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.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Procedural Background

Plaintiff, Linda Magwood, was employed by First Transit, Inc., as a bus driver, from April 9, 2003 to February 8, 2006. She was terminated by First Transit only nine days after she applied for leave, under the *Family and Medical Leave Act* of 1993, 29 U.S.C. §2601 *et seq*. (the "FMLA") to address certain physical impairments that were affecting her major life activities, including, but not limited to, breathing, sleeping, seeing, driving, concentrating and working.

Ms. Magwood filed a charge with the *U.S. Equal Employment Opportunity Commission*, alleging violations of the *Americans with Disabilities Act* of 1990, 42 U.S.C. §12101 *et seq*., and the *FMLA.* This charge was deemed dual filed with the *Virginia Human Rights Commission*, under the *Virginia Human Rights Act* ("VHRA"), Va. Code Ann. § 2.2-3900(B)(1), pursuant to a work-sharing agreement between the two agencies.

After an investigation, the EEOC issued a *Determination*, finding that there was probable cause to believe that First Transit had discriminated against Ms. Magwood, in violation of the ADAAlthough the parties initially consented to conciliation, First Transit withdrew its consent

shortly thereafter. On November 4, 2008, the EEOC issued a Right to Sue letter to Ms. Magwood. On February 4, 2009, Ms. Magwood filed this lawsuit, alleging violations of the ADA, FMLA and Virginia Human Rights Law. Ms. Magwood's *Complaint* alleges both discrimination and retaliation for asserting her rights under both statutes.

Both parties conducted discovery, which was closed on August 14, 2009. On August 20, 2009, Defendant filed a *Motion to Amend its Answer to the Complaint*. On August 24, 2009, Plaintiff filed a *Motion to Amend her Complaint*. Both parties were permitted to file amended pleadings to conform to the evidence produced at trial, pursuant to Fed. R. Ev. 15. Trial is set for November 2, 2009. Granting summary judgment to Plaintiff would obviate the need for a trial on liability and would leave only the issue of damages for trial.

Statement of Undisputed Material Facts[1]

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.[2] 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.[3] 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.[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

[1] See also Plaintiff's attached *Statement of Undisputed Material Facts*, with numbered paragraphs and citations to the record, is attached separately, pursuant to Local Rule 56(B).
[2] Stipulated Facts ¶ 1.
[3] Stipulated Facts ¶ 2.
[4] **Exhibit B**, Linda Magwood Affidavit ¶ 2.

grandchildren; yet, she made time to obtain her GED and has taken some college courses.[5] She trained for and obtained her "CDL license" in 2003, to drive buses and immediately put her new license to work at First Transit.[6] 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.[7] 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 their basic living expenses.[8]

First Transit Managers selected Ms. Magwood to perform special tasks and presented as a "model employee" or an example to other employees.[9] In October of 2004, Ms. Magwood was honored as "Employee of the Month."[10] Ms. Magwood repeatedly received "Safety Bonuses" – a monetary award for safe driving.[11] She recruited other employees for First Transit.[12] Ms. Magwood received a $500.00 recruiting bonus.[13] She applied to, and was selected to, train new employees for First Transit.[14] 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.[15]

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

[6] **Exhibit B,** Linda Magwood Affidavit ¶ 2.

[7] **Exhibit B,** Linda Magwood Affidavit ¶¶ 2-8;

[8] **Exhibit C,** Magwood depo at 160:14-16; **Exhibit X**, Thaddeus Magwood Affidavit ¶ 5.

[9] **Exhibit B**, Linda Magwood Affidavit ¶ 2.

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

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

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

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

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

[15] **Exhibit B,** Linda Magwood Affidavit ¶ 7**; Exhibit** B, Linda Magwood Affidavit ¶ 7.

She 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.[16] First Transit selected Ms. Magwood to demonstrate new bus features for passengers with disabilities to elementary school children.[17] She volunteered her personal time to refurbish the employee lounge.[18]

Prior to her illness, Ms. Magwood earned attendance bonuses for good attendance.[19] She worked "overtime" on numerous occasions.[20] "Overtime" is defined as working more than 40 hours in one week.[21] As of January 2006, Ms. Magwood had 60 days of personal leave accumulated before she requested FMLA leave in February of 2006.[22] 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.[23] 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.[24]

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[16] **Exhibit B,** Linda Magwood Affidavit ¶ 9.

[17] **Exhibit B,** Linda Magwood Affidavit ¶ 10.

[18] **Exhibit JJ**, First Transit Letter of Appreciation for refurbishing lounge; **Exhibit B,** Linda Magwood Affidavit ¶ 8; **Def's 9/11/09 Answer to Am. Compl.** ¶ 19.

[19] **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.

[20] **Def's 9/11/09 Answer to Am. Compl.** ¶14; **Exhibit F**, paystubs of Linda Magwood showing overtime; **Exhibit B,** Linda Magwood Affidavit ¶10.

[21] **Exhibit B,** Linda Magwood Affidavit ¶10.

[22] **Exhibit B**, Linda Magwood Affidavit ¶11.

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

[24] **Exhibit G,** Collective Bargaining Agreement, Article 35 §7; **Exhibit H,** Dell depo at 29:18-30:10.

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.[25] She called in sick to "Dispatch" and/or directly to her supervisor, Timothy Collins, on January 23, 24, 25, and 26th, 2006.[26]

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.[27] Mr. Collins suggested that Ms. Magwood apply for Family and Medical Leave Act (FMLA) leave.[28] Ms. Magwood responded that she would immediately begin the application process.[29] First Transit's Employee Handbook, §7.01 states: "Employees must not operate a transit vehicle when their ability and alertness is impaired because of fatigue, illness or any other cause to create a safety hazard.[30] Mr. Collins therefore did not schedule Ms. Magwood for any bus operating duties from January 27th, 2006, until further notice, 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.[31]

Ms. Magwood initially believed she would be well enough to meet with Mr. Collins to

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

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

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

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

[29] **Exhibit B,** Linda Magwood Affidavit ¶ 18.

[30] **Exhibit Y,** First Transit Employee Handbook.

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.[32] 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.[33]

During at least the last month of her employment with First Transit, Ms. Magwood was a person with a serious illness.[34] She could not safely drive a bus with headaches, fatigue, dizziness, blurred vision and the inability to stay awake and alert.[35] Ms. Magwood had had numerous conversations with Mr. Collins about her illnesses[36] 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

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

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

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

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

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

[36] See **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; **Exhibit O**, collective medical records provided to Mr. Collins by Ms. Magwood. *See also* Mr. Collins' testimony, acknowledging that such conversations took place. **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. **Exhibit E**, Collins depo at 127:128:4.

(including asthma, allergies and muscle pain).[37] Her symptoms included severe headaches, dizziness, fatigue, blurred vision, weakness, inability to sleep at night, episodes in which she stops breathing at night, choking during sleep[38] and irregular menstruation.[39]

Dr. Hines, an endocrinologist with Kaiser Permanente, saw Ms. Magwood as a referral from Dr. Hopkins, for testing and examination for suspected hyperthyroidism.[40] Ms. Magwood underwent the ultrasound test that Dr. Hines prescribed to further diagnose her thyroid condition.[41] This ultrasound confirmed that she suffered from a thyroid goiter, including nodules (tumors) on her thyroid gland.[42] Thyroid problems, particularly the incorrect emission of the hormone TSH, can also affect brain function.[43] 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.[44] Due to some similar symptoms, it can be confused with allergies or hay fever.[45] Although Ms. Magwood's TSH tests results for January 18, 2006 indicated normal levels the hormone, and thus, are

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[37] **Exhibit EE,** *Def's EEOC Position Statement*, 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, dated 5/5/05); *see also* **Exhibit O**, collective medical records provided to Mr. Collins by Ms. Magwood.

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

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

[40] **Exhibit K,** Hines depo at 16:20-18:1.

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

[42] **Exhibit K,** Hines depo at 63:5-18; **Exhibit J,** Hopkins depo at 109:13-22.

