IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY WARD	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-5996
MERCK & COMPANY, INC.	:	

SURRICK, J. **JANUARY 9, 2006**

MEMORANDUM & ORDER

Presently before the Court are Plaintiff Gary Ward's Motion For Partial Summary Judgment As To Liability (Doc. No. 11) and Defendant Merck & Co., Inc.'s Motion For Summary Judgment (Doc. No. 16). For the following reasons, Plaintiff's Motion for Partial Summary Judgment will be denied and Defendant's Motion for Summary Judgment will be granted.

I. BACKGROUND

A. Facts

Plaintiff Gary Ward was hired by Defendant Merck & Co., Inc. ("Merck") as a Grade 8 Staff Chemist in June 1996. (Jt. Case Report, Doc. No. 8. at 1.) Beginning in 1998, Plaintiff was assigned to a lab run by Dr. Steven Cohen who was supervised by Dr. Michael Washabaugh. (Doc. No. 11 at 4.) This lab was part of a department managed by Dr. Robert Sitrin. (*Id.* at 4-5.) Plaintiff remained a member of this lab group until his employment at Merck was terminated in July 2003.

At the time that Plaintiff was hired, he was required to undergo a pre-placement physical examination. (Doc. No. 16 at 3.) Based on this examination, Merck determined that Plaintiff was able to "perform any job without restriction." (*Id.*) Plaintiff's initial years at Merck

proceeded without incident. Between 1998 and 2001, Cohen observed that although Plaintiff displayed good technical skills, he did not develop independence, he lacked engagement in his job, and he progressed more slowly than expected. (*Id.* at 4.) Nevertheless, Plaintiff received a promotion to Grade 7 Research Biochemist in January 2001. (Doc. No. 11 at 4.)

During the Fall of 2002, Cohen noted that Plaintiff had grown more introverted. (*Id.* at 5.) Unknown to Defendant, at this time Plaintiff began to experience what he perceived to be "problems" at work. (*Id.* at 4.) In late October 2002, Plaintiff made separate visits to the emergency room at Doylestown Hospital and to Dr. Jonathan Beck, his primary care physician, in order to complain of anxiety and stress related to incidents at work. (*Id.* at 5.) At the hospital, Plaintiff "reported that his computer [at work was] being monitored and that he [was] being harassed." (Aff. of Bennett in Supp. of Def.'s Mot., Doc. No. 14 at Ex. D-13.) Hospital staff diagnosed Plaintiff with anxiety disorder and advised him to seek out-patient treatment. Plaintiff agreed to see a psychiatrist. (Doc. No. 11 at 5.) Dr. Beck made the same diagnosis and prescribed medication, which Plaintiff took only once and then stopped because it made him light-headed. (*Id.* at 5-6.)

On November 6, 2002, Plaintiff tendered his resignation from Merck, citing stress from perceived problems on the job. (Doc. No. 11 at 5; Doc. No. 16 at 7.) When questioned by Sitrin and Washabaugh about his decision to resign, Plaintiff was unable to articulate any reason for wanting to leave Merck. (Doc. No. 16 at 7.) His supervisors asked him to reconsider. (*Id.*) On November 20, 2002, Plaintiff withdrew his resignation. (*Id.*)

On February 19, 2003, Plaintiff had an "episode" in a Merck cafeteria. (Doc. No. 11 at 5.) According to the police report, Plaintiff "backed himself up against the food tables and was

screaming at people, telling them not to eat any of the vegetables." (Doc. No. 14 at Ex. D-18.) Fearing that Plaintiff could become violent, Merck security called local police for assistance. (*Id*.) Upon arrival, police officers noted that Plaintiff seemed "dazed and incoherent and couldn't tell [them] his last name." (Doc. No. 14 at Ex. D-18.) The police convinced Plaintiff to leave the cafeteria and go to Central Montgomery Medical Center ("CMMC") for an evaluation. (Doc. No. 11 at 5.)

