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

MICHELE WILKINSON, *et al.*,

Plaintiffs,

v.

GREATER DAYTON REGIONAL TRANSIT AUTHORITY,

Defendant.

Case No. 3:11-cv-247

JUDGE WALTER H. RICE

DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFFS' OBJECTIONS TO UNITED STATES MAGISTRATE JUDGE'S JANUARY 6, 2014, ORDER (DOC. #126)

Plaintiffs in this putative class action filed suit pursuant to Federal Rule of Civil Procedure 23(b)(2). They allege that Defendant, Greater Dayton Regional Transit Authority ("GDRTA"), violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, by interfering with Plaintiffs' FMLA rights and retaliating against Plaintiffs for exercising such rights. This matter is currently before the Court on Plaintiffs' Objections (Doc. #126) to a January 6, 2014, Order (Doc. #120), issued by United States Magistrate Judge Ovington, granting Defendant's motion to compel certain discovery and denying Plaintiffs' motion for a protective order.[1]

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[1] These discovery motions were filed in connection with Plaintiffs' Amended Motion for Class Certification. Doc. #95. On March 3, 2014, the Court overruled

Pursuant to Federal Rule of Civil Procedure 72(a), the district judge "must consider timely objections and modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to questions of fact, and requires that the court be "left with the definite and firm conviction that a mistake has been committed." *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985). The question of whether an order is "contrary to law" is purely a legal inquiry subject to *de novo* review. *United States v. Curtis*, 237 F.3d 598, 607 (6th Cir. 2001).

Plaintiffs maintain that portions of Magistrate Judge Ovington's January 6, 2014, Order are clearly erroneous and contrary to law, and open the floodgates to full-blown pre-certification merits-based discovery. More specifically, Plaintiffs object to those portions of the Order that: (1) require Plaintiffs to identify all doctors who treated them for any medical or psychiatric conditions since July of 2008, and to produce all medical records and documents related to those conditions; and (2) require Plaintiffs to identify all putative class members by name.

I. Medical Records

Plaintiffs first argue that "[t]he Magistrate Judge erred by finding that plaintiffs placed their health conditions at issue in this lawsuit and by requiring

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that motion without prejudice to re-filing at the conclusion of class discovery. Doc. #133.

plaintiffs to produce documents that are beyond the scope of permissible discovery, overbroad, unduly burdensome, and not relevant." Doc. #126, PageID#2779. Plaintiffs deny that they have placed their health conditions at issue. They maintain instead that the thrust of their claims is that: (1) Defendant's uniform policies impose higher standards than the FMLA permits and discourage employees from exercising their rights under the FMLA; and (2) Defendant retaliates against employees who attempt to exercise their rights under that law.

Magistrate Judge Ovington's factual determination that the named Plaintiffs have placed their health conditions at issue in this lawsuit is not clearly erroneous. As she noted, Plaintiff Stauter specifically alleges that he has a "serious health condition," was denied a request for FMLA leave, and was subsequently terminated for excessive absences. Doc. #79, PageID#1376, ¶¶ 80, 87-88. Moreover, Plaintiffs generally allege that Defendant violated the FMLA by "[w]rongfully and willfully charg[ing] the Plaintiffs and other similarly situated GDRTA employees with violations such as absenteeism and/or misuse of medical leave provided by the FMLA, which resulted in discipline, suspension and/or termination of employment resulting in lost pay and benefits and/or other materially adverse employment actions." Doc. #79, PageID#1366, ¶3(a). Plaintiffs also seek damages for "time lost as a result of being denied FMLA leave." Doc. #79, PageID#1383.

By alleging that Defendant wrongfully charged them for absences that should have been designated as FMLA leave, and disciplined them for "misuse" of

FMLA leave, Plaintiffs have clearly put their health conditions at issue. As such, Magistrate Judge Ovington properly concluded that information concerning the health conditions that gave rise to the need for FMLA leave is relevant and discoverable. In order to prevail on their FMLA claims, Plaintiffs must first prove that they were *entitled* to FMLA leave. *Edgar v. JAC Prods., Inc.*, 443 F.3d 501, 507-08 (6th Cir. 2006). This, in turn, requires them to prove that they, or a family member, suffered from a "serious health condition," as that term is defined in 29 U.S.C. § 2611(11), on the date in question.

Medical records related to the health conditions that allegedly gave rise to the need for FMLA leave therefore "fall within the ambit of discoverable information." *Weimer v. Honda of Am. Mfg., Inc.*, No. 2:06-cv-844, 2008 WL 1775522, at *3 (S.D. Ohio April 17, 2008).[2] Magistrate Judge Ovington also properly concluded that, to the extent that some of the Plaintiffs may have sought FMLA leave based on a serious mental health condition, they have failed to show that the psychotherapist-patient privilege applies. *See Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (holding that plaintiff waived the privilege by placing her mental or emotional condition at issue in the lawsuit).

Plaintiffs next argue that, even if the Court finds that they have placed their health conditions at issue, the Court should find that Magistrate Judge Ovington

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[2] Plaintiffs rely on *Smith v. University of Chicago*, No. 02-C-221, 2003 WL 22757754, at *9 (N.D. Ill. Nov. 20, 2003), for the proposition that an employee who has not placed his health condition at issue cannot be compelled to produce his medical records. Given the Court's finding that Plaintiffs have, in fact, placed their health conditions at issue, *Smith* is inapposite.

erred with respect to the *scope* of her Order. Plaintiffs contend that Defendant is not entitled to any information that is unrelated to the specific health conditions that gave rise to their requests for FMLA leave. The Magistrate Judge, however, ordered Plaintiffs to identify every health care professional who treated them for any physical, emotional or mental health condition since July 20, 2008, to produce all documents related to those conditions, and to produce a signed medical release authorizing the healthcare providers to release medical records related to those conditions, subject to the Protective Order previously entered in this case, Doc. #56.

In so holding, Magistrate Judge Ovington relied on *Moody v. Honda of America Manufacturing, Inc.*, No. 2:05-cv-880, 2006 WL 1785464, at *5 (S.D. Ohio June 26, 2006). In *Moody*, the plaintiff alleged that her use of FMLA leave was a motivating factor in the decision to terminate her. The court held that "information about both the medical conditions that were certified as serious, and other medical conditions which [plaintiff] may have suffered from" during that same time period was relevant and discoverable. This is because the employer may argue that a particular absence did not stem from a previously-certified "serious health condition," but rather "from some other condition which was not 'serious,' or from no medical condition at all." *Id.*

Similar arguments could be made by Defendant in this case, given that Plaintiffs have alleged that Defendant "wrongfully charged the Plaintiffs and other similarly situated GDRTA employees with violations such as absenteeism and/or

misuse of medical leave provided by the FMLA." Doc. #79, PageID#1366, ¶3(a). In this respect, information about health conditions other than those that gave rise to the requests for FMLA leave may be relevant and discoverable.

Nevertheless, the Court agrees that Magistrate Judge Ovington's Order is contrary to law in that it does not adequately protect Plaintiffs' privacy interests in their medical records related to those *other* health conditions. Even in *Moody*, the court held that the employer was not entitled to evidence in the medical records "which relates not to either of her FMLA conditions nor any other potentially disabling condition." Nor was the employer entitled to medical records concerning any treatment that took place outside the relevant time frame. *Moody*, 2006 WL 1785464, at *6. The court therefore ordered the plaintiff to obtain the medical records sought by the employer, and to produce only those records that were relevant to her claim. With respect to records that plaintiff withheld, she was ordered to produce them for "a counsel's eyes-only" inspection or an *in camera* inspection. *Id.*

Likewise, in *Ward v. ESchool Consultants, LLC*, No. 2:10-cv-866, 2011 WL 4402784, at *1 (S.D. Ohio Sept. 21, 2011), the court noted that the waiver of the physician-patient privilege is limited to communications that are "related causally or historically" to the physical or mental injuries at issue in the FMLA claim. Accordingly, rather than ordering the plaintiff to execute a broad medical release and turn all medical records over to the employer's attorney, the court ordered plaintiff's counsel to procure the records, review them, and produce those

that were deemed relevant. Plaintiff's counsel was directed to indicate the nature of any records not produced, and of any redactions, and state the reason for not producing them. In this manner, the employer was able to obtain the medical records to which it was entitled, but the plaintiff's privacy interests were also protected.

In light of the foregoing case law, Plaintiffs' Objections to Magistrate Judge Ovington's Order concerning discovery related to Plaintiffs' medical records is SUSTAINED IN PART AND OVERRULED IN PART. Plaintiffs shall fully respond to Discovery Requests No. 1, No. 3, and No. 9, all of which seek information about health conditions that gave rise to the FMLA leave requests.[3] Plaintiffs shall also fully respond to Interrogatory No. 2, which requires them to "[i]dentify every

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[3] Discovery Request No. 1 requires Plaintiffs to produce "[a]ny communications or other documents that relate or refer to your alleged need for FMLA leave, your requests for FMLA leave, your application for FMLA leave, your use of FMLA leave, your medical certifications for FMLA leave, your recertification for FMLA leave, or any second/third opinions concerning your certifications for FMLA leave, including but not limited to any communications or documents you received from or provided to the GDRTA or any representative, officer, or member of ATU Local 1385 or the International ATU."

Discovery Request No. 3 requires Plaintiffs to produce "[a]ny communications or other documents that relate or refer to any medical examination concerning any alleged serious health condition for which you have sought FMLA leave, including but not limited to any examinations conducted by your primary healthcare provider, any second or third opinion healthcare provider, or any other physician, nurse, counselor, therapist, or other medical professional."

Discovery Request No. 9 requires Plaintiffs to produce "[a]ny notes, diaries, logs, journals, letters, electronic mail, text messages, calendars, Facebook postings, tweets, or other social media messages that relate or refer to your employment with the GDRTA, your alleged serious health condition, or your activities on days when you requested FMLA leave."

doctor, medical practitioner, psychiatrist, psychologist, psychological therapist, or counselor with whom [they] have consulted or been treated for any physical, emotional, or mental illness, condition or concern from [July 20, 2008] until the present."[4]

Discovery Requests No. 2 and No. 4, however, must be restricted in order to protect Plaintiffs' privacy interests. Discovery Request No. 2 seeks disclosure of "[a]ny communications or other documents that relate to any medical or psychiatric treatment or any counseling you received from [July 20, 2008] to the present, including but not limited to copies of records from any physician, psychiatrist, psychologist, counselor, or healthcare provider who examined or treated you, or with whom you consulted, concerning any alleged serious health condition for which you sought FMLA leave." Discovery Request No. 4 seeks "[a] signed medical release authorizing any healthcare provider identified in response to Interrogatory No. 2 to release your medical records."

Defendants are certainly entitled to all communications and documents, including medical records, related to the health conditions for which Plaintiffs sought FMLA leave. However, with respect to communications and medical records *unrelated* to the health conditions for which Plaintiffs sought FMLA leave during the applicable time period, more discretion is required. Plaintiffs' counsel

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[4] The physician-patient privilege, as set forth in Ohio Revised Code § 2317.02, attaches only to *communications* relating to medical care. It does not prevent disclosure of the fact that an individual consulted with a doctor on a particular date. *State v. Desper*, 151 Ohio App. 3d 208, 220, 783 N.E.2d 939, 949 (Ohio Ct. App. 2002).

shall procure the records, review them, and produce those deemed relevant and discoverable. Plaintiffs' counsel shall indicate the nature of any records not produced, and of any redactions, and state the reason for not producing them. At that point, any conflicts of opinion can be resolved by the Magistrate Judge through an *in camera* inspection.

II. Putative Class Members

Plaintiffs next argue that:

> The Magistrate Judge erred by finding the identity of each putative class member is necessary for RTA to challenge plaintiffs' claims of numerosity, commonality, and typicality under Rule 23(a), and by requiring the named plaintiffs to provide information that is not within their personal knowledge, but rather is protected attorney work product.

Doc. #126, PageID#2779.

Plaintiffs seek certification of a class consisting of "current and former employees of GDRTA who were 'eligible' within the meaning of 29 U.S.C. § 2611(2)(A), and who applied for, been [sic] denied, disciplined, terminated or otherwise had their rights under the FMLA interfered with or who were retaliated against for their exercise of rights under the FMLA." Doc. #79, PageID#1380, ¶127. They also propose six possible subclasses consisting of employees: (1) who were disciplined or terminated under the absenteeism policy; (2) who were required to obtain re-certification of their medical condition; (3) who were required to obtain second and third opinions; (4) whose medical certifications were found to be

insufficient; (5) whose notification of foreseeable medical leave of absence was not accepted; and (6) whose eligible hours of intermittent FMLA leave were miscalculated. Doc. #79, PageID##1380-81, ¶131.

In their Amended Motion for Class Certification, Doc. #95, Plaintiffs relied heavily on a Declaration of Timothy Killeen, a law clerk at the law firm representing Plaintiffs. Killeen, who is also a licensed attorney, analyzed discovery produced by GDRTA to determine exactly how many employees: (1) requested FMLA leave after July 20, 2008; (2) were asked for medical certification; (3) submitted medical certification; (4) were told that the medical certification they submitted was insufficient or incomplete; (5) were required to recertify their condition; (6) were required to get a second opinion for their medical certification; (7) were required to get a third opinion for their medical certification; (8) were required to sign authorizations for release of their medical records; and (9) were told they must acquire an absence before requesting FMLA leave. Killeen Decl. ¶¶ 12-20; Doc. #95-4.

In their Second Request for Interrogatories, Doc. #111-8, Defendant asked Plaintiffs to identify each employee who falls within the proposed class and each proposed sub-class, and to identify all documents that support those classifications. Plaintiffs maintain that it is sufficient that Defendant knows the nature of the claims of the putative class members and the number of putative members in each subclass. According to Plaintiffs, Defendant has not shown why

it cannot adequately respond to a motion for class certification without also knowing the identities of the class members.

Magistrate Judge Ovington found that, by relying on Killeen's affidavit, Plaintiffs have placed the identities of putative class and subclass members at issue. She found that the identity of the putative class members was relevant to test many of the assertions raised by Plaintiffs,

> because Defendant is entitled to challenge whether or not individuals Attorney Killeen counted fit Plaintiffs' proposed definitions of the class and subclasses they want certified. If Defendant knows who fits and who doesn't fit Plaintiffs' class definitions, its counsel can efficiently determine whether or not it should challenge any of Plaintiffs' arguments under Rule 23(a)(1)-(3)'s requirements of numerosity, commonality, and typicality.

Doc. #120, PageID#2746. Citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011), the Magistrate Judge noted that the court must conduct a "rigorous analysis" to determine if Rule 23's requirements have been met, and that this frequently overlaps with the merits of plaintiffs' underlying claim. Doc. #120, PageID#2748.

The Magistrate Judge rejected Plaintiffs' argument that Defendant has access to this same information through its own business records, rendering disclosure unnecessary. She found that it would be a waste of time to require Defendant to duplicate the work already done by Plaintiffs. She noted that once the identities of the putative class members are disclosed, Defendant's counsel will be able to readily determine whether the Rule 23(a) requirements are met. *Id.* at PageID#2746-47.

Magistrate Judge Ovington discounted Plaintiffs' reliance on *Brinkerhoff v. Rockwell International Corp.*, 83 F.R.D. 478 (N.D. Texas 1978), in which the court refused to order disclosure of the names of the putative class members prior to class certification. The court noted that the only reason the employer wanted the names was to conduct merits-based discovery, which was, at that time, irrelevant to the question of class certification. *Id.* at 481. Magistrate Judge Ovington noted, however, that *Brinkerhoff* was decided long before *Wal-Mart.* Moreover, it carried no precedential value.

Plaintiffs argue that Magistrate Judge Ovington's Order is clearly erroneous and contrary to law in that: (1) the identity of putative class members is not relevant to Rule 23(a)'s requirements; (2) her analysis of *Wal-Mart* is flawed; (3) she incorrectly placed the burden on Plaintiffs to show that the putative class members "fit" within their proposed class definitions; and (4) she implicitly found that Plaintiffs waived the work product doctrine with respect to the identity of the putative class members. The first three Objections are inter-twined and may be considered together.

First, however, the Court must address the fact that Plaintiffs have mischaracterized the scope of Defendant's discovery requests and of Magistrate Judge Ovington's Order. The Court rejects Plaintiffs' claim that the Order contemplates full-blown, pre-certification merits-based discovery of putative class members. At this point in the litigation, Defendant has asked only that Plaintiffs identify which employees Plaintiffs contend fall into the proposed class and sub-

classes, and to produce any documents that support those contentions. Notably, Defendant has not sought medical records or depositions of any of the putative class members, nor has Magistrate Judge Ovington ordered any such discovery.

Plaintiffs correctly note that, despite the "rigorous analysis" required by *Wal-Mart*, the Supreme Court has recently stated that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen v. Conn. Retirement Plans & Trusts Funds*, 133 S. Ct. 1184, 1194-95 (2013). *See also In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 851-52 (6th Cir. 2013) (admonishing district courts to consider, at the class certification stage, only those matters relevant to the Rule 23 inquiry).

In the Court's view, Magistrate Judge Ovington's Order does not run afoul of these decisions. As previously noted, she has not ordered any merits-based discovery concerning the claims of the individual putative class members. She has simply ordered Plaintiffs to identify which employees allegedly fit into each proposed sub-class and to produce any documents, already in Plaintiffs' possession, that support these contentions. This information is relevant to the Rule 23(a) requirements of numerosity, commonality, and typicality.

None of the cases cited by Plaintiffs establishes that the Magistrate Judge's Order is contrary to law. They cite to *Johnson v. Midland Credit Management Inc.*,

No. 1:05CV1094, 2012 WL 5996391, at *11 (N.D. Ohio Nov. 29, 2012), in which the court stated that, "on class certification, only the *ability* to identify class members is necessary; the actual names and addresses of class members are not necessary at this time." In making this statement, however, the *Johnson* court was addressing the issue of whether the proposed class was sufficiently *ascertainable*. In contrast, in the present case, the question is not whether the proposed class definitions are sufficiently definite; rather the question is whether Rule 23(a) requirements have been met.

In addition, Plaintiffs' continued reliance on *Brinkerhoff* is misplaced. Although *Brinkerhoff* is admittedly directly on point, it is not mandatory authority; therefore, Magistrate Judge Ovington was not obligated to follow it. Moreover, as she noted, the Supreme Court's decision in *Wal-Mart* now requires a more rigorous analysis of the Rule 23(a) requirements. Plaintiffs must "affirmatively demonstrate . . . that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551.

In this case, Plaintiffs have submitted Killeen's declaration in support of their claim that the Rule 23(a) requirements have been satisfied. That declaration sets forth Killeen's statistical analysis of the business records produced by Defendant. Defendant simply wants to know which specific employees Killeen has identified as members of the class and the various proposed sub-classes. Defendant argues that until it knows which employees Plaintiffs contend fall into the proposed class,

and each proposed sub-class, it cannot adequately respond to Plaintiffs' contentions concerning numerosity, commonality, and typicality.

Magistrate Judge Ovington acknowledged that Defendant could search its business records to attempt to guess which employees Plaintiffs allege belong in each proposed sub-class. But she properly found that, in light of the fact that Killeen had already made those determinations, this would be a waste of time and would unnecessarily increase litigation costs. As she noted, once Defendant knows the identities of the putative class members, its counsel will be able to readily determine whether to challenge class certification on grounds that Plaintiffs have not satisfied Rule 23(a) requirements. Doc. #120, PageID#2747.[5] As a practical matter, this could likely be accomplished by simply reviewing the personnel files to see if Defendant agrees with Plaintiffs' classifications. Additional pre-certification merits-based discovery of the individual putative class members would not necessarily be required.

On a related note, Plaintiffs maintain that Magistrate Judge Ovington incorrectly charged them with having to "show that the putative class members fit within their proposed class definitions." Doc. #120, PageID#2748. Plaintiffs contend that the law instead requires them to "establish that *they* possess the same interest and suffered the same injury as the class members they seek to

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[5] This does not mean that, in every case, plaintiffs should be required to disclose the identities of putative class members. In this case, however, Plaintiffs put the identities of the putative class members at issue by submitting Killeen's statistical analysis. Under the unique circumstances presented here, disclosure is warranted.

represent." *In re Whirlpool*, 722 F.3d at 851 (emphasis added). This is a correct statement of what is needed to satisfy the "adequate representation" requirement set forth in Rule 23(a)(4). In the Court's view, however, Magistrate Judge Ovington was referring to Rule 23(a)'s three other requirements. She properly pointed out that Plaintiffs cannot establish numerosity, commonality, or typicality without first identifying which employees fall within the proposed sub-classes.

Finally, Plaintiffs argue that Magistrate Judge Ovington erred by implicitly finding that they waived the attorney work product doctrine by submitting Killeen's declaration. They note that his declaration sets forth a purely statistical analysis, and does not divulge any legal theories or conclusions. Magistrate Judge Ovington's ruling on this issue is neither clearly erroneous nor contrary to law.

Regardless of whether Killeen's statistical analysis is properly characterized as "work product," Plaintiffs clearly waived any work product immunity by submitting Killeen's affidavit. As the Tenth Circuit noted in *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998), "a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *See also In re Powerhouse Licensing, LLC*, 441 F.3d 467, 474 (6th Cir. 2006) (holding that by electing to interject their attorney into the proceedings by submitting his affidavit, petitioners waived both the attorney-client privilege and the work product doctrine); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) ("Respondent can no more advance the

work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.").

Given that Plaintiffs placed the identities of the putative class members at issue by submitting Killeen's declaration, the Court finds that Magistrate Judge Ovington's Order, requiring Plaintiffs to disclose the identities of those putative class members and to produce any supporting documentation, is neither clearly erroneous nor contrary to law. The Court therefore OVERRULES Plaintiffs' Objections to this portion of the Order.

III. Conclusion

For the reasons set forth above, the Court SUSTAINS IN PART AND OVERRULES IN PART Plaintiffs' Objections to Magistrate Judge's Order (Doc. #126). Plaintiffs shall respond to Defendant's discovery requests as ordered by Magistrate Judge Ovington, except that, with respect to communications and medical records *unrelated* to the health conditions for which Plaintiffs sought FMLA leave, Plaintiffs' counsel shall procure the records, review them, and produce only those deemed relevant and discoverable. Plaintiffs' counsel shall indicate the nature of any records not produced, and of any redactions, and state the reason for not producing them. Any conflicts of opinion can be resolved by the Magistrate Judge through an *in camera* inspection.

Date: May 9, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE