

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
WESTERN DIVISION

|                      |   |                         |
|----------------------|---|-------------------------|
| JEFFREY L. SCHLATER, | ) |                         |
|                      | ) |                         |
| Plaintiff,           | ) | Civil No. 1:02-CV-10003 |
|                      | ) |                         |
| vs.                  | ) |                         |
|                      | ) |                         |
| EATON CORPORATION,   | ) | ORDER                   |
|                      | ) |                         |
| Defendant.           | ) |                         |
|                      | ) |                         |
|                      | ) |                         |

The Court has before it defendant's motion for summary judgment, filed February 21, 2003. Plaintiff filed a resistance on March 13, 2003, and defendant replied on March 28, 2003. The matter is now fully submitted.

I. BACKGROUND

The following facts are either undisputed or viewed in a light favorable to plaintiff. Defendant, Eaton Corporation, operates a transmission manufacturing plant in Shenandoah, Iowa ("the Plant"). Plaintiff, Jeffrey Schlater, began his employment at the Plant as a forklift operator in 1987. On August 1, 1995, plaintiff sought and received a welder position in the Plant's sub-assembly department. As a welder, plaintiff was responsible for using robotic welding machines to attach gears to shafts. Plaintiff handled different types of gear/shaft units, depending upon the particular transmission model being assembled. The lightest units weighed approximately 15 pounds, the heaviest 38 pounds.

On May 19, 1999, plaintiff fractured a vertebrae in his neck during a non-work-related bicycle accident. He was unable to work for a few weeks following his injury, but returned to work in June 1999. Thereafter, he underwent two separate surgical procedures on his neck.<sup>1</sup>

During the 22 months following his neck injury, plaintiff's treating physician, Dr. Taylon, issued a series of temporary work restrictions. The restrictions varied greatly, ranging from "totally incapacitated"/no working allowed (October 21, 1999), to "regular work duties"/no restrictions (January 20, 2000). Appendix to Defendant's Motion for Summary Judgment, at 10, 14. Dr. Taylon frequently recommended that plaintiff restrict his lifting, standing, walking, bending, squatting, driving, and climbing. *Id.* at 7-33. The lifting restrictions ranged from lifting no more than 10 pounds, to no restriction at all.<sup>2</sup>

When plaintiff was placed on temporary work restrictions by Dr. Taylon, defendant assigned him to light-duty work at the Plant. For example, when temporary restrictions prevented plaintiff from lifting the heavier gear/shaft units, he was assigned to weld only the lighter units. When plaintiff was restricted from standing for more than four hours, he welded during part of his shift and performed clerical work for the remainder of his shift.

On April 30, 2001, Dr. Taylon placed plaintiff on "permanent" work restrictions. Dr. Taylon

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<sup>1</sup> Plaintiff was also out of work for approximately one month after breaking a finger in a non-work-related accident in February 2001.

<sup>2</sup> The following is a list of Dr. Taylon's recommended lifting restrictions: June 10, 1999, 20 pounds; July 1, 1999, 40 pounds; September 30, 1999, 35 pounds; October 21, 1999, no lifting allowed; November 23, 1999, 30 pounds; December 3, 1999, 20 pounds; January 20, 2000, no restriction; April 6, 2000, 25 pounds; April 24, 2000, 10 pounds; May 16, 2000, 16 pounds; September 6, 2000, no lifting allowed; September 18, 2000, 20 pounds; November 13, 2000, no lifting; December 14, 2000, 15 pounds.

advised plaintiff not to lift more than 35 pounds, push or pull more than 15 pounds, grasp or forcefully pinch objects, climb stairs, sit or stand. Appendix to Defendant's Motion For Summary Judgment, at 29. The Plant's safety manager, Jason Neutzling ("Neutzling"), sought clarification of certain aspects of plaintiff's new permanent work restrictions, particularly the restriction on any standing or sitting. Dr. Taylon advised that plaintiff could stand or sit for no longer than two hours at a time, after which he would need a 15-minute break.

