This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 02/21/06

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
TOMA OSMAN,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 2002SF0191
	)	EEOC NO: 21BA28002
	)	ALS NO: S04-222
STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS - TAMMS CORRECTIONAL CENTER	)	
	)	
Respondent.	)	

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.). A public hearing was held before me in Carterville, Illinois on December 14, 2004. The parties have filed their post-hearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In the instant Complaint, *pro se* Complainant asserts that she was denied her request for light-duty work on account of her pregnancy. She also contends that she was denied a part-time intermittent schedule after her baby was born in retaliation for having filed a Charge of Discrimination. Respondent, however, maintains that Complainant failed to establish a *prima facie* case of pregnancy-related sex discrimination since she was unable to demonstrate that a similarly-situated, non-pregnant co-worker received more favorable treatment. Respondent further submits that the restrictions on Complainant's job duties proposed by her doctor could not have been reasonably accommodated via a request for light-duty because the restrictions would have caused a material change in Complainant's job duties. As to Complainant's retaliation claim, Respondent asserts that Complainant did

not establish a causal connection between her request for a part-time schedule and the filing of her Charge of Discrimination.

Findings of Fact

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

1. On May 18, 1998, Respondent hired Complainant as a paralegal in its Tamms Correctional Center.

2. At all times pertinent to the instant Complaint, a paralegal at Tamms was required to fill inmate requests for legal materials. Specifically, paralegals would obtain and make copies of case law as requested by the inmates, make scheduled weekly trips to the housing Pods, deliver the case law and answer questions posed by the inmates. Moreover, paralegals would also provide legal materials for inmates throughout the week on an as needed basis.

3. At all times pertinent to the instant Complaint, Tamms was a super-maximum correctional facility that essentially housed its inmates on a 23-hour lock-down. These restrictions meant, among other things, that inmates were limited in their ability to obtain legal materials in the law library, but could go during their one hour of free time to a Pod library, which the paralegals maintained as part of their job duties.

4. At all times pertinent to the instant Complaint, Complainant spent approximately seven hours a week distributing during one shift legal materials and answering questions by inmates housed in two housing Pods. However, Complainant spent additional time gathering requested legal materials and made other unscheduled distributions of legal materials to inmates, such that Complainant spent approximately fifty percent of her time in her job related to gathering and delivery of legal materials to inmates or to individual Pod libraries, as well as to answering inmate questions.

5. At some point between May of 1998 and December of 1999 Complainant became pregnant and delivered a baby. During her pregnancy, Complainant did not seek any sort of leave time and worked until just prior to her delivery.

6. On March 15, 2001, Complainant informed her supervisors that she was pregnant for a second time.

7. On April 16, 2001, Complainant sent a memorandum to Dr. Geneva Bonifield, Complainant's immediate supervisor, seeking leave to take Family Responsibility Leave to begin approximately eight weeks after the birth of her baby, with the last four weeks of said leave to be a part-time schedule. At all times pertinent to the instant complaint, Family Responsibility Leave time was without pay. Complainant's request for Family Responsibility Leave was granted, and she was told to submit a proposed work schedule in the future.

8. On May 1, 2001 Complainant spoke to her doctor about tightness in her stomach that she was experiencing during her pregnancy. Shortly thereafter Complainant wrote a note to her doctor's office that described her condition as being more serious than what she experienced during her first pregnancy in that the tightness, which became worse when she was standing, caused a strain on her back and leg muscles that would ache for hours. Specifically, Complainant wrote:

> "I am required to deliver supplies to inmates on a weekly basis and to discuss legal issues at their cell. I must carry or pull their materials to the Pods and deliver each piece to the inmate. During this I must go up and down 12-16 flights of stairs and I am continuously stooping to get their materials out of my cart/bag…I am standing the entire time. I was also required to take new books to six of the satellite law libraries. I had to pull 36 books to 3 different Pods and then stoop to get them out of the cart and then stack on the shelves. My belly gets tight after standing for even a short period of time now."

