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

JAMES YANSICK	:	CIVIL ACTION
	:	
v.	:	04-4228
	:	
TEMPLE UNIVERSITY HEALTH SYSTEM, TEMPLE EAST, INC., NORTHEASTERN HOSPITAL, AND JOHN DOES 1-10 (fictitious individuals and entities)	:	

MEMORANDUM AND ORDER

JOYNER, J. **July 27, 2006**

Via the motion now pending before this Court, Defendant, Temple East, Inc. d/b/a Northeastern Hospital ("Defendant" or the "Hospital"), moves for summary judgment on all of Plaintiff's claims. For the reasons set forth below, the motion shall be granted.

I. Factual Background

A. Plaintiff's Employment

Plaintiff, James Yansick, initiated this civil action to recover for alleged violations of the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. ("FMLA"). Plaintiff was hired by Defendant in September 2001 as a full-time respiratory therapist in the Hospital's Respiratory Care Department. (Def.'s Mot. for Summary Judgment ("Def.'s Mot.") Ex. 2, Dep. of James Yansick ("Pl.'s Dep.") at 27.) While Plaintiff did join the National Union of Hospital and Health Care Employees District 1199C

("District 1199C"), he was covered by the Collective Bargaining Agreement ("CBA") between the Hospital and District 1199C. (Pl.'s Dep. at 26.) The CBA contains provisions regarding eligibility for unpaid leave, including FMLA leave.[1] (Def.'s Mot. Ex. 5, CBA, at Article XVI.)

Plaintiff's employment was also covered by the Northeastern Hospital Work Rules.[2] (Def.'s Mot. Ex. 6, Northeastern Hospital Work Rules ("Work Rules") at 1.) The Work Rules provide, inter alia, for progressive discipline to address absenteeism. (Work Rules at 3-4.) Plaintiff acknowledged receipt of a copy of the Work Rules with his signature, and was aware that the Work Rules applied to him. Pl.'s Dep. at 57.) In addition to the Work Rules, the Hospital promulgated a Policy and Procedure Manual ("Manual"), and maintained copies in each department. (Def.'s Mot. Ex. 7, Dep. of Ann-Marie Wallack ("Wallack Dep."), at 16.)

---

[1]Plaintiff asserts that he never received a copy of the CBA. (Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts ("Pl.'s Resp.") at ¶ 4.)

[2]Plaintiff disputes the applicability of the Work Rules, claiming that the rules could be amended and that he was not provided copies of amended versions. (Pl.'s Resp. at ¶ 5.) Plaintiff, however, provides no support for this assertion, and does not claim that any amendments were actually made, or that any such amendments affected the provisions relating to attendance. (See id.) We note that this response is typical of others provided by Plaintiff – denials are made or discrepancies pointed out, but no supporting citation to the record is provided. We cannot credit such bald assertions of fact. See infra Part II. Thus, we discuss Plaintiff's objections to Defendant's statement of the facts only to the extent that either Plaintiff's objections are supported by the record or that Defendant's statement of the record is incorrect.

The Manual includes a leave policy that describes FMLA leave.[3] (Def.'s Mot. Ex. 4, Manual, at 4.) Plaintiff acknowledged in writing that he reviewed the Manual. (Wallack Dep. at 160-61.) The Hospital also maintained a poster in the Human Resources department containing information about the FMLA, but Plaintiff claims that he never saw the poster during his employment.[4] (Def.'s Mot. Ex. 10, Dep. of Dorothy Kennedy ("Kennedy Dep.") at 11; Pl.'s Dep. at 57.)

---

[3]Plaintiff argues that the leave policies set forth in the Manual did not apply to him because he was part of a bargaining unit covered by the CBA. (Pl.'s Resp. at ¶ 6.) The relevant portion of the Manual was designated as "applicable to all non-bargaining Temple East, Inc. employees." (Manual at 4.) Director of Labor Relations Kay Deming-Graham ("Graham") testified that the leave provisions of the Manual would be inapplicable to Plaintiff only "[t]o the extent that any provisions of [the Manual] are in conflict with the provisions of the [CBA]. . . ." (Def.'s Mot. Ex. 3, Dep. of Kay Deming-Graham ("Graham Dep."), at 36.) Graham admitted, however, that she knew of no documents supporting the applicability of the Manual's leave policy to workers covered by the CBA. (Id.)

[4]Plaintiff was referred to Human Resources by Wallack at some point in 2002. (Pl.'s Dep. at 37, 38.) Kennedy testified that Plaintiff spoke to her about his desire to be examined by Dr. Rosales and the availability of worker's compensation. (Kennedy Dep. at 21-29.) Plaintiff testified that he spoke with Kennedy about his mother's illness and that during November and December of 2002, he provided Kennedy with medical documentation from Dr. Rosales, Dr. Bala, and Dr. Gleimer. (Pl.'s Dep. at 42-44.) Plaintiff claimed that he asked Kennedy whether he could take " some sort of leave," but that Kennedy answered that because Plaintiff had exhausted his sick time and vacation time, she did not know what to tell him. (Id. at 42.)

Kennedy testified that she provided Plaintiff with a Leave of Absence form that addresses FMLA and other leave, and that she discussed FMLA leave with him, including describing what he would need to do in order to get paid, rather than unpaid, FMLA leave. (Kennedy Dep. at 29-33.) Plaintiff denies receiving this form or any information regarding the FMLA. (Pl.'s Dep. at 360.)

B. The Hospital's Absence Policy

The Work Rules set forth the lateness and absence policy applicable to Plaintiff's employment, and designate a series of penalties to be applied to infractions based on the seriousness and number of offenses. (See generally, Def.'s Mot. Ex. 6, Work Rules, at 2.) These penalties, from the least (1) to the most (6) severe, are:

(1) General Counseling;
(2) Verbal Warning with Documentation;
(3) Written Warning;
(4) Final Written Warning;
(5) Three Working Days' Suspension; and
(6) Termination.

(See Work Rules at 2.) The Work Rules provided, in relevant part:

> 2. Absenteeism
>
> Each employee was selected to work at Northeastern because his/her services are needed to operate the Hospital properly. Therefore, it is important that all employees be on duty to perform the work assigned.
>
> Unauthorized absence from the department will result in loss of pay.
>
> . . .
>
> Failure to notify your supervisor of an absence prior to the start of an employee's shift in accordance with established policies and regulations, the absence will not be excused.
>
> (a) Unexcused absenteeism.
>
> (3) (5) (6)
>
> . . .

(d) Habitual/excessive absenteeism will result in the following disciplinary action being taken during the fiscal year (July 1 - June 30).

Incidents of absence	9	10	11	12	13	14
Penalty	(1)	(2)	(3)	(4)	(5)	(6)

* Habitual/excessive Incidents of Absence will be cause for disciplinary action even when the employee receives paid sick leave for the absence. Also, four (4) or more consecutive days of absence will be counted as four (4) Incidents of Absence.

** Failure to complete a workday of at least four (4) hours will be counted as one (1) Incident of Absence. Failure to complete an entire workday when the employee has already worked at lest four (4) hours will be counted as one-half (1/2) an Incident of Absence.

Employees who develop habitual/excessive absentee records will be evaluated on an individual basis and are subject to corrective action.

. . .

(Work Rules at 3-4.) Excused absences and absences as part of approved FMLA or workers compensation leave were not counted as Incidents of Absence under the Work Rules. (Wallack Dep. at 30-31; Kennedy Dep. at 78; see CBA at Article XXII.)