At CMMC, Plaintiff was diagnosed as possibly suffering from schizophrenia. (Doc. No. 15 at Ex. G.) He was released with instructions that he seek further treatment. (*Id.*) Plaintiff thereafter came under the care of Dr. Esther Kamisar, a psychologist, and Dr. Josephine Pobre-So, a psychiatrist. (Doc. No. 11 at 5.) Dr. Kamisar examined Plaintiff on February 20, 2003 and diagnosed him as having suffered from a "brief psychotic disorder the previous day," and "generally suffering from anxiety disorder." (Doc. No. 16. at 9.) Dr. Pobre-So gave Plaintiff a prescription for anxiety medication and established a "return-to-work plan" for him. Plaintiff was authorized to return to work on March 17, 2003, with the restriction that he work only three days per week until March 31, 2003, when he could return to full-time employment. (*Id.*)

After Plaintiff returned to work, his behavior and performance deteriorated. Washabaugh received a series of comments from colleagues regarding Plaintiff's unusual behavior. He and Cohen became concerned for "[Plaintiff's] well-being [and] for the well-being of others." (Doc. No. 15 at Ex. E, pp. 68-69.) Both Washabaugh and Cohen observed that Plaintiff maintained a "catatonic" demeanor. (*Id.* at Ex. E, p. 69; *id.* at Ex. F, p. 56.) In addition, Cohen noted that his lab group was beginning to miss deadlines due to Plaintiff's decreased work output. (*Id.* at Ex. F, pp. 58-59.) Washabaugh subsequently contacted Kathy Korsen, a Director of Human

Resources at Merck, to express his concerns about Plaintiff. (Doc. No. 16 at 10.) After discussing the situation, Korsen, Washabaugh, and Cohen decided to seek guidance from Merck's Health Services. (*Id.* (quoting Doc. No. 15 at Ex. H, p. 45).)

A physician with Health Services, Dr. Peter Nigro, asked Washabaugh and Korsen to produce written examples of the "behavior and performance issues that led them to contact his office." (*Id.* (citing Doc. No. 15 at Ex. I, p. 21.) Washabaugh documented his personal observations of Plaintiff's behavior in a June 23, 2003 e-mail to Dr. Nigro. He noted that

> [Plaintiff] is reluctant (or unable) to initiate . . . conversation. [He] seems to be resistant to advice, counsel, mentoring, or guidance—all and any forms of interaction.
>
> . . . [His behavior is] a prolonged, low level lack of involvement that is interrupted only by a[] brief, unusual level of involvement. . . . He is not involved in the day-to-day activities of his lab or the larger group. Just present 9-5. His productivity has dropped to near zero—he is not performing or communicating at even a minimal level.
>
> [Plaintiff] is now usually silent and non[-]interactive. When he does speak, it's a loud, terse (frequently interrupting another discussion) and off-topic question or comment . . . .
>
> Members of the group are reluctant to approach him (or continue working with him) because of his irregular and odd behavior.

(*Id.* at Ex. D-26.) Two administrative assistants at Merck, Lorie Keller and Joye Minisci, also recorded their observations of Plaintiff, noting "major changes in the past few months that are of concern to my co-workers and I" and that "[Plaintiff's] mood would switch from pleasant to angry in mere seconds." (Doc. No. 16 at 11; Doc. No. 15 at Ex. D-25.) In a June 17, 2003 memo, Cohen noted:

> [Plaintiff's] lack of communication and inwardness deepened [after the cafeteria incident] to where he is now very strangely and eerily quiet. A face-to-face conversation with him now is practically impossible; he will not initiate conversation, even if it is "expected" of him. He will mainly stare with an odd, dazed smile . . . . And most of his comments will be terse and repetitive . . .

> inappropriate for the situation and leaving you with the clear feeling that no connection was made. I've also notice[d] him walk past my office, almost on a daily basis . . . deliberately slow, almost catatonic. . . . This behavior borders on frightening.