9. On May 23, 2001, Complainant filled out a request for light-duty, after noting that her doctor had placed restrictions on her standing, bending, stooping and/or lifting. The request sought light-duty status until the September 14, 2001 due date of her baby. Attached to the request was a form signed by her doctor indicating that Complainant was

able to do light-duty work. In the “limitations” box, her doctor checked standing, lifting, bending and stooping. In the “physical impairment” box, Complainant’s doctor indicated that she had a “slight limitation of functional capacity; capable of light-duty work (35-55%)”. However, in the “extent of disability” box, Complainant’s doctor indicated that she was “temporarily totally disabled” from her regular occupation.

10. On May 25, 2001, Bonifield orally informed Complainant that her light-duty request was being denied. The decision to deny Complainant’s request was made by Rick Dunbar, Respondent’s chief of time-keeping and payroll, on grounds that: (1) the request was for a time period that exceeded 90 days, which was contrary to one of Respondent’s official policies; and (2) it was perceived that Complainant’s doctor was limiting her from performing any duties that involved standing, lifting, bending or stooping, which would involve a material change in Complainant’s job.

11. During the May 25, 2001 meeting, Bonifield also told Complainant that, because her doctor had indicated that she was “temporarily totally disabled”, she either had to get her doctor to change the form or go on a leave of absence. Complainant thereafter elected to take an unpaid leave of absence as of May 30, 2001 under the Family Medical Leave Act and continued under this status until November 5, 2001.

12. On June 22, 2001 Complainant received the paperwork from Respondent denying her initial request for light-duty. The denial was signed on June 19, 2001 by Bonifield, Dane Eggertsen, who served as Respondent’s Superintendent of the school district operating at Tamms, and George Welborn, the Warden at Tamms. Included in the denial was a copy of Respondent’s policy indicating that requests for light-duty may not exceed 90 days, and that if employees continued to need medical restrictions beyond 90 days, the employee could use sick time, request a leave of absence or request a “reasonable accommodation”.

13. On June 23, 2001, Complainant resubmitted her request for light-duty because she was now within 90 days of her due date, and because she believed that the 90–day limitation was the only basis for the original denial. In the request, Complainant used white-out on the signatures of her supervisors and essentially resubmitted her light-duty request with a similar physician's statement, which also contained the "temporary totally disabled" label, but differed only in that it specifically provided for no standing for more than 1.5 hours or lifting more than 20 pounds and prohibited any stooping or bending.

14. Rachel Ferguson, a human resource representative in Respondent's personnel department who had forwarded Complainant's initial light-duty request to Dunbar, failed to forward or take any action on Complainant's second light-duty request because she perceived it to be identical to the first request.

15. On August 24, 2001, Complainant submitted a proposed work schedule that called for her to work some full and part-time days and to be off on certain workdays.

16. On September 13, 2001, Ferguson sent Complainant a response indicating that: (1) although she could take part-time leaves of absence in less than full-day increments under FMLA, she exhausted her FMLA leave at some point after she left the work force on May 30, 2001; and (2) her proposed part-time schedule could not be approved since Family Responsibility Leave must be taken in full-day increments.

17. On September 15, 2001, Complainant drafted a memorandum to Ferguson acknowledging that her request for a part-time work schedule was not approved, but submitted another proposed part-time schedule that called for her working three full-days on one week and two full-days the following week.

18. On September 21, 2001, Complainant filed a union grievance regarding the denial of her request for a part-time schedule. A hearing regarding the grievance was conducted on October 5, 2001, during which Respondent took the position that it was not going to grant the request for a part-time schedule because Complainant was a full-time

employee, and that Complainant's job required the services of a full-time employee. During the hearing, Complainant indicated that she planned on returning to work on November 5, 2001.