C. Plaintiff's Attendance for FY03

On September 6, 2002, Respiratory Department Supervisor Ann-Marie Wallack ("Wallack") gave Plaintiff a Performance Evaluation for his first year of employment.[5] (Def.'s Mot. Ex. A, Performance Evaluation and Improvement Plan.) Plaintiff's

[5]While Evaluation included information from both the previous and current fiscal years, the relevant Work Rules apply to each fiscal year separately. (See Work Rules at 4.) Thus, we consider only those absences occurring in the fiscal year beginning July 1, 2002 and ending June 30, 2003 ("FY03").

performance in a number of areas, including "[a]dhering to attendance and tardiness standards," were found to "need improvement." (Id.) Plaintiff was issued a Plan for Performance Improvement ("Improvement Plan") that included a directive that Plaintiff immediately improve timeliness and attendance. (Id.)

Plaintiff's first absence of FY03 was Thursday, August 8, 2002. (Pl.'s Dep. at 76-77.) Plaintiff requested a vacation day, but had no vacation time available. (Id.) Wallack nonetheless approved Plaintiff's absence, and did not count August 8 as an Incident of Absence under the Work Rules. (Id.)

Plaintiff's second absence of FY03 was on Monday, August 26, 2002. (Pl.'s Dep. at 78.) Plaintiff did not pre-arrange this absence, or provide an excuse. (Id.) Wallack treated August 26 as the first Incident of Absence under the Work Rules. (See Wallack Dep. at 39-40; Work Rules at 3-4.)

While working at the Hospital on Sunday, September 29, 2002, Plaintiff hit his left knee on a bed rail. (Pl.'s Dep. at 78-81.) Plaintiff initially continued working, but later visited the Hospital's Emergency Room. (Id. at 82.) Plaintiff was examined and determined to have a "contusion." (Def.'s Mot. Ex. 14, Emergency Department Treatment Records ("ER Records") at 3.) Plaintiff was told to report to the Industrial Health Center ("IHC") on his next scheduled work day, which was Tuesday, October 1, 2002. (Pl.'s Dep. at 83.) After his discharge from the Emergency Room, Plaintiff completed his shift. (Id. at 84.)

Plaintiff was not scheduled to work on Monday, September 30, 2002. (Pl.'s Dep. at 83.) Plaintiff telephoned Wallack at home on September 30 to notify her that he had hurt his knee and was expected to go to the IHC. (Pl. Dep. at 94; Wallack Dep. at 130-31.) Plaintiff told Wallack that he was going to visit the IHC that same day. (Wallack Dep. at 132-33; see also Pl.'s Dep. at 94.) Plaintiff indicated to Wallack that he would not be able to work on October 1 because of his knee. (Wallack Dep. at 145; Def.'s Mot. Ex. 15, Notes of Ann-Marie Wallack ("Wallack Notes").)

Plaintiff did not visit the IHC on September 30. (Pl.'s Dep. at 95-97; Wallack Dep. at 42.) Plaintiff did not report for work on Tuesday, October 1, 2006, and did not visit the IHC that day. (Pl.'s Dep. at 94-95.) Plaintiff did not contact Wallack on October 1, but Wallack later found out that Plaintiff did not go to IHC on that day. (Wallack Dep. at 133.) Because Plaintiff did not work, and did not visit the IHC for evaluation of his condition, Wallack treated October 1 as Plaintiff's second Incident of Absence. (Wallack Dep. at 130-33; Wallack Notes.)

Plaintiff was not scheduled to work on Wednesday, October 2, 2002, and did not visit the IHC on that date. (Pl.'s Dep. at 95.) Wallack called Plaintiff on October 2 to determine whether he was seen by IHC and whether he planned to work his scheduled shift on Thursday, October 3, 2002. (Wallack Dep. at 142; Wallack Notes.) Plaintiff called Wallack back, at her home, and

stated that his knee hurt, and that he would go to IHC on October 3. (Pl.'s Dep. at 95.)

Plaintiff was examined by Dr. Gabriel Rosales ("Dr. Rosales") in the IHC on Thursday, October 3, 2002. (Pl.'s Dep. at 97-98; Def.'s Mot. Ex. 16, Aff. of Dr. Gabriel Rosales ("Rosales Aff.").) Dr. Rosales examined Plaintiff, and ordered and reviewed x-rays of Plaintiff's left knee, leg and ankle areas. (Rosales Aff. at ¶ 4.) Dr. Rosales concluded that Plaintiff had a "simple contusion, i.e., a bruise." (Id. at ¶ 5.) Dr. Rosales determined that Plaintiff's contusion was not severe, and that Plaintiff was not restricted in performing regular daily activities or working based on the contusion. (Id. at ¶ 5-6.) Dr. Rosales released Plaintiff to work "with no restrictions whatsoever." (Id.; see also Def.'s Mot. Ex. 17, Rosales Notes ("Rosales Notes").)

After being released from the IHC, Plaintiff went to the Respiratory Care Department at approximately 3:30 p.m. (Pl.'s Dep. at 101, 105-10, 118-19.) Plaintiff gave Dr. Rosales' note to Wallack, and indicated that he was only cleared for light duty.[6] (Pl.'s Dep. at 104-05; Wallack Dep. at 138.) Because Plaintiff's shift started at 3:00 p.m., Wallack had already

---

[6]Both Plaintiff and Wallack interpreted the note incorrectly as restricting Plaintiff to light duty, apparently due to a looping cursive letter on the line above the "light duty" designation that circled part of that phrase. (Pl.'s Dep. at 104-05; Wallack Dep. at 138; see Rosales Notes.) On October 4, 2002, Wallack received and reviewed a copy of the note, and saw that it actually indicated release to full duty. (Wallack Dep. at 138, 146.) As a result, Wallack expected Plaintiff to return to work on full duty. (Id.)

arranged a replacement. (Pl.'s Dep. at 104-05.) Wallack did not have any light work available for Plaintiff, so she sent him home. (Wallack Dep. at 45; Wallack Notes.) Wallack asked Plaintiff to call the following morning, Friday, October 4, 2002, at 11:00 a.m. to determine what work was available. (Id.) Wallack did not count October 3 as an Incident of Absence under the Work Rules. (Wallack Dep. at 39, 138.)

When Plaintiff called Wallack on the morning of Friday, October 4, 2002, he informed her that he was unable to start his shift as scheduled at 3:00 p.m., even for light duty work, because he had a doctor's appointment. (Pl.'s Dep at 120-21; Wallack Dep. at 46.) Plaintiff told Wallack that he could start work at 7:00 p.m. instead, and Wallack agreed to this arrangement. (Id.)

On October 4, Plaintiff visited his family physician, Dr. Albert Dow ("Dr. Dow"). (Def.'s Mot. Ex. 18, Deposition of Dr. Albert Dow ("Dow Dep.") at 62-63.) Dr. Dow treated Plaintiff for anxiety, and renewed Plaintiff's prescription for anti-anxiety medication. (Id. at 91.) Dr. Dow did not perform any tests on Plaintiff's knee, but instead recommended "watchful waiting" to determine if the injury worsened, making referral to an orthopedic specialist necessary. (Id. at 91-92.) Dr. Dow did not advise Plaintiff to stay home from work based on his knee injury. (Pl.'s Dep. at 122.)

At 4:30 p.m. on October 4, Plaintiff called Wallack to say

that he would not report to work the second half of his shift that evening as previously arranged because his mother had been hospitalized. (Wallack Dep. at 46; Pl.'s Dep. at 123.) Wallack did not count October 4 as an Incident of Absence under the Work Rules. (Wallack Dep. at 46.)

On Sunday, October 6, 2002, Plaintiff called Wallack at home and told her that he had visited his personal physician, and that he wanted to see an orthopedic specialist. (Wallack Dep. 145-46.) Plaintiff said that he did not expect to be at work on his next scheduled day, Monday, October 7, 2002. (Id.)

