** ¶ 60; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 45.

⁵⁶ **MSJ Exhibit R**, Kaiser Permanente Medical Records Request Form, completed by Linda Magwood; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 28; **MSJ Exhibit C**, Magwood depo at ¶ 28; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 12.

⁵⁷ **MSJ Exhibit S**, medical records documenting Ms. Magwood’s January 31, 2006 assessment by Dr. Hines.

⁵⁸ Defendant acknowledges that Ms. Magwood and Ms. Anderson met with Mr. Collins to discuss her medical condition and capability to perform future work, but disputes that FMLA leave was to be discussed in the meeting.

⁵⁹ Defendant disputes that Mr. Collins told Ms. Magwood to return with the medical records “in 48 hours,” but rather, claims that Mr. Collins told her “within 48 hours.” Defendant also apparently disputes that it was 10:30 when Mr. Collins made this comment, but Defendant does not state what time it was when Mr. Collins made this statement or offer any proof that it was close to 10:00 than to 10:30. Mr. Collins acknowledged that, since he had the termination letter written and printed out for Ms. Magwood when she arrived at 10:30 a.m., he must have begun writing it no later than 10:15 or 10:20 and may even have begun writing it before 10:00 a.m. **MSJ Exhibit** ___ of Pl’s MSJ, Collins depo at ___.

⁶⁰ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 31.

⁶¹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit J**, Anderson Affidavit ¶ 4; **MSJ Exhibit D**, Collins depo at 54:20-66:5, 11:8-13, 120:3-9.

approximately 10:30 a.m. and appears to claim that it was closer to 10:00 a.m.]⁶²

56) Ms. Anderson took notes during this meeting.⁶³ Her notes reflect that Mr. Collins scheduled the next meeting for 10:30 a.m., on February 8, 2008.⁶⁴

57) Ms. Anderson gave her notes to Ms. Magwood to assist her in gathering the documents that Mr. Collins said he needed to grant her FMLA leave.⁶⁵

58) On February 7, 2006, Ms. Magwood obtained the required medical certification for FMLA leave from her primary care doctor, Dr. Hopkins.⁶⁶

59) Dr. Hopkins also wrote a letter for Ms. Magwood to provide to her employer, stating that, due to symptoms that posed a safety risk, Ms. Magwood should not drive a bus until her condition was properly diagnosed and treated.⁶⁷

60) On February 8, 2006, at approximately 10:30 a.m., Ms. Magwood arrived at Mr. Collins' office, with her union representative, Sandra Anderson, for a meeting to discuss her application for FMLA leave.⁶⁸

61) On February 8, 2006, at approximately 10:30 a.m., Ms. Magwood was prepared to discuss her medical conditions, physical symptoms and need for accommodation.⁶⁹ Ms. Magwood brought with her the required medical certification for her FMLA application, signed

⁶² **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit J**, Anderson Affidavit ¶ 4.

⁶³ **MSJ Exhibit T**, notes of Sandra Anderson; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit U**, Anderson Affidavit ¶ 2.

⁶⁴ **MSJ Exhibit T**, notes of Sandra Anderson; **MSJ Exhibit J**, Anderson Affidavit ¶ 4; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 15.

⁶⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit J**, Anderson Affidavit ¶ 3.

⁶⁶ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 33; **MSJ Exhibit U**, February 7, 2006 letter from Dr. Hopkins; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 14, 15, 16, 17, 18.

⁶⁷ **MSJ Exhibit U**, February 7, 2006 letter from Dr. Hopkins.

⁶⁸ **MSJ Exhibit J**, Anderson Affidavit ¶¶ 6-7; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 34.

⁶⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 34; **MSJ Exhibit U**, February 7, 2006 letter from Dr. Hopkins; **MSJ Exhibit J**, Anderson Affidavit 7.

by Dr. Hopkins.⁷⁰

62) On February 8, 2006, at approximately 10:30 a.m., Mr. Collins refused to look at or accept the documentation that she offered him;⁷¹ instead, he handed Ms. Magwood letter terminating her employment with First Transit – effective immediately -- for alleging “job abandonment.”⁷²

63) Mr. Collins began drafting the February 8, 2006 termination letter to Ms. Magwood no later than 10:15 or 10:20 a.m. on February 8, 2006⁷³ and may actually drafted it prior to 10:00 a.m.⁷⁴

64) First Transit’s February 8, 2006 termination letter to Ms. Magwood states:

On February 6 (sic) we met to discuss your availability to continue working as a bus operator for First Transit. At that time you agreed to meet again on February 8 at 10AM. You did not appear for that meeting.