19. On September 24, 2001, Andrew D. Walter, Respondent's Chief of Staff, sent a letter to Senator Woolard's office responding to a complaint made to the Senator's office by Complainant about not being able to return to work in a light-duty capacity. In the letter, Walter asserted that the reason for the denial was the fact that: (1) the request was for more than 90 days; and (2) Complainant's restrictions were not limited to minor changes in her work assignments since providing legal materials to inmates constituted a primary job duty which required her to walk significant distances and perform significant standing, climbing, stooping and bending tasks.

20. On October 12, 2001, Complainant filed a Charge of Discrimination with the Department of Human Rights, alleging that Respondent discriminated against her on the basis of her pregnancy when it denied her request for light-duty work. (Complainant later amended her Charge of Discrimination to add a retaliation claim.)

21. On October 22, 2001, Eggertsen sent Complainant a letter informing her that her request for Family Responsibility Leave had been approved effective October 15, 2001 for a period of six months. Eggertsen further stated that:

> "As you are aware, the position that you applied for and currently hold, is a full-time Paralegal Assistant position at Tamms Correctional Center. Based on the operational needs of the facility and the School District, this position will remain a full time position."

22. On October 26, 2001, someone at Respondent was served with a copy of Complainant's Charge of Discrimination. The record is unclear when anyone in Respondent's management at Tamms Correctional Center had knowledge of the existence of Complainant's Charge of Discrimination.

23. On November 5, 2001, Complainant went to work. However, Bonifield informed her that she would not be able to work on an intermittent basis. Complainant left Tamms later that day and went back on Family Responsibility Leave on November 6, 2001.

24. On November 6, 2001, Eggertsen sent Complainant a letter indicating that: (1) his October 22, 2001 letter to Complainant had approved her request for Family Responsibility Leave, but had denied her request for a part-time work schedule; (2) operational needs of the facility formed the basis of the denial; and (3) Complainant could resume her Family Responsibility Leave on November 6, 2001.

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. Complainant failed to establish a *prima facie* case of sex discrimination related to her pregnancy in that Complainant failed to show that any adverse job action taken by Respondent was related to her pregnancy.

4. Respondent has articulated a legitimate, non-discriminatory reason for its denial of Complainant's request for light-duty work assignment.

5. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for its denial of Complainant's request for a light-duty assignment is a pretext for sex discrimination related to her pregnancy.

6. Complainant failed to establish a *prima facie* case of unlawful retaliation arising out of Respondent's decision to deny Complainant's request for a part-time work schedule in that Complainant failed to show that the applicable decision-maker was aware of the existence of her Charge of Discrimination at the time her request for a part-time work

schedule had been denied, or that the adverse decision was made subsequent to any protected activity.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated either section 2-102 or section 6-101(A) of the Human Rights Act (775 ILCS 5/2-102, 5/6-101(A)) when it denied Complainant's requests for light-duty or for a part-time work schedule.

Discussion

In a case alleging sex discrimination related to pregnancy or unlawful retaliation, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, **Ellis and Brunswick Corporation**, 31 Ill. HRC Rep. 326 (1987) and **Foley v. Illinois Human Rights Commission**, 165 Ill.App.3d 594, 519 N.E.2d 129 (5th Dist. 1988) .) Under this approach, the Complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the action taken against the Complainant. If the Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the Complainant is required to prove by a preponderance of the evidence that the Respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination/retaliation. This latter requirement merges with Complainant's ultimate burden of proving that Respondent discriminated unlawfully against the Complainant. See, **Village of Oak Lawn v. Human Rights Commission**, 113 Ill.App.3d 221, 478 N.E.2d 1115, 88 Ill.Dec. 507 (1st Dist., 4th Div. 1985).

