This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 12/28/06

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
CONNIE BASTIAN,	)		
	)		
Complainant,	)		
	)		
and	)	CHARGE NO:	2003SN2659
	)	EEOC NO:	N/A
WILL DAV, INC. D/B/A SPORTSMEN'S LOUNGE,	)	ALS NO:	S04-485
	)		
	)		
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 on December 1, 2005 in Springfield, Illinois. The parties have filed their post-hearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In her Complaint, Complainant contends that Respondent terminated her from her bartender/bar manager position on account of her handicap, after she had informed her supervisor that she could not work on a certain day because of her previously scheduled chemotherapy session. Respondent asserts that Complainant cannot establish that her handicap was unrelated to her ability to perform her job because she had not obtained medical clearance to resume her job at the time of her separation. Respondent also submits that Complainant cannot establish that any adverse act was related to her cancer condition because she voluntarily resigned her position, and because, as a factual matter, she was not prevented from attending her scheduled chemotherapy session.

Findings of Fact

Based on the record in this matter, I make the following Findings of Fact:

1. On or around September 1, 2001, Complainant was hired by William Davis, the owner of Respondent, as a bartender in Respondent's bar and lounge located in Flora, Illinois. At that time, Complainant was scheduled to work approximately 40 hours per week.

2. On or around April of 2002, Complainant was promoted to the bar manager position, which required her to work 60 hours behind the bar, make weekly scheduling assignments for herself and at least three other full and part-time bartenders, and order inventory for the bar. As bar manager, Complainant was also responsible for cleaning the bar, which consumed an additional 14 hours per week. Complainant was given a raise to nine dollars per hour when she became the bar manager.

3. At all times pertinent to the instant Complaint, Complainant submitted her proposed work schedule to Davis for his approval.

4. At or around May 19, 2002, Complainant discovered a lump in one of her breasts and went to a doctor, who confirmed the presence of cancer. Complainant told Davis about her diagnosis, and Davis told her that she did not have to worry about her job, and that he would work with her with respect to her cancer diagnosis.

5. Complainant continued working until shortly before June 6, 2002, when she had surgery to remove the cancer mass from her breast. Complainant thereafter went on an unpaid medical leave of absence.

6. In June of 2002, Complainant sought and received Public Aid medical benefits for her cancer treatment.

7. At some point after Complainant underwent surgery for her cancer, Complainant brought in a medical slip from her doctor indicating that she was to be off work completely while receiving medical treatment for her cancer. Davis looked at the slip and indicated to Complainant that she could have all the time off that she wanted.

8. After Complainant underwent surgery for her cancer, she was directed by her physician to undergo chemotherapy, which was scheduled to take place in four monthly

sessions starting with July of 2002. Complainant initially intended to go back to work after her last chemotherapy treatment in October of 2002.

9. At some point in early July 2002, Complainant approached Davis about the possibility of returning to work because she had been without a paycheck during her leave of absence, and because, as a single mother supporting three children, she needed the money. During this conversation, Davis and Complainant agreed to have her come back to work as a bartender for approximately forty hours per week. Both parties also agreed that Complainant would do no bar cleaning duties because she could not physically perform any of them. Davis also reduced Complainant's hourly pay to reflect the fact that Complainant was no longer doing what he considered to be bar manager duties.

10. During her conversation with Davis about the possibility of returning to work in July of 2002, Complainant expressed a concern that her return to work could disqualify her from Public Aid's health insurance coverage that she relied upon for payment of her cancer treatments. Specifically, she told Davis that she feared that she would lose her medical benefits if Public Aid found out that it was paying her medical benefits while she was employed with Respondent. At the end of the conversation, Complainant and Davis agreed that Davis would pay Complainant her wages via a company check that did not withhold any payroll (income or social security) taxes. In this way, although Complainant was working fewer hours than what she worked prior to taking her medical leave, her loss of income would not be as great due to the inclusion of taxes that should have been withheld. The instant agreement had a second benefit to Complainant because it reduced the chance that Public Aid could find out via a paper trail that she was employed while obtaining medical benefits through Public Aid.