(Doc. No. 15 at Ex. D-24.)

Based on these submissions, Dr. Nigro recommended that Plaintiff be examined in order to assess whether he remained capable of performing the duties of his position. (*Id.* at Ex. H, p. 50; *id.* at Ex. I, p. 58.) This recommendation was only advisory. The ultimate decision as to whether Plaintiff should submit to an examination was Washabaugh's. (Doc. No. 11 at 9.) On June 26, 2003, Washabaugh sent Plaintiff an e-mail requesting that Plaintiff make an appointment with Dr. Nigro for an evaluation. (Doc. No. 15 at Ex. D-28.) Plaintiff initially contacted Health Services, but was unable to schedule the appointment "since the person was out." He asked Washabaugh to arrange the examination. (*Id.*) On June 30, 2003, Washabaugh informed Plaintiff that he had to personally make the appointment, that doing so was required, and that the appointment had to be scheduled before the end of business on July 2, 2003. (*Id.* at Exs. D-29, D-30.)

Plaintiff again called Health Services on July 2, but the call was disconnected after Plaintiff was placed on hold. (*Id.* at Ex. D-31.) Plaintiff did not respond to the return calls from Health Services. (Doc. No. 16 at 13.) After learning that Plaintiff had made no additional attempts to contact Health Services, Korsen explained to Plaintiff that

> [Dr. Washabaugh] has observed some behaviors that have lead him to be concerned about [Plaintiff's] overall well-being and [his] ability to continue to perform effectively. The fitness for work evaluation would involve [Plaintiff] being evaluated by one of the physicians in Health Services to help with this determination.

(Doc. No. 15 at Ex. D-32.) Plaintiff inquired of Korsen as to what behaviors Washabaugh had observed, but took no further action. (*Id.* at Exs. D-31, D-32.)

Washabaugh met with Plaintiff on July 3, 2003 "in an attempt to (1) explain the situation . . . and (2) assist [Plaintiff] in making an app[ointment] to see Dr. Nigro." (Doc. No. 15 at Ex. D-35.) Washabaugh recalled that

> [Plaintiff] does not agree that he needs to have an evaluation, and does not believe that his behavior, performance or productivity has changed over the past several months (or is now an issue). [Washabaugh] explained that [he and others were] concerned about [Plaintiff's] well-being, and are trying to define a path forward with the fitness evaluation. . . . [Plaintiff] asked [Washabaugh] about the consequences . . . [Washabaugh] explained that the app[ointment] was mandatory and that disciplinary actions would take place if [Plaintiff] elected to not undergo the evaluation.

(*Id.*) Plaintiff's noncompliance with Defendant's directive continued. In a meeting with Sitrin, Washabaugh, and Korsen on July 7, 2003, Plaintiff was given a letter which advised him that he was "being suspended from work with pay, effective immediately." (*Id.* at Ex. D-36.) This suspension was based on Plaintiff's "refusal to agree to a Fitness for Duty evaluation." Washabaugh wrote:

> This requirement was a result of various behaviors that have clearly impacted your job performance since your return from Short Term Disability in March, 2003. These behaviors are as follows:
>
> - Prolonged, low level of engagement and attention to assigned duties interrupted by a brief, unusually high level of engagement and focus on your work.
> - Persistently non-communicative and silent. When you do speak, it's a loud, terse (frequently interrupting another discussion) and off-topic question or comment, which has undermined the productivity and results of business meetings.
> - Reluctance (or inability) to initiate a conversation. You appear to be resistant to advice, counsel, mentoring, or guidance—all and any forms of interaction.

- Over the past several days, you have become increasingly angry, confrontational, and defensive. When we have met regarding your situation, you continually want to review the facts, and to challenge in a hostile manner what I am sharing with you. There have also been recent occasions where you have dealt with your co-workers in a similar fashion.