As with any case of unequal treatment related to pregnancy-based sex discrimination, the elements of a *prima facie* case will vary according to the specific claim. Generally, a

complainant must show that: (1) she is a member of a protected classification; (2) she suffered an adverse act; and (3) similarly situated, non-pregnant co-workers outside of her classification received more favorable treatment. (See, for example, **Loyola University of Chicago v. Illinois Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1st Dist., 3rd Div. 1986).) In her Charge of Discrimination, Complainant alleged that Respondent "routinely" accommodated employees by giving light-duty assignments to workers who had temporary medical issues. However, at the public hearing Complainant focused on the alleged preferential treatment given to only one co-worker (i.e., Jim Goodman) to establish her sex discrimination claim.

Specifically, Complainant claimed in her post-hearing brief that Goodman, who also served as a paralegal at Tamms, had similar or greater restrictions than her but was granted light-duty status for approximately 187 days covering various periods of time between March and September of 2002. At first blush, these allegations could make a viable *prima facie* case of pregnancy-based sex discrimination if Complainant could show that they actually occurred. However, the problem lies in the fact that Complainant failed to present any competent evidence at the public hearing to support her allegations. For example, Complainant admitted at the public hearing that her source of knowledge regarding Goodman's light-duty status was what she had read from some unspecified document. (Transcript p. 93.) However, this hearsay evidence is insufficient to establish what actually happened in the workplace.

True enough, Complainant was able to elicit from one of Respondent's witnesses that Goodman's restrictions included no lifting over 20 pounds and no repetitive bending, stooping or twisting. (Transcript at p. 170.) However, this evidence falls short of establishing either what Goodman sought in terms of a light-duty assignment or whether Goodman's request pertained to a material aspect of his paralegal job. This distinction is important since, unlike the restrictions placed on Complainant by her doctor, Goodman's purported

restrictions did not prohibit any stooping or bending and did not contain any limitation on standing. Thus, there is no way of knowing under this record whether Goodman is actually a similarly-situated comparable co-worker in the absence of any evidence indicating that Respondent excused Goodman from performing a material aspect of his job.[1]

Alternatively, Complainant attempts to introduce direct evidence of pregnancy-based sex discrimination via a statement made by Bonifield in March of 2003, when Bonifield purportedly asked Complainant in front of an assembled group of paralegals: "We are not going to have any more babies?" However, both Complainant and Bonifield agreed that the comment was made during a meeting in which new workloads were being assigned to all of the paralegals, and Bonifield otherwise explained that the comment was only an acknowledgement that Complainant and others would be resuming their regular schedule of assignments. While Complainant stated that she viewed the comment as a threat, I doubt whether the comment demonstrates an anti-pregnancy animosity given context in which the statement was made.

Moreover, even if Complainant could establish an anti-pregnancy spin on Bonifield's comment, case law provides that in order for direct evidence to have any probative value, it must be causally related to the adverse employment decision. (See, for example, **Marshall v. American Hospital Association**, 157 F.3d 520 (7th Cir. 1998).) In this respect, I doubt whether the statement attributed to Bonifield could ever be causally connected to the instant denial of Complainant's light-duty request where the statement was made nearly two years after the instant denial, and where Complainant has not produced any evidence to counter Respondent's claim that Rick Dunbar, Respondent's chief payroll and time-keeping clerk, was the operative decision-maker with respect to the denial of her light-duty request. (See, **Sola v. Illinois Human Rights Commission**, 316 Ill.App.3d 528, 736 N.E.2d 1150, 249

[1] Additionally, for the sake of completeness, I would note that there is no evidence that the same decision-maker granted Goodman's request for light-duty, which according to

Ill.Dec. 712 (1st Dist., 3rd Div. 2000) for the proposition that isolated statements from supervisors who are not decision-makers are insufficient to establish direct evidence of discrimination.) Thus, because Complainant failed to present sufficient evidence regarding the nature of Goodman's light-duty request and further failed to causally connect any direct evidence of an anti-pregnancy animosity to the relevant decision-maker, I find that Complainant failed to establish a *prima facie* case of sex discrimination based on her pregnancy.[2]