Plaintiff spoke with Wallack on the phone again on Monday, October 7, 2002, and they discussed that Plaintiff would visit the IHC that day. (Wallack Notes.) Plaintiff visited the IHC, and was examined by Dr. Rosales. (Pl.'s Dep. at 129-30.) Plaintiff complained of left knee pain, but Dr. Rosales found that Plaintiff's complaints were disproportionate to the medical findings, which showed no swelling, discoloration, noise, or fluid. (Rosales Aff. at ¶ 7.) Because Plaintiff still complained of pain, Dr. Rosales ordered an MRI and placed Plaintiff on light duty pending a follow-up appointment scheduled for Friday, October 11, 2002.[7] (Id. at ¶ 8; Rosales Notes.)

[7]Dr. Rosales specified that Plaintiff be standing or walking for only four to six hours of his shift, and that he climb or squat "occassionally" throught his shift, and lift no more than fifty pounds. (Rosales Notes.) Plaintiff was cleared to sit for five to eight hours, and to use his hands, bend, and lift "frequently." (Rosales Aff. at ¶ 8; Rosales Notes.)

Plaintiff did not work on October 7 after completing his visit to IHC, even though he had been cleared for light duty work, and such work was available.[8] (Wallack Dep. at 149-49.) Wallack counted October 7 as Plaintiff's third Incident of Absence under the Work Rules.[9] (See id.)

Plaintiff reported for his scheduled shift on Tuesday, October 8, 2002, and performed light duty work in the medical records department. (Pl.'s Dep. at 136.) Wallack reminded Plaintiff to continue working light duty in medical records during his scheduled shifts. (Wallack Dep. at 52, 150.) Plaintiff left his shift early because his mother, who had been hospitalized since October 4, was not doing well.[10] (Pl.'s Dep. at 136.) Plaintiff also spoke with Wallack on the phone on Thursday, October 10, 2002, and she reminded him that he was scheduled to work in medical records on both Saturday, October 12

---

[8]It is not clear whether Plaintiff discussed his release to light duty work with Wallack on October 7, or if she found out later that he had been cleared for light duty work. (Pl.'s Dep. at 133-34, 138; Wallack Dep. at 148-49.) It is undisputed that Plaintiff was cleared for light duty work, that such work was available, and that Plaintiff did not work at all on that date. (See id.) Plaintiff's statement that Wallack sent him home and that he did not refuse work is unsupported by either his or Wallack's testimony. (See id.; see Pl.'s Resp. at ¶ 35.)

[9]Plaintiff asserts that the attendance record for October 7, 2002, indicates that Plaintiff was absent but excused. It is undisputed, however, that Wallack included this absence when calculating the Incidents of Absence that resulted in the disciplinary action of December 27, 2002. (See Wallack Dep. at 49; see also Def.'s Mot. Ex. 13, Disciplinary Reports ("Disciplinary Reports").)

[10]Plaintiff did not notify Wallack on October 8, 2002 that he was leaving early, or why. (Pl.'s Dep. at 137.)

and Sunday, October 13. (Wallack Notes.)

Plaintiff did not report for work on either October 12 or 13. (Pl.'s Dep. at 144, 147.) Plaintiff spent those days helping his mother, who had been ill, by preparing her house for her return and assisting with her health care.[11] (Pl.'s Dep. at 144-46.) Plaintiff called the Medical Records department to let them know that he would not be at work, but did not contact Wallack until at least Monday, October 14, 2002.[12] Wallack counted these absences as Plaintiff's fourth and fifth Incidents of Absence under the Work Rules.

On Monday, October 14, 2002, Plaintiff, who was not scheduled to work, was examined by Dr. Rosales in the IHC. (Rosales Aff. at ¶ 9.) Plaintiff's knee showed no swelling, discoloration, tenderness, or instability. (Id.) The MRI did

---

[11]Plaintiff also complained of knee pain during this period. (Pl.'s Dep. at 144-49.) Plaintiff's mother had been released from the Hospital earlier that week, and stayed with her daughter for a few days before returning to her own home on October 12. (Id.)

[12]At his deposition, Plaintiff testified that he called "Kathy, medical records supervisor" to notify her that he would not be in on October 12 and 13. When asked whether he told Wallack that he would be absent, Plaintiff answered "That weekend, no. That Monday afterwards, I'm sure I had a discussion with her about it." (Pl.'s Dep. at 148.) In the Affidavit attached to his opposition to Defendant's motion, Plaintiff claims that he spoke to Wallack on October 10, stating that he needed the weekend off to care for his mother. (Pl.'s Aff. at ¶ 6.) Plaintiff claims that Wallack referred him to Human Resources, who provided him with no solution. (Id. at ¶ 7, 8.)

Where a party, without explaination, submits an affidavit that contradicts his or her prior testimony, "the subsequent affidavit does not create a genuine issue of material fact." Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 706 (3d Cir. 1988). Plaintiff's statements in his Affidavit clearly contradict his earlier testimony regarding when he spoke with Wallack about his absences, and we are, therefore, free to ignore them. See id.

not reveal any tear, but did show some "degeneration" of the menisci. (Id. at 10.) Such degeneration occurs with age, and was not the cause of the alleged pain relating to the September 29 incident. (Id.) see also Def.'s Mot. Ex. 22, Nov. 18, 2002 Rosales Ltr. ("Rosales Ltr.").) Dr. Rosales concluded that the degeneration was not severe, and would not affect Plaintiff's ability to perform his job or perform regular daily activities. (Rosales Aff. at 10.) Dr. Rosales discharged Plaintiff to return to full duty with no restrictions. (Id.) Plaintiff notified Wallack of his clearance to return to full duty when they spoke late in the evening on October 14. (Pl.'s Dep. at 150; Wallack Dep. at 152.)

When Plaintiff returned to work on Tuesday, October 15, 2002, Wallack gave Plaintiff a written memo concerning his progress towards the goals set out in his improvement plan. (Def.'s Mot. Ex. 23.) The memorandum, among other things, instructed that "[Wallack] must be notified as Jim's Supervisor when he is inquiring about leaving early or calling out sick." (Id.)

Plaintiff was scheduled to work Monday, October 21, 2002. Plaintiff called the Respiratory Care Department that morning, and told co-worker Darnell Johnson ("Johnson") that he was "sick." (Def.'s Mot. Ex. 26, Dep. of Darnell Johnson ("Johnson Dep.") at 15-16.) Plaintiff did not contact Wallack on October 21. (Pl.'s Dep. at 154.) Plaintiff did not recall whether he

contacted Wallack after that date with regards to his absence and the reason therefor. (Id.) Plaintiff testified that he was absent as a result of his knee. (Pl.'s Dep. at 153.) Wallack counted October 21 as Plaintiff's sixth Incident of Absence. (Wallack Dep. at 39, 194-95.)

Plaintiff visited the IHC on Monday, October 28, 2002, and was examined by Dr. Rosales. (Rosales Aff. at ¶ 12.) Dr. Rosales found that the left knee was unremarkable, and discharged Plaintiff to continue working without restrictions. (Id. at 12-13.)

Plaintiff was scheduled to work on Monday, November 4, 2002, but called the Respiratory Care Department and told Johnson that he was "sick." (Johnson Dep. at 16-17, 27.) Plaintiff did not tell Johnson that he could not work because of problems with his knee, but says that his knee was the reason for his absence. (Id.; Pl.'s Dep. at 161-63.) Plaintiff did not contact Wallack concerning his absence. (Wallack Dep. at 63-64, 194-95.) Wallack counted November 4 as Plaintiff's seventh Incident of Absence under the Work Rules. (Id. at 39.)

On Tuesday, November 12, 2002, Plaintiff went to the Hospital's Department of Orthopaedic Surgery and Sports Medicine (the "Orthopaedics Department") and was examined by Dr. Easwaran Balasubramanian ("Dr. Bala"), an orthopaedic surgeon. (Pl.'s Dep. at 165-66.) Dr. Bala examined Plaintiff's left knee, and determined that it was normal, with full range of movement.