This suspension has been put in place to provide you with time to reconsider your decision to submit to a Fitness for Duty evaluation. Gary, it is important for you to understand that the approach the Company has chosen to take at this time by sending you for a Fitness for Duty evaluation is specifically intended **not** to punish or discipline you even though your work place productivity and performance has been well below acceptable standards and your behavior has often been unprofessional. . . . If you do not agree to this evaluation within two weeks . . . your employment will be terminated.

(*Id.*) During his suspension period, Plaintiff had no contact with any Merck employees. (Doc. No. 16 at 16.) On July 21, 2003, the date that Plaintiff's termination became effective, Plaintiff arrived at the main gate and asked a security guard about whether he was still a Merck employee. He did not enter Defendant's campus. (*Id.* at 17.)

Korsen called Plaintiff's home on July 22, 2003 to ask why he had appeared at the main gate and to see if he would now submit to the evaluation. (*Id.*) Plaintiff's wife informed Korsen that Plaintiff was unavailable and advised her that Plaintiff went to Merck only to inquire about his employment status. Plaintiff never returned Korsen's call. On July 25, 2003, Korsen sent Plaintiff a memo informing him that his employment was terminated immediately, but also giving him a final opportunity to reconsider his refusal to comply, and to schedule an evaluation within the next two days. (Doc. No. 15 at D-37.) Plaintiff never responded.

B. Procedural History

On September 5, 2003, Plaintiff filed a Charge of Discrimination against Merck with the Equal Employment Opportunity Commission ("EEOC"). (Doc. No. 14 at Ex. A.) Plaintiff

alleged that he was "subjected to unfair treatment and subsequent discharge" from his employment at Merck in violation of the Americans with Disabilities Act ("ADA") because of his "disability and[/]or because [he] was perceived to have a disability." (*Id.*) According to Plaintiff, he refused to submit to the medical evaluation "because [he] could not get the rationale and what the exam entailed from management officials." (*Id.*) On October 6, 2004, the EEOC sent Plaintiff a Dismissal and Notice of Rights form advising that it was closing his file and advising Plaintiff of his right to sue. (Doc. No. 14 at Ex. B.)

Plaintiff filed the instant Complaint on December 23, 2004. (Compl., Doc. No. 1.) He claims that Defendant (1) discriminated against him on account of his disability, by creating and maintaining a hostile work environment and later terminating his employment, in violation of the ADA; (2) retaliated against him for exercising his rights under the ADA; and (3) violated the Family and Medical Leave Act ("FMLA") by compelling him to take a one-month medical leave and requiring him to submit to a medical examination. (*Id.* ¶¶ 15-50.)

II. LEGAL STANDARD

Summary judgment is appropriate "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the non-moving party's legal position. *Celotex Corp. v. Catrett*, 477

U.S. 317, 322-24 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicions' to support its claim." *Townes v. City of Phila.*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). However, we will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

A. Disparate Treatment & FMLA Claims

In Count I of the Complaint, Plaintiff alleges that "Defendant Merck intentionally, knowingly and purposefully violated the Americans with Disabilities Act by invidiously discriminating against the qualified Ward who had a disability"; that Defendant "created, maintained and permitted to be maintained a work environment which was hostile to persons such as Plaintiff who have a record of or are perceived as having a disability"; and "[a]s a direct result of Plaintiff's disability, Defendant terminated Plaintiff's employment." (Doc. No. 1 ¶¶ 41-

43.) However, in his Response to Defendant's Motion for Summary Judgment, Plaintiff explicitly abandons these claims. Plaintiff's Brief in Opposition states:

> Plaintiff does not contend that he suffered from any actual disability, nor that Defendant regarded him as being impaired. To the contrary, Plaintiff's supervisors have testified that they did not regard him as impaired. Plaintiff is therefore proceeding under ¶¶ 23-24 of his Complaint, alleging that he was suspended and later terminated for refusing to undergo an illegal examination.