Both parties, though, spend a considerable amount of time as to whether Respondent could have accommodated Complainant's request for light-duty, and indeed, Respondent asserted as part of its articulation that it could not accommodate Complainant's request since it would have materially altered her job which was to find and deliver legal materials to the inmates who were otherwise confined to their cells. Complainant testified at the public hearing that: (1) she really did not need an accommodation and would not have needed an accommodation if the delivery of legal materials remained only five percent of her job as reflected in the written job description; and (2) she only presented her doctor's form in conjunction with her request for light-duty to make Respondent aware that she might need some extra time in the future to complete her delivery of legal materials. In this regard, Complainant contends that Respondent must have harbored an anti-pregnancy animosity since Respondent could have easily accommodated her request for more time to perform her duties, but instead forced her to go home.

Complainant's arguments on the pretext issue, however, do not persuade. Initially, it should be noted that Complainant's quarrel with the fact that her mail delivery duties had

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Complainant, took place approximately eleven months after her denial.

[2] Complainant briefly attempted to introduce evidence of a light-duty assignment given to Peggy Baquet who worked in the library at Tamms. However, Complainant's source of information regarding the granting of light-duty to Ms. Baquet was through hearsay statements, and the objection to said evidence was sustained. Moreover, Complainant

become a sizeable portion of her actual job duties is irrelevant to the instant pretext issue since there is no question that by the time Complainant sought her light-duty requests she was required to perform significant gathering and delivery duties along with the other paralegals. Moreover, I disagree with Complainant that she did not really need an accommodation since her own physician, by noting that Complainant was temporarily totally disabled from her regulation occupation on the form accompanying her light-duty request, essentially indicated that (from what she had told him) Complainant's complications from her pregnancy rendered her unable to do her regular job. Thus, I cannot fault Respondent for taking at face value the statements made by Complainant's doctor and then requiring that she either address the restrictions with her doctor or take a leave of absence.

Too, aside from the observations made by her physician, I doubt whether Complainant's proposed accommodation of sitting down and doing something else whenever she experienced a tightness in her abdomen would have been a reasonable request given the instant record that established that gathering and distributing mail to the inmates was a material aspect of Complainant's job[3]. In this regard, it is interesting to note that while Complainant asserted at the public hearing that she did not need any sort of accommodation at the time she presented her request to Bonifield, she was making markedly different statements to her physician some ten days earlier when she maintained that: (1) her tightness in her abdomen was occurring with some frequency even after standing for a short period of time; (2) she was required to go up and down 12 to 16 flights of steps; and (3) she was continually having to stoop to get the materials out of her cart. Additionally, contrary to her testimony, Complainant's condition raised the specter that someone else would have had

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makes no mention of Ms. Baquet in her post-hearing brief and did not elaborate on any of Ms. Baquet's job duties at the public hearing.

[3] Bonifield testified that it took paralegals approximately 50 per cent of their time finding and delivering legal material to the inmates. While Complainant's testimony pegs that figure at only twenty per cent based on her assertion that she is on her feet seven hours per week,

to perform her gathering and delivery duties if the legal materials were going to be delivered to the inmates during her scheduled shift given Complainant's admission that she generally did not resume her delivery duties whenever she incurred tightness in her abdomen during her first pregnancy.

Thus, in light of the alleged frequency that she was experiencing tightness in her abdomen on May of 2001, what Complainant was really asking Respondent to do was to alter a material aspect of her job in order for her to continue her employment during her pregnancy, something that even employees with qualifying handicaps cannot demand of employers under the Human Rights Act. (See, for example, **Fitzpatrick v. The Human Rights Commission**, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785, 790 (4th Dist. 1994), where the Court approved the Commission's observation that if an employee is incapable of performing his or her present job, the duty of reasonable accommodation does not extend to giving the employee another job which the employee can perform.) In summary, Complainant can only win her case if she could show that Respondent voluntarily provided light-duty assignments to similarly-situated, non-pregnant co-workers. As mentioned above, the record lacked sufficient evidence to establish the nature and extent of any award of light-duty by Respondent to a similarly-situated co-worker. Moreover, Complainant failed to establish that Respondent's stated reasons for denying her request for light-duty (i.e., that the request was for more than 90-days and concerned an alteration of a material aspect of her job) were pretexts for pregnancy-related sex discrimination.