11. In early July, 2002 Complainant came back from her medical leave and began working as a bartender pursuant to her agreement with Davis at that time. The work schedule of other employees of Respondent who had worked extra hours to compensate

for Complainant's total absence were adjusted to reflect Complainant's partial presence in the workplace. Complainant was thereafter paid via weekly checks drawn on Respondent's account that did not withhold any of her payroll taxes. The checks also had the term "payroll" on them.

12. At some point in July of 2002, Complainant made arrangements with her medical providers to start submitting her medical bills to her ex-husband's medical insurance company even though Complainant was not covered under this policy. Complainant, however, could not count on the ex-husband's private insurance company to pay any of her cancer-related medical bills, although the insurance company had paid some of her medical bills in the past even when she was not covered on the policy.

13. From when Complainant returned to Respondent in early July of 2002 to near the end of September 2002, Complainant received time-off for her monthly chemotherapy sessions without incident and generally worked 40 to 44 hours per week tending bar. Moreover, the responsibility for scheduling of work hours during this time period fell on Davis, although Complainant and David Barnes, a part-time bartender at Respondent, did some of the scheduling when Davis was not available.

14. At or near September 20, 2002, Davis had a conversation with his accountant, during which the accountant told him that Davis could get into trouble by paying employees without withholding taxes. Later that day, Davis told Complainant that he could no longer pay her without withholding taxes from her paycheck. Complainant then responded that she needed to get more hours to compensate for what was going to be withheld. Davis then told Complainant that he could only give her a finite number of hours because he had to take care of the "hourly" commitments made to other employees.

15. On September 27, 2002, Complainant approached Davis and requested that her paycheck covering the prior week's wages be written in her son's name so that she could continue to hide her employment from Public Aid. Davis agreed to Complainant's

request, and a check reflecting Complainant's hours and a withdrawal of payroll taxes was issued on the same day in the name of Complainant's son.

16. On September 28, 2002, Complainant drafted a proposed work schedule that had her working 64 hours for the following week and had her off work on September 30 and October 1, 2002 to accommodate her October 1, 2002 chemotherapy session. Once Davis became aware of the proposed schedule, he changed the schedule to reflect that Complainant would have no more than 40 hours. Davis's schedule, however, did not alter Complainant's requested off-work dates of September 30, and 0ctober 1, 2002.

17. Complainant came into work around 5:30 p.m. on September 28, 2002 to relieve Barnes from his bartending duties. At that time, Complainant noticed the altered schedule that was posted by Davis and told Barnes that the schedule was not "going to work" for her since she needed more hours. At that time Davis, who had overheard Complainant, took the schedule back to his office for further revision.

18. When Davis brought back the schedule a second time, Complainant looked at the schedule and said that it too was not satisfactory since she needed more hours. The second revision still had Complainant off work on September 30 and October 1, 2002, and Complainant made no protest to Barnes that the second revision would interfere with her chemotherapy treatment.

19. Davis then took the schedule back to his office a third time. While Davis was working on the revision, Complainant told Barnes words to the effect that if the schedule was not satisfactory in terms of number of hours, she was going to quit, and that he should be ready to take over her shift. Complainant also told Barnes that she was "fed up", and that Davis could "shove this place up his ass."

20. Barnes then went into Davis's office and told Davis that Complainant was mad about his schedule, and that if he did not give Complainant more hours she would quit. Davis told Barnes that he could not give Complainant more hours due to commitments that

he had made to other employees. Davis then revised the schedule, which still gave Complainant approximately 40 hours and left intact her requested time off as September 30 and October 1, 2002.

21. When Davis came out a third time with the schedule, Complainant saw the schedule, became upset, and repeatedly asked Davis in a voice loud enough so that the customers could hear, if he wanted her to go home. Eventually, Davis told Complainant to go home. Complainant left the bar while uttering several phrases with the word “fuck” in them.

