STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
SYLVIA L. TERRY,	)	
	)	Charge No. 2006CH1789
Complainant,	)	EEOC No. 21BA60873
	)	ALS No. 07-109
and	)	
	)	
NEW HOPE CENTER	)	
	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Complainant's Exceptions filed thereto, and the Respondent's Response to the Complainant's Exceptions.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has DECLINED further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on February 20, 2009, has become the Order of the Commission.

STATE OF ILLINOIS)
) **Entered this 3rd of June 2009.**
HUMAN RIGHTS COMMISSION)

Commissioner Gregory G. Simoncini

Commissioner Diane Viverito

Commissioner Yonnie Stroger

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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SYLVIA L. TERRY,	)	
	)	**Charge No. 2006CF1789**
Complainant,	)	**EEOC No. 21BA60873**
	)	**ALS No. 07-109**
and	)	
	)	
NEW HOPE CENTER,	)	
	)	**Judge Reva S. Bauch**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a Response. Respondent filed a Reply. Respondent also filed Supplemental Authority to its Reply Brief. Accordingly, this matter is now ripe for a decision.

Findings of Fact

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. On January 23, 2006, Complainant filed a Charge alleging physical disability and race discrimination.

2. Complainant is a black female.

3. Complainant suffers from a right shoulder impairment.

4. Respondent is a not-for-profit community based organization.

5. Respondent's purpose is to provide services which enhance the quality of life for individuals with developmental disabilities and to promote community integration.

6. Respondent operates residential homes for developmentally disabled adults throughout the south suburbs of Chicago.

7. Complainant was hired as a part-time Program Assistant on February 8, 1999.

8. Complainant became a full-time Program Assistant on January 30, 2000, the position she held at the time of her termination.

9. Program Assistants in a residential home either work the evening shift (where one or two Program Assistants are present) or the overnight shift (where one Program Assistant is present).

10. Program Assistants' duties are to provide supervision and assistance in the implementation of programs for Respondent's participants.

11. Among other things, a Program Assistant must be able to perform the physical demand of pushing or pulling, reaching (both horizontally and above the shoulder), and lifting/carrying a minimum of 50 pounds to successfully perform the position.

12. Paulette Stark is Respondent's Director of Human Resources.

13. Paulette Stark is black.

14 Stark terminated Complainant after Complainant presented a doctor's note containing permanent restrictions.

15. Complainant's permanent restrictions prohibited her from successfully performing the lifting duties required of a Program Assistant.

16 Complainant suffered an injury to her right shoulder on February 28, 2004, when one of Respondent's participants fell on her shoulder.

17. After Complainant returned to work on March 16, 2004, Respondent offered and provided Complainant a light duty assignment to accommodate her work restrictions while she drew workers' compensation benefits.

18. On March 24, 2004, Respondent's workers' compensation physician returned Complainant to work without any restrictions.

19. On May 11, 2004, Complainant brought in a note from her doctor containing work restrictions, which Respondent again accommodated by finding a light duty assignment for her to perform.

20. Complainant performed light duty work until October 20, 2004.

21. On October 21, 2004, Complainant had surgery and remained off work on a leave of absence until February 7, 2005.

22. Upon Complainant's return to work, Respondent offered and provided Complainant a light duty assignment.

23. Complainant performed light duty work until the termination of her employment

24. On November 3, 2005, Respondent received a doctor's note from Complainant's physician dated November 2, 2005.

25. Complainant's doctor stated that Complainant had a permanent restriction of lifting a maximum of 20 pounds and of overhead lifting a maximum of 5 pounds.

26. Lifting/carrying is an essential function of a Program Assistant's job.

27. The physical demands of the Program Assistant require a minimum lifting/carrying of 50 pounds to the highest level of one's waist and the lowest level of the floor.

28. The 50 pound minimum lifting requirement for a Program Assistant cannot be modified or avoided.

29. Program Assistants may seek assistance for lifting over 50 pounds

30. The Program Assistant's minimum lifting requirement exceeded Complainant's permanent restriction of lifting no more than 20 pounds and overhead lifting no more than 5 pounds

31 Complainant's permanent restrictions made her unable to perform an essential function of the Program Assistant's position.

32. Respondent could not accommodate Complainant's permanent lifting restrictions to allow her to perform the Program Assistant position.

33 At the time of Complainant's notice of her permanent restriction, Respondent did not have any vacancy for which Complainant was qualified.

34 Complainant requested a light duty assignment, after submitting her doctor's note setting forth her permanent restriction.

35. Respondent does not have permanent light duty positions, but rather temporary light duty assignments while an employee receives workers' compensation benefits.

36 Stark terminated Complainant in a letter dated January 6, 2006 because Complainant could not perform the essential responsibilities of her job as Program Assistant.

37. In 2001, Respondent terminated a white employee, Lisa Kuba, who was unable to perform the same Program Assistant position because of a permanent lifting restriction

38 Ms. Kuba had presented a doctor's note containing a permanent restriction and requesting a desk job only.

39 At that time, Respondent did not have any vacant positions which Ms. Kuba could perform given her permanent restriction.

40 Ms. Kuba was terminated on January 4, 2001 because she was unable to lift and perform the duties of a Program Assistant position.

41 Ms. Knezevich was a Program Assistant who presented a medical document stating she had a permanent lifting restriction due to a heart condition.

42 At that time, an Accounts Payable Clerk position was available.

43. Ms. Knezevich had accounts payable experience from a prior job.

44. Ms. Knezevich was hired for the Accounts Payable Clerk job.

45. Ms. Vanderlugt was a Program Assistant who took a leave of absence after she was diagnosed with lung cancer.

46. Ms. Vanderlugt returned to work without restrictions and resumed her job as a Program Assistant.

47. Ms. Banik worked for Respondent in a position that does not involve working in a residential home.

48. Ms. Banik suffered an injury when a participant scratched her eye. Ms Banik took a leave of absence.

49. Ms. Banik's doctor subsequently returned her to work with a restriction of wearing protective eyewear.

50 There was no requirement in Ms. Banik's job description that she refrain from wearing glasses of any kind.

51 Ms. Banik's restriction of wearing protective eyewear did not impact on her ability to perform the essential duties of her position.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant failed to establish a *prima facie* case for race discrimination.

4. Complainant failed to establish a *prima facie* case for physical disability discrimination.

5. Respondent has articulated a legitimate, nondiscriminatory reason for terminating Complainant.

6. Complainant has failed to show that Respondent's reason is a pretext for discrimination.

Discussion

I. Standards for Summary Decision

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. *See also* **86 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill App3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill App3d 386 (1994).** The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill App3d (1969)**. All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill App3d 453 (1979)**. If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill App3d 482 (1990)**. Where the facts are susceptible to two or more inferences, reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill App3d 519 (1991)**. Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill App3d 119 (1993)**. Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill App3d 881 (1991)**. If a respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings

to create a genuine issue of material fact. **Fitzpatrick at 392.** Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill App3d 410 (1997).** Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess, 111 Ill2d 229 (1986).**

II. *Preliminary Matters*

In resolving the present Motion for Summary Decision, I must first determine if some of the documents submitted by Respondent should be stricken or disregarded, as urged by Complainant. As to the Respondent's verification page to Complainant's First Set of Interrogatories, Complainant filed a Motion to Strike on January 30, 2009. In its Motion, Complainant stated that the copy of the verification requested by me, through the Commission's clerk, was a "supplemental" filing that had not been shown to Complainant. Thus, it should be stricken. Thereafter, I ordered Respondent to provide Complainant with a copy of the verification page. My Order gave Complainant an opportunity to respond. According to Respondent, notwithstanding Complainant's representation to the contrary in her Motion to Strike, Respondent had supplied Complainant with a copy of the verification page on at least two prior occasions. In any event, although given an opportunity to respond by February 17, 2009, Complainant failed to do so. Given the foregoing, Complainant's Motion to Strike the verification page is denied.

As to the Paulette Stark Affidavit ("Stark Affidavit") and some other documents submitted by Respondent in support of its Motion for Summary Decision, although Complainant has not filed a motion to strike, her arguments in her response to this Motion shall be treated as such. The granting or denying of a motion to strike summary

decision affidavits, and other attached exhibits, is discretionary. **Lake Cty. Trust Co. v. Two Bar B, Inc., 239 Ill App3d 588 (1992).**

Complainant argues that the Commission should strike or disregard exhibits to the Motion for Summary Decision (including a job description, a job analysis report, Complainant's return to work form and the Stark Affidavit) because no foundation exists for these documents and they are therefore inadmissible. As to the employee handbook, Complainant argues that this exhibit should be stricken or given no weight because it is unclear if the handbook was in effect on Complainant's termination, given an apparent contradiction between its effective date and revision date.

Specifically, Complainant states that the Stark Affidavit is legally deficient under Illinois Supreme Court Rule 191(a). Complainant is correct that the Commission should consider whether the Stark Affidavit satisfies Supreme Court Rule 191. **Bannister and Harrington Righter & Parsons, IHRC, 9604, June 2, 1999.** Illinois Supreme Court Rule 191(a) requires that an affidavit be made on personal knowledge, set forth with particularity the facts upon which a defense is based, consist of facts admissible in evidence, and affirmatively show that the affiant, if sworn as a witness, can testify competently to the matters asserted. **Supreme Court Rule 191(a).**

At the outset, it should be noted that, in the context of a summary decision, answers to interrogatories can serve as the functional equivalent of affidavits. **Komater v. Kenton Court Assoc., 151 Ill App3d 632 (1986).** Complainant has not challenged the admissibility of the interrogatory answers. Thus, the sworn answers shall be considered as the equivalent of an affidavit in addressing this motion.

As to whether a proper foundation has been laid to allow the Commission to consider the Stark Affidavit, I find that it has. In Respondent's sworn Answers to Complainant's First Set of Interrogatories, Ms. Stark is identified as one of the persons who participated in the preparation of the answers to the interrogatories, as well as a

person having information regarding the facts and allegations contained in the pleadings. In addition, the Respondent's sworn interrogatory answers indicate that Ms. Stark is a witness who may testify to such matters as "job descriptions, examinations and requirements," "supervision of and communications with the Complainant" and "participation in and the reasons for the termination of Complainant." Further, Respondent's sworn interrogatory answers state that Ms. Stark has worked for the Respondent as Director of Human Relations since January 1, 2004. Moreover, it was Ms. Stark who sent the letter of termination to Complainant explaining the reasons for the termination decision. Thus, although the Stark Affidavit could have been drafted better, I find that the requirements of Supreme Court Rule 191(a) are satisfied; Ms. Stark has personal knowledge regarding the facts contained in her Affidavit and would be able to testify to her sworn facts. Thus, the proper foundation has been laid.

In addition, I also find that the contents of the Stark Affidavit lays the foundation for the job analysis report, the job description and the return to work form. ***Supra,* Bannister at 3** (facts set forth in the respondent's position statement were admissible when read in conjunction with an affidavit which laid the proper foundation for those facts); **Bill Marek's The Competitive Edge, Inc. v. Mickelson Group, Inc., 346 Ill App3d 996, 1010 (2004), *app. Denied,* 211 Ill2d 571 (2004)** (affidavits complied with Rule 191 and authenticated an exhibit as true, accurate and maintained in the normal course of business). In sum, I will consider the Stark Affidavit, job analysis report, job description and return to work exhibits. I will not consider the employee handbook, however, because there does appear to be a question as to the effective date and I am not entirely satisfied with Respondent's arguments regarding that point at this time.

III. Analysis

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill**

App3d 528 (2000). Since there is no direct evidence in this case, the indirect analysis will be used.[1] The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green, 411 US 792 (1973)**, and is well-established

First, the Complainant must establish a *prima facie* showing of discrimination against her by Respondent. If she does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. *See* **Texas Dep't. of Community Affairs v. Burdine, 450 US 248, 254-55 (1981)**. This method of proof has been adopted by the Commission and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill2d 172 (1989)**.