First Transit has concluded that you have abandoned your job. Accordingly, your employment with First Transit is terminated.⁷⁵

65) The union contract, Article 11, Section 3(f), defines “a “voluntary quit,” as follows.

Failure to report to work for two (2) consecutive workdays without properly notifying the Company prior to the operator’s quitting time on the second day. Such action will be considered a voluntary quit unless it is proven that notification to the Company was beyond the

⁷⁰ **MSJ Exhibit U**, February 7, 2006 letter from Dr. Hopkins; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 34.

⁷¹ **MSJ Exhibit J**, Anderson Affidavit ¶¶ 6-8, **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 35; **MSJ Exhibit D**, Collins depo at 50:5-51:7.

⁷² **MSJ Exhibit V**, First Transit’s February 8, 2006 letter to Linda Magwood, signed by Timothy Collins, terminating her employment; **MSJ Exhibit J**, Anderson Affidavit ¶¶ 6-8, **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 35; **MSJ Exhibit D**, Collins depo at 124:21-125:14, 165:11-13.

⁷³ **MSJ Exhibit D**, Collins depo at 124:21-125:14, 165:11-13.

⁷⁴ **MSJ Exhibit D**, Collins depo at 124:21-125:14, 165:11-13.

⁷⁵ **MSJ Exhibit V**, First Transit’s February 8, 2006 letter to Linda Magwood, signed by Timothy Collins.

operator's control due to the individual operator's medical emergency, and that notification was provided as soon as reasonably possible.

See also Article 35, Section 7.

66) Ms. Magwood was not suspended prior to termination.⁷⁶

67) First Transit is obligated, based on the union contract, to notify the union shop steward with a copy of any disciplinary action that First Transit plans to take against any union member....⁷⁷ but it did *not* notify the union that Ms. Magwood was in danger of being terminated or otherwise disciplined.⁷⁸

68) Ms. Magwood returned to Mr. Collins' office, on February 13, 2006, with her husband, Thaddeus Magwood.⁷⁹

69) On February 13, 2006, Dr. Hopkins updated his letter of February 7, 2006, to clarify that, although Ms. Magwood could not safely operate a bus at that time, she was able to perform desk work or light duty assignments, pending further diagnoses and treatment.⁸⁰

70) On February 13, 2006, Ms. Magwood again offered Mr. Collins medical documentation of her illness, including Dr. Hopkins' February 13, 2006 letter, hoping that her willingness and ability to work in a temporary light duty capacity would increase her chances of being reinstated or having her termination revoked.⁸¹

71) On February 13, 2006, Mr. Collins refused to accept any documents from Ms.

⁷⁶ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 43; **MSJ Exhibit D**, Collins depo at 68:12-14.

⁷⁷ **MSJ Exhibit J**, Anderson Affidavit ¶ 10.

⁷⁸ **MSJ Exhibit J**, Anderson Affidavit ¶ 10.

⁷⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 37; **MSJ Exhibit D**, Collins depo at 155:7-156:15; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 22, 23.

⁸⁰ **MSJ Exhibit W**, Dr. Hopkins' February 13, 2006 letter.

⁸¹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 37; **MSJ Exhibit D**, Collins depo at 155:7-156:15; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 22, 23.

Magwood.⁸² He also refused to reconsider her termination or to consider re-hiring her.⁸³

73) First Transit denied Ms. Magwood the opportunity to submit her FMLA medical certification within 15 days from the date that she began the FMLA application process.⁸⁴

74) First Transit never processed Ms. Magwood's application for FMLA leave.⁸⁵

76) Ms. Magwood was awarded unemployment compensation by the Virginia Employment Commission, based on a finding that she was not fired for "cause," "job abandonment" or excessive absences.⁸⁶ First Transit made no claims of misconduct or "cause" for Ms. Magwood's termination to the Virginia Employment Commission.