22. Approximately 30 minutes later, Complainant returned to the bar to pick up her tip jar and other personal effects. At that time she told Barnes that Davis would be “fucking sorry”, and that she was “going to see that no one ever comes back in this fucking place.” Davis presumed that Complainant had quit her position based upon what Barnes had told him and upon the fact that she never returned for work after September 28, 2002.

23. As of September 28, 2002, Complainant had not yet been released by her physician to return to work under any condition. Moreover, Complainant had not by the time of the public hearing received a return to work release from her physician treating her cancer, although she had sought and acquired subsequent employment.

24. At all times pertinent to the instant Complaint, Barnes suffered from cancer and was given time-off by Davis to attend to all of his medical needs related to his cancer.

25. On March 6, 2003, Complainant filed and signed under oath her original Charge of Discrimination alleging that Respondent discharged her in lieu of accommodating her physical handicap of cancer and had discriminated against her on account of her gender. As to both her handicap and sex discrimination claims in the Charge, Complainant alleged that: (1) she was ready to return to work in late September of 2002; (2) she assigned herself 64 hours of work; and (3) Davis changed the schedule to preclude her from going to her chemotherapy session.

26. On March 10, 2003, Complainant filed and signed under oath a technical amendment to her original charge that changed the name of Respondent. All of the other allegations from Complainant's original Charge of Discrimination remained the same and were included in the technical amendment.

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 handicap discrimination in that Complainant failed to show that an adverse action was taken against her that was related to her handicap.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when Complainant left the workplace after having a dispute with her supervisor over the number of hours she was going to receive for the following week.

Discussion

By all accounts, Complainant did not have a good day on September 28, 2002 when she came into the workplace, discovered that she had a problem with the work schedule for the following week, and left the premises while uttering obscenities after confronting her supervisor about the schedule. The reason why Complainant left Respondent's premises in such a manner is the subject of her handicap claim. Specifically, Complainant contends that the above dispute arose because her supervisor terminated her for refusing to work on a day that had been set aside for a required chemotherapy treatment. Respondent, though, submits that it never scheduled Complainant to work on a day set aside for her

chemotherapy treatment, and that the instant dispute arose because her supervisor was unwilling to schedule her for 64 hours due to the needs of her co-workers. Having concluded that Respondent's witnesses were more credible in their contentions, I find that Complainant failed to establish a *prima facie* case of handicap discrimination.

To understand how Complainant loses on her handicap claim before the Commission, a review of Commission and court precedent is required. In cases alleging handicap discrimination, 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, **Whipple v. Illinois Department of Rehabilitation Services et al.**, 269 Ill.App.3d 554, 646 N.E.2d 275, 277, 206 Ill.Dec. 910 (4th Dist. 1995), and **Ner and Illinois State Medical Society**, ___ Ill. HRC Rep. ___, (1987CF0217, February 25, 1992).) Under this approach, Complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its adverse action taken against the complainant. If 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 Complainant is required to prove by a preponderance of the evidence that Respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination.

As with any case alleging handicap discrimination, the elements of a *prima facie* case will vary according to the specific claim. Generally, in establishing a *prima facie* case of handicap discrimination under the Human Rights Act, a complainant must show that: (1) she is handicapped within the definition of the Act; (2) her handicap is unrelated to her ability to perform the functions of the job she was hired to perform or, after her request, the employer has failed to make a reasonable accommodation which was necessary for her performance; and (3) an adverse job action was taken related to her handicap. In this

regard, Respondent has not challenged Complainant's contention that her cancer condition qualified as a covered handicap under the Human Rights Act, but has attacked Complainant's *prima facie* handicap claim on grounds that: (1) her cancer was in fact related to her ability to do her job since her doctor gave her an off-work slip that precluded her from performing any of her bar manager job duties at all times pertinent to this case; and (2) no adverse job action was taken against her in relation to her cancer since she quit her job for reasons unrelated to her chemotherapy schedule.