(Def.'s Mot. Ex. 27, Aff. of Dr. Easwaran Balasubramanian ("Bala Aff.") at ¶ 4, 5 .) Dr. Bala also reviewed the MRI, and concluded that Plaintiff's symptoms suggested degeneration of the meniscus, as shown in the MRI, or perhaps a slight, but not significant or serious, tear of the meniscus. (Id. at ¶ 6, 7.) Dr. Bala concluded that any degeneration was not severe, and would not be affected by or restrict Plaintiff from his work as a respiratory therapist. (Id. at 9-10.) Plaintiff informed Dr. Bala that he wanted to use acupuncture (which Plaintiff practiced) and knee exercises. (Id. at 8.) Dr. Bala did not believe that additional examination or physical therapy were necessary. (Id.)

On Thursday, November 14, 2002, Plaintiff visited Dr. Barry Gleimer ("Dr. Gleimer"), an orthopedist who treated Plaintiff for other injuries in the past. (Pl.'s Dep. at 166-67; see Def.'s Mot. Ex. 39, Records of Dr. Barry Gleimer ("Gleimer Records").) While the records do note that Plaintiff complained of left knee pain, the doctor's report addresses Plaintiff's complaint that his left knee injury caused "exacerbation" of his right knee, which he previously injured. (Id.) The examination results, diagnosis, and recommended treatment are for Plaintiff's right knee, not his left. (Id.) Dr. Gleimer's testimony confirmed that he did not provide any diagnosis or prognosis regarding Plaintiff's left knee. (Def.'s Mot. Ex. 38, Dep. of Dr. Barry Gleimer ("Gleimer Dep.") at 33-34.) Dr. Gleimer did not perform

any diagnostic testing on Plaintiff's left knee, or review any existing test results. (Id.) For Plaintiff's right knee, Dr. Gleimer recommended cortisone injection, physical therapy, and possibly surgery if the situation did not resolve. (Id.)

Plaintiff was scheduled to work on Wednesday, November 20 and Thursday, November 21, 2002. (Pl.'s Dep. at 163-64.) Plaintiff called in "sick" on November 21, again speaking with Johnson. (Johnson Dep. at 18.) Plaintiff did not contact Wallack, and did not provide any medical or other documentation regarding these absences. (Wallack Dep. at 64, 195.) Plaintiff asserts that these absences were "primarily" due to left knee pain, and that he also had some stomach distress and anxiety at that time. (Pl.'s Dep. at 164.) Wallack treated November 20 and 21 as Plaintiff's eighth and ninth Incidents of Absence. (Wallack Dep. at 39.)

On November 20, Plaintiff visited Dr. Dow. (Dow Dep. at 59.) Dr. Dow did not treat Plaintiff for any problems related to his knee. (Id. at 67.) Plaintiff complained of gas and belching, possibly attributable to Gastroesophageal Reflux Disease ("GERD").[13] (Id. at 63-64.) Dr. Dow did not prescribe Plaintiff any medication or treatment that day, and did not know whether Plaintiff was under another doctor's care for GERD at that time. (Id.)

[13]This visit was the first time that time that Dr. Dow has records related to GERD. (Dow Dep. at 230-53; Pl.'s Dep. at 194.)

Plaintiff was scheduled to work on Thursday, December 5, 2002. (Pl.'s Dep. at 222.) It snowed that day, and Plaintiff called out "sick," again speaking with Johnson. (Id.; Johnson Dep. at 19, 27.) Plaintiff had an appointment scheduled with a neurology practice that he had treated with previously, but that appointment was cancelled due to inclement weather. (Pl.'s Dep. at 222-23.) Plaintiff called Dr. Dow's office and made an appointment for later that day. (Id. at 223-24.) Plaintiff complained of knee and abdominal pain. (Dow. Dep. at 67-68.) Dr. Dow did not determine whether Plaintiff's abdominal pain was caused by or related to GERD, and did not definitively diagnose Plaintiff with GERD. (Id.) Other than recommending that Plaintiff eat a bland diet and avoid eating before bed, Dr. Dow did not recommend any treatment or prescribe any medication. (Id.) Plaintiff did not contact Wallack, and Wallack counted December 5 as Plaintiff's tenth Incident of Absence under the Work Rules.[14] (Wallack Dep. at 39-40, 68-70.)

On Tuesday, December 10, 2002,[15] Wallack met with Plaintiff and Eleanor Dickson ("Dickson"), the District 1199C delegate. (Pl.'s Dep. at 225; Def.'s Mot. Ex. 30, Aff. of Eleanor Dickson ("Dickson Aff.") at ¶ 4.) Wallack issued Plaintiff a written counseling for excessive absenteeism under the Work Rules. (See

[14]Plaintiff claims that the attendance record for December 5 was altered. (Pl.'s Resp. at ¶ 32 (citing Wallack Dep. at 65).)

[15]Plaintiff also worked on December 7, 2002. (Pl.'s Dep. at 225.)

Disciplinary Reports.) The written counseling included an instruction that "[a] doctor's note will be required for the last sick call, 12/5 and for future call outs."[16] (Id.)

Plaintiff was scheduled to work on Sunday, December 22 and Tuesday, December 24, 2002. Plaintiff called out on December 22, and claims that he suffered flu-type symptoms, but cannot recall who he notified of his absence on December 22 or what he told them. (Id. at 236-41.) Plaintiff called on December 24 and told a co-worker that he was sick. (Id. at 243.)

On Monday, December 23, 2002, Plaintiff visited Dr. Dow. (Dow Dep. at 72; Def.'s Mot. Ex. 19, Treatment Notes of Dr. Dow ("Dow Notes").) Plaintiff reported reduced pain in his left knee, but increased anxiety. (Dow Notes.) Dr. Dow testified that he would have included information about flu-like symptoms if Plaintiff had provided such information. (Dow Dep. at 73.)

Plaintiff did not speak directly to Wallack concerning the absences of December 22 and 24, but claims to have left her a voice mail message. (Pl.'s Dep. at 241-43; Wallack Dep. 74-79, 195.) Plaintiff did not provide a doctor's note. (Pl.'s Dep. 243.) Wallack counted December 22 and 24 as Plaintiff's eleventh and twelfth Incidents of Absence. (Id. at 81-82.)

On Friday, December 27, 2002, Wallack issued Plaintiff a

---

[16]Plaintiff claims that he tried to submit a doctor's note for the December 5 absence, but that Wallack told him that it was no longer necessary. (Pl.'s Dep. at 230-31.) Plaintiff admits that he did not produce this note as part of the discovery process, and that he was not able to obtain a copy. (Id.)

written notice and three-day suspension for excessive absenteeism under the Work Rules. (See Disciplinary Reports.) Plaintiff admitted that he had not provided a doctor's note for December 22 and 24. (Pl.'s Dep. at 247.)

Plaintiff was scheduled to work on Friday, February 7, 2003, but called out to Johnson, stating that he was "sick." (Pl.'s Dep. at 250; Johnson Dep. at 20-21, 27.) Plaintiff did not see a doctor, but asserts that the absence was because his GERD symptoms had interfered with his sleep the prior evening. (Pl.'s Dep. at 251.) Plaintiff asserts that he called Wallack at her home on February 7 and told her that he had not yet gone to a doctor, but planned to do so.[17] (Id. at 253.) Wallack counted February 7 as Plaintiff's thirteenth Incident of Absence under the Work Rules. (See Disciplinary Reports.)