Retaliation.

According to the instant Complaint, Complainant asserts that she was the victim of unlawful retaliation since: (1) on October 26, 2001, Respondent was served with a copy of the instant Complaint alleging pregnancy-related sex discrimination; (2) on November 6,

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Complainant apparently did not factor any time spent in gathering the materials in her calculation.

2001, Respondent rejected Complainant's request to return to work on an intermittent or part-time basis due to alleged operational needs of the correctional facility; and (3) the denial was actually based on the fact that Complainant had filed a Charge of Discrimination. However, after reviewing the record, I find that Complainant has failed to establish the requisite causal connection between the filing of her Charge of Discrimination and Respondent's denial of her request for a part-time/intermittent schedule.

One of the issues raised during the public hearing was whether the applicable decision-maker knew about the existence of Complainant's Charge of Discrimination at the time Respondent denied Complainant's request for an intermittent schedule after the birth of her child. This issue is always important in any retaliation claim since, as the Commission noted in **Westfield and Illinois Department of Labor**, 40 Ill. HRC Rep. 395, 411 (1988), it is necessary that the decision-maker be aware of the protected activity in order to establish the requisite causal connection in a retaliation case. In this regard, Complainant contends that she satisfied this aspect of a *prima facie* case of retaliation since Respondent's "Chicago Office" served the Warden at Tamms with a copy of the Charge on October 29, 2001, and thus the relevant decision-maker (presumably Eggertsen, who wrote the November 6, 2001 letter denying Complainant's request) was on notice of her Charge.

However, the record indicates only that someone was served with a copy of Complainant's Charge of Discrimination on October 26, 2001, and thus one can only speculate as to whether Eggertsen actually knew of the existence of her Charge of Discrimination at the time he wrote the November 6, 2001 letter. Indeed, Complainant fares no better even if she could show that someone else in authority (such as Welborn) had actual knowledge of the existence of her Charge of Discrimination at the time of the adverse decision since the Commission has rejected the notion that "constructive knowledge" of a protected activity by a Respondent is a suitable substitute for actual knowledge by a decision-maker. (See, **Pace and Illinois Department of Transportation**, ___ Ill. HRC Rep.

___ (1989SF0588, February 27, 1995).) Here, there is no evidence that anyone in Respondent's Chicago Office contacted anyone at Tamms by November 6, 2001 (let alone notify Eggertsen) regarding the existence of Complainant's Charge of Discrimination.

More fundamentally, the Commission has required that the adverse act take place subsequent to notice of the protected activity. (See, **Ellis and Brunswick Corporation**, 31 Ill. HRC Rep. 325 (1987).) In this regard, Respondent notes that Complainant filed a union grievance in September of 2001 regarding the denial of her request for a part-time schedule, and that Respondent took the position at the grievance hearing on October 5, 2001 that it was not going to grant Complainant's request. Moreover, Eggertsen informed Complainant on October 22, 2001 that while Complainant's request for Family Responsibility Leave had been approved as of October 15, 2001, the operational needs of the facility required that the position remain a full-time position. Thus, because Respondent had already taken the stance that it was denying Complainant's request for part-time schedule prior to the filing of her Charge of Discrimination, Complainant's retaliation claim can be dismissed since something other than her filing of her Charge of Discrimination had to have been the motivation for its denial of her request for a part-time schedule.

Recommendation

For all of the above reasons, it is recommended that Complainant's Complaint and underlying Charge of Discrimination be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

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

ENTERED THE 22ND DAY OF DECEMBER, 2005