Admittedly, Respondent's argument that Complainant failed to show that she had an ability to perform the duties of her job has some facial appeal since it is difficult to argue that Complainant could have performed her bar manager job with or without an accommodation where Complainant: (1) tendered to Davis a note from her physician directing her not to return to work under any circumstance until her cancer treatment had been completed; (2) testified that her doctor did not want her working in any public setting due to the potential harm that could be caused on her immune system; and (3) admitted that she has never received a clearance from her doctor to return to work from her cancer condition. Moreover, while Complainant satisfactorily performed the bartending duties of her bar manager job, albeit at roughly two-thirds the number of normally scheduled hours, the record shows that: (1) Complainant never performed any of the bar cleaning functions of her bar manager job during the three months after her return from cancer surgery; and (2) Complainant never disputed Davis's testimony that she was physically unable to do the bar cleaning duties. As such, it could be argued that Complainant's cancer condition did relate to her ability to perform the duties of the bar manager position to the extent either that Complainant had never obtained (either before or after her separation from Respondent) a release from her cancer physician to work under any condition, or that the bar cleaning functions constituted an essential job duty that consumed approximately nineteen percent (14 out of a total of 74 hours) of her typical workweek.

However, Respondent never claimed that the bar cleaning duty was an essential aspect of her bar manager position, and the record otherwise suggests that neither Complainant nor Davis treated the doctor's slip as something that would have precluded her from performing the bartending aspects of her position. Indeed, regardless of whether Complainant or Davis approached the other about continuing Complainant's employment during her recovery period, an agreement was reached that allowed Complainant to resume her bartending duties while shedding other aspects of her bar manager position that Complainant could not physically accomplish. Moreover, where Davis conceded in his testimony that he would have allowed Complainant to resume her bar manager's duties once she was able to do so, I cannot find that Respondent can rely on a doctor's slip to undo the legal effect of a job restructuring that it had agreed to do as a form of an accommodation to Complainant.

This, of course, assumes that Complainant wanted to work during her recovery period in the first place, and Complainant argues that Davis forced her to resume her bartending duties in July of 2002 under a threat that she would lose her job if she refused to do so. However, I did not believe Complainant's testimony in this regard since it seemed implausible that Davis would have taken such a stance where: (1) Complainant conceded that Davis indicated to her that she could have "all the time she needed" when she initially asked for time off work due to her cancer (Tr. at pg 35); (2) Barnes testified that Davis had given him all the time he needed to treat his cancer condition; and (3) Complainant failed to present any convincing explanation as to why Davis needed her presence at the bar in July of 2002 after she had already been off work for approximately one month. Additionally, Complainant's allegations in her sex discrimination claim in her Charge of Discrimination also make me doubt that Davis would have forced Complainant to come back into work because of an anti-handicap animosity. Specifically, Complainant asserted in her sex discrimination claim that Davis permitted Barnes "literally weeks off at a time" for treatment

of his cancer, while he allegedly did not do the same for her. If true, Complainant's allegations may show an existence of an animosity based on her gender[1], but it cannot show an existence of an animosity based on her cancer where, if gauged by what he had already given to Complainant and Barnes, the record suggests that Davis regularly gave time-off to his employees having cancer-related conditions.

Even so, the record reflects that Davis could be generous with giving Complainant time-off for her cancer treatment since both sides agree that her medical leave was without pay. Indeed, where Complainant's medical leave was scheduled to last at least four months, I found believable Davis's testimony that: (1) it was Complainant who came to him in early July, 2002 seeking some sort of employment due to dire financial circumstances she was facing with having to support three children by herself and having no paycheck from Respondent; and (2) it was Complainant who came to him with the suggestion that he pay her without withholding payroll taxes as a means to maximize her income and to potentially hide the fact of her employment from Public Aid, which was otherwise footing her cancer treatment bills. Complainant's contrary testimony indicating that it was Davis's idea to not withhold payroll taxes or to issue a paycheck to her son as a means to protect him from any liability for employing her while she was under a "no-work" medical slip was simply not credible.[2]

Specifically, Complainant's contention that there was never a need to hide her employment from Public Aid because she was "covered" by a private insurer from her ex-husband's company is belied by her admission that she was covered under Public Aid for

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[1] Complainant's sex discrimination claim was dismissed by the Department for lack of subject matter jurisdiction presumably because Complainant's Charge of Discrimination indicated that Respondent had less than 15 employees.