⁸² **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 39; **MSJ Exhibit D**, Collins depo at 155:7-156:15; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 22, 23; **Def's 9/11/09 Answer to Am. Compl.** ¶ 79.

⁸³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 39; **MSJ Exhibit D**, Collins depo at 155:7-156:15; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 18, 19, 20, 21, 22, 23.

⁸⁴ **MSJ Exhibit B**, Linda Magwood Affidavit ¶¶ 32-40; **MSJ Exhibit J**, Anderson Affidavit ¶ 3-9; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 11-23, **MSJ Exhibit D**, Collins depo at 50:5-51:7, 155:7-156:15.

⁸⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 41.

⁸⁶ **MSJ Exhibit Z**, Virginia Employment Commission Determination.

I. **Facts Alleged by Plaintiff where the Evidence is so One-Sided that No Reasonable Juror Could Conclude Otherwise**

A. **Facts that Defendant Purports to Challenge, but does not Cite any Admissible Evidence to Dispute Them**

In its *Opposition*, Defendant argues about the significance of the facts and adds its own factual allegations to the facts, but it has not offered any evidence to dispute the facts as stated below.

31) Ms. Magwood underwent the ultrasound test that Dr. Hines prescribed to further diagnose her thyroid condition.⁸⁷ This ultrasound confirmed that she suffered from a thyroid goiter, including nodules (tumors) on her thyroid gland.⁸⁸

15) In accordance with First Transit's policies and procedures and the union contract, two "attendance points" are assessed against employees for unexcused absences, but no "attendance points" are assessed employees for excused absences.⁸⁹

16) In accordance with First Transit's policies and procedures and the union contract, no attendance points are assessed against an employee who calls in to report his/her inability to work, due to illness, at least one hour prior to his/her scheduled shift.⁹⁰

18) Ms. Magwood called in sick to dispatch and/or directly to Mr. Collins, on January ... 24th ... 2006⁹¹, stating that she was unable to report to work as a bus operator on those days,

⁸⁷ **MSJ Exhibit K**, Hines depo at 62:17-71:12; **MSJ Exhibit AA**, Dr. Hopkins' February 22, 2006 medical record entry confirming the diagnoses of thyroid goiter and nodules; **MSJ Exhibit BB**, Dr. Hopkins' February 22, 2006 letter to Ms. Magwood, informing her of the results of her ultrasound (Hopkins depo Ex. 29, FT0370)

⁸⁸ **MSJ Exhibit K**, Hines depo at 63:5-18; **MSJ Exhibit J**, Hopkins depo at 109:13-22.

⁸⁹ **MSJ Exhibit G**, Collective Bargaining Agreement, Article 35 §6-7; **MSJ Exhibit H**, Dell depo at 60:15-18; 59:6-60:9.

⁹⁰ **MSJ Exhibit G**, Collective Bargaining Agreement, Article 35 §7, 9; **MSJ Exhibit H**, Dell depo at 29:18-30:10.

⁹¹ Defendant disputes that Ms. Magwood called in on January 24th, but does not dispute that she called in on the 23rd, 25th and 26th of January.

due to illness.⁹²

62) On February 8, 2006, at approximately 10:30 a.m., Mr. Collins refused to look at or accept the documentation that she offered him;⁹³ instead, he handed Ms. Magwood letter terminating her employment with First Transit – effective immediately -- for alleging “job abandonment.”⁹⁴

69) On February 13, 2006, Dr. Hopkins updated his letter of February 7, 2006, to clarify that, although Ms. Magwood could not safely operate a bus at that time, she was able to perform desk work or light duty assignments, pending further diagnoses and treatment.⁹⁵

B. Facts that Defendant Disputes, but only by Misrepresenting or Ignoring the Record

15) From Monday January 23 through Friday, January 27th, 2006, Ms. Magwood was sick, due to one or more ongoing physical impairments that substantially limited her major life activities, including, but not limited to breathing, sleeping, driving, seeing and working.⁹⁶

19) (in part)⁹⁷ On January 25, 2006, Ms. Magwood spoke with Mr. Collins directly, explaining that she needed some time off for additional medical tests and treatment for her ongoing illnesses, which she identified as hyperthyroidism and sleep apnea.⁹⁸

⁹² **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 13; **MSJ Exhibit I**, First Transit Dispatch Records for January 23-30th, 2006; **MSJ Exhibit D**, Collins depo at 172:17-178:15.