(Doc. No. 18 at 1 n.1.) In addition, Plaintiff states that he "is not pursuing the allegation in the Complaint that he was subjected to a hostile work environment."[1] (*Id.* at 2 n.2.) Since Plaintiff has withdrawn these claims, we will not consider them. *See Betzel v. State Farm Lloyds*, No. 4:04-CV-617-A, 2005 U.S. Dist. LEXIS 11908, at *2-3 (N.D. Tex. June 15, 2005) (dismissing, without further analysis, claims withdrawn by plaintiff in his response to defendant's summary judgment motion).

Plaintiff also abandons a portion of his claim in Count III of the Complaint, in which he alleges that Merck violated the FMLA by compelling him to take leave and requiring him to submit to a fitness-for-duty evaluation. (*Id.* ¶¶ 17, 20-21, 48-50.) In his Response to Defendant's Summary Judgment Motion, Plaintiff states that he "is not pursuing the allegation of the Complaint that he was compelled by Merck to take FMLA leave."[2] (Doc. No. 18 at 2 n.2.) Nevertheless, Plaintiff continues to assert his claim that the FMLA does not permit an employer to obtain a fitness-for-duty examination "other than when the employee is seeking to return to work after leave." (*Id.* at 2.)

---

[1] We note that our review of the record found no evidence that Plaintiff was subjected to a hostile work environment.

[2] We note that there is no evidence in the record indicating that Plaintiff was compelled by Merck to take a leave of absence.

The FMLA includes provisions that guide what information an employer may request when an employee seeks to return from an FMLA leave of absence. An employer "may have a uniformly-applied policy or practice that requires all similarly-situated employees . . . who take leave . . . to obtain and present certification from the employee's health care provider that the employee is able to return to work." 29 C.F.R. § 825.310(a). The employer may only seek "fitness-for-duty certification" with regard "to the particular health condition that caused the employee's need for FMLA leave." *Id.* § 825.310(c). Such certification "need only be a simple statement of an employee's ability to return to work." *Id.* Under certain circumstances, an employer may subsequently request recertification of an employee's medical condition, for example where "[c]ircumstances described by the previous certification have changed significantly." *Id.* § 825.308(c)(2). "No second or third opinion on recertification may be required." *Id.* § 825.308(e).

Notwithstanding the fact that Merck never requested that he provide recertification to return to work, Plaintiff argues that Defendant's requirement that he submit to a fitness-for-duty evaluation qualified as a "second opinion" under the FMLA. (Doc. No. 18 at 4.) Section 825.308(e) of the FMLA prohibits second opinions. We reject Plaintiff's argument that Defendant has requested a second opinion on recertification. There can be no second opinion on recertification when there has been no recertification. Moreover, Plaintiff's leave of absence ended months before Defendant requested that Plaintiff undergo the examination challenged here.

The FMLA *does* permit fitness-for-duty examinations where there exists "some business need . . . independent of the employee's having taken FMLA leave." *Albert v. Runyon*, 6. F.

Supp. 2d 57, 69 (D. Mass. 1998). After an employee has returned from FMLA leave, a fitness-for-duty examination may be ordered by the employer "if it has sufficient reason under the ADA." *Id.* Under the circumstances, the propriety of Defendant's medical inquiry depends upon whether it meets the ADA standard.

B. Prohibited Medical Inquiry and Retaliation Claims

By abandoning the above mentioned claims in his Complaint, Plaintiff has recast his case against Merck as a prohibited medical inquiry claim and a retaliation claim.[3] Since Plaintiff's retaliation claim cannot stand absent a finding that Merck violated the ADA by requiring the fitness-for-duty evaluation, we will address the prohibited medical inquiry claim first.[4]

Medical inquiry claims, which are governed by 42 U.S.C. § 12112(d)(4), represent causes of action independent of disparate treatment and retaliation claims that accompany them. *See, e.g.*, *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 516 (3d Cir. 2001) (seeking separate monetary damages to remedy medical inquiry violation); *Law*, 159 F. Supp. 2d at 794 (considering medical inquiry claim outside of traditional analysis applied to wrongful termination allegation). Although the Third Circuit has not specifically decided the question of whether § 12112 applies to the nondisabled, it has dealt with the claims of nondisabled plaintiffs in

---

[3] In his Motion for Partial Summary Judgment, Plaintiff does not address either the disparate treatment claim in Count I or the FMLA claims in Count III of his Complaint. (Doc. No. 11 at 10-27.) Instead, he argues that Defendant has committed an independent ADA violation by requiring him to submit to a prohibited medical examination and that his termination, as a result of refusing to submit to the examination, constitutes retaliation under the ADA. (*Id.*)

[4] "[I]t is unlawful for an employer to retaliate against an employee based upon the employee's opposition to anything that is unlawful under the ADA." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003).

situations similar to this. *See, e.g., Tice*, 247 F.3d at 517; *cf. Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (proceeding with factual analysis but declining to decide whether § 12112(d) applied to all nondisabled plaintiffs); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1181-82 (9th Cir. 1999) (finding § 12112(d)(4) applies to all "employees," not just those that are disabled within the meaning of the ADA).

Section 12112 provides in pertinent part:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112(d)(4)(A). This provision was enacted in order "to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose." Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35,726, 35,750 (July 26, 1991). "There must be sufficient evidence for a reasonable person to doubt whether an employee is capable of performing the job, and the examination must be limited to determining an employee's ability to perform essential job functions." *Law*, 159 F. Supp. 2d at 794 (citing *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999)). The "employee's behavior cannot be merely annoying or inefficient to justify an examination.'" *Sullivan*, 197 F.3d at 811 (citing 42 U.S.C. § 12112(d)(4)(B)). According to the EEOC,[5] an examination may be viewed as acceptable where the employer "has a reasonable belief based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical

[5] Administrative interpretations of the ADA by the EEOC are "not controlling upon the courts by reason of their authority," but "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

condition; or (2) an employee will pose a direct threat due to a medical condition." EEOC, Enforcement Guidance: Disability Related Inquiries and Medical Examination of Employees Under the Americans With Disabilities Act, No. 915.002 (July 27, 2000) ¶ 5.

In the instant case, there is more than sufficient evidence to justify Defendant's medical inquiry. After Plaintiff returned from medical leave, his supervisors and colleagues noted detrimental changes in his demeanor. Washabaugh received anecdotal feedback from employees, namely Keller, Minisci, and Oswald, indicating "people were afraid of [Plaintiff]." (Doc. No. 15 at Ex. E, p. 68.) Cohen also "was afraid for [him]self and afraid for others," based on Plaintiff's "catatonic" behavior. (*Id.* at Ex. F, pp. 53, 56.) Washabaugh personally felt threatened because he "wasn't accustomed to having people pound on [his] door or attack [him] for simple corrections." (*Id.* at Ex. E, pp. 67, 71.) Plaintiff "came off as aggressive and threatening. . . . [changing from] a spirit of silence to an aggressive statement of just saying things very aggressively, loudly, tersely, and . . . that made both [Washabaugh] and others feel a bit threatened." (*Id.* at 71.) Plaintiff also "willingly misbehaved" by attending a conference without his supervisor's authorization. (*Id.* at Ex. E, p. 108; *id.* at Ex. F, p. 69.) Cohen observed Plaintiff have a "temper tantrum" when questioned about his presence at this conference. (*Id.* at Ex. F, p. 89.) Colleagues also noted a decline in Plaintiff's job performance. Washabaugh's "observation was that [Plaintiff] was not doing his job." (*Id.* at Ex. E, p. 98.) Cohen noted that Plaintiff would regularly spend significant time "pac[ing] up and down the hallways slowly." (*Id.* at Ex. F, p. 56.) He observed Plaintiff's performance was "just absolute minimal" and that his team was "beginning to miss time lines." (*Id.* at Ex. F, pp.58-59.)