[2] Complainant's counsel has me stumped as to how Davis could have pulled off this alleged scheme since, although Davis was not tipping off federal or state officials that he was employing Complainant by submitting payroll taxes on her behalf, Davis' payment of Complainant with company checks that were labeled "payroll" does not fit in well with

her medical expenses as of June of 2002, and by medical documents indicating that Illinois Medicaid was listed as her only insurance company as of October 1, 2002. True enough, Complainant testified that a private insurer through her ex-husband's employer had paid certain medical claims in the past, even though she was not technically covered under the policy. However, the medical form calling for Complainant's October, 2002 chemotherapy still listed Complainant as the "guarantor" of the medical bill, and Complainant conceded that her ex-husband's private insurance company was under no legal obligation to pay any of her medical bills. (Tr. at p. 170.) Thus, contrary to Complainant's claims, she still needed to hide her employment from Public Aid since: (1) she could not count on the private insurance company to keep paying for claims that were no longer covered under her ex-husband's policy; and (2) the potential medical benefits provided by Public Aid served as a safety net should the private insurance company ever wake up to the fact that it had wrongfully been paying medical benefits to someone who was not covered under its policy.[3]

What's more, Complainant's claim that she had no need to hide her income from Public Aid does not square with her concession at the public hearing that she was the one who initially informed Davis that she would lose coverage under Public Aid upon her return to work. (Tr. at p. 46.) Thus, if in fact she had no worries about payment of her medical bills upon any return to work in July of 2002, why would Complainant have mentioned the Public Aid issue to Davis in the first place, and why could she not "honestly" remember if she had ever told Public Aid that she was working at Respondent in July of 2002?[4] The

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counsel's suggestion that he was hiding from others the fact of Complainant was an employee during the summer and fall of 2002.

[3] The record suggests that Complainant's dilemma has come to pass since she eventually responded that she had lost her Public Aid medical benefits, and that she had "tons" of medical bills that had been turned over to a collection agency because she could not pay them. Tr. at pgs. 45, 60-61.

[4] Tr. at p. 61. Apparently, Complainant still could not bring herself to declare as of March, 2003 that she was working during the July to September 2002 time period as evidenced by the fact that she filed her Charge of Discrimination indicating falsely that her return to work

same result applies with even greater clarity as to the issuance of Complainant's pay check to her son since, unlike the checks that had been issued to Complainant (which presumably benefited both Complainant and Davis), Davis had no financial incentive to issue a check with all of the applicable taxes withheld to Complainant's son. Indeed, the only one who could have potentially benefited from such an issuance was Complainant herself since such an issuance had the potential for hiding the fact of her employment from Public Aid.

Thus, after considering competing versions of the facts, I find that: (1) although Complainant's physician had not released her to return to work after her surgery, Complainant requested Davis to give her an opportunity to earn money during her leave of absence due to an overriding need to obtain income; (2) Davis agreed to her request by restructuring the bar manager job into a bartending position that Complainant could physically perform and by altering the forms of payment so as to accommodate Complainant's desire to hide her income from Public Aid; and (3) Davis agreed to employ Complainant in the restructured position until Complainant could resume all of her bar manager duties. Moreover, Davis's agreement to restructure Complainant's position precludes Respondent from relying on the physician's "off-work" note to establish that her handicap was "related" to her job, especially where Complainant had otherwise satisfactorily performing the restructured job.

That, of course, leaves Respondent's remaining contention that Complainant cannot establish a *prima facie* case of handicap discrimination because she cannot prove that Respondent ever took an adverse act against her based on her handicap when she walked out of the bar after having what Davis viewed was a dispute over assigned hours. Complainant, though, argues that she satisfied this aspect of her *prima facie* case since, as a factual matter: (1) there never was a dispute as to the number of hours she assigned to

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from her cancer-related medical leave of absence was in "late September, 2002" instead of early July, 2002.

herself on September 28, 2002 because she had only assigned herself the normal 40 hour workweek for the restructured position; and (2) she was terminated by Davis only after she had complained about her need to be off on October 1, 2002 for one of her chemotherapy treatments. In reviewing the record and judging the credibility of the parties, I find that Respondent has the better argument.