Plaintiff was scheduled to work on Sunday, February 16 and Tuesday, February 18, 2003. On February 16, it snowed, and Plaintiff notified Johnson that he was "sick." (Pl.'s Dep. at 256, Johnson Dep. at 27.) Plaintiff did not call Wallack on February 16, but claims that he left her a voice mail message on

[17]Plaintiff saw Dr. Dow on February 11, 2003. (Dow Notes.) Plaintiff claims that he went to the hospital that same day, and placed a note from Dr. Dow under Wallack's door that excused his absence on February 7. (Pl.'s Dep. at 264-66.) Wallack testified that she did not receive this note. (Wallack Dep. at 85.) In March of 2003, Plaintiff provided a note dated February 11, 2003 indicating that he was under Dr. Dow's care for GERD from February 11 through February 13, and was able to "return to work" on February 13. (Def.'s Mot. Ex. 33, Note of Feb. 11, 2003 ("Feb. 11 Note").)

February 17 stating that he would try to be in on February 18.[18] (Pl.'s Dep. at 257.)

Plaintiff called co-worker Donna Farrell ("Farrell") on the evening of February 17 and morning of February 18 to call out because he was snowed in and could not get out of his driveway. (Pl.'s Dep. at 257.) Plaintiff did not contact Wallack with regards to his absence of February 18, nor did he provide a doctor's note. (Wallack Dep. at 88-94.) Wallack counted February 16 and February 18 as Plaintiff's fourteenth and fifteenth Incidents of Absence under the Work Rules. (Id.)

On February 20, 2003, Wallack issued Plaintiff a written notice, final written warning, and a second three-day suspension for excessive absenteeism under the Work Rules. (See Disciplinary Reports.) During his meeting with Wallack, Plaintiff stated that he could provide medical excuses for the February absences, but provided only the receipt from a dentist he saw on February 19 to address his lost filling.[19] (Pl.'s Dep. at 275; Wallack Dep. at 95.)

Plaintiff requested assistance from Dickson in dealing with the disciplinary actions. (Dickson Aff. at ¶ 7.) Dickson instructed Plaintiff on several occasions to provide doctor's

---

[18]Plaintiff did not specify to Johnson or Wallack the reason for his absence, but asserts that he had a toothache because a filling had fallen out, was under stress that caused his stomach to act up, and that his knee bothered him. (Pl.'s Dep. at 254-55.)

[19]Plaintiff's filling fell out while eating a sandwich on February 15, 2003. (Pl.'s Dep. at 259.)

notes for his absences. (Id.) Plaintiff never showed Dickson any doctor's note for any of his absences, and did not tell her that he had provided or attempted to provide any such notes to Wallack. (Id.) Plaintiff never told Dickson that he missed work to care for his mother or due to GERD. (Id. at ¶ 8.) Plaintiff mentioned his knee once, but generally stated that his absences were due to him being "sick" or "not feeling well." (Id.)

Plaintiff was scheduled to work Thursday, March 20, and Friday, March 21, 2003, but called out sick both of those days. (Pl.'s Dep. at 277, 279.) Plaintiff does not recall who he spoke with on March 20. (Id.) On March 21, Plaintiff called out to co-worker Anne Gibbs ("Gibbs").[20] Wallack called Plaintiff on March 21, and was told not to report on March 24, which was his next scheduled day, but to report on March 25 instead. (Pl.'s Dep. at 280-81.) Wallack counted March 20 and March 21 as Plaintiff's sixteenth and seventeenth Incidents of Absence. (See Disciplinary Reports.)

Plaintiff visited Dr. Dow on March 21. (Dow Dep. at 76; Dow Treatment Notes.) Dr. Dow renewed Plaintiff's anti-anxiety medication, and prescribed Prilosec and avoidance of dairy products to address Plaintiff's "gastroenteritis." (Id.; Dow Dep. at 182-83.)

---

[20]Plaintiff claims that he told Gibbs that he was having "stomach problems," but Gibbs does not recall that Plaintiff or anyone else ever told her why Plaintiff missed time from work. (Pl.'s Dep. at 280; Def.'s Mot. Ex. 12 at 47-48.)

D. Plaintiff's Termination

On March 25, 2003, Plaintiff was notified of his termination for excessive absenteeism in violation of the Work Rules. (See Disciplinary Reports.) At some point during or after the termination meeting, Plaintiff provided a copy of the Feb. 11 Note, and also provided a note from Dr. Dow indicating that Plaintiff was under Dr. Dow's care for "gastritis – abdominal pain" from March 20 to "present," and could return to work on March 24. (Def.'s Mot. Ex. 34, Notes Provided Upon Termination.)

Plaintiff grieved the termination, and presented in support of his grievance numerous notes from Dr. Dow issued after the termination. (Pl.'s Dep. at 370.) These notes indicate that Plaintiff was under treatment with Dr. Dow for various periods coinciding with Plaintiff's absences to address left knee pain and GERD. (Def.'s Mot. Ex. 35, Post-Termination Notes.) These notes were issued at Plaintiff's request, and Dr. Dow testified that he wrote them based on Plaintiff's statements, rather than based on the relevant treatment records. (Dow Dep. 137-38.) Plaintiff's grievance was not successful, and he proceeded with the instant suit.

II. Legal Standard for Summary Judgment

In deciding a motion for summary judgment under Fed. R. Civ. P. 56(c), a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co.

v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Rule 56(c) provides that summary judgment is properly rendered:

> . . . 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.

Thus, summary judgment is appropriate only when it is demonstrated 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. Celotex Corp. v. Catrett, 477 U.S. 317, 322-32 (1986). An issue of material fact is said to be genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

A party seeking summary judgment bears the initial burden of identifying portions of the record that demonstrate the absence of issues of material fact. Celotex, 477 U.S. at 323. The party opposing a motion for summary judgment cannot rely upon the allegations of the pleadings, but instead must set forth specific facts showing the existence of a genuine issue for trial. Id. at 324; Fed. R. Civ. P. 56(e). "With respect to an issue on which the nonmoving party bears the burden of proof," the movant may satisfy its burden by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. Where

the nonmoving party fails to identify specific facts in opposition to the factual assertions and arguments advanced in the motion, the district court is not obliged to "to scour the entire record to find a factual dispute." See Dawley v. Erie Indem. Co., 100 Fed. Appx. 877, 881 (3d Cir. 2004) (internal citations omitted).

III. Discussion

Defendants move for summary judgment on the basis that Plaintiff has raised no genuine issue of material fact as to whether Defendant illegally interfered with Plaintiff's rights under the FMLA. Defendant argues that Plaintiff's condition did not make him eligible for FMLA leave and, even if he was or might arguably have been eligible based on his condition or his need to care for his mother, Plaintiff failed to properly notify Defendant as required under the FMLA and attendant regulations.

A. Interference claims under the FMLA

The FMLA allows an eligible employee to take up to twelve weeks of unpaid leave during any twelve month period where such leave is the result of a "serious health condition" that renders the employee "unable to perform the functions" of his job. 29 U.S.C. § 2612(a)(1)(D). FMLA leave is also available for an employee to care for an immediate family member who suffers from a serious health condition. Id. at § 2612(a)(1)(C).

The FMLA prohibits an employer from interfering with an employee's exercise of his or her right to take unpaid leave

under the FMLA. 29 U.S.C. § 2615(a); see also 29 C.F.R. § 825.220(b). To support a claim that an employer has wrongfully interfered with an employee's FMLA rights or deprived him or her of entitlements under the statute, a plaintiff must show that he or she was entitled to benefits and that those benefits were denied. See generally, Callison v. City of Philadelphia, 430 F.3d 117 (3d Cir. 2005).

If an employee can successfully support his or her eligibility for FMLA benefits, the analysis turns to whether such benefits were denied. See Callison, supra. Denial of benefits can include a failure to advise an employee of the availability of such benefits. See Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 142-144 (3d Cir. 2004.) A plaintiff may show interference with his FMLA rights if he is "able to establish that this failure to advise rendered him unable to exercise that right in a meaningful way, thereby causing injury." Id. at 143.

It appears that Plaintiff has raised a question of fact as to whether he was advised of his rights under the FMLA. (See supra Part I.A.) Thus, we will consider both his eligibility for benefits and the second part of the interference test – whether the interference precluded the employee from exercising his or her FMLA rights in a meaningful way.

To show that an employer's interference has prevented meaningful exercise of FMLA rights, a plaintiff must show that

the interference resulted in prejudice.[21] Conoshenti, 364 F.3d at 144 (concluding that "the Supreme Court would find an actionable "interference" in violation of § 2615(a) here in the event Conoshenti is able to show prejudice as a result of that violation") (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002)). Courts have found that interference by failure to advise has prejudiced an employee where, had the appropriate information been provided, the employee could have structured leave so as to be protected by the FMLA.[22] Id. at 145 (citing Nusbaum v. CB Richard Ellis, Inc., 171 F. Supp. 2d 377, 379-80 (D.N.J. 2001)).

Plaintiff appears to argue that prejudice can be shown if, had he known of his rights, he could have taken FMLA leave in place of any one of the absences considered in deciding to terminate him, regardless of whether the remaining absences might still have resulted in termination. (Pl.'s Br. at 2, 21.) Plaintiff relies entirely on Brannon v. Oshkosh B'Gosh, Inc., 897

---

[21]Plaintiff correctly states that the intent of the employer is not relevant in determining liability for interference with FMLA rights. (Pl.'s Br. at 14-15.) This 'strict liability' does not, however, obviate a plaintiff's obligation to show that he was eligible for FMLA leave and that the alleged interference caused prejudice. Thus, the interference alone – even a failure to advise – does not entitle a plaintiff to relief.

[22]We do not examine the prejudice that may be caused by a failure to timely designated leave as FMLA leave, because Plaintiff does not allege that Defendants retroactively designated leave to his detriment. We further note that, while Conoshenti did not consider the question of eligibility for leave, it confirms that the same is a threshold issue by requiring that a plaintiff must be able to show that he could have actually exercised his right to leave to recover for interference with such rights.

F. Supp. 1028 (M.D. Tenn. 1995) for the proposition that if one of a plaintiff's absences qualified for protection of the FMLA, a termination that considered those absences was invalid under the FMLA. (Id.) This reading of Brannon, however, is both inaccurate and in conflict with the binding authority on this issue.

In Brannon, the plaintiff was terminated because she accumulated more than the permitted eighty points during a twelve month period under her employer's attendance policy. Brannon, 897 F. Supp. at 1031. While the plaintiff was unable to prove that her own absences were due to any "serious health condition," she successfully argued that two of the absences for which she was assessed points were FMLA-qualified because she was caring for her daughter, and notified her employer of her need to do so. Id. at 1037.

Before counting the two absences to care for her daughter, the plaintiff had accumulated seventy-five and one half points for the relevant twelve month period. Brannon, 897 F. Supp. at 1033. The two days of absence to care for her daughter resulted in the assessment of an additional eight points, bringing the total above the eighty-point limit and leading to the plaintiff's termination. Id. The court concluded that if either the plaintiff's absences for her own illness, or those to care for her daughter, or both, were covered by the FMLA, then the termination was invalid because the plaintiff would not have

accumulated eighty or more points under the attendance rules. Id. at 1031 n.2.

Thus, Plaintiff's apparent interpretation of Brannon as holding that a termination is invalid if any absence counted towards termination is covered by the FMLA is not supported by the court's reasoning in that case. Rather, Brannon, like Conoshenti, found that a termination would be invalid if a plaintiff can show that enough of the relevant absences were FMLA-protected that he or she should not have been subject to termination or excluded from reinstatement.

The Hospital's Work Rules provide that employees accumulating fifteen or more absences are subject to termination. (See supra Part I.B.) Plaintiff was terminated because, according to the Hospital's records, he accumulated seventeen Incidents of Absence under the Work Rules. (See Disciplinary Records.) Plaintiff must show that he was eligible for FMLA leave, and that had he been apprised of the option to take FMLA leave, he would not have accumulated so many absences as to be subject to termination under the Work Rules. See Brannon, 897 F. Supp. at 1031; see also Conoshenti, 364 F.3d at 145. Thus, to show that his termination was invalid, Plaintiff must establish that three or more of his absences were covered by the FMLA.[23]

[23]We note that the question of whether any or all of the absences at issue should have been "excused" under any policy or law other than the FMLA is not relevant. Plaintiff can only recover for violation of the FMLA if he could have taken FMLA leave in lieu of the absences that resulted in his termination.

1. Plaintiff's Ailments

Plaintiff's response to Defendant's motion does not address Defendant's argument that neither Plaintiff's knee injury nor his GERD were a "serious health condition" under the FMLA. (See generally, Pl.'s Mem. of Law in Opp. to Def.'s Mot. for Summary Judgment ("Pl.'s Opp.").) Thus, the question before us is whether Defendant has sufficiently highlighted an absence of evidence to support that one or both of Plaintiff's alleged conditions were a "serious health condition."

For leave to have been covered by the FMLA, a plaintiff must establish that he was an eligible employee under the FMLA, that his employer was an employer subject to the FMLA, and that either the employee or an immediate family member suffered from a serious health condition. 29 U.S.C. § 2612(a)(1). Here, Defendant does not dispute that Plaintiff was an eligible employee and that the Hospital was an employer subject to the FMLA. (Def.'s Br. at 40.) Defendants do argue, however, that Plaintiff did not suffer from a serious health condition. (Id.)

A serious health condition is defined as "an illness, injury, impairment, or physical or mental condition" that involves either inpatient care or "continuing treatment by a health care provider." 29 C.F.R. § 825.114(a). The regulations delineate five situations that qualify as a "serious health condition involving continuing treatment by a health care provider." See id. at § 825.114(a)(2). One relevant situation

requires

> (I) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
> (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g. , physical therapist) under orders of, or on referral by, a health care provider; or
> (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.[24]

29 C.F.R. § 825.114(a)(2)(i). The other relevant situation qualifying as a serious health condition requiring continuing treatment includes

> (iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
> (A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
> (B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

---

[24]A regimen of treatment includes

> a course of prescription medication (e.g. , an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

29 C.F.R. § 825.114(b).

(C) May cause episodic rather than a continuing period of incapacity (e.g. , asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.114(a)(2)(iii).[25]

A plaintiff's assertion that he or she suffered from a serious health condition must be supported by evidence from a health care provider that the claimed condition, in that provider's professional medical opinion, actually prevented the plaintiff from working.[26] Brown v. Seven Seventeen HB Phila. Corp. No. 2, Civ. A. No. 01-1741, 2002 U.S. Dist. LEXIS 15066, 10-11 (E.D. Pa. August 8, 2002) (internal citations omitted). It is not enough that, "in the employee's own judgment, he or she should not work, or even that it was uncomfortable or inconvenient for the employee to have to work."[27] Id. (citing Olsen v. Ohio Edison Co., 979 F. Supp. 1159, 1166 (N.D. Ohio

---

[25]The other situations qualifying as a serious health condition requiring continuing treatment are incapacity due to pregnancy or prenatal care; long-term or permanent incapacity due to a condition for which treatment may not be effective (e.g. Alzheimer's, late stage terminal illness); and recovery from surgery or treatment for an illness that would cause incapacity for at least three consecutive days if not treated. See 29 C.F.R. § 825.114(a)(2)(ii), (iv), and (v).

[26]This inquiry is separate from the issue of medical certification. Here, we do not examine the employer's procedures or obligations with regards to obtaining medical certification for a condition. See 29 C.F.R § 825.305(a). Rather, we must determine whether any medical evidence shows that, at the time of Plaintiff's absence, the specified condition actually prevented him from working.

[27]Although the Third Circuit has not explicitly spoken on this issue, the majority of appellate courts have found that a plaintiff's own statement of incapacity is insufficient to support his or her eligibility for FMLA benefits. See McCoy v. Port Liberte Condominium Assoc. #1, Inc., Civ. A. No. 02-1313, 2003 U.S. Dist. LEXIS 26462, *14-18 (D.N.J. Sept. 12, 2003) (providing a thorough discussion of opinions of circuits that have decided this question).

1997)). Generally, "a health care provider must instruct, recommend, or at least authorize an employee not to work for at least four consecutive days for that employee to be considered incapacitated." Id. (citing Bond v. Abbott Laboratories, 7 F. Supp.2d 967, 974 (N.D. Ohio 1998)).

a. Knee injury of Sept. 29, 2002

Defendant contends that none of the medical evidence of record with regards to Plaintiff's knee injury – records from the Emergency Room from the day of the injury, the treatment records and Affidavit of Dr. Rosales, the treatment notes and deposition testimony of Dr. Dow, the affidavit of Dr. Bala, and the treatment records and deposition testimony of Dr. Gleimer – provides evidence tending to show that Plaintiff was incapacitated. (Mem. of Law of Def. Temple East, Inc. in Support of its Mot. for Summary Judgment ("Def.'s Mem.") at 43-49.) Thus, Defendants argue, Plaintiff cannot show a serious health condition under 29 C.F.R. § 825.114(a)(2)(i) or (iii). (Id.)

i. ER Records

The ER Records do not offer any evidence that Plaintiff was incapacitated by the injury to his left knee. The ER Records reflect that Plaintiff was diagnosed as having a "contusion" of the left knee. (ER Records.) Plaintiff was discharged from the Emergency Room with no restrictions or prescriptions. (Id.) The only instruction given was that Plaintiff should follow up with a visit to the IHC. (Pl.'s Dep. at 83.) Upon discharge from the

emergency room, Plaintiff completed his shift. (Id. at 84.) The ER Records contain no recommendation that Plaintiff refrain from working or performing other daily activities. (See ER Records.) Thus, the ER Records do not support Plaintiff's claim that he was incapacitated by the injury to his left knee.

ii. Dr. Rosales' Records

Dr. Rosales examined Plaintiff in the IHC on October 3, October 7, October 13, and October 28. Dr. Rosales' records provide no evidence that tends to show that Plaintiff was ever incapacitated by the injury to his left knee. Instead, Dr. Rosales consistently concluded that Plaintiff's left knee was not severely injured, and that any injury sustained would not be affected by Plaintiff's continued work and would not prevent Plaintiff from working or carrying out his daily activities. (See Rosales Aff. at ¶¶ 5-13; Rosales Notes.)

The only arguable evidence of incapacity is the fact that Dr. Rosales put Plaintiff on "light duty" beginning on October 7, pending the results of an MRI of Plaintiff's knee. (See Rosales Aff. at 8; Rosales Notes.) Dr. Rosales' medical findings on October 7, however, were that the examination of Plaintiff's knee revealed no condition that should cause the complained-of pain. (Id. at 7.) Plaintiff's light-duty restrictions specified that he stand no more than six hours during his shift, lift no more than fifty pounds, and be asked to squat or climb only occasionally. (See Rosales Notes.) During the period that he

was restricted to light duty, Plaintiff cleaned his mother's house and performed respiratory and other health care functions for her. (Pl.'s Dep. at 144-46.) Upon examination of the MRI on October 13, Dr. Rosales released Plaintiff to full duty because he found no injury that would be affected by Plaintiff's continued work or that would restrict Plaintiff's ability to work. (Rosales Aff. at 10.)

Neither Defendant nor Plaintiff addresses whether an individual who is cleared to perform light duty work is incapacitated, and we can find no binding authority on this question. Because the question of whether an ailment is a "serious health condition" is a separate inquiry from whether an employee was "unable to perform the functions" of his or her job, we cannot assume that incapacity for the purpose of the first is equivalent to the latter. See 29 U.S.C. § 2612(a)(1)(D). An employee is "unable to perform the functions" of his position when he is "unable to perform any one of the essential functions of the position[] within the meaning of" the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. 29 C.F.R. § 825.115. In contrast, a "period of incapacity" is described as "inability to work, attend school or perform regular daily activities." Id. at § 825.114(a)(2)(i). Thus, the plain language of the regulations suggest that a question of incapacity for purposes of determining whether an ailment is a "serious health condition" does not turn on an inability to perform one

function of his job, but rather may properly consider whether a plaintiff could perform light duty work or carry out other daily activities.

We conclude, therefore, that the restriction to light work is not equivalent to incapacity. See Wilkins v. Packerware Corp., Civ. A. No. 04-4024, 2005 U.S. Dist. LEXIS 14711, *16-18 (D. Kan. June 22, 2005); cf. Pinson v. Berkley Medical Resources Inc., Civ. A. No. 03-1255, 2005 U.S. Dist. LEXIS 13045, *50 (W.D. Pa. June 21, 2005). Thus, Plaintiff's restriction to light duty from October 7 through October 13, cannot support that he was incapacitated for the purposes of § 825.114(a)(2)(i).

iii. Dr. Dow's Records

Dr. Dow examined Plaintiff on October 4, November 20, December 5, December 23, February 11, and March 21. Dr. Dow's records indicate that Plaintiff complained of left knee pain at all but the last two of these appointments. (Dow Notes.) Plaintiff reported reduced knee pain on December 23. (Dow Notes.) Despite the complaints, Dr. Dow did not recommend or prescribe any course of treatment with regards to Plaintiff's knee, or conclude that Plaintiff should refrain from working or limit his activities in any way.[28] (Id.; see also Dow Dep. at

[28]We find that the notes from Dr. Dow submitted in support of Plaintiff's grievance are not relevant. (Def.'s Mot. at 35.) These notes were not submitted to Defendant until long after the termination decision was made, and any information contained therein was, therefore, not available to Defendant at the time the Hospital allegedly interfered with Plaintiff's FMLA rights. Furthermore, these notes contradict Dr. Dow's treatment records and deposition testimony (as well as Plaintiff's own testimony), and were admittedly drafted

67-68; 91-92.) Thus, Dr. Dow's treatment records and testimony fail to support that Plaintiff was incapacitated.

iv. Dr. Bala's Records

Dr. Bala examined Plaintiff on November 12, 2002. Dr. Bala's Affidavit offers no evidence that Plaintiff was incapacitated as a result of Defendant's knee injury. Dr. Bala examined Plaintiff's left knee, and reviewed the MRI. (Bala Aff. at ¶¶ 4-7.) Dr. Bala concluded that there was no severe injury, and that any injury would not be affected by Plaintiff's continued work or restrict Plaintiff from working. (Id. at ¶ 9-10.) While Plaintiff indicated an interest in using acupuncture and knee exercises, Dr. Bala did not prescribe such treatments, nor did he prescribe or recommend any further course of treatment. (Id. at 8.) Thus, Dr. Bala's records do not show that Plaintiff was incapacitated.

v. Dr. Gleimer's Records

Dr. Gleimer examined Plaintiff on November 14, 2002. Dr. Gleimer previously treated Plaintiff for an injury to Plaintiff's right knee. (See Gleimer Records.) Although Plaintiff complained of some left knee pain, Dr. Gleimer did not perform

---

without any first-hand knowledge of when Plaintiff was absent and whether any or all of the referenced conditions necessitated his absence. They offer no new diagnosis, but merely attempt to retroactively change the previously issued prognosis and treatment recommendation. We cannot, therefore, conclude that these notes represent Dr. Dow's professional medical opinion, and therefore these notes are not relevant to determining whether Plaintiff had a serious health condition.

any diagnostic testing, review any records or test results, or provide a diagnosis for Plaintiff's left knee. (Id.; Gleimer Dep. at 33-34, 40.) Rather, Dr. Gleimer's treatment was limited to addressing Plaintiff's complaint of exacerbation of the preexisting right knee problem as a result of favoring his left knee. (Id.) Dr. Gleimer did recommend cortisone injection and physical therapy to address the right knee problem, with consideration of surgery if those treatments did not resolve the complaint. (Id.) This evidence, even with respect to Plaintiff's right knee, does not provide any medical opinion supporting the conclusion that Plaintiff was incapacitated.

Our review of the medical evidence of record reveals no medical opinion that Plaintiff was incapacitated – unable to work or perform daily activities – as a result of the injury to his left knee. In the absence of such evidence, Plaintiff has not raised a genuine material question of fact as to whether he suffered from a serious medical condition for FMLA purposes. See § 825.114(a)(2)(i) or (iii); see also Part III.A.1., supra. Thus, the evidence does not create any genuine issue of material fact as to whether Plaintiff was incapacitated by his left knee on any of the dates that he was absent from work.

b. GERD

Defendants argue that Plaintiff has provided no medical opinion showing that Plaintiff was incapacitated as a result of GERD, and thus cannot show that this problem was a "serious

medical condition." (Def.'s Mem. at 49-52.) The medical evidence of record with regards to Plaintiff's GERD consists of the treatment notes and deposition testimony of Dr. Dow.[29,30]

Dr. Dow's records and testimony do not indicate that he concluded that Plaintiff's GERD were a "serious health condition." The first time that Dr. Dow has records related to Plaintiff's for GERD is November 20, 2002. (Dow Dep. at 230-53; Pl.'s Dep. at 194.) Plaintiff's complaint was of gas and belching. (Dow Dep. at 63-64.) Dr. Dow did not prescribe Plaintiff any medication or treatment that day, and did not know whether Plaintiff had received treatment from another doctor for that complaint. (Id.) Dr. Dow did not conclude that GERD rendered Plaintiff unable to work or perform daily activities, and Plaintiff claimed that his absences of November 20 and 21 were "primarily" due to his knee. (Id.; Pl.'s Dep. at 164.)

On December 5, 2002, Plaintiff complained of abdominal pain, but Dr. Dow did not determine whether Plaintiff's abdominal pain was caused by or related to GERD, and did not definitively diagnose Plaintiff with GERD. (Dow. Dep. at 67-68.) Dr. Dow recommended that Plaintiff eat a bland diet and avoid eating before bed. (Id.) Dr. Dow did not recommend that Plaintiff stay

---

[29]As above, we find that the notes issued after Plaintiff's termination do not represent Dr. Dow's medical opinion, and are, therefore, not relevant in this inquiry. See supra n.28.

[30]While Plaintiff may have treated with other doctors for GERD or other gastric complaints before or during the relevant period, he has provided no evidence of the medical opinions rendered.

home from work, or conclude that Plaintiff's condition that day made him unable to perform his job or daily activities. (See id.)

Dr. Dow saw Plaintiff again on February 11, 2003. (Dow Notes.) Dr. Dow's treatment records indicate that he treated Plaintiff only for anxiety. (Id.) Dr. Dow, nonetheless, issued a note stating that Plaintiff was under his care from February 11 to February 13 for GERD, and that Plaintiff could return to work on February 13. (Feb. 11 Note.) Dr. Dow had not prescribed any medication or any additional treatment since the initial mention of GERD on November 20, 2002. (See Dow Notes.) This note, even if it can support that Plaintiff was unable to work on February 11 and February 12, does not support that Plaintiff was incapacitated under the FMLA. This note only covers two days, making it insufficient to show a "serious health condition" under § 825.114(a)(2)(i), which requires a period of incapacity of at three or more days. Furthermore, this note does not support that Plaintiff was incapacitated on February 7, 2003, or that he even had any GERD-related symptoms on that date.

Even if the note of February 11 could be interpreted to suggest a chronic health condition, such condition is irrelevant because there is no evidence supporting that Plaintiff was incapacitated by or receiving treatment for his GERD on any other occasion that he was absent. After February 11, the next time Dr. Dow treated Plaintiff was March 21, 2003. On that date,

Plaintiff was treated for anxiety and gastroenteritis – not GERD. (Dow Notes; Dow Dep. at 76.) Dr. Dow's note of March 21 reflects that gastroenteritis, not GERD, was the problem at that time, stating that Plaintiff was under Dr. Dow's care beginning March 20 for "gastritis – abdominal pain," and could return to work on March 24. (See Notes Provided Upon Termination.) Plaintiff presents no evidence that gastroenteritis, gastritis, and GERD are the same condition. Thus, Dr. Dow's note of March 21 does not support that Plaintiff was incapacitated by or treated for GERD on March 20 and 21.

At most, the medical evidence suggests that Plaintiff was incapacitated by and treated for GERD on February 11 and 12, 2003. Because Plaintiff was not scheduled to work either of these days, the evidence creates no genuine issue of material fact as to whether Plaintiff was incapacitated by or treated for GERD on any of the dates that he was absent from work.

2. Plaintiff's Mother's Illness

Plaintiff's response to Defendant's motion relies entirely on the argument that the absences of October 12 and 13, 2002 were covered by the FMLA, thus invalidating Plaintiff's termination for excessive absenteeism. (See generally, Pl.'s Opp.) As discussed above, however, Plaintiff must show that at least three of his absences were FMLA protected. (See supra Part III.A.) Plaintiff cannot show that any absences were protected based on his knee or GERD. (See supra Part III.A.1.a. and b.) Thus,

merely showing that two absences were covered by the FMLA is insufficient to render Plaintiff's termination invalid as violating the FMLA.[31]

IV. Conclusion

Plaintiff is unable to identify any genuine issue of material fact as to whether three or more of the seventeen Incidents of Absence that led to his termination were covered by the FMLA. Thus, Plaintiff cannot establish that he was terminated in violation of the FMLA.

For the reasons outlined above, Defendant's motion shall be GRANTED, and Plaintiff's Complaint DISMISSED pursuant to the attached order.

---

[31]We note that while there appears to be little dispute as to whether Plaintiff's mother suffered from a serious health condition, Plaintiff would have significant difficulty in showing that he notified Defendant of his need to take FMLA leave to care for her. While notice of need for leave need not mention the FMLA, it must be provided as soon as practicable, and must provide sufficient information to make the employer aware that the employee needs FMLA-qualifying leave. 29 C.F.R. § 825.302. To demonstrate that he provided notice of his need for FMLA leave, Plaintiff relies first on his affidavit. Plaintiff's statements in his affidavit regarding his notice of his need for leave on October 12 and 13 must be disregarded because they directly conflict with his prior sworn testimony. See supra n.12. Plaintiff next relies on Farrell's testimony that Wallack knew Plaintiff's mother was ill, but the cited testimony includes Farrell's admission that she did not know to what extent Wallack was aware or kept apprised of the situation. (Pl.'s Opp. at 18; Pl.'s Mot. Ex. D, Farrell Dep. at 58-60.) Finally, Plaintiff argues that because Wallack knew when Plaintiff's mother was entering the hospital, that Wallack must have known when Plaintiff's mother was being discharged. (Pl.'s Opp. at 18.) Even if Wallack was aware of Plaintiff's mother's discharge from the hospital, there is nothing other than Plaintiff's affidavit to suggest that Wallack knew when Plaintiff's sister decided that their mother should return to her own home. Thus, Plaintiff fails to identify any facts suggesting that Wallack was actually or constructively on notice that his absences of October 12 and 13 were for a potentially FMLA-qualified reason.

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

JAMES YANSICK	:	CIVIL ACTION
	:	
v.	:	04-4228
	:	
TEMPLE UNIVERSITY HEALTH SYSTEM, TEMPLE EAST, INC., NORTHEASTERN HOSPITAL, AND JOHN DOES 1-10 (fictitious individuals and entities)	:	

ORDER

AND NOW, this 27th day of July, 2006, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 23), and all responses thereto (Doc. Nos. 25, 27), it is hereby ORDERED that the motion is GRANTED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.