⁹³ **MSJ Exhibit J**, Anderson Affidavit ¶¶ 6-8, **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 35; **MSJ Exhibit D**, Collins depo at 50:5-51:7.

⁹⁴ **MSJ Exhibit V**, First Transit’s February 8, 2006 letter to Linda Magwood, signed by Timothy Collins, terminating her employment; **MSJ Exhibit J**, Anderson Affidavit ¶¶ 6-8, **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 35; **MSJ Exhibit D**, Collins depo at 124:21-125:14, 165:11-13.

⁹⁵ **MSJ Exhibit W**, Dr. Hopkins’ February 13, 2006 letter.

⁹⁶ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 14; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 10, 5, 6, 7, 18, 21, 23.

⁹⁷ Defendant admits that Ms. Magwood spoke to Mr. Collins directly, on January 25, 2006; however, it disputes that she told him that she needed additional time off for her medical conditions of hyperthyroidism and sleep apnea.

⁹⁸ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 19; *see also* **MSJ Exhibit D**, Collins depo at 174:4-178:8, 176:6-8.

20) (in part)⁹⁹ Ms. Magwood responded that she would immediately begin the [FMLA] application process.¹⁰⁰

24) (in part)¹⁰¹ Mr. Collins did not schedule Ms. Magwood to work, pending their discussion of her medical condition, with medical documentation to determine how much FMLA leave she would need and what accommodations might be made for her during her diagnoses, treatment and recovery period.¹⁰²

27) During at least the last month of her employment with First Transit, Ms. Magwood was a person with a serious illness.¹⁰³

28) Ms. Magwood had had numerous conversations with Mr. Collins about her illnesses¹⁰⁴ and had presented him with numerous notes from her doctors and excerpts from her medical records stating her diagnoses as “hyperthyroidism,” “a thyroid goiter” and “sleep apnea,” among other physical ailments (including asthma, allergies and muscle pain).¹⁰⁵ Her

⁹⁹ Defendant does not dispute that Mr. Collins suggested that Ms. Magwood apply for FMLA leave, but does dispute that Ms. Magwood said that she would immediately begin the process of applying for it.

¹⁰⁰ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 18.

¹⁰¹ Defendant does not dispute that Mr. Collins did not schedule Ms. Magwood to work after January 27th, if not January 25th, but it disputes that the medical documentation was to be brought in for purposes of assessing FMLA eligibility or any potential accommodation for her medical condition(s).

¹⁰² **Def’s 9/11/09 Answer to Am. Compl.** ¶¶ 57, 87; see also ¶¶ 35, 36, 40, 50, 55,

¹⁰³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶¶ 14, 24, 25, 26, 29, 30; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 10, 5, 6, 7, 18, 21, 23; **MSJ Exhibit J**, Hopkins depo at 88:12-99:3, 104:19-107:7; **MSJ Exhibit K**, Hines depo at 17:4-135:7, particularly 130:18-135:7.

¹⁰⁴ See **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 24; 90:3-97:22; 121:20-126:22; 126:9-132:21; 155:7-194:8; 205:13-210:11; 301:15-322:9; **MSJ Exhibit O**, collective medical records provided to Mr. Collins by Ms. Magwood. See also Mr. Collins’ testimony, acknowledging that such conversations took place. **MSJ Exhibit D**, Collins depo at 49:3-76:23; 63:1-64:6; 127:12-128:4, 136:23-137:10, 139:5-19; 139:5-19; 140:4-17; 141:5-15; 126:24-129:15; 151:18-152:22; 155:7-156:15; 172:17-178:13. Mr. Collins testified that he suggested FMLA leave to Ms. Magwood, during their conversation on January 25, 2006, in response to reports of her illnesses and her need for leave to address them. **MSJ Exhibit E**, Collins depo at 127:128:4.