Specifically, I am skeptical of Complainant's first contention that there was never a dispute on September 28, 2002 as to the number of hours she had assigned herself since: (1) her signed and verified allegations in her original and amended Charge of Discrimination indicate that prior to Davis changing her proposed schedule, she had assigned herself 64 hours, rather than the 40 hours that she maintained during the public hearing; and (2) Complainant's proposed schedule, which gave her a more than 50 percent increase in her number of hours, ran contrary to Davis's warning to her during the prior week that she could not obtain more hours to replace what she would be losing due to the withholding of payroll taxes because of his obligation to the hourly needs of her co-workers. In an attempt to minimize the discrepancy between her testimony and the written allegations in her Charge of Discrimination, Complainant suggests that she was the victim of a scrivener's error by a Department employee, who should have put "40" instead of "64" when she submitted both her original and amended Charge of Discrimination. But how can that be so where Complainant admitted to having seen the alleged error in the amended Charge and yet signed off on it anyway? (Tr. at p. 40) Indeed, one would think that, in the midst of the changes that the Department was apparently willing to make in the amended Charge of Discrimination, Complainant could have easily insisted that the 64-hour contention be changed to 40 hours if that had been the truth.[5]

[5] True enough, Complainant eventually testified that she attempted to change the amended Charge of Discrimination at the Department. (Tr. at p. 152.) However, I did not take too much stock in her testimony because she did not give any details as to what she attempted to do in this regard.

The Commission in **Schmitt and Adams County Highway Department**, ___ Ill. HRC Rep. ___, (1995SF0053, January 13, 1998) addressed a similar issue when a complainant made an eleventh-hour attempt shortly before the public hearing to change an allegation in her verified charge of discrimination and her complaint to assert for the first time that the alleged sexual harasser was a supervisor rather than a co-worker. There, the Commission, in recognizing that there are consequences to parties who sign verified pleadings, found that the original allegation should be treated as a "judicial admission" that was still binding on the complainant. (See, **Schmitt**, slip op. at p.19 and **Robins v. Lasky**, 123 Ill.App.3d 194, 462 N.E.2d 774, 78 Ill.Dec. 655 (1st Dist., 5th Div. 1984).) Moreover, while the judicial admission rule is relaxed somewhat where an inconsistent statement in the original verified pleading was made by "mistake or inadvertence" (see, **Colgan v. Premier Electrical Construction Co.**, 92 Ill.App.3d 407, 414 N.E.2d 1364, 47 Ill.Dec. 248 (3rd Dist. 1981)), our Complainant cannot take advantage of this exception since: (1) the mistake or inadvertence must result from information not known to the pleader at the time of the filing of the original pleading (or here, the amended pleading that Complainant wanted to change a second time); and (2) Complainant conceded that she was aware of the alleged mistake at the time she signed the amended Charge of Discrimination. See, **Lasky**, 462 N.E.2d at 778, 78 Ill.Dec. at 659.

Accordingly, for all of the above reasons, I am going to hold Complainant to her original statement that she assigned herself a 64-hour schedule. Thus, when this fact is plugged into the other facts concerning Complainant's financial concerns and her need to hide her employment from Public Aid, I agree with Respondent that Complainant cannot link any adverse act to her handicap because I find that: (1) Complainant was engaged in a dispute on September 28, 2002 that concerned only the amount of hours she was going to be able to work for the following week; and (2) Complainant quit her job after she discovered that she could not work the hours she needed to make up for the lost income

that would now be withheld as taxes and after she realized that she could no longer be able to hide her income from Public Aid. Moreover, while Complainant is adamant that the dispute concerned the scheduling of her on a day that she had already committed to her chemotherapy, the other, more credible, evidence does not support this contention since: (1) Complainant conceded that Davis had previously accommodated her prior requests to be off on chemotherapy days; and (2) Complainant has failed to present any convincing evidence to explain why Davis would suddenly reverse course and insist that she work on the day of her last scheduled chemotherapy treatment.