The issues in this case revolve around race and physical disability discrimination. In general, to establish a *prima facie* case for race discrimination, Complainant must prove: (1) she is in a protected class; (2) she was meeting Respondent's legitimate performance expectations; (3) Respondent took an adverse action against her; and (4) similarly situated employees outside Complainant's protected class were treated more favorably. *See* **Interstate Material Corp. v. Human Rights Comm'n, 274 Ill App3d 1014 (1995).**

To establish a *prima facie* case for physical disability, the Complainant must prove: (1) she is "disabled" within the meaning of the Act; (2) her disability is unrelated to her ability to perform her job, or if the disability is related to that ability to perform, after her request, Respondent did not make reasonable accommodations to perform her job;

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[1] Complainant's assertion that direct evidence exists in this case is incorrect. As Respondent correctly points out, direct evidence in this case would consist of a statement that Respondent terminated Complainant because she was disabled and/or black. The termination letter and other exhibits, however, do not indicate those facts. Rather, the evidence indicates that Respondent terminated Complainant because her permanent restrictions rendered her unable to perform the

and (3) Respondent took adverse action against her because of her disability. **Whipple v. Ill. Dept. of Rehabilitative Services, 646 NE2d 275 (1995).**

Complainant has failed to demonstrate a *prima facie* case of physical disability discrimination. It appears that Complainant's shoulder injury is related to her ability to perform the duties of the Program Assistant position. The job analysis report and the job description demonstrate that lifting a minimum of 50 pounds is an essential function of the job. The Stark Affidavit states the same, as does Respondent's Answers to Complainant's First Set of Interrogatories. Complainant cannot perform the essential function of lifting since she is permanently restricted to lifting no more than 20 pounds and overhead lifting no more than 5 pounds. Thus, Complainant's shoulder injury is related to her performance of the Program Assistant position because she could not perform an essential function of her job.

In addition, Complainant cannot show that Respondent failed to accommodate her because, given the circumstances, no accommodation would have been reasonable, short of reassigning or transferring her to light duty job. The law, however, does not require Respondent to make a reassignment or transfer when a disability precludes her from doing her original job, or to restructure an existing job to eliminate the problem. **Caterpillar, Inc. v. Human Rights Comm'n, 154 Ill App3d 424 (1987).**

Finally, Complainant cannot prove that her termination was related to an alleged disability of a shoulder injury. Respondent terminated Complainant because she could not perform an essential function of the job, with or without an accommodation

Regarding the race claim, I also find that Complainant has failed to establish a *prima facie* case. Complainant was not meeting Respondent's legitimate expectations. Respondent expected that a Program Assistant would be able to lift a minimum of 50

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essential functions of her position with or without a reasonable accommodation, and no other accommodation existed

pounds. Given Complainant's permanent lifting restriction, she could not satisfy Respondent's legitimate expectation of her job position, a necessary element of a race discrimination case. In addition, Complainant has not shown that Respondent treated similarly employees outside of the protected class more favorably than her. The reference to Ms. Kuba as a similarly situated comparison is improper. Ms. Kuba, a white woman, was terminated because she could not perform the job duties because of lifting restrictions. Thus, she was not treated more favorably.

I also find that Ms. Knezevich and Ms. Banik are not proper comparisons. For example, at the time Ms. Knezevich incurred a permanent restriction, a vacant administrative "light duty" job existed. Ms. Knezevich was qualified, based on her prior work experience, and even with her restriction, to perform the job. By contrast, at the time Complainant presented her doctor's note documenting a permanent restriction, Respondent's only vacant positions were other Program Assistant positions. Complainant could not perform the job responsibilities of a Program Assistant. In any event, as stated previously, Respondent has no legal responsibility to transfer or reassign an employee who cannot perform his/her job. Likewise, Ms. Banik is not an appropriate comparison. Unlike Complainant, Ms. Banik could perform her job duties (Ms. Banik had a different job than Complainant and was in a different program) when she was given the accommodation of protective eyewear.

Whether or not Complainant has demonstrated that she can establish a *prima facie* case for race or physical disability discrimination, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. ***Clyde and Caterpillar, Inc.*, 52 Ill. HRC Rep. 8 (1989),** *aff'd sub nom* ***Clyde v. Human Rights Comm'n*, 206 Ill App3d 283 (1990).**

Respondent's submissions are replete with facts documenting that Complainant could not perform an essential function of her job as a Program Assistant because of her permanent restrictions, that no reasonable accommodation could be given to allow her to perform the essential function of her job, and that at the time she submitted her doctor's note stating her permanent restriction, no alternative positions existed for which she was qualified.

As to the issue of pretext, Complainant, in her response, relies on the termination letter, a two year period where Complainant was not disciplined (as evidence she was reasonably performing her job), and a determination at the Illinois Industrial Commission (now the Illinois Worker's Compensation Commission) regarding Complainant's workers' compensation claim. None of the foregoing points creates disputed facts that would disprove or meaningfully challenge Respondent's articulated non-discriminatory reason for terminating Complainant.

On its face, the termination letter is not "direct evidence" of physical disability discrimination, as Complainant asserts. The fact that Complainant was not disciplined for two years misses the point because Respondent is arguing that because of Complainant's permanent restriction, she could no longer perform her job responsibilities. And any determination/resolution of a workers' compensation claim at the Workers' Compensation Commission is irrelevant because the definitions of "handicap" and "disability" under the Act and the worker's compensation statutory scheme are different. Even if the workers' compensation claim was relevant, the relevance would go to the issue of damages, not liability.

Complainant has failed to raise any factual issue which might suggest that Respondent's articulation is pretextual. Although not required to prove her case as if at hearing, Complainant must provide *some* factual basis for denying the motion. ***Supra,* Birck at 123.** In her response, Complainant provides no evidentiary facts for the

Commission to consider. Respondent submitted the Stark Affidavit to support its position, and sworn answers to interrogatories, as well as other exhibits. Complainant failed to contradict these facts with counter affidavits or other documentation. This can be fatal. ***Supra*, Rotzoll at 7**. Complainant may not rest on her pleadings once Respondent supplies sworn facts warranting a decision in its favor. In addition, because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. ***Id* at 416.** *See* ***Supra*, Cano at 139** (if the party seeking summary judgment supplied facts *via* affidavit, which, when left uncontradicted, would warrant judgment in its favor as a matter of law, the opponent may not sit idly by and rely on his pleadings to create a genuine issue of factual issue); *see also* **Estate of Budis Andernovics, 197 Ill2d 500, 508 Fn. 2 (2001)** (allegations of a verified complaint do not constitute evidence, except by way of admission, and can be of no assistance in proving a plaintiff's case).

The Stark Affidavit, and other exhibits, show that Respondent terminated Complainant because she could not perform an essential function of her job (lifting a minimum of 50 pounds) due to her permanent restrictions, and no accommodation existed at the time. To show pretext, a complainant must offer evidence to show that the respondent's explanation is not believable or raised genuine issues of fact as to whether Respondent discriminated against Complainant. **Gomez v. The Finishing Co., Inc., 369 Ill App3d 711 (2006)**. Complainant has failed to offer evidence to prove that there is a material factual dispute as to this reason for termination and that Respondent is lying to cover-up discrimination, *i.e.*, Complainant has not demonstrated pretext. Complainant has not offered evidence to show that Respondent did not honestly believe the reasons it gave for terminating Complainant and that Respondent is simply lying to "cover-up" its tracks. **McCoy v. Maytag Corp., 495 F3d 515 (7th Cir. 2007).** It does not matter whether Respondent's stated nondiscriminatory reason and action in terminating

Complainant is correct, but whether it is the true ground of Respondent's action rather than a pretext. **Forrester v. Rauland-Borg. Corp., 453 F3d 416 (7th Cir. 2006).**[2]

Recommendation

Based on the foregoing, there is no genuine issue of material fact. Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:

REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: February 20, 2009

[2] The Commission and Illinois Courts may consider analogous federal cases arising under federal discrimination statutes in deciding issues arising under the Illinois Human Rights Act. **Hoffelt v. Ill. Dept. of Human Rights, 367 Ill App3d 628, 634 (2006).** *See e.g.* **In re Papa, IHRC, 9894(S), June 9, 2000**