On May 10, 2001, Neutzling met with plaintiff and discussed the permanent work restrictions issued by Dr. Taylon. Neutzling told plaintiff that there were no available job assignments at the Plant that he could perform. Although defendant's practice was to provide light-duty work to employees with temporary work restrictions whenever possible, there were no permanent light-duty job assignments available at the Plant at that time. Plaintiff ceased working on May 11, 2001.

On July 31, 2001, plaintiff delivered to Neutzling a revised work release from Dr. Taylon that indicated plaintiff could return to work on August 6, 2001 with a permanent 35-pound lifting limitation. Neutzling told plaintiff that there were no available positions in the Plant for someone with a permanent 35-pound lifting restriction.

When plaintiff began his leave of absence in May, he received salary continuation, which allowed him to be paid his regular salary for a specified period of time. After his salary continuation was exhausted, plaintiff applied for short-term disability ("STD") benefits with Kemper National Services ("Kemper"), defendant's disability benefits administrator. Plaintiff received STD benefits in the amount of \$607.60 per week for six months. On October 7, 2001, plaintiff applied for long-term disability ("LTD") benefits with Kemper. The LTD benefits plan provided, in relevant part:

## ELIGIBILITY FOR BENEFITS

You may be eligible for monthly long term disability benefits if you are covered by the Plan and:

- # you cannot work due to an illness or injury, whether occupational or non-occupational;
  - # you have a covered disability as defined below under “Covered Disability”; and
  - # you are under the continuous care of a physician who verifies, to the satisfaction of the Claims Administrator, that you are totally disabled.
- ...

### Covered Disability

- # You will be considered to have a covered disability . . . under the Plan if:

during the first 24 months of such disability, inclusive of any period of short term disability, you are totally and continuously unable to perform the essential duties of your regular position with the Company, or the duties of any suitable alternative position with the Company; . . .

The availability and suitability of alternative positions at Eaton corporation are determined by the Company, in its sole discretion.

Plaintiff’s Appendix in Resistance to Defendant’s Motion For Summary Judgment, at 29 (Long Term Disability Plan Excerpt).

On October 31, 2001, Kemper notified defendant that plaintiff’s LTD claim had been approved, and that his LTD benefits would begin on November 9, 2001. On November 9, 2001, defendant’s human resources manager sent plaintiff a letter stating that his employment at the Plant was terminated because he had been approved for LTD benefits. This employment action was consistent

with defendant's practice of automatically terminating employees who qualified for LTD leave.<sup>3</sup>

Prior to his termination, plaintiff told his supervisors that he wanted to continue working as a welder at the Plant. According to defendant, the Plant implemented "lean manufacturing principles" in September 2000 that fundamentally changed the jobs in the assembly and sub-assembly areas. This shift combined the various jobs in the assembly and sub-assembly areas into a single job classification. As a result, assembly employees were no longer assigned to individual tasks, such as welding, but were required to rotate among all work assignments in the assembly area, including welding, sub-assembly, oil drain, air check, end yoke, and the main line. Employees in this new job classification were required to lift and carry parts weighing up to 56 pounds, handle or push fixtures or other items weighing up to 50 pounds, and engage in constant standing, repetitive motion, and occasional walking.

Plaintiff denies that "lean manufacturing principles" were implemented at the Plant in September 2000.<sup>4</sup> Plaintiff claims that although defendant may have announced the implementation of "lean manufacturing principles" during plaintiff's employment with the Plant, employees were not actually required to rotate among different duties. Instead, they were assigned particular work projects, such as welding. Out of the approximately 20 employees in his department on his shift, plaintiff was the only one asked to work on the heavier job involving clutch housings.

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<sup>3</sup> Shortly after receiving the November 9, 2001 letter, plaintiff began receiving LTD benefits from Kemper at the rate of 60% of his regular pay. Plaintiff continues to receive LTD benefits to date. Plaintiff has not applied for Social Security disability benefits.

<sup>4</sup> No documents in the record pre-dating plaintiff's termination indicated a change in plaintiff's job description. Defendant's employee, John Travis, prepared a worksheet on May 14, 2001 in which he described plaintiff's former position as "assembly welder." Plaintiff's Appendix In Resistance To Defendant's Motion For Summary Judgment, at 26.

Plaintiff told his supervisors that he could perform the heavy job involving clutch housing if a mechanical arm could be installed on his welding machine. In order for a mechanical arm to function properly on a welding machine, plaintiff concedes that the device would need to be able to simultaneously lift and turn the assembly units. Mechanical arms were used in other areas of the Plant, but only to lift parts. Plaintiff did not consult with an engineer about the feasibility of installing a mechanical arm to simultaneously perform lift and turn functions. Defendant did not install a mechanical arm on plaintiff's welding machine.

On January 22, 2002, plaintiff filed this action, claiming defendant violated the Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA"). Plaintiff alleged that: 1) plaintiff's absence from work, which was protected under the FMLA, was a motivating factor in defendant's decision to discharge plaintiff (Count I); 2) defendant failed to provide plaintiff with notice as required under the FMLA (Count II); and 3) plaintiff's disability, record of a disability, or perceived disability was a motivating factor in defendant's decision to terminate him (Count III).

## II. APPLICABLE LAW AND DISCUSSION

### A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity that there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere

existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court's function is to determine whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id.* at 248. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8<sup>th</sup> Cir. 1996). "Because discrimination cases often turn on inferences rather than on direct evidence," the court is to be particularly deferential to the nonmovant. *EEOC v. Woodbridge Corp.*, 263 F.3d 812, 814 (8<sup>th</sup> Cir 2001) (citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8<sup>th</sup> Cir. 1994)). "Notwithstanding these considerations, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case." *Id.*

#### B. Family and Medical Leave Act

The FMLA permits an eligible employee to take up to 12 weeks of unpaid leave during any 12-month period for incapacity caused by an employee's own serious health condition. 29 U.S.C. § 2612(a)(1)(D). The FMLA defines "serious health condition" as "an illness, injury, impairment, or

physical or mental condition that involves . . . continuing treatment by a health care provider.” 29 U.S.C. § 2611(11). According to the Department of Labor’s regulations, a “serious health condition” is an illness, impairment, or condition involving: (1) inpatient care and subsequent treatment associated with such care; or (2) continuing treatment by a health care provider for, among other things, a period of incapacity or a chronic condition. 29 C.F.R. § 825.114.

The FMLA prohibits an employer from interfering with, restraining, or denying an employee’s exercise of rights under the Act. 29 U.S.C. § 2615(a)(1). The regulations state that the term “interfering with” the exercise of an employee’s rights includes violating the FMLA, refusing to authorize FMLA leave, discouraging an employee from taking FMLA leave, and manipulating the work force to avoid responsibilities under the Act. 29 C.F.R. § 825.220(b). Employers are “prohibited from discriminating against employees or prospective employees who have used FMLA leave.” 29 C.F.R. § 825.220(c).

i. Retaliation Claim

The burden shifting approach first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) applies to plaintiff’s FMLA retaliation claim. *See King v. Preferred Technical Group*, 166 F.3d 887, 891-92 (7<sup>th</sup> Cir. 1999) (applying the burden shifting analysis where plaintiff lacks direct evidence of discrimination.) Under the *McDonnell Douglas* framework, plaintiff must carry the initial burden of coming forward with sufficient evidence to establish a prima facie case of retaliation. *McDonnell Douglas*, 411 U.S. at 802. If plaintiff makes a prima facie case, then the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for the employee’s termination. *Id.* “If [defendant] meets this burden of production, the legal presumption that would

justify a judgment as a matter of law based on . . . plaintiff's prima facie case simply drops out of the picture, and . . . plaintiff bears the burden of persuading the finder of fact that the proffered reasons are pretextual and that the employment decision was the result of discriminatory intent." *Longstreth v. Copple*, 1999 WL 33326724, at \* 6 (N.D. Iowa 1999) (internal quotation omitted). Plaintiff retains the ultimate burden of showing that defendant's stated reason for terminating him was in fact a pretext for retaliating against him for having engaged in protected activity under the FMLA. *Id.*

To establish a prima facie case of retaliation under the FMLA, plaintiff must prove that: (1) he availed himself of a protected FMLA right; (2) he was adversely affected by an employment decision; and (3) there is a causal connection between the protected conduct and the adverse employment action. *Maxwell v. GTE Wireless Serv. Corp.*, 121 F. Supp.2d 649, 657-58 (N.D. Ohio 2000). Defendant argues that plaintiff cannot establish the third element of his prima facie case, a causal link between his protected FMLA leave and his subsequent termination.<sup>5</sup> The Court agrees. The six-month time period between the beginning of plaintiff's leave in May 2001 and his termination in November 2001 is too remote to establish a temporal connection that might support an inference of causation. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close."); *Kipp v. Missouri Highway & Transp.*

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<sup>5</sup> For purposes of this motion, defendant does not dispute that the first two elements of plaintiff's prima facie case are satisfied. *See* Memorandum in Support of Defendant's Motion for Summary Judgment, at 12.

*Comm'n*, 280 F.3d 893, 897 (8<sup>th</sup> Cir. 2001) (two-month interval “so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff’s] favor on the matter of causal link.”). Plaintiff has not identified any additional facts that support a causal connection between his FMLA leave in May and his termination in November.

Plaintiff argues that he was effectively discharged on May 10, 2001, the day on which the Plant’s safety manager informed plaintiff that there were no available job assignments for him.<sup>6</sup> Even if the Court accepts plaintiff’s contention that he was effectively discharged on May 10, 2001, no reasonable jury could find that this termination was in retaliation for FMLA leave he *subsequently* took.<sup>7</sup> The Court enters summary judgment in favor of defendant on plaintiff’s FMLA retaliation claim.

ii. Notice Claim

In Count II of his complaint, plaintiff alleges that defendant violated the FMLA by failing to provide notice as required by the Act. Defendant filed a motion for summary judgment on all counts. In his response to defendant’s motion, plaintiff did not address his failure to notify claim. The Court therefore finds that plaintiff has abandoned this claim. *See* Local Rule 56.1(b)(1) (requiring brief submitted in resistance to summary judgment motion to respond to “each of the grounds asserted in the motion”).

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<sup>6</sup> Thereafter, plaintiff continued to receive his full salary for a period of time. When his salary continuation was exhausted, he received short-term disability benefits.

<sup>7</sup> Plaintiff did not work for approximately one month after breaking a finger in a non-work-related accident in February 2001. Nothing in the record suggests that the employment decision defendant made in May was in retaliation for plaintiff’s February absence, and the time period between these two events is insufficient to support an inference of causation. *See Kipp*, 280 F.3d 893, 897 (8<sup>th</sup> Cir. 2001).

The FMLA provides no relief to an employee unless the employee has been prejudiced or harmed by the alleged violation. *Ragsdale v. Wolverine world Wide, Inc.*, 535 U.S. 81 (2002). Defendant granted plaintiff leave that far exceeded the 12-week allotment guaranteed by the FMLA. Plaintiff has not identified any way in which he was prejudiced by defendant's failure to provide timely notice. Therefore, even if plaintiff had not abandoned it, the Court must grant summary judgment in favor of defendant on plaintiff's failure to notify claim.

C. Americans With Disabilities Act

In addition to his FMLA claim, plaintiff alleges that defendant's actions violated the Americans With Disabilities Act ("ADA"). To qualify for relief under the ADA, plaintiff must establish: (1) that he was a disabled person within the meaning of the ADA; (2) that he was qualified to perform the essential functions of his job with or without reasonable accommodations; and (3) that he suffered an adverse employment action because of the disability. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8<sup>th</sup> Cir. 1995). If plaintiff can establish these three elements, then the burden shifts to defendant to proffer a legitimate, nondiscriminatory reason for the adverse employment action. *See Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1326 (N.D. Iowa 2000). Once defendant proffers such a reason, the burden shifts back to plaintiff to show that defendant's stated reason is pre-textual. *Id.* at 1326-27.

The ADA defines a "disabled person" as one who: (1) has a "physical or mental impairment that substantially limits one or more of the [person's] major life activities[,]" (2) has "a record of such an impairment," or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2). The term "major life activities" refers to activities that are of central importance to most people's daily lives,

including “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, as well as sitting, standing, lifting, and reaching.” *Cooper v. Olin Corp., Winchester Div.*, 246 F.3d 1083, 1088 (8<sup>th</sup> Cir. 2001). In determining whether a disability comes within the protections accorded by the ADA, a court should consider “the nature and severity of the impairment, the duration or expected duration of the impairment, and the long-term impact resulting from the impairment.” *Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8<sup>th</sup> Cir. 2001) (citing 29 C.F.R. § 1630.2(j)(2)).

At the time of his termination, plaintiff’s sole medical restriction was a 35-pound lifting limitation.<sup>8</sup> The Eighth Circuit has held that a general lifting restriction without more does not constitute a disability under the ADA. *Brunko*, 260 F.3d at 931-42 (40-pound lifting restriction); *Mellon v. Federal Express Corp.*, 239 F.3d 954, 957 (8<sup>th</sup> Cir. 2001) (15-pound restriction); and *Gutridge v. Clure*, 153 F.3d 898, 901 (8<sup>th</sup> Cir. 1998)(45-pound restriction). *Cf. Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8<sup>th</sup> 2001) (upholding the juries finding that plaintiff was disabled within the meaning of the ADA where plaintiff’s lifting restriction was coupled with the inability to walk, stand, twist, and bend). The Court finds that plaintiff cannot establish he was “actually disabled” under the ADA.

The next question is whether plaintiff was “regarded as disabled,” as that term is used in 42 U.S.C. § 12102(2)(C). The Supreme Court has interpreted this section of the ADA as follows:

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<sup>8</sup> On July 31, 2001, plaintiff sent defendant a work release from Dr. Taylon which stated that plaintiff could return to work on August 6, 2001 with a 35-pound lifting limitation.

There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

*Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

Plaintiff maintains that defendant perceived him as having an impairment that significantly restricted his ability to perform the major life activity of working. To meet the statutory requirements of a perceived disability, plaintiff must demonstrate that defendant regarded him as having an impairment that “significantly restricted” his “ability to perform either a class of jobs or a broad range of jobs in various classes.” 29 C.F.R. § 1630.2(i). See *Conant v. City of Hibbing*, 271 F.3d 782, 784-85 (8<sup>th</sup> Cir. 2001).

Plaintiff first argues that defendant regarded him as disabled under the ADA when it refused to allow him to work as a welder. Although defendant claims “lean manufacturing principles” required the employees to rotate among various tasks, plaintiff alleges that in actuality, employees were still assigned to particular tasks, such as welding. Viewing the facts in a light most favorable to plaintiff, the Court finds plaintiff’s original welding job may have existed at the time of plaintiff’s termination. However, even assuming a welding position existed at the time of plaintiff’s termination, plaintiff cannot establish that defendant regarded him as disabled. As the Eighth Circuit has noted, “There is a distinction between being regarded as an individual unqualified for a particular job because of a limiting physical impairment and being regarded as ‘disabled’ within the meaning of the ADA. . . . [A]n employer is free

to decide that . . . some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.” *Conant*, 271 F.3d at 785 (quoting *Sutton*, 527 U.S. at 490-91).

Defendant’s refusal to allow plaintiff to return to his welding position shows only that defendant perceived plaintiff as unable to perform that particular job at the Plant. It does not demonstrate that defendant regarded plaintiff as “precluded from working a whole range or class of jobs.” *Conant*, 271 F.3d 782, 786 (being regarded as having a limiting restriction does not amount to being regarded as having a disability within the meaning of the ADA where employer perceives a prospective employee as being unable to fill only one particular position). See *Murphy v. United Parcel Serv. Inc.*, 527 U.S. 516, 524 (1999) (concluding that summary judgment is proper where ADA plaintiff fails to show that he is “regarded as unable to perform a class of jobs”).

Plaintiff next contends that defendant regarded him as disabled when it adopted its disability plan administrator’s determination that plaintiff qualified for long term disability benefits. To qualify for LTD benefits under the plan, an employee must: (1) be under the continuous care of a physician who believes he is “totally disabled;” and (2) be continuously unable to perform the essential duties of his regular position with the Company, or the duties of any suitable alternative position with the Company.

Plaintiff argues the fact he qualified for LTD benefits demonstrates defendant regarded him as unable to perform not only his welding position, but a whole range or class of jobs, and therefore “regarded him as disabled” under the ADA. The Court disagrees.

An employee who qualifies for long term disability under defendant’s benefit plan must be “continuously unable to perform the essential duties of [his] regular position with the Company, or the duties of any suitable alternative position with the Company.” Plaintiff’s Appendix in Resistance to

Defendant's Motion For Summary Judgment, at 29 (Long Term Disability Plan Excerpt). However, the plan states that "[t]he availability and suitability of alternative positions at Eaton corporation are determined by the Company, in its sole discretion." *Id.* Therefore, a determination that an employee qualifies for benefits under the disability plan does not by itself demonstrate that the employee was regarded as suffering an impairment that precluded him from performing a class of jobs or broad range of jobs. To the contrary, it shows only that the employee was deemed unable to perform his own job duties and those of any suitable alternative positions *that were available at the time*. The record contains no evidence that there were any other positions available at the plant from May to November 2001. Thus, plaintiff cannot establish that defendant regarded him as having an impairment that precluded him from performing a broad range of jobs. Consequently, no reasonable jury could find that defendant regarded plaintiff as disabled under the ADA.<sup>9</sup>

In summary, plaintiff cannot establish that he was disabled within the meaning of the ADA. Because plaintiff cannot establish the first element of his prima facie case, the Court enters summary judgment in favor of defendant on plaintiff's ADA claim.

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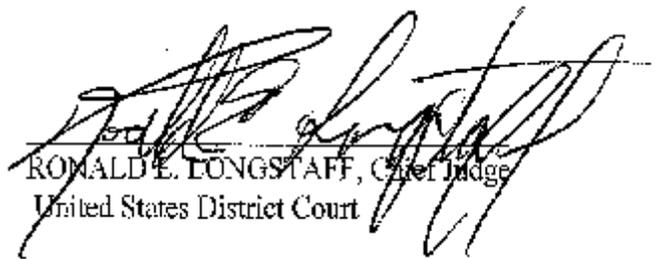
<sup>9</sup> In his complaint, plaintiff avered that he qualified as a disabled person under the ADA because he was actually disabled, regarded as disabled, or because he had a record of disability. *See* Complaint And Demand For Jury Trial, at 3, ¶ 20 ("Plaintiff's disability, record of disability, or perceived disability was a motivating factor in defendant's decision to terminate him.") In its motion for summary judgment, defendant argued that plaintiff cannot prevail on his record of disability theory. Plaintiff did not address this argument in his response to defendant's motion. The Court finds that plaintiff has abandoned his claim that he had a record of disability. *See* Local Rule 56.1(b)(1) (requiring brief submitted in resistance to summary judgment motion to respond to "each of the grounds asserted in the motion").

III. CONCLUSION

Summary judgment is entered in favor of defendant on plaintiff's two FMLA claims and his ADA claim.

IT IS SO ORDERED.

This 7th day of May, 2003.



RONALD E. LONGSTAFF, Chief Judge  
United States District Court