To be sure, Complainant's counsel in Complainant's reply brief provides an explanation for Davis's conduct during the September 28, 2002 confrontation by arguing that Davis: (1) needed Complainant to work, but did not want to use fill-in, part-time employees to accommodate Complainant's medical needs for an extended period of time; (2) devised a scheme to force Complainant to work for him under a threat of losing her job while paying her "under the table" in order to avoid incurring potential liability in the event that her physical condition worsened while she was still under a "no-work" doctor's slip, (3) needed to change the current arrangement for paying Complainant because his accountant had told him that he could not continue to pay Complainant "under the table"; and (4) trumped up the instant confrontation on September 28, 2002 by assigning her to work on her scheduled day for undergoing chemotherapy in order either to force Complainant into quitting or to supply a justification to terminate her for refusing to work the amended schedule. Counsel's argument, though, does not square with the facts in the instant record.

Initially, while I agree with Complainant that Davis believed that she was a good bartender and wanted her back at the work site, I do not agree with Complainant's suggestion that such a desire necessarily or easily translates into an anti-handicap intent on the part of Davis. Indeed, the Commission implicitly rejected Complainant's stance in **Terry and Watts Copy Systems**, ___ Ill. HRC Rep. ___, (1998SF0549, March 11, 2001), where

it concluded that although there could be some Worker's Compensation Act ramifications for requiring workers to come back into the workforce to do light duty work while out on a medical leave of absence, there can be no Human Rights Act/handicap consequence where the employer actually wants the employee back into the workforce and honestly believes that she can do available light-duty work. (**Terry**, slip op. at pp. 16-17.) Similarly, I am not so sure that any alleged threat by Davis to terminate her if she did not return to her job in July of 2002 would have violated the Human Rights Act where an employee such as Complainant brings in a doctor's slip indicating that she is to be completely off work for an open-ended period of time. However, I need not address the question as to whether, as a required form of accommodation, Respondent must keep Complainant's job open and hire other individuals to perform her job under these circumstances since the weight of the evidence in the record indicates that there was no threat made by Davis, and that it was Complainant who approached Davis about working during her medical leave of absence because of an overriding need to obtain income.[6]

Finally, the argument raised by Complainant's counsel that the September 28, 2002 dispute was orchestrated by Davis to force her out of the workforce does not square with the facts in the instant record. Specifically, Complainant's counsel agrees that, at least as of July 2002, Davis wanted her in the workforce because Complainant proved to be a good bartender. Moreover, although the plan to pay Complainant without withholding payroll taxes had all but unraveled by September 28, 2002, such a fact does not support Complainant's claim that Davis no longer wished to accommodate her disability because Davis was at least initially willing to keep Complainant employed at that time by granting her

[6] As it is, Davis's willingness to accommodate Complainant's request for employment by parsing out those aspects of the bar manager's job, including arguably essential job duties that both parties believed she could not have performed, is something to be commended, rather than condemned, especially where he did not have any obligation to do so when presented with an off-work doctor's slip. See, **Fitzpatrick v. Human Rights Commission**, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994).

request to make out a check in the name of her son. More fundamentally, though, the argument posed by Complainant's counsel ignores the fact that Complainant presented Davis with an "off-work" slip by her doctor shortly after her surgery that was still in force throughout the summer and fall of 2002. In this respect, therefore, Davis did not have to manufacture a confrontation with Complainant if he wanted her out of the workforce since he could have sent her home pursuant to terms of the doctor's slip. In summary, Complainant loses on her handicap claim since the record shows that she quit over a dispute about the number of hours she was scheduled to work.

Recommendation

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

HUMAN RIGHTS COMMISSION

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

ENTERED THE 27TH DAY OF OCTOBER, 2006