¹⁰⁵ **MSJ Exhibit EE**, *Def’s EEOC Position Statement*, MSJ Exhibit E, which consists of First Transit personnel records that included the medical records and doctor’s notes submitted to First Transit by Ms. Magwood during her employment, particularly pages Bates Stamped FT 1063 (diagnoses listed as “hyperthyroidism” and “sleep apnea,” dated 12/16/06), FT 1034, 1044 (re: sleep apnea and headaches,

symptoms included severe headaches, dizziness, fatigue, blurred vision, weakness, inability to sleep at night, episodes in which she stops breathing at night, choking during sleep¹⁰⁶ and irregular menstruation.¹⁰⁷

41) Ms. Magwood was hesitant to undergo the severe treatments presented to her, but as her symptoms progressed to the point that she could not function normally in her life and her job was in jeopardy, she knew that she needed to take the appropriate time off to address them and also that she had an obligation to her employer, the public, herself and her family, to immediately stop driving – particularly a bus.

44) On Monday, January 30, 2006, Ms. Magwood’s husband, Thaddeus Magwood, drove her to First Transit where she obtained an FMLA leave application from the Administration Office.¹⁰⁸

45) Ms. Magwood showed the FMLA form to Mr. Collins, telling him that she would immediately take it to her doctor to get the required medical certification.¹⁰⁹ Mr. Collins scheduled their next meeting for one week later, on January 6, 2006, to further discuss her doctors’ recommendations and documentation.¹¹⁰

50) Pursuant to the Union Contract, Article 32, § 2, First Transit is obligated to provide an employee with a medical problem up to **six (6) months** to address a medical

dated 5/5/05); *see also* **MSJ Exhibit O**, collective medical records provided to Mr. Collins by Ms. Magwood.

¹⁰⁶ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 25; **MSJ Exhibit C**, Magwood depo at 243:18-244:8.

¹⁰⁷ **MSJ Exhibit K**, Hopkins depo at 119:14-120:12; **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 25; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 3-11, 26-27.

¹⁰⁸ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 27; **MSJ Exhibit P**, FMLA application from Linda Magwood; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶12.

¹⁰⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 27; **MSJ Exhibit P**, FMLA application from Linda Magwood.

¹¹⁰ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 27; **MSJ Exhibit P**, FMLA application from Linda Magwood; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶12; **Def’s 9/11/09 Answer to Am. Compl.** ¶¶ 50, 85.

problem.¹¹¹

54) (in part)¹¹² On February 6, 2006, Ms. Magwood, accompanied by her union representative, Sandra Anderson, met with Mr. Collins to discuss her FMLA leave request and any possible limited duty assignment until treatment for her illnesses would enable her to safely return to her duties as a bus operator.¹¹³

55) Ms. Magwood explained to Mr. Collins that she had requested her medical records to support her FMLA leave request, but that she had not yet received them.¹¹⁴ Mr. Collins told Ms. Magwood to return to his office with the required medical records “in 48 hours.”¹¹⁵ At the time that he made this statement, it was approximately 10:30 a.m.¹¹⁶

67) (in part) First Transit ... did *not* notify the union that Ms. Magwood was in danger of being terminated or otherwise disciplined.¹¹⁷

72) On February 13, 2006, Mr. Collins told Ms. Magwood and her husband to get out of his office and that he had “a bus company to run” and did not “have time for sick people.”¹¹⁸ Mr. Collins further said that he thought that Ms. Magwood would be better off working somewhere else and told them to get out of his office.¹¹⁹

75) As of February, 2006, Ms. Magwood needed a temporary accommodation of a

¹¹¹ **MSJ Exhibit G**, Union contract, Article 32, § 2.

¹¹² Defendant acknowledges that Ms. Magwood and Ms. Anderson met with Mr. Collins to discuss her medical condition and capability to perform future work, but disputes that FMLA leave was to be discussed in the meeting.

¹¹³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 30; **MSJ Exhibit J**, Anderson Affidavit ¶¶ 2-5; **MSJ Exhibit D**, Collins depo at 49:9-76:24; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 14, 15; **Def’s 9/11/09 Answer to Am. Compl.** ¶ 40, 50.

¹¹⁴ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 31.

¹¹⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit J**, Anderson Affidavit ¶ 4; **MSJ Exhibit D**, Collins depo at 54:20-66:5, 11:8-13, 120:3-9.

¹¹⁶ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 32; **MSJ Exhibit J**, Anderson Affidavit ¶ 4.

¹¹⁷ **MSJ Exhibit J**, Anderson Affidavit ¶ 10.

¹¹⁸ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 40; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 23.

brief light duty assignment until further testing, and possibly, corrective surgery, could be performed, then medical leave, or Family and Medical Leave Act leave to obtain the necessary testing and treatment for her medical conditions.¹²⁰

II. Facts that, even if Defendant were Correct, cannot Justify Denying Summary Judgment to Plaintiff

5) Prior to her health problems, beginning to manifest themselves in mid-2005, Ms. Magwood was recognized as a dedicated employee whose performance was praised by management.¹²¹

5) First Transit Managers selected Ms. Magwood to perform special tasks and presented as a “model employee” or an example to other employees.¹²²

14) As of January 2006, Ms. Magwood had 60 days of personal leave accumulated before she requested FMLA leave in February of 2006.¹²³

18) (in part)¹²⁴ Ms. Magwood called in sick to dispatch and/or directly to Mr. Collins, on January ... 24th ... 2006, stating that she was unable to report to work as a bus operator on those days, due to illness.¹²⁵

31) Thyroid problems, particularly the incorrect emission of the hormone TSH, can also

¹¹⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 40; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶ 23.

¹²⁰ **MSJ Exhibit K**, Hopkins at 88:10-110:9; **MSJ Exhibit U**, Hopkin’s February 7, 2006 letter; **MSJ Exhibit W**, Hopkins’ February 13, 2006 letter; **MSJ Exhibit B**, Linda Magwood Affidavit at ¶¶ 18, 19, 20, 21, 22, 23, 24, 25, 26, 25, 26, 27, 28, 37, 46, 47, 48, 49, 50, 51, 52, 53, 56; **MSJ Exhibit K**, **Hines depo** at 62:12-71:15, 22:6-28:6, 36:2-37:21, 40:3-51:22.

¹²¹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 2.

¹²² **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 2.

¹²³ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 11.

¹²⁴ Defendant disputes that the dispatch log states that Ms. Magwood called in on January 24th, 2006, but admits that she called in on January 23rd, 25th and 26th, 2006. The Dispatch Log for January 24th, 2006 actually has a handwritten note, which is partially crossed out. The full original note reads “L. Magwood out did not call from yest;” but “did not call from yest” is crossed out, implying that it was crossed out because it was inaccurate, i.e., that she did call in that day.

¹²⁵ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 13; **MSJ Exhibit I**, First Transit Dispatch Records for January 23-30th, 2006; **MSJ Exhibit D**, Collins depo at 172:17-178:15.

affect brain function.¹²⁶

78) Ms. Magwood has received no further testing, diagnoses or treatment for her thyroid condition or sleep apnea since her Kaiser Permanente Health plan expired shortly after she was terminated by First Transit on February 8, 2006.¹²⁷ Her health has continued to deteriorate.¹²⁸ Ms. Magwood has suffered severe injuries, physically, financially, professionally and emotionally as a result of her termination from First Transit.¹²⁹

¹²⁶ **MSJ Exhibit L**, Hines depo at 45:11-46:7.

¹²⁷ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 52; **MSJ Exhibit J**, Hopkins depo at 116:16-117:12, **MSJ Exhibit K**, Hines depo at 71:13-15.

¹²⁸ **MSJ Exhibit B**, Linda Magwood Affidavit ¶ 56; **MSJ Exhibit X**, Thaddes Magwood Affidavit ¶¶ 25-28.

¹²⁹ **MSJ Exhibit B**, Linda Magwood Affidavit ¶¶ 56-59; **MSJ Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 25-28.