It is clear that Plaintiff's behavior posed more than a mere inconvenience for his supervisors. Colleagues felt threatened by Plaintiff's presence and odd behavior, evincing concern for their own well-being. They were also concerned for Plaintiff's well-being. In addition, Plaintiff's lack of productivity proved an obvious threat to business objectives. Plaintiff argues that Defendant's medical inquiry request was inappropriate because Merck did not first counsel Plaintiff on his performance. (Doc. No. 18 at 11.) However, nothing in the ADA indicates that such intervention must precede a post-employment medical inquiry. Moreover, Plaintiff was aware of his supervisors' concerns before the fitness-for-duty evaluation was requested. Washabaugh had communicated to Plaintiff "that his behavior was becoming unprofessional, and creating a disruptive atmosphere with people. It was creating a work environment that other people had commented to [Washabaugh] anecdotally they were having difficulty with." (Doc No. 15 at Ex. E, p. 71.) Plaintiff had been approached by Washabaugh about his "low performance." His supervisors "tried to engage him in discussion about what was concerning him or what was causing him to underperform," but received "zero response." (*Id.* at Ex. E, p. 98.)

Given the overwhelming evidence, we are compelled to conclude that the medical inquiry requested of Plaintiff was "consistent with business necessity," as required by § 12112(d)(4). *See Sullivan*, 197 F.3d at 811 (mental exam upheld after teacher engaged in odd behavior, including disruptive verbal outbursts, disclosing confidential information, inappropriately criticizing colleague, and failing to appear for a meeting); *Conrad v. Bd. of Johnson County Comm'rs*, 237 F. Supp. 2d 1204, 1232 (D. Kan. 2002) (exam upheld after nurse sent unusual emails, complained of chronic fatigue, and acted inappropriately with supervisors); *Fritsch*, 2000 U.S.

Dist. LEXIS 14820, at *1-2, 4 (psychological exam upheld after city attorney had emotional outburst and verbal altercation with opposing counsel during court hearing). Moreover, because Plaintiff "never submitted to the examination[], he precluded himself from being able to establish a genuine issue of material fact as to whether the exam[was] related to his job, or w[as] too broad in scope." *Sullivan*, 197 F.3d at 812. We are satisfied that this medical inquiry meets the "job related and consistent with business necessity" standard. Accordingly, Defendant did not violate the ADA by requiring Plaintiff to submit to a fitness-for-duty evaluation. Since Plaintiff cannot show that Defendant violated the ADA, Plaintiff's retaliation claim must also fail. *Shellenberger*, 318 F.3d at 188.

IV. CONCLUSION

Defendant's requirement that Plaintiff submit to a fitness-for-duty evaluation was permissible under § 12112(d)(4)(A) of the ADA. The inquiry was "job-related and consistent with business necessity." As such, Defendant's decision to terminate Plaintiff's employment, after he refused or failed to submit to the examination, is not retaliation under the ADA. In addition, the fitness-for-duty evaluation was not violative of the FMLA which permits such evaluations as long as the inquiry complies with ADA requirements. Accordingly, we will grant Defendant's Motion for Summary Judgment in its entirety.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY WARD	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-5996
MERCK & COMPANY, INC.	:	

ORDER

AND NOW, this 9th day of January, 2006, upon consideration of Plaintiff Gary Ward's Motion For Partial Summary Judgment As To Liability (Doc. No. 11), Defendant Merck & Co., Inc.'s Motion For Summary Judgment (Doc. No. 16), and all papers submitted in support thereof and in opposition thereto, it is ORDERED as follows:

1. Plaintiff's Motion For Partial Summary Judgment is DENIED.

2. Defendant's Motion For Summary Judgment is GRANTED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge