STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
PATTY LYNN SMITH,	)		
	)		
	)		
Complainant,	)	CHARGE NO(S):	2006SF2742
	)	EEOC NO(S):	N/A
and	)	ALS NO(S):	S07-338
	)		
NAEIR,	)		
	)		
	)		
Respondent.	)		

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 17th day of March 2009

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS

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RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.) On October 18, 2007, Respondent filed a motion for summary decision, alleging that Complainant could not establish a *prima facie* case of handicap discrimination under the Human Rights Act in that Complainant could not present any evidence demonstrating that she could have performed her job with or without a reasonable accommodation. Complainant, who is representing herself in this matter, filed a document labeled as a "sworn response" to the pending motion for summary decision. Respondent thereafter filed a motion to strike Complainant's response on the ground that it failed to contain any notarized verification from Complainant indicating that the statements made in her response were truthful. Complainant has not filed a response to Respondent's motion to strike.

Contentions of the Parties

In the instant Complaint, Complainant states that she was the victim of handicap discrimination when Respondent discharged her from her "Sorter/Kitter" position after denying her request for a 25 pound weight restriction with no repetitive bending as an accommodation for her injured back. She further argued that Respondent should have

provided her with a different job that would have accommodated her medical restrictions and maintained that Respondent allowed other workers to continue working while their injuries healed. In the motion for summary decision, Respondent contends that Complainant cannot establish that her back condition is a covered condition under the Human Rights Act, since there is no accommodation that would have allowed her to accomplish the standing, bending, lifting and walking requirements of her "Sorter/Kitter" job given the fact that she was eventually placed on a "sedentary only" medical restriction. It also submits that there were no other jobs available that could have accommodated a sedentary only restriction, and that Complainant was terminated because she ran out of available leave time.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. At some point prior to January of 2005, Complainant was employed by Respondent as a "Sorter/Kitter" in Respondent's warehouse. The duties of a "Sorter/Kitter" required that Complainant: (1) sort various parts in bins, shelves and/or pallets and locate said items throughout the warehouse; (2) count, weigh and record various items and parts; (3) pick up or make up kits; and (4) load and unload materials by hand onto or from pallets, trays, racks, conveyors and machines. The "Sorter/Kitter" job also required an ability to lift 50 pounds.

2. At all times pertinent to the instant Complaint, the "Sorter/Kitter" job was the least physically demanding position in Respondent's warehouse.

3. At some point in January of 2005, Complainant injured her back and was placed on light duty that restricted her from doing any prolonged or repetitive bending or stooping.

4. On April 26, 2005, Respondent issued Complainant a memorandum, which clarified her work status and indicated that Complainant was to do no bending,

squatting or stooping and was limited to lifting items to waist level. Complainant was also given a weight restriction of 25 pounds. The memorandum also indicated that "further decisions about [Complainant's] work status at [Respondent] will be dependent on the results of your examination by Dr. Schierer."

5 On December 15, 2005, Complainant re-injured her back. At that point, an examining physician drafted a note, which indicated that Complainant was to avoid repetitive bending and lifting until "at least" December 19, 2005, and that Complainant could perform "sedentary work only" beginning on December 16, 2005.

6. At all times pertinent to the instant Complaint, there was no reasonable accommodation that would have allowed Complainant to perform the duties of a "Sorter/Kitter" with a sedentary only restriction since the physical duties of a "Sorter/Kitter" could not be performed from a sitting or stationary position with no physical exertion.

7 At all times pertinent to the instant case, there were no other non-clerical positions in Respondent's warehouse that could have been performed with a "sedentary only" work restriction.

8. On December 16, 2005, Robert Clark, Respondent's Director of Human Resources, informed Complainant that Respondent did not have any "sedentary work only" positions in the warehouse. At that time, Complainant asked Clark whether she could have a clerical job in Respondent's office. Clark informed Complainant that there were no vacant office positions at that time.

9. On December 16, 2005, Clark also told Complainant that she needed to obtain a leave of absence under the Family and Medical Leave Act and to obtain short-term disability benefits from Respondent. Clark gave Complainant the appropriate forms and instructed Complainant to have her doctor complete the forms in order for her to be placed on approved FMLA leave and to receive short-term disability benefits.

10. On December 19, 2005, Complainant orally informed Clark that her medical condition causing her "sedentary only" restriction was permanent

11. Although Complainant never submitted either an FMLA leave of absence form or a form requesting short-term disability benefits, Complainant was placed on FMLA leave from December 20, 2005 to March 16, 2006. Complainant also received short-term disability benefits during this same time frame.

12. On March 21, 2006, Complainant was informed that her employment had been terminated due to the fact that she had exhausted all of her available leave of absence time.

13. As of March 21, 2006, Complainant had not requested any extension of her leave of absence, nor had she requested any other accommodation subsequent to her December 2005 request that she be provided a clerical position in the office

14. As of March 21, 2006, there were no vacancies in any clerical positions in Respondent's office and no positions in Respondent's warehouse that would have accommodated a "sedentary only" work restriction.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2 Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3 Employers are not required to reassign or transfer an employee whose handicap prevents her from doing the job for which she was hired to perform.

Determination

The instant Complaint and underlying Charge of Discrimination alleging handicap discrimination should be dismissed with prejudice because Complainant failed to present

any evidence to establish a material question regarding whether she was able to perform the essential duties of her job with or without a reasonable accommodation.