[43] **Exhibit L**, Hines depo at 45:11-46:7.

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

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

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.[46] Sleep apnea is often associated with obesity; however, Ms. Magwood weighed only 178 pounds, standing approximately 5'6-5-7" tall.[47] She was therefore only "mildly overweight," particularly for a woman in her late forties.[48]

Remedies for a thyroid goiter include surgery or radioactive iodine therapy, which destroys the thyroid or the thyroid nodules radioactively.[49] There are two types of surgery for hyperthyroidism.[50] The first type of surgery is to remove the entire thyroid gland.[51] 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.[52] Patients should stay out of work for approximately two weeks after this surgery.[53] The second type of remedial surgery is to remove only the nodules on the thyroid gland, rather than the entire gland.[54] 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.[55] 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.[56]

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[46] **Exhibit K,** Hines depo at 19:16-22:1; **Exhibit J,** Hopkins depo at 121:20-125:19.
[47] **Exhibit J,** Hopkins depo at 126:17-129:1.
[48] **Exhibit J,** Hopkins depo at 129:1.
[49] **Exhibit K,** Hines depo at 24:21-27:21.
[50] **Exhibit K,** Hines depo at 27:11-21.
[51] **Exhibit K,** Hines depo at 27:11-15; 44:18-45:8.
[52] **Exhibit K,** Hines depo at 45:12-46:16.
[53] **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).
[54] **Exhibit K,** Hines depo at 27:11-21; 46:17-47:17.
[55] **Exhibit K,** Hines depo at 47:6-17.
[56] **Exhibit K,** Hines depo at 26:1-27:10; 44:1-16.

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.

Dr. Hopkins is employed by Ms. Magwood's then health care provider, Kaiser Permanente.[57] 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 recorded his "working," "presumptive" and "suspected" diagnoses under the heading of "diagnosis."[58] Ms. Magwood read these forms 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.

On Monday, January 30, 2006, Ms. Magwood's husband drove her to First Transit where she obtained an FMLA leave application from the Administration Office and showed it to Mr. Collins, telling him that she would immediately take it to her doctor to get the required medical certification.[59] Mr. Collins scheduled their next meeting for one week later, on January 6, 2006, to further discuss her doctors' recommendations and documentation.[60]

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

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

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

[59] **Exhibit B,** Linda Magwood Affidavit ¶ 27**; Exhibit P**, FMLA application from Linda Magwood; **Exhibit X**, Thaddeus Magwood Affidavit ¶12.

his/her FMLA leave request.[61] 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.[62]

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.[63] AFSCME represented employees of First Transit, which included Ms. Magwood, for the entire duration of her employment.[64] 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 problem.[65] Ms. Magwood had not exceeded six months of leave to address any disability at the time of her termination.[66]

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.[67] On January 31, 2006, Ms. Magwood also saw Dr. Daniela Hines, an endocrinologist, to further diagnose and treat the condition which her primary care

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

[61]**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).

[62] **Exhibit Q,** Baccille depo at 41:10-17, 42:12-44:7.

[63] **Exhibit G,** union contract.

[64] **Exhibit B,** Linda Magwood Affidavit ¶ 55.

[65] **Exhibit G,** Union contract, Article 32, § 2.

[66] **Def's 9/11/09 Answer to Am. Compl.** ¶ 60; **Exhibit B,** Linda Magwood Affidavit ¶ 45.

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

physician, Dr. Hopkins, had preliminarily diagnosed as hyperthyroidism.[68]

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.[69] 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.[70] Mr. Collins told Ms. Magwood to return to his office with the required medical records "in 48 hours."[71] At the time that he made this statement, it was 10:30 a.m.[72] Ms. Anderson took notes during this meeting.[73] Her notes reflect that Mr. Collins scheduled the next meeting for 10:30 a.m., on February 8, 2008.[74] 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.[75]

On February 7, 2006, Ms. Magwood obtained the required medical certification for FMLA leave from her primary care doctor, Dr. Hopkins.[76] Dr. Hopkins also wrote a letter for Ms. Magwood to provide to her employer, stating that, due to symptoms that posed a safety risk,

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[68] **Exhibit S,** medical records documenting Ms. Magwood's January 31, 2006 assessment by Dr. Hines.

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

[70] **Exhibit B,** Linda Magwood Affidavit ¶ 31.

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

[72] **Exhibit B,** Linda Magwood Affidavit ¶ 32**; Exhibit J,** Anderson Affidavit ¶ 4.

[73] **Exhibit T,** notes of Sandra Anderson; **Exhibit B,** Linda Magwood Affidavit ¶ 32**; Exhibit U**, Anderson Affidavit ¶2.

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

[75] **Exhibit B,** Linda Magwood Affidavit ¶ 32**; Exhibit J,** Anderson Affidavit ¶ 3.

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

Ms. Magwood should not drive a bus until her condition was properly diagnosed and treated.[77] 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.[78] She was prepared to discuss her medical conditions, physical symptoms and need for accommodation.[79] Ms. Magwood brought with her the required medical certification for her FMLA application, signed by Dr. Hopkins.[80]

On February 8, 2006, at approximately 10:30 a.m., Mr. Collins refused to look at or accept the documentation that she offered him;[81] instead, he handed Ms. Magwood letter terminating her employment with First Transit – effective immediately -- for alleging "job abandonment. [82] He began drafting this letter no later than 10:15 or 10:20 a.m.[83] and may even have drafted it prior to 10:00 a.m.[84]

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.[85]

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[77] **Exhibit U,** February 7, 2006 letter from Dr. Hopkins.

[78] **Exhibit J,** Anderson Affidavit ¶¶ 6-7; **Exhibit B,** Linda Magwood Affidavit ¶ 34.

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

[80] **Exhibit U,** February 7, 2006 letter from Dr. Hopkins; **Exhibit B,** Linda Magwood Affidavit ¶ 34**.**

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

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

[83] **Exhibit D,** Collins depo at 124:21-125:14, 165:11-13**.**

[84] **Exhibit D,** Collins depo at 124:21-125:14, 165:11-13**.**

[85] **Exhibit V,** First Transit's February 8, 2006 letter to Linda Magwood, signed by Timothy Collins.

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 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.

Ms. Magwood was not suspended prior to termination.[86] 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,[87] but it did *not* notify the union that Ms. Magwood was in danger of being terminated or otherwise disciplined.[88]

Ms. Magwood returned to Mr. Collins' office, on February 13, 2006, with her husband, Thaddeus Magwood.[89] Earlier that day, Dr. Hopkins had 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.[90] 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

[86] **Exhibit B,** Linda Magwood Affidavit ¶ 43**; Exhibit D,** Collins depo at 68:12-14.
[87] **Exhibit J,** Anderson Affidavit ¶ 10.
[88] **Exhibit J,** Anderson Affidavit ¶ 10.
[89] **Exhibit B,** Linda Magwood Affidavit ¶ 37; **Exhibit D,** Collins depo at 155:7-156:15; **Exhibit X,** Thaddeus Magwood Affidavit ¶¶ 22, 23.
[90] **Exhibit W,** Dr. Hopkins' February 13, 2006 letter.

revoked.[91] Mr. Collins again refused to accept any documents from Ms. Magwood.[92] He also refused to reconsider her termination or to consider re-hiring her.[93]

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."[94] 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.[95] 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[96] and never even began to process her application for FMLA leave.[97]

As of February, 2006, Ms. Magwood needed a temporary accommodation of a 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.[98] First Transit did not offer Ms. Magwood any accommodation for these medical conditions,[99] in violation of both the FMLA and the ADA. Ms. Magwood was awarded unemployment compensation by the Virginia Employment

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

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

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

[94] **Exhibit B,** Linda Magwood Affidavit ¶ 40; **Exhibit X,** Thaddeus Magwood Affidavit ¶ 23.

[95] **Exhibit B,** Linda Magwood Affidavit ¶ 40; **Exhibit X,** Thaddeus Magwood Affidavit ¶ 23.

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

[97] **Exhibit B,** Linda Magwood Affidavit ¶ 41.

[98] **Exhibit K,** Hopkins at 88:10-110:9; **Exhibit U,** Hopkin's February 7, 2006 letter; **Exhibit W**, Hopkins' February 13, 2006 letter; **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; **Exhibit K, Hines depo** at 62:12-71:15, 22:6-28:6, 36:2-37:21, 40:3-51:22.

Commission, based on a finding that she was not fired for "cause," "job abandonment" or excessive absences.[100] First Transit made no claims of misconduct or "cause" for Ms. Magwood's termination to the Virginia Employment Commission.

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.[101] Her health has continued to deteriorate.[102] Ms. Magwood has suffered severe injuries, physically, financially, professionally and emotionally as a result of her termination from First Transit.[103]

ARGUMENT

I. Standard of Review for Motion for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Pursuant to Rule 56(c), a party is entitled to Summary Judgment where "the evidence in the record shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

Local Rule 56(B) specifically places the burden on the party opposing the motion to cite evidence of record to dispute each material fact asserted by the moving party:

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[99] **Exhibit B,** Linda Magwood Affidavit ¶¶¶ 18, 19, 20, 21, 22, 23, 24, 25, 26, 25, 26, 27, 28, 37, 46, 47, 48, 49, 50, 51, 52, 53, 56.

[100] **Exhibit Z,** Virginia Employment Commission Determination awarding Ms. Magwood unemployment benefits.

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

[102] **Exhibit B**, Linda Magwood Affidavit ¶ 56; **Exhibit X**, Thaddes Magwood Affidavit ¶¶ 25-28.

> In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

To withstand a motion for summary judgment, the non-moving party's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The non-moving party is required to provide evidence that would permit a reasonable jury to find in his/her/its favor. If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Summary judgment should not be imposed to deny a party an opportunity to present a meritorious claim or defense on his/her "day in court;"[104] however, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327. The moving party is entitled to summary judgment where "the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

A court may grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "Summary judgment is appropriate [w]here the record taken

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[103] **Exhibit B**, Linda Magwood Affidavit ¶ ¶ 56-59; **Exhibit X**, Thaddes Magwood Affidavit ¶ ¶ 25-28.

as a whole could not lead a rational trier of fact to find for the nonmoving party[because then] there is no genuine issue for trial." (Internal quotation marks omitted). *Beale v. Burlington Coat Factory*, 36 F. Supp. 2d 702, 703 (E.D. Va. 1999), citing *Matsushita Electric Ind., Co.* v. *Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *First National Bank v. Cities Services Co.*, 391 U.S. 253, 289 (1968).

II. Plaintiff is Entitled to Summary on her FMLA Claim

A. The Elements of an FMLA Claim

1. The Elements of an FMLA Interference with Entitlement Claim

The Family and Medical Leave Act entitles an employee to a maximum of twelve weeks of unpaid leave during any twelve month period where the employee has a "serious health condition" that renders the employee unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(D). The Act defines a "serious medical condition" as "illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital…or (B) continued treatment by a health care provider. 29 C.F.R. § 2611(11). EEOC Regulations define "a chronic serious health condition" as one that requires periodic visits to a health care provider for treatment, continues over an extended period of time and causes episodic rather than a continuing period of incapacity." 29 C.F.R. § 825.114(a)(2)(iii)(A), (B) and (C). See also *Barr v. New York City Transit Authority*, 20002 WL 257823 (E.D.N.Y. 2002), *citing Barnett v. Reeve Smelting and Refining Corp.*, 67 F. Supp. 2d 378, 385 (S.D.N.Y. 1999).

The FMLA also permits the employee to take leave intermittently or on a reduced schedule when medically necessary. § 2612(b). Under the FMLA, it is unlawful for an employer to interfere with an employee's attempt to exercise the rights established by the FMLA. §

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[104] *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979).

2615(a). An employee does not need to be aware of her rights in order to invoke them; "[t]he employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed." 29 C.F.R. § 825.303(b).

In order to establish an FMLA interference claim, a plaintiff must demonstrate that: (1) she was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee FMLA benefits to which she was entitled. *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 *(6th Cir. 2005)*." *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549, 556 (6th Cir.2006). Accord, *Hoge v. Honda of Am. Mfg. Inc*., 384 F.3d 238, 244 (6th Cir. 2004). Under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The FMLA defines the term "serious health condition" to mean "an illness, injury, impairment, or physical or mental condition that involves--(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The FMLA prohibits an employer from interfering with the exercise of, or the attempted exercise of, any right provided under that subchapter. 29 U.S.C. § 2615(a)(1).

> ... an employee must provide certification ... within the time frame requested by the employer (which must allow at least 15 days after the employer's request) or as soon as reasonably possible under the particular facts and circumstances.

29 C.F.R. § 825.311(b).

First Transit had *no right* to set a deadline of February 8, 2006, *at any time of day*, for Ms. Magwood to submit her FMLA medical certification. First Transit was

absolutely obligated to accept her medical certification on February 8, 2006 and to process her FMLA application. First Transit flatly refused to do so. Mr. Collins' admission and the record as a whole *requires* summary judgment for Ms. Magwood on her FMLA claim.

2. The Elements of an FMLA Retaliation Claim

To establish a prima facie FMLA retaliation claim, the plaintiff must show that (1) s/he availed himself/herself of a protected right under the FMLA; (2) s/he was adversely affected by an employment decision; and (3) there is a causal connection between the two actions. *Morgan v. Hilti*, 108 F.3d 1319, 1325 (10th Cir.1997). Once a prima facie case of discrimination is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. If the defendant can express a legitimate nondiscriminatory reason for the termination, the burden then shifts back to the plaintiff to produce evidence that the reason articulated by the employer is a pretext for the retaliatory reason. *Id.*

B. The Undisputed Facts Meet the Elements of an FMLA Claim

1. Ms. Magwood has Proven a *Per Se* Violation of the FMLA with Respect to her Entitlement Claim

On January 30, 2006, Plaintiff, Linda Magwood, requested Family and Medical Leave Act (FMLA) leave to address physical impairments that had been preliminarily diagnosed as hyperthyroidism and sleep apnea. Only *nine days later*, Defendant, First Transit, Inc. terminated Ms. Magwood from her position of nearly three years, as a bus driver. First Transit did not even process Ms. Magwood's FMLA application -- nor would it even *accept* the medical certification that she offered, on February 8, 2008, in support of her FMLA application -- although the FMLA

specifically allows the employee up to fifteen (15) days from the date of the application to provide such certification.

Ms. Magwood's medical records clearly demonstrate that she qualified for FMLA leave because she suffered from "a chronic serious health condition." The records demonstrate that she required periodic visits to a health care provider for treatment that continued over an extended period of time and caused episodic incapacity. Her medical records reflect complaints of severe, chronic headaches, fatigue, inability to sleep at night and choking in her sleep. As these symptoms emerged and increased, there were days in which she was incapacitated, but other days when she was able to work.

Ms. Magwood's medical records also demonstrate that her incapacitation was unpredictable in advance, so that she could not be relied upon to perform a job that required a definitive schedule – unless and until she obtained treatment to correct the condition(s). Dr. Hopkins' February 8, 2006 FMLA certification specifically states that Ms. Magwood is not "currently incapacitated." Dr. Hopkins explained that he meant that Ms. Magwood was not completely incapacitated, but was capable of performing some work, although not driving. Based on this undisputed evidence of record, a jury would be compelled to conclude that Ms. Magwood, was a person with a "serious health condition" that prevented her from performing her job as a bus driver; accordingly, she was eligible, under the FMLA, to take leave without paying a penalty for it – and certainly not the ultimate penalty of losing both her ability to earn a livelihood and to maintain her health care benefits.

Defendant committed four acts constituting violations of the FMLA by: 1) refusing to accept Ms. Magwood's medical certification to complete her FMLA application, within the 15 days mandated by the statute; 2) refusing to process her FMLA application; 3) refusing to grant

her FMLA leave; and 4) terminating her in response to her FMLA application.

In a case with very similar facts, *Cooper v. Fulton County, Ga*., 458 F.3d 1282, 1285 (11th Cir. 2006), the Eleventh Circuit affirmed the trial court's grant of summary judgment to a plaintiff employee where the employer-county terminating an employee applying for FMLA leave for failing to provide medical certification for an absence within *six days* of the employer's written request.[105] The Appellate Court explained its reasoning as follows.

> Employers may require that employees furnish medical certification to verify eligibility for leave. 29 U.S.C. § 2613(a). Employers must provide notice of such a requirement, and of the anticipated consequences for failing to comply, every time an employee requests FMLA leave. *See* 29 C.F.R. § 825.305(d). This notice must be written unless the employee has, within the preceding six months, been given the required written notice regarding the FMLA and the employer's specific FMLA policies. *Id.* at § 825.301(c)(2)(ii). Otherwise, subsequent oral notification is sufficient. *Id.* When the leave is unforeseeable, employers must allow employees at least fifteen (15) calendar days to comply with a request for certification. *Id.* at § 825.305(b).

Even First Transit's *own* corporate policy and procedures, an employing requesting FMLA leave is entitled to fifteen (15) days from the date of his/her FMLA application, to submit medical certification supporting the application;[106] therefore, Ms. Magwood should have been permitted, at least until *February 9, 2006*, to provide the medical certification, even if the date of her FMLA application is considered January 25, 2006, when she made the request orally during her telephone conversation with Mr. Collins.

If the application date is considered from the date that Ms. Magwood obtained the FMLA application, which was January 30, 2006, then she was entitled to take until February 13, 2006 to submit the medical certification. Ms. Magwood's supervisor, Mr. Collins, blatantly violated

[105] Following a bench trial solely on the issue of damages, the district court awarded Cooper: 1)$248,828.41 in back pay; 2) $58,031.59 in pension contributions; and 3)liquidated damages.

[106] **Exhibit Q,** Baccille depo at 41:10-17, 42:12-44:7.

First Transit's own FMLA policy -- and its managers above Mr. Collins *ratified his decision rather than correct it*.

An employer is unquestionably liable for its *per se* violations of an employee's substantive FMLA rights. *Arban v. West Publishing Corp*., 345 F. 3d 390 (6th Cir. 2003).

> The issue is simply whether the employer provided its employee the entitlements set forth in the FMLA- for example, a twelve-week leave or reinstatement after taking a medical leave. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer."

Arban, 345 F. 3d at 401, quoting *Hodgens v. General Dynamics Corp.,* 144 F.3d 151, 159 (1st Cir. 1998). Ms. Magwood is entitled to summary judgment for First Transit's *per se* violation of the FMLA.

2. <u>Ms. Magwood has Proven Retaliation under the FMLA</u>

To prevail on a retaliation claim under the Family and Medical Leave Act, a plaintiff must demonstrate that: 1) she availed herself of a protected right; 2) she suffered an adverse employment decision; and 3) there is a causal connection between the protected activity and the adverse action. *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000); *Gleklen v. Democratic Congressional Campaign Comm., Inc.*, 199 F.3d 1365, 138 (D.C. Cir. 2000).

It is undisputed that Ms. Magwood availed herself of a protected right, on January 25, 2006, when she and Mr. Collins discussed FMLA leave and she told him that she would apply for it. She further pursued this protected right, on January 30, 2006, when she met with Mr. Collins and then submitted her FMLA form to First Transit's Administrative Office. She met with Mr. Collins on February 6, 2006, per his request, to explain the steps she had taken to obtain her medical records and her doctor's certification to support her FMLA leave application. She explained that she had ordered her medical records and was told that it would take 7-10 days

(from January 30, 2006) for her to receive them. Ten days from January 30, 2006, would have been *February 10, 2006*.

Despite specific notice that Kaiser could well take up to *February 10, 2006*, to produce the records, Mr. Collins required Ms. Magwood to produce them on *February 8, 2006*, at the beginning of the office workday – essentially "setting her up" not to meet the deadline. While still sick, Ms. Magwood would somehow have to get Kaiser to speed up its own process and provide her with the records the very next day, February 7, 2006, so that she would have them to present in the morning, at 10:30 a.m. Because Ms. Magwood and her husband, Thaddeus Magwood, clearly understood the importance of providing this documentation, as requested, Mr. Magwood drove his sick wife back to Kaiser and joined her in pleading for an audience with Dr. Hopkins directly, to ask him to certify the FMLA form right away.[107] When she actually *did* meet this unreasonable and illegal deadline, obtaining Dr. Hopkins' certification on February 7, 2006, Mr. Collins had a termination letter waiting for her – as if it had been a pre-determined and foregone conclusion that he would fire her that morning. Mr. Collins refused to accept the medical documentation that Ms. Magwood and her husband had worked so hard to secure.

It is undisputed that Mr. Collins made the appointment with Ms. Magwood and her union representative, Ms. Anderson, for February 8, 2006, for the express purpose of reviewing her medical documentation to determine what type of FMLA leave and/or other temporary accommodation she might need to enable her to once again, perform her job as a bus operator; yet, he freely admitted that *he refused to accept it when she offered it to him*. Instead, he *fired* her – on the spot, with a letter he had waiting for her before she arrived at 10:30.

First Transit attempts to justify Mr. Collins' refusal to accept her medical certification on

[107] **Exhibit X**, Thaddeus Magwood Affidavit ¶¶ 14-17.

February 8, 2006 and terminating her by claiming that she was half an hour late for this meeting; however, there simply is no justification and no reasonable juror could so find. First and foremost, Mr. Collins had no right to set a deadline of February 8, 2006, *at any time of day*, for Ms. Magwood to submit her FMLA medical certification. The FMLA itself expressly provides that the employee is allowed fifteen (15) days from the date of his/her initial FMLA application to supplement it with medical certification. Ms. Magwood should have been permitted, at least until *February 9, 2006*, to provide the medical certification, even if the date of her FMLA application is considered January 25, 2006, when she made the request orally during her telephone conversation with Mr. Collins. If the application date is considered from the date that First Transit provided her with an FMLA form, which was January 30, 2006, then she was entitled to take until *February 13, 2006* to submit the medical certification. In any case, however, First Transit was absolutely obligated to accept her medical certification on February 8, 2006 and to process her FMLA application. First Transit flatly refused to do so.

Had Ms. Magwood not requested the FMLA leave, there would have been no meeting, no deadline for medical documents and no question about whether "in 48 hours" meant 10:00 a.m. two days later or 10:30 a.m. two days later. These roadblocks, simultaneous with, set precisely in the context of – and only because of -- Ms. Magwood's FMLA leave request, demonstrates the causal connection between her FMLA request and her termination.

These undisputed facts constitute a *per se* violation of the FMLA -- both as a refusal to provide FMLA leave a qualified person *and* as retaliation against an employee for requesting FMLA leave. These facts compel summary judgment for Ms. Magwood's FMLA claims, both as a refusal to provide FMLA leave a qualified person *and* as retaliation against an employee for

requesting FMLA leave.[108]

III. Summary Judgment Should be Granted to Plaintiff on her ADA Claim

A. The Elements of an ADA Claim

The *Americans with Disabilities Act* (ADA), 42 U.S.C. §12112(a), prohibits discrimination against qualified employees with a disability. A person may assert protection under the ADA based on three alternative theories: A) the person suffers from a physical impairment that substantially limits one or more of his/her major life activities; B) the person has a record of such impairment; or (C) the person is "regarded as" having a disability. 42 U.S.C. §12102(2).

B. Ms. Magwood is Entitled to Summary Judgment on her ADA Claim

1. Ms. Magwood is a Person with a Physical Impairment that Substantially Limits a Major Life Activity, pursuant to 42 U.S.C. §12102(2)(A)

Based on the undisputed evidence of record, a jury would be compelled to conclude that: 1) Ms. Magwood is a qualified person with a disability, as defined by the ADA; and 2) that she was terminated because of her disability. Ms. Magwood suffers from one or more physical impairments that substantially limits one or more major life activities, including breathing, seeing, sleeping and working. Her supervisor, Mr. Collins, regarded her as a person with a disability.

> It is common knowledge that the thyroid gland is an integral part of the endocrine system, as can be verified by turning to an ordinary dictionary…. (defining the thyroid gland as "a two-lobed endocrine gland, located at the base of the neck that secretes two hormones that regulate the rate of metabolism, growth and

[108] Summary judgment for Plaintiff on liability on her FMLA and ADA claims would leave the issue of damages for trial (in addition to a trial on her remaining claim of intentional infliction of emotional distress). Section 2617(a)(1) provides that an employer who violates § 2615 shall be liable for lost wages and other employment benefits, out of pocket expenses, interest, liquidated damages, reinstatement and any other equitable or monetary relief as may be appropriate.

> development". Therefore, disorders of the thyroid gland fit squarely within the meaning of impairment, as that term is defined in the applicable federal regulations.

Harris v. H & W Contracting Co., 102 F.3d 516, 520 (11th Cir. 1997), discussing EEOC Regulation 29 CFR § 1630.2(h)(1), defining impairment to include "any physiological disorder … affecting one or more of the following body systems: neurological… and endocrine." Courts have addressed thyroid problems, recognizing that they are physical impairments, within the meaning of the ADA. In *Larson v. Endodontic and Periodontic Assoc., Ltd.*, 2006 WL 2038600 at 1-2 (N.D. Ill. 2006), the Court discussed the similarities in symptoms and treatment between Graves disease and hyperthyroidism, particularly when hyperthyroidism is accompanied, or caused by, a multi-nodular goiter, as is the case with Ms. Magwood. 2006 WL 2038600 at 1-2. Doctors in *Larson* explained that radiation treatment to remove the goiter would require that the plaintiff take three weeks off from work. *Id.*

The Court in *Barr* specifically recognized that symptoms of Graves disease "consists of hyperthyroidism, but is characterized by one or more of the following: goiter, exophthalmos, and pretibial myxedema." 20002 WL 257823 at 2. *Barr* listed symptoms of Graves disease that included fatigue, insomnia, weakness, "eye signs," and "warm, fine, moist skin." *Id. See also Harris*, 102 F.3d at 522. At its worst, hyperthyroidism can be fatal. "Thyroid storm" results from untreated thyrotoxicosis and is a life threatening emergency requiring immediate emergency medical treatment. 102 F.3d at 521. A thyroid storm is characterized by fever, marked weakness and muscle wasting, extreme restlessness, emotional swings, confusion, psychosis, or even coma. *Id.*

The Court in *Rohr v. Designed Telecommunications, Inc.*, 2009 WL 891739 at 2, 5 (S.D. Ohio 2009), a disability benefits case, listed the symptoms of a plaintiff with Graves disease as

having symptoms including eye problems, vision impairment, fatigue, chronic headaches, muscle atrophy, muscle pain, back pain, neck pain and confusion. These are the same debilitating symptoms that Ms. Magwood repeatedly reported to her husband, doctors and supervisors. *With treatment*, however, thyroid conditions need not limit a person's major life activities.

Ms. Magwood is a *qualified* person with a disability, since she can perform the essential functions of her job with a reasonable accommodation. She was a bus operator who functioned at a high level, as a "model employee" for at least two years, prior to her illness. Ms. Magwood was selected as "Employee of the Month," trained other drivers, drove Board members to meetings, was commended for her volunteer work refurbishing the employee lounge, worked overtime, earned attendance bonuses and recruited other drivers for First Transit, for which she received additional bonus.

In mid-2005, however, Ms. Magwood began to feel fatigued and suffer from recurring headaches. She found herself unable to sleep any more than four hours per night, for months at a time. At first, she attributed it to stress and simple aging; however, the symptoms became more pronounced as the months progressed. She experienced choking in the night and woke unable to breathe. Her husband told her that she was falling asleep and snoring as she sat next to him in the daytime, but she was unaware of it herself. Her primary physician, Dr. Hopkins, told her that she had the symptoms of hyperthyroidism and sleep apnea. At least for some period of time, Dr. Hopkins also suspected that Ms. Magwood had "Graves disease." Dr. Hopkins provided Ms. Magwood with printouts summarizing these conditions. She obtained copies of her own medical records, trying to understand these conditions.

Ms. Magwood's symptoms included severe headaches, dizziness, fatigue, blurred vision, weakness, inability to sleep at night, episodes in which she stops breathing at night,

choking during sleep and irregular menstruation. Dr. Hines also testified that thyroid problems, particularly the incorrect emission of the hormone TSH, affect brain function. 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. *Target Stores v. Labor and Industry Review Com'n*, 217 Wis.2d 1, 576 N.W.2d 545, 547 (1998). Due to some similar symptoms, it can initially be confused with allergies or hay fever. *Id*.

The major life activities substantially limited by these symptoms include sleeping, breathing, concentrating, driving and being able to stay awake and alert to work at any job that requires focused concentration. The Fourth Circuit has held that *sleeping* is a major life activity with in the meaning of the ADA. *E.E.O.C. v. Sara Lee Corp*., 237 F.3d 349 (4th Cir. 2001). *See also Desmond v. Mukasey*, 530 F.3d 944, 954 (D.C. Cir. 2008); *Harding v. Cianbro* Corp. 436 F. Supp.2d 153, 175-176 (D. Me. 2006).

An employee's own testimony suffices to allow a jury to conclude that his/her inability to sleep more than 2-4 hours of sleep per night, for a period of months, substantially limits his/her major life activities. *Desmond*, 530 F.3d at 954; *Harding v. Cianbro* Corp. 436 F. Supp. 2d at 175-176. In the present case, however, Ms. Magwood's testimony regarding her symptoms are corroborated by her husband of more than thirty years. In addition, they are documented by her primary physician as progressing over a period of more than a year. Preliminary medical examinations and tests further indicated that she had these conditions.

The ADA focuses on symptoms, rather than precise diagnoses, and their affect on "major life activities," which include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." EEOC Regulation 29 C.F.R. §1630.2(i). The statute does not exclude persons from coverage simply because

doctors have not specifically identified the medical condition that is affecting the person's major life activities. The employer's duty to accommodate a disability comes long before there is a precise medical diagnosis. *Target Stores,* 217 Wis. 2d at 14.

The employer's obligation to provide reasonable accommodations arises in light of the information the employer has, regardless of whether that information would constitute proof of a disability as a matter of law. When an employer becomes *aware* of a disability and knows what type of accommodation the employee requires, the employer is required to provide an accommodation for the disability, even in the absence of a specific request from the employee. EEOC Regulations, 29 C.F.R. §1630.2(O)(3) (employer's are to take seriously the need for their duties in an interactive process); *Jones v. United Parcel Service*, 514 F.3d 402, 407 (3d Cir. 2002); *Taylor v. Phoenixville School District*, 184 F.3d 296, 313 (3d Cir. 1999); *Deane v. Pocono Medical Center*, 142 F.3d 138, 149 (3d Cir. 1998).

Ms. Magwood's medical conditions, whether definitively diagnoses or not, caused her to experience headaches, fatigue, dizziness and blurred vision, which interfered with her ability to perform her daily life activities, including, but not limited to, sleeping, breathing, driving, seeing, staying awake and working;[109] accordingly, she is a person with a disability under the ADA.

2. Precedent and ADA Policy

An employee should not be punished for not having a definitive diagnosis for his/her illness. *Hodgens v. General Dynamics Corp*., 144 F.3d 151, 163 (1st Cir. 1998):

[109] **Exhibit K,** Hopkins' February 7, 2006 letter; **Exhibit K,** Hopkins' February 13, 2006 letter; **Exhibit J,** Hopkins depo at 88:10-99:1; **Exhibit B,** Linda Magwood Affidavit ¶ 55**; Exhibit O,** Excerpted documents from medical records of Linda Magwood.

> … Congress intended to include visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined. The Labor Department's final regulations support this interpretation: "Treatment for purposes of paragraph (a) of this section [defining 'serious health condition' in terms of 'treatment' received, inter alia] includes (but is not limited to) examinations *to determine if a serious health condition exists* and evaluations of the condition." 29 C.F.R. § 825.114(b) (1997) (emphasis added). Thus, as long as Hodgens satisfied, at some point in time, the "more than three consecutive days" requirement for establishing a serious health condition, his intermittent absences for less than four days (even for portions of one day) were protected under the FMLA if they were necessary "to determine if a serious health condition exists," *id.*, or to treat such a condition. This is true even if the intermittent absences occurred before the consecutive absences.

144 F.3d at 163.

In *Larson*, the plaintiff, misunderstanding her own diagnosis, told her employer that she had Graves disease, when in fact, she had "MNG," which is hyperthyroidism anda toxic mult0nodular goiter. 2006 WL 2038600 at 1-2, 5. The Court flatly rejected the Defendant's argument that the plaintiff did not put her employer on sufficiently detailed notice of her condition to alert it that she might need leave because she misstated her diagnosis. 2006 WL 2038600 at 5-6. The Court held that the plaintiff's explanation that she had a thyroid problem that would require her to be away from work for three to six weeks was sufficient to entitle her to FMLA leave and bring her within the protection of the Act. 2006 WL 2038600 at 5. The Court held that the plaintiff is not expected to be a "medical expert." 2006 WL 2038600 at 6. The Court also found it irrelevant that the plaintiff actually elected not to have the radiation treatment that she discussed with her supervisor. *Id*.

Incapacitating or debilitating symptoms may result from one medical condition or from several different, unrelated illnesses. *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997). The precedent that would be set by a holding sought by the Defendant would also affect legal questions about ADA coverage where a person has been misdiagnosed with a particular

condition, when, in fact, the correct diagnosis is another medical condition. Certainly, the ADA was not intended to punish persons with disabilities for their doctors' misdiagnosis or inability to adequately name of identify a particular disease.

If Defendant can prevail in against an ADA claim because her suspected conditions of "hyperthyroidism," and "sleep apnea" were not confirmed by needed tests, it will set precedent that will permit employers to terminate persons with disabilities – while they are still in the process of taking tests to obtain a diagnosis and obtain treatment. Once their employment is terminated, they may never be able to obtain the required tests or treatment because their health insurance is contingent upon their employment. Precedent that allows an employer escape liability under the ADA because there is no confirmed diagnosis – when the diagnosis is unavailable to the employee because the employer has removed his/her health insurance, flies in the face of the ADA and thwarts the legislative intent to protect persons with disabilities from employment discrimination.

3. **Ms. Magwood is Covered by the ADA because she was "Regarded as" a Person with a Physical Impairment that Substantially Limits a Major Life Activity, under 42 U.S.C. §12102(2)(C)**

A second means of demonstrating protection under the ADA is, if an individual is regarded as having a substantially limiting impairment. 42 U.S.C. §12102(C). There is no intrinsic contradiction in claiming both a disability, and being regarded as disabled. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180**,** 189 (3rd Cir. 1999). Courts have long issued inconsistent decisions on whether a particular physical impairment is a disability within the legal meaning of the ADA.[110] The legal analysis involves not only whether the disability is a physical

[110] EEOC Regulation, 29 CFR app. § 1630.2(j). *See also* Dawn V. Martin, "*911: How Will Police and Fire Departments Respond to Public Safety Needs and The Americans with Disabilities Act?*" 2 N.Y.U. J. Leg. & Pol'y 37, 55-57 (1998-1999),

impairment, but also an individualized, case by case assessment of whether the particular plaintiff at issue is substantially limited by this impairment.[111] These considerations include questions of whether the physical impairment, such as diabetes, is controlled by medication such that the condition does not substantially limit the plaintiff's daily activities.[112] The analysis can also depend upon whether the plaintiff's condition excludes him/her from the life activity of working – which requires that the plaintiff be excluded not just from one job, but from a wide range of jobs, considering the plaintiff's level of education, skill, experience and opportunities.[113] Of course, there is also the possibility of a misdiagnoses, an uncertain presumptive diagnosis, and/or the inability of the medical community to identify or define a particular physical impairment; accordingly, Ms. Magwood also invokes 42 U.S.C. §12102(2)(C). Ms. Magwood is entitled to ADA coverage because her supervisors "*regarded*" her as having a physical impairment that substantially limited her major life activities, even if the Court ultimately concludes that her physical impairments do not meet the legal definition of a disability within the meaning of 42 U.S.C. §12102(2)(A).

As Ms. Magwood learned about her own medical conditions, she shared this information with her supervisors. Ms. Magwood had numerous conversations with Mr. Collins about her illnesses and provided documentation him from her doctors, including the diagnosis of "sleep apnea." Mr. Collins expressly acknowledged that he knew that she had a medical condition that interfered with her ability to sleep.[114] Similarly, he admitted that he knew that Ms. Magwood had

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http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_060608.pdf.

[111] Id.

[112] Id.

[113] Id.

[114] **Exhibit B,** Linda Magwood Affidavit ¶ 46**; Exhibit D,** Collins depo at 140:4-17, 149:5-15; see also **Exhibit X,** Thaddeus Magwood Affidavit ¶¶ 22, 23, regarding Mr. Collins' comment that he has a bus company to run and does not have time for "sick people."

a "thyroid problem."[115] Mr. Collins never disputed this diagnosis and he excused her Magwood's absences based on this perception of her conditions.

Mr. Collins' express suggestion that Ms. Magwood take FMLA leave to address her ongoing illnesses[116] confirms that he regarded her as a person with one or more physical impairments that affect one or more major life activities, including, but not necessarily limited to, working. FMLA leave is only available where a person has a "serious illnesses." Mr. Collins therefore must have regarded Ms. Magwood as seriously ill and unable to work in order to recommend FMLA leave to her. Ms. Magwood sought to take time off from work to undergo the treatment necessary for her to be well, return to work and once again, safely operate a bus. Based on these undisputed facts, a reasonable juror would be compelled to conclude that Mr. Collins "regarded her" as a person with a disability.

Employees are entitled to a reasonable accommodation for both actual disabilities and perceived disabilities.

> [T]he ADA bars employment discrimination "against a qualified individual with a disability" on the basis of such disability. 42 U.S.C. § 12112(a). A "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). Accordingly, reading the prohibition and the definition together, the ADA bars discrimination "against an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position...."
>
> A "disability," in turn, is defined by the statute as either "a physical or mental impairment that substantially limits one or more of the major life activities of

[115] **Exhibit B,** Linda Magwood Affidavit ¶¶ 46, 47, 48, 53, 56, 58**; Exhibit D,** Collins depo at 139:15-20. See also **Exhibit B**, Linda Magwood Affidavit ¶ 40; **Exhibit X,** Thaddeus Magwood Affidavit ¶¶ 22, 23, regarding Mr. Collins' comment that he has a bus company to run and does not have time for "sick people."

[116] **Exhibit B,** Linda Magwood Affidavit ¶ 18**; Exhibit D,** Collins depo at 127:22-129:11.

> such individual," *or* "a record of such an impairment," *or* "*being regarded as having such an impairment.*" *Id.* § 12102(2)(A)-(C) (emphasis added). Inserting this definition into the statute's prohibition, the ADA can only be read as barring discrimination "against an individual *with a physical or mental impairment* that substantially limits one or more major life activities of such individual who, with or without reasonable accommodation, can perform the essential functions of the employment position," *and* as barring discrimination "against an individual *with a record of such an impairment* who, with or without reasonable accommodation, can perform the essential functions of the employment position," *and,* finally, as barring discrimination "against an individual *regarded as having such an impairment* who, with or without reasonable accommodation, can perform the essential functions of the employment position." In other words, the statute's prohibition on discrimination applies equally to all statutorily defined disabilities.
>
> Moreover, "discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Id.* § 12112(b). The ADA prohibits discrimination "against a qualified individual with a disability." Accordingly, the statute plainly prohibits "not making reasonable accommodations" for any qualified individual with a disability, including one who is disabled in the regarded-as sense no less than one who is disabled in the actual-impairment or the record-of-such-an-impairment sense.

D'Angelo v. Conagra Foods, Inc., 422 F.3d 1220, 1235-1236 (11th Cir. 2005). *D'Angelo* relied, in part, on the Supreme Court's interpretation of the ADA's predecessor, the Rehabilitation Act of 1973, as set forth in *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987).

> In *Arline,* the Court considered the claim of a school teacher afflicted with tuberculosis who argued that she had been fired because her employer regarded her as handicapped, in violation of the Rehabilitation Act's prohibition on excluding otherwise-qualified handicapped individuals from participation in federally funded state programs. The Act's definition of "handicapped individual," then codified at 29 U.S.C. § 706(7)(B), included "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."
> Finding the teacher to be a handicapped individual within the Act's "regarded as" definition, the Court remanded for the district court to determine "whether the school board could have reasonably accommodated her," since "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." *Arline,* 480 U.S. at 288-89 & n. 19, 107 S.Ct. 1123.

See also Sutton v. United Airlines, 527 U.S. 471 (1999); *Cigan v. Chippewa Falls School District*, 388 F.3d 311 (7th Cir. 2004).

Mr. Collins never considered Ms. Magwood's application for FMLA – which was the primary accommodation that she requested for her disability – nor did Mr. Collins discuss with her any possible temporary light duty assignment until she received the treatment necessary to return to driving a bus safely. Instead, he fired her, on the spot – in place of the very meeting in which he had scheduled purportedly to discuss these very accommodations. Apparently, when he realized that Ms. Magwood had requested her medical records and would be timely providing the medical documentation necessary to complete her FMLA application and obligate him to offer her a reasonable accommodation under the ADA, he abandoned the entire process in the only way he believe he could – by firing her. No reasonable jury could find this termination justified by legitimate business reasons that did not violate both the FMLA and the ADA.

IV. Defendant Cannot Produce Evidence of a Legitimate, Non-Discriminatory Reason for its Termination of Ms. Magwood

Ms. Magwood has established that she is a covered person within the ADA and that First Transit refused to even participate in an interactive process to offer her a reasonable accommodation, but fired her instead. The burden now shifts to First Transit to not only assert, but also, to produce evidence of, a legitimate, non-discriminatory reason for her termination. It is still not clear why Defendant claims it fired Ms. Magwood. Mr. Collins' February 8, 2006 termination letter states that was being fired for "job abandonment," but even if she had shown up a half an hour late for a meeting with her supervisor, as the letter alleges, such lateness would not constitute "job abandonment," as defined by First Transit itself.

Pursuant to the Collective Bargaining Agreement, Article 35, Section 7(a):

Late is defined as *reporting for work* more than one (1) minute to five (5) minutes

after the operator's scheduled report time.[117]

Ms. Magwood was not *reporting for work* on February 8, 2006, so she could not have even accumulated 1 attendance point for this lateness – let alone be terminated. The February 8, 2006 letter, on its face, is false and pre-textual. This purported reason is simply not credible, particularly in light of the Collective Bargaining Agreement's progressive discipline requirements, requirement of union notice and the employee protections against termination which Mr. Collins signed himself.[118]

The Defendant's defenses again bring to mind the *Larson* case, in which the Defendant also claimed that the plaintiff "*abandoned*" her job when it fired her in response to her request for FMLA leave to address a thyroid problem. Like the present case, the Defendant in *Larson* has also alleged two different dates for the plaintiff's termination, whereas only one can be the actual termination date. Like the plaintiff's supervisor in *Larson*, Mr. Collins resisted answering the question of when Ms. Magwood was terminated and what the significance was of the January 27, 2006 purported termination letter in light of the February 8, 2006 termination letter.

> …. Zweifler's testimony regarding the date of Larson's termination is far from clear and he repeatedly refused to answer the question as to when E & P considered Larson to have been terminated. (Zweifler Dep. at 38-40). …. [119]

> Finally, E & P's record-keeping is at best sloppy and at worst appears fabricated. For example, E & P repeatedly refers to Larson's unexcused absences.[FN6] E & P insists that Larson had 5.5 *unexcused* sick days and 5 *unexcused* personal days in 2004, referring to days marked "S" and "P" on the employee calendar.[FN7] (Def. St. at ¶ 105-106). But an approved day off to attend a doctor's appointment on November 19, 2003, is also marked with an "S," and Defendant nowhere explains

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[117] **Exhibit G**.

[118] **Exhibit G, Exhibit E**, Collins depo at 40:17-41:3.

[119] Similarly, Mr. Collins repeatedly resisted answering questions about whether he fired Ms. Magwood on February 8, 2006 or January 27, 2006. **Exhibit E**, Collins depo at 158:8-178:13. He also could not adequately explain the purpose of the January 27, 2006 letter. *Id.* Defendant's counsel objected repeatedly and profusely throughout this line of questioning, thwarting direct answers to these questions.

how or why it considered the 2004 "S" & "P" days as unexcused. (Def. St. at ¶ 32; Pl. St., Ex. A). Similarly, Moore testified that Larson was out for 39.5 days between August 2003 and April 2004 and that 28.5 were taken on short notice, with a call in the morning and marked "as either S or P on her employee calendar." (Moore Dep. at 57). But as noted above, Moore's testimony cannot be reconciled with E & P's approval of the November 19 appointment, which was also marked as an "S." Perhaps most troubling is Defendant's use of Exhibit 7. Exhibit 7 purports to be a "summary" of Larson's attendance. (Def.St., Ex. 7). It suggests that the vast majority of Larson's sick days, excluding her leave in August 2003, were "unexcused." (Def.St., Ex. 7). But nothing on Larson's attendance calendar, *see* Pl. St., Ex. A, designates *any* of the sick days as unexcused, and Defendant nowhere offers an explanation of how it compiled this "summary" or how it determined that certain days were unexcused. In short, **Defendant's Exhibit 7 appears to be a post-hoc explanation concocted to make the evidence conform to its version of the facts. ….** (Emphasis added)

Given these facts, a reasonable jury could infer that E & P's "refusal to train in Homewood" theory is a post-hoc explanation for Larson's termination.

> FN6. E & P makes much of Larson's absences in its summary judgment materials, although never suggests that Larson's absences were a reason for her termination. In that respect, Larson's attendance is not a material fact.
>
> FN7. Despite the fact that the attendance calender designates "S" as suspended, "U" as unexcused, and "I" as ill, E & P personnel appear to have used "S" as sick and "P" as personal and makes no designation whatsoever for days that are not excused. (Def.St., Ex. 16).
>
> ….
>
> E & P argues that it has provided a non-pretextual reason for its action: that it terminated Larson because she failed to show up for work on April 26 to train as a rover. As noted earlier, E & P's reason turns on an issue of fact: whether Larson was terminated on April 22 or whether she was terminated on April 26.... If a jury believes Larson's testimony that she was terminated on April 22 and not April 26, then E & P's proffered reason for terminating her is a lie.

2006 WL 2038600 at 7-9**.**

Ms. Magwood filed her EEOC charge on November 6, 2006. In response to this charge, First Transit claimed that Ms. Magwood was *actually* fired on *January 27, 2006*, for "job abandonment." As "evidence" of this January 27, 2006 termination, First Transit offers nothing but a self-serving letter – although it ultimately does not serve First Transit very well.

Apparently recognizing that the February 8, 2006 letter, on is face, violates First Transit's own policies, the FMLA, the ADA – any concept of reasonableness, First Transit alternately changed its story and produced a letter that has none of the *indicia* of authenticity. First Transit's policies and procedures require that a termination letter be hand-delivered to the employee, and, if that is not possible, then mailed *certified* mail.[120] It is undisputed that Mr. Collins handed the *February 8, 2006* termination letter to Ms. Magwood personally. It is undisputed that the purported January 27, 2006 letter was never delivered to Ms. Magwood – either in person or by mail – certified or otherwise.[121]

Mr. Collins claims that he wrote the letter on Friday, January 27, 2006. He would have had to write it at the end of the day, allowing the full day for Ms. Magwood to call before firing her for not calling before the end of her shift. Ms. Magwood was at First Transit *on the morning of very next workday, Monday, January 30th, 2006*, obtaining her FMLA application from the Administration Office. No one at that office informed her that she was "terminated;" instead, they provided her with the FMLA form and required her to fill out the identifying information in their presence.[122] Ms. Magwood even met with Mr. Collins and showed him the FMLA application, on that day. Mr. Collins did not hand-deliver to Ms. Magwood or even mention to her, a January 27, 2006 termination letter; instead, he set the follow-up meeting for a week later, on February 6, 2006 to discuss her FMLA leave, with medical certification. Similarly, Mr. Collins never mentioned this *phantom* January 27, 2006 letter when he met with Ms. Magwood and Ms. Anderson on February 6, 2006 or on February 8, 2006.

The February 8, 2006 termination letter makes no mention of a previous letter

[120] **Exhibit E**. Collins depo at 161:17-162:16.
[121] **Exhibit C**, Magwood depo at 186:16-20.
[122] **Exhibit B**, Linda Magwood Affidavit ¶ 27.

terminating Ms. Magwood. First Transit has no produced no "termination profile" for Ms. Magwood based on the January 27, 2006 letter, but *did* produce such a profile based on her February 8, 2006.[123] When the union attempted to grieve Ms. Magwood's termination, on March 10, 2006,[124] Mr. Collins responded rejected it, writing that it was untimely, filed more than ten days from Ms. Magwood's termination date –February 8, 2008.[125] Ms. Anderson was completely unaware of any purported January 27, 2006 letter – although the letter bears a "cc," to her, as the union representative.[126]

First Transit has produced no record that indicates that the purported January 27, 2006 termination was ever revoked or that Ms. Magwood was rehired so that she could have been fired *again*, on February 8, 2006.

Even if the January 27, 2006 were authentic, the stated reason for Ms. Magwood's termination in that letter is blatantly false and pre-textual. The purported January 27, 2006 letter states that Ms. Magwood did not call in for two days in a row, namely, January 26, 2006 and January 27, 2006.**[127]** This statement fits the "classic" definition of "job abandonment," according to the Collective Bargaining Agreement and would be terms for immediately termination *if the accusation were true*; but First Transit's *own Dispatch* records document that Ms. Magwood called in on *January 26, 2006.*[128]

Having had both of its alternatively asserted purported reasons for terminating Ms. Magwood exposed as false, First Transit has insinuated, in some of its filings and certainly, in its

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[123] **Exhibit GG,** February 8, 2006 Termination Profile for Linda Magwood.
[124] **Exhibit HH**, March 10, 2006 letter from Collins to Anderson, rejecting grievance as "late."
[125] **Exhibit II**, union grievance filed on behalf of Ms. Magwood for terminating her.
[126] **Exhibit J**, Anderson Affidavit ¶ 10.
[127] **Exhibit FF**, First Transit's purported January 27, 2008 letter terminating Ms. Magwood**.**
[128] **Exhibit I**, First Transit Dispatch records.

Answer to the Amended Complaint,[129] that First Transit has alleged that it actually fired Ms. Magwood due to excessive unexcused absences; however, this allegation is an irrelevant red-herring. The February 8, 2006 termination letter makes *no mention* of Ms. Magwood's absences – nor does even the mysterious, purported January 27, 2006 letter.[130] Again, had Ms. Magwood been fired for excessive absences, First Transit could have terminated her for excused absences and would have been required to follow the progressive discipline policy set forth in the Collective Bargaining Agreement if she had, indeed, exceeded the permissible number of attendance points accumulated for unexcused absences. Ms. Magwood had not exceeded this number. First Transit can produce no evidence to indicate that she did.[131] This is why First Transit strained to classify its reason for Ms. Magwood's termination as "job abandonment" – which is grounds for immediate termination, with no reference to the progressive discipline plan.

First Transit has made much of its purported "estimates" and "summaries" of Ms. Magwood's attendance records; however, it has failed to produce her actual attendance records, claiming that the records were "lost" in a computer crash "sometime" in 2007. Because the Defendant has failed to maintain records that would, if produced, be material to any claims regarding Ms. Magwood's absences and whether they were excused, Ms. Magwood is entitled to an adverse inference that these records would have shown that she had not exceeded her allotted

[129] **Def's 9/11/09 Answer to Am. Compl. ¶** 79. Rather than "admit" or "deny" the allegations as phrased, Defendant improperly "re-wrote" narratives changing the meaning of Plaintiff's allegations in many instances in its Answer. Plaintiff may have to file a *Motion to Compel* a proper Answer to the Amended Complaint,

[130] **Exhibit FF**, First Transit's purported January 27, 2006 letter terminating Ms. Magwood for "job abandonment," claiming that she did not call in for two days in a row, January 26, 2006 and January 27th – despite First Transit's own Dispatch records documenting that she called in on January 26, 2006 (**Exhibit I**) and Mr. Collins' own testimony that, on January 25, 2006, he and Ms. Magwood specifically discussed her need for FMLA and her inability to safely drive a bus due until she received treatment and got her illness under control.

[131] **Def's Answer to First Am. Compl. ¶¶** 57, 105, 106, 107, 112.

number of permitted unexcused absences and there was therefore no basis to terminate her based on attendance, even if Defendant could make such an argument in spite of its *two* purported termination letters, stating otherwise.

Like the employer in *Larson*, First Transit has engaged in inconsistent explanations and evaluations of the plaintiff, as well as document production that reflects at least "sloppy" bookkeeping, and at worst, a "*post* hoc explanation concocted to make the evidence conform to its facts;" yet, even this "concocted explanation" is fatally flawed because there is absolutely no evidence to support it. Throughout this litigation and the EEOC process, First Transit appears to have just "made up" alleged fact, out of thin air, in an attempt to justify its actions. For example, in its *EEOC Position Statement*, First Transit claimed that, on January 23, 24, 25th and 26th and 27th 2007, Ms. Magwood was a "no call/no show,"[132] meaning that she neither showed up for work nor called to say that she would not be coming in to work; however, First Transit's own Dispatch records document that she called in on January 23rd , 24th and 26th[133] , yet, First Transit contradicts is own statement in its purported January 27, 2006 letter, in which Mr. Collins *admits* that Ms. Magwood called him and spoke to him personally on January 25th.[134]

Since Ms. Magwood committed no misconduct punishable under the Collective Bargaining Agreement or First Transit's policies and procedures, but had specifically complied with the requirements of the Agreement, the FMLA and the ADA, First Transit can produce no evidence to convince a reasonable juror that it terminated her for legitimate, non-discriminatory reasons; accordingly, she is entitled to summary judgment on her ADA claims.

[132] **Exhibit EE**, *Def's EEOC Position Statement* at 3-4.
[133] **Def's Answer to First Am. Compl.** ¶ 101.
[134] See also **Def's Answer to First Am. Compl.** ¶ 35, 100.

Conclusion

Other than the issues of damages, there are no material facts to be decided by a jury; accordingly, *Plaintiffs' Motion for Summary Judgment* should be granted, as a matter of law. Plaintiff respectfully requests that she be reinstated immediately and granted FMLA leave, so that she can once again, have health insurance, obtain the treatment she needs to control the symptoms of her illnesses and return to safely performing her duties as a bus operator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of September, 2009, I will electronically file the foregoing *Plaintiff's Motion for Summary Judgment and the Accompanying Statement of Material Undisputed Facts,* through the electronic filing system of this Court, which will, in turn, electronically serve this document upon the following:

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