Discussion

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue as to any material fact, and the moving party is entitled to a recommended order as a matter of law. (See, section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and *Bolias and Millard Maintenance Service Company*, 41 Ill HRC Rep 3 (1988).) Moreover, in determining whether there is any genuine issue of material fact, the record is construed most strictly against the moving party and most liberally in favor of the opponent. (See, for example, *Armagast v Medici Gallery and Coffee House*, 47 IllApp3d 892, 365 NE2d 446, 8 IllDec 208 (1st Dist, 5th Div 1977).) Inasmuch as a summary order is a drastic method for disposing of cases, it should only be allowed when the right of the moving party is clear and free from doubt (See, *Susmano v Associated Internists of Chicago*, 97 IllApp3d 215, 422 NE2d 879, 52 IllDec 670 (1st Dist 1981).) Furthermore, although there is no requirement that Complainant prove her case to overcome the motion, Complainant is still required to present some factual basis that would arguably entitle her to a judgment under the applicable law. See, *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 IllApp3d 640, 411 NE2d 1168, 44 IllDec 802 (1st Dist, 2nd Div 1980).

In its motion for summary decision, Respondent argues that Complainant cannot establish a *prima facie* case of handicap discrimination since she is unable to establish that she could have performed her "Sorter/Kitter" job with or without a reasonable accommodation. Specifically, it notes that Complainant's "Sorter/Kitter" job required that she either stand, bend, lift or walk to different areas of the warehouse to load and unload by hand various materials weighing up to 50 pounds onto or from pallets, trays, racks, conveyors and machines. Moreover, it maintains that Complainant's "sedentary only"

restriction that her doctor issued in December of 2005 prevented her from doing any of the essential functions of the "Sorter/Kitter" job because there is no known accommodation that would have assisted Complainant in performing these duties from a sitting position, and Complainant never suggested to management the existence of any device that would have allowed her to perform the "Sorter/Kitter" job for which she was hired. See, for example, *Wilheim v Human Rights Commission*, 324 IllApp3d 793, 755 N2d 43, 49, 257 IllDec 941, 947, where the court similarly observed that a complainant who cannot physically perform the duties of a job even with an accommodation is not handicapped within the meaning of the Human Rights Act

In her response to the instant motion, Complainant does not dispute Respondent's contention that she could not have performed the "Sorter/Kitter" job under the work restrictions issued in December of 2005. Nor does she identify at this time any accommodation that would have allowed her to perform the essential duties of said position. Rather, Complainant maintains that she has a valid handicap claim under the Human Rights Act because Respondent had a duty to accommodate her by giving her a different job somewhere in the plant that would have allowed her to continue her employment with Respondent. However, Complainant's contention is a non-starter since, before the issue of Respondent's duty to accommodate her physical condition can be considered, Complainant must first show that she can perform the essential functions of her job with or without an accommodation (see, *Harton v City of Chicago*, 301 IllApp3d 378, 703 NE2d 493, 234 IllDec 632 (1st Dist, 4th Div 1998)), and, as noted above, she failed to do this. Moreover, even if the accommodation issue is properly before the Commission, Complainant loses on this portion of her argument since the Appellate Court, in *Fitzpatrick v The Human Rights Commission*, 267 IllApp3d 386, 642 NE2d 486, 491, 204 IllDec 785, 790 (4th Dist 1994) found that "the duty to accommodate

in Illinois only extends to accommodating a handicapped employee in the employee's present position."

True enough, there is some evidence in the record that the minimum requirements for the "Sorter/Kitter" position were not absolute, and that Respondent in practice relaxed some of the listed requirements for the "Sorter/Kitter" position. Specifically, Complainant brought out the point that on April 26, 2005, she was instructed by management to do no bending, squatting or stooping, and to do no lifting of objects weighing more than 25 pounds. Still, Complainant makes no argument that she could have performed her job in December of 2005 under these reduced requirements, and I would note that both Complainant and Respondent agree that Complainant's only request for an accommodation in December of 2005 was her request for a clerk's position in a different area of the plant. However, under *Fitzpatrick*, Respondent was not required under the Human Rights Act to find Complainant a different job that she could have performed that was consistent with her work restrictions.

Too, Complainant alleged in her Complaint that Respondent treated non-handicapped co-workers more favorably because it allowed them to continue working with their restrictions until their temporary conditions had healed. However, Complainant never identifies these alleged co-workers in her response to the instant motion for summary decision or provides any specifics as to their medical conditions or their work restrictions so as render them suitable comparables with respect to her discrimination claim. What's more, it can be argued that Respondent treated Complainant similarly to her unidentified co-workers since it did make initial attempts to accommodate Complainant's work restrictions in April of 2005, when it relaxed some of the duties of her "Sorter/Kitter" job by, among other things, limiting her lifting to items weighing 25 pounds. Yet, Complainant's status arguably changed from that of her unidentified co-workers when she gave notice on December 19, 2005 that her restrictions were

"permanent" and made a request for a change of jobs to clerical position In this respect, Complainant loses on even this aspect of her discrimination claim since she failed to establish whether any of her unidentified co-workers were able to trade jobs as a result of their non-handicapped conditions.

Thus, for all of the above reasons, I agree with Respondent that Complainant cannot establish a *prima facie* case of handicap discrimination under the instant record. Alternatively, Complainant has not set forth any evidence to counter Respondent's explanation that she was terminated because she had exhausted all of her leave time, and I would note parenthetically that Complainant has not presented any case law to support the notion that an employer must provide open-ended requests for a leave of absence as part of any duty to accommodate an employee's medical condition. Accordingly, I find that Complainant failed to present to any evidence that would support her claim that Respondent's explanation for its decision to terminate her was a pretext for handicap discrimination. Finally, due to the result of this recommended order, Respondent's motion to strike Complainant's response to the motion for summary decision will be denied as moot.

Recommendation

For all of the above reasons, it is recommended that Respondent's motion for summary decision be granted, and that the instant Complaint and the underlying Charge of Discrimination be dismissed with prejudice

HUMAN RIGHTS COMMISSION

BY:
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 19TH DAY OF NOVEMBER, 2008