CAUSE NO. 11-13467

CARLOTTA HOWARD,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	160th JUDICIAL DISTRICT
	§	
STATE OF TEXAS, TEXAS	§	
DEPARTMENT OF FAMILY AND	§	
PROTECTIVE SERVICES	§	DALLAS COUNTY, TEXAS

Defendant.

MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

Respectfully submitted,
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TO THE HONORABLE DISTRICT COURT JUDGE:

NOW COMES Plaintiff, Carlotta Howard, and files this, her motion for summary judgment and supporting brief, and respectfully shows the following:

There is no genuine issue of material fact that Defendant, Texas Department of Family and Protective Services (the Department), failed to reasonably accommodate Plaintiff, Ms. Carlotta Howard, a qualified person with a disability, when the Department terminated her after she requested an accommodation. This failure to accommodate has caused Ms. Howard to suffer damages.

There is no genuine issue of fact that: (1) Ms. Howard had a disability, (2) the Department knew of Ms. Howard's disability, (3) Ms. Howard could have performed the essential functions of her job with a reasonable accommodation, and (4) the

Department refused to accommodate Ms. Howard. Therefore, Plaintiff is entitled to summary judgment in her favor.

I.
SUMMARY JUDGMENT EVIDENCE

Plaintiff includes the following summary judgment evidence in the appendix attached to and filed with this motion. Citations to materials in the appendix generally state the name of the document and identify the relevant pages of the appendix.

1. Deposition of Carlotta Howard (Howard Dep.).
2. Deposition of Lisa Black (Black Dep.).
3. Deposition of Monica McFarland (McFarland Dep.).
4. Deposition of Nicole Ogle (Ogle Dep.).
5. Ms. Howard's Application for employment (Job App.).
6. Human Services Technician III job requirements (Job reqs).
7. Nicole Ogle's recommendation for Termination with Cover Letter (Term. Rec.).
8. Lisa Black's termination letter (Term. letter).
9. Ms. Howard's performance reviews (Perf. Rev.).
10. Medical Release allowing Ms. Howard to return to work (Med. Release).
11. Doctors' notes and status reports.
12. Email notification sent to Nicole Ogle regarding Ms. Howard's workers' compensation claim.

13. Ms. Howard's initial injury report (Initial injury rep.).

14. Emails between Ms. Ogle, Ms. Black, Larry Barnes, and Melissa Hobbs regarding Ms. Howard's requests for an accommodation.

15. Human and Health Services Manual (HHR Manual).

16. Reasonable Accommodation Request Form (RA Req. form).

17. Fax sent by Ms. Howard to Ms. McFarland requesting a reasonable accommodation (Jan. fax to McFarland)

II.
FACTS

A. Carlotta Howard was a successful employee of the Department until her December 2008 car wreck.

Ms. Carlotta Howard first began working for the Texas Department of Family and Protective Services in July 2007 as a Human Services Technician III, or case aide. (Initial injury rep. at 105, item 30; Ogle Dep. at 57). As a Human Services Technician, Ms. Howard transported children, visited with families, delivered Christmas toys, and performed administrative tasks. (McFarland Dep. At 50). For the entirety of her employment with the Department, she never had any performance issues. (Perf. Revs at 83-91; McFarland Dep. at 50). She was never written up or otherwise disciplined for performance issues. (*Id.*; McFarland Dep. at 50). In fact, Ms. Howard was a happy employee. Monica McFarland, Ms. Howard's supervisor at that time, described Ms. Howard as "a very happy person. Just easy to talk to when she came to work." (McFarland Dep. at 49).

B. Due to a work-related car wreck at Christmas, Ms. Howard developed a disability.

On December 16, 2008, Ms. Howard was delivering Christmas presents to children who had open cases with the Department of Family and Protective Services. (Initial injury rep. at 105, item 20; McFarland Dep. at 51). While she was delivering those presents, a truck, failing to stop at an intersection, struck her vehicle on the driver's side. (*Id.*; McFarland Dep. at 51). Ms. Howard was rushed to the emergency room, where she was found to have contusions over multiple body parts and a bruised collarbone. (Initial injury rep. at 105, items 18-20).

In the months following the accident, Ms. Howard was diagnosed with a cervicothoracic sprain, a lumbosacral dorsal sprain, lumbar radiculitis, cervical radiculitis, right and left arm ligament injuries, and left shoulder contusions. (Dr. status rep. at 95, item 21; Howard Dep. at 9, 13). These injuries impacted her range of motion, caused back spasms, and exacerbated her pre-existing vision problems. (Howard Dep. at 7, 11-12). It also caused her a great deal of pain. Monica McFarland explained that when she visited Ms. Howard in the hospital, "[Ms. Howard] was in a lot of pain. And she couldn't go to the bathroom. I mean I remember she wanted to go to the bathroom, and they wouldn't let her go to the bathroom. . . . They didn't want to move her." (McFarland Dep. at 51: 16-25).

As a consequence of these injuries, Ms. Howard was placed on a daily regimen of medicines to treat her pain. (Howard Dep. at 3, 4-5, 8, 22-26).

C. Ms. Howard kept the Department informed of her injuries.

The car accident was reported to the Department on the same day it happened, December 16, 2008, to Ami Labrecque. (Initial injury rep. at 105, items 29, 40, 41; Black Dep. at 29). Ms. Labrecque, who provided Human Resources for the Department, filled out the initial injury report. (Initial injury rep. at 105, item 40). Three weeks later, on January 6, 2009, Ms. Labrecque notified Nicole Ogle that Ms. Howard was out on Workers' Compensation. (Jan. 6 2009 email to Ogle at 103). Ms. McFarland also informed Nicole Ogle of Ms. Howard's injuries. (McFarland Dep. at 53).

Nicole Ogle, known to be "[v]ery--not friendly . . . . a bit intimidating," was Ms. Howard's new supervisor. (McFarland Dep. at 54: 2-4; Term. Rec. at 76). In December 2008, as part of a departmental reorganization, Ms. Howard was transferred to Unit 70, which was under Ms. Ogle's supervision. (Term. Rec. at 76; McFarland Dep. at 52). At the time of Ms. Howard's accident, Ms. Ogle herself was on statutorily protected maternity leave. (Term. rec. at 77). In February 2009, Nicole Ogle returned from maternity leave and contacted Ms. Howard, telling Plaintiff to send her a doctor's note regarding the injuries suffered from the accident. (Term. rec at 77-78).

Throughout the coming months, Ms. Howard and her doctor kept Nicole Ogle informed of her condition. (See Doctors' notes and status reports at 95-101; Ogle Dep. at 60-61). She provided medical documentation and status updates every time such documents were requested by Ms. Ogle. (Term. rec. at 77). It was during this

period that Ms. Howard started actively seeking an accommodation that would allow her to return to work.

D. Ms. Howard repeatedly asked for accommodations, but was denied every time and no alternatives were suggested.

Ms. Howard first requested an accommodation from the Department in a fax sent to Monica McFarland on January 6, 2009, per the Department's procedures. (Howard Dep. at 10; Ogle Dep. at 61; Black Dep. at 30, 39-40; HHR manual at 111). The Department requires employees to request accommodations directly from their own supervisors. (HHR manual at 111; Ogle Dep. at 61; Black Dep. at 30, 39-40). The handwritten letter addressed to Ms. McFarland stated, "I probably can return before Jan 19, 09, but on lite [sic] duties". (Jan. fax to McFarland at 123). The Department, in violation of its own procedures, did not respond to this request. (HHR manual at 111; Ogle Dep. at 61; Black Dep. at 30, 39-40).

Ms. Howard then directly requested an accommodation from Nicole Ogle in June 2009. (June 1 2009 email from Ogle at 108-09; Ogle Dep. at 61). Again, Ms. Howard asked for light duty. (*Id.* at 108-09; Howard Dep. at 17: 15-16 "I asked Ms. Ogle can I just sit at the office and do stuff and do the visits."). Ms. Ogle neither accepted this accommodation nor suggested any alternatives. (Ogle Dep. at 64:4 "I wouldn't know what those alternatives are.").

In July 2009, Nicole Ogle again contacted Ms. Howard. (Term rec. at 77). Ms. Ogle knew that Ms. Howard wanted to return to work because Ms. Howard had just requested an accommodation from her in June. (June 1 2009 email from Ogle at 108-09; Ogle Dep. at 61). However, Nicole Ogle did not consider any

accommodations that would allow Plaintiff to return to work during that July discussion. Ms. Ogle did not even inform Ms. Howard that she had at least 72 hours of annual leave still available for her. (Ogle Dep. at 62:20-22).

Instead, on July 27, 2009, Nicole Ogle sent an email to her supervisor, Larry Barnes, asking him what she should do about Ms. Howard. (July 27, 2009 email at 108). Mr. Barnes coldly replied: "prepare a dismissal recommendation packet." (*Id.*).

After Ms. Howard's July meeting with Nicole Ogle, Ms. Howard went to April Gonzales for help. (July 27, 2009 email at 108; Howard Dep. at 19). April Gonzales was Ms. Howard's caseworker at the Department of Assistive and Rehabilitative Services. (Howard Dep. at 16). After discussing the issue with Ms. Howard, Ms. Gonzales asked Nicole Ogle for an accommodation on Ms. Howard's behalf. (Howard Dep. at 19; July 27, 2009 email at 108). During her conversation with Ms. Ogle, April Gonzales specifically asked what could be done to save Ms. Howard's job. (July 27, 2009 email at 108). In response to this question, Nicole Ogle asked Ms. Gonzalez what accommodations Plaintiff was seeking. (*Id.*). Although Ms. Howard had previously requested light duty, Ms. Gonzales suggested special glasses to help with Plaintiff's blurry vision. (*Id.*). Ms. Ogle did not agree to that accommodation and did not suggest any alternative accommodations. (Ogle Dep. at 60).

E. Instead of accommodating her, the Department terminated Carlotta Howard.

Ms. Howard met with Lisa Black, her regional director, on September 28, 2009 after receiving a recommendation for termination. (D18, D113; Howard Dep. at 56-57). This was the fourth time she had asked for an accommodation and the third person with whom she discussed the issue. During that meeting, Ms. Howard implored the Department to work with her. (Term letter at 80; Howard Dep. at 14-15). She asked to work four hours a day for a short period of time. (Black Dep. at 35; Howard Dep. at 21). She explained that she still had 72 hours of leave available. (Howard Dep. at 21). Ms. Black did not discuss Ms. Howard's request or any alternative accommodations. (Black Dep. at 35). Instead, she only asked for a doctor's note. (Black Dep. at 38).

Ms. Howard provided the Department with the requested note on October 9, 2009. (Med. Release at 93; Black Dep. at 43; Howard Dep. at 20). The doctor's note released Ms. Howard to work for four hours a day. (Med. Release at 93; Howard Dep. at 20). On October 12, Ms. Howard discussed this medical release with Lisa Black's assistant, Melissa Hobbs. (Oct. 12, 2009 email to Ms. Black at 107). She explained to Ms. Hobbs that she only needed this modified work schedule for two to three weeks. (*Id.*). She explained that her doctor could send the Department another note supporting this accommodation. (*Id.*). Ms. Black was informed of each of those things. (Black Dep. at 37-38).

Ms. Howard begged the Department to work with her. (Oct. 12 email to Ms. Black at 107). However, the Department refused to discuss accommodation options

with her. (Black Dep. at 41-42: "Q: What did Child Protective Services do when she asked to be worked with? . . . A: We dismissed her."). Ms. Black did not give Plaintiff time to get another doctor's note. (Oct. 12, 2009 email from Ms. Black at 107; Black Dep. at 41). Ms. Black did not attempt to verify whether Plaintiff needed the requested accommodation for only two to three weeks. (Black Dep. at 42). Ms. Black did not offer any alternative accommodations to Ms. Howard. (Black Dep. at 41). Ms. Black also did not offer to let Ms. Howard use her 72 hours of annual leave as an accommodation. (Black Dep. at 39). Instead, the Department fired her. (Black Dep. at 41-42). As Ms. Howard testified in her deposition, "I asked, the state asked, I asked Nicole, I asked Ms. Lisa, it was just flat out no. Melissa Hobbs said, we can't help you, no." (Howard Dep. at 17:2-5).

The Department dismissed Ms. Howard even though both Lisa Black and Nicole Ogle admitted that the requested accommodations were reasonable. In her deposition, Ms. Black stated, "[i]f she would have said for the next month I need to come in four hours, you know, a day, I would venture to say that I would have approved that." (Black Dep. at 36:5-8). In fact, Ms. Black stated that the requested accommodation would have been reasonable even if Ms. Howard did not have any leave hours remaining. (Black Dep. at 36:10-14 "Q: Even without leave? . . . A: Leave without pay. She would have to take leave without pay. I would do – I wouldn't have been unreasonable."). Ms. Ogle admitted that her unit would have operated normally had the Department granted Ms. Howard's accommodation request. (Ogle Dep. at 65: 1-3 "Q: Would you have been able to run your unit if

[Howard] was only able to work four hours a day? A: Absolutely."; Ogle Dep. at 58: 4-5 "Q: And how did your unit operate during that time [without a case aide]? Did it operate normally? A: Uh-huh.").

F. It is undisputed that Ms. Howard had a disability, that she requested an accommodation, that the Department refused to accommodate her, and that the Department terminated her because she needed an accommodation.

- It is undisputed that Howard had a disability. (Dr. notes at 95-101; Black Dep. at 33-34; Ogle Dep. at 59; McFarland Dep. at 51).
- It is undisputed that the Department knew she had a disability. (Dr. notes at 95-101; Initial injury rep. at 105; Black Dep. at 33-34: "It was obvious that, you know, she had been in a wreck and, obviously, she was under a doctor's care . . . . She talked about being in pain."; Ogle Dep. at 59:23-24 "[S]he told me she was suffering from back pain."; McFarland Dep. at 51:15-25 "she was in a lot of pain. And she couldn't go to the bathroom. I mean I remember she wanted to go to the bathroom, and they wouldn't let her go to the bathroom. . . . they didn't want to move her.").
- It is undisputed that Howard followed proper procedure in asking for an accommodation by going to her own supervisor. (Jan. fax to McFarland at 123; Ogle Dep. at 61; Black Dep. at 30, 39-40; HHR manual at 111).
- It is undisputed that the Department violated its own procedures denying Howard's requests for an accommodation. (Jan. fax to McFarland at 123; Ogle Dep. at 61; Black Dep. at 30, 39-40; HHR manual at 111).

- It is undisputed that asking to work four hours a day for two to three weeks was reasonable. (Black Dep. at 36:5-8 "If she would have said for the next month I need to come in four hours, you know, a day, I would venture to say that I would have approved that;" Ogle Dep. at 65:1-3 "Q: Would you have been able to run your unit if [Ms. Howard] was only able to work four hours a day? A: Absolutely."; Ogle Dep. at 58:4-5 "Q: And how did your unit operate during that time [without a case aide]? Did it operate normally? A: Uh-huh.").
- It is undisputed that Ms. Howard had 72 hours of leave left. (Howard Dep. at 21).
- It is undisputed that Ms. Howard's request would have been reasonable even if she did not have 72 hours of leave available. (Black Dep. at 36:10-14 "Q: Even without leave? . . . A: Leave without pay. She would have to take leave without pay. I would do – I wouldn't have been unreasonable.").
- It is undisputed that the Department did not suggest alternative accommodations, or otherwise engage in any dialogue about potential accommodations. (Black Dep. at 41:20-23 "Did Child Protective Services make any counteroffer to her? . . . A: No, sir."; Ogle Dep. at 63-64: "I wouldn't know what those alternatives are.").
- It is undisputed that Howard was not accommodated. (Term. letter at 80-81)
- It is undisputed that Howard was terminated because she needed an accommodation. (Term. letter at 80-81).
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III.
STANDARD OF REVIEW

Summary judgment must be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *See also* TEX. R. CIV. P. 166a(c). If a plaintiff conclusively establishes each element of his claim, then the plaintiff is entitled to summary judgment. Tex. R. Civ. P. 166a(c); *Elliot-Williams Co. v. Diaz*, 9 S.W. 3d 801, 803 (Tex. 1999). Only reasonable inferences and doubts must be resolved in the nonmovant's favor. *See Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Here, if reasonable jurors could not differ in their conclusions in light of the evidence presented, then Plaintiff is entitled to summary judgment. *Goodyear Tire and Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

By adopting the Texas Commission on Human Rights Act into the Labor Code, the Texas legislature intended to correlate state and federal anti-discrimination law. *See Autozone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008); *Quantum Chem.*, 47 S.W.3d at 476; *Willrich*, 28 S.W.3d at 24. Therefore, courts applying Texas anti-disability discrimination law may look to federal statutes and case law to interpret the requirements of the TCHRA. *See Reyes*, 272 S.W.3d at 592 (applying federal law in state law-based discrimination claim "to interpret the Act's provisions."); *Quantum Chem.*, 47 S.W.3d at 476 ("[A]nalogous federal statutes and the cases interpreting them guide our reading of the TCHRA.").

IV.
ARGUMENTS AND AUTHORITIES

Summary judgment should be granted in favor of Ms. Carlotta Howard because there is no genuine dispute that the Texas Department of Family and Protective Services failed to accommodate her and terminated her because of her disability.

An employer that fails to make "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability" violates chapter 21 of the Texas Labor Code ("Labor Code"). Tex Lab. Code Ann. §21.128. A plaintiff who claims failure to reasonably accommodate is entitled to summary judgment when there is no genuine dispute that: (1) she is disabled within the meaning of the Labor Code, (2) she was otherwise qualified for her job, (3) the employer knew of her limitations but failed to provide an accommodation requested by the employee, (4) the employee suffered an adverse action, and (5) the reasonable accommodation was not unduly burdensome. *See Davis v. City of Grapevine*, 188 S.W.3d 748, 758 (Tex. App. – Fort Worth 2006, no pet.)

Here, the Department failed to reasonably accommodate Ms. Howard. It is undisputed that Ms. Howard was an otherwise qualified employee with a disability, that the Department knew of Ms. Howard's physical limitation, and that it failed to provide an accommodation for her. Finally, it is undisputed that the Department's failure to accommodate Ms. Howard resulted in her termination. Therefore, summary judgment must be granted in favor of Ms. Howard.

I. Carlotta Howard has a disability under the Texas Labor Code because her physical impairments, caused by a car accident, have substantially limited her ability to perform several major life activities and major bodily functions.

Ms. Howard's physical impairments qualify her as having a disability as defined by the Texas Labor Code. Under the Labor Code, a disability is defined as a "physical impairment that substantially limits at least one major life activity." Tex. Lab. Code Ann. § 21.002(6). The definition of a major life activity includes, among other things, "seeing, hearing, eating, sleeping, walking, standing, lifting, [and] bending." Tex. Lab. Code Ann. § 21.002(11-a). A major life activity also includes "the operation of a major bodily function." *Id*.

This broad definition is expanded further by the Texas Labor Code's own explicit rule of construction stating that "[t]he term 'disability' shall be construed in favor of broad coverage of individuals under Subchapters B and C, to the maximum extent allowed under those subchapters." Tex Lab. Code Ann. 21.0021 (a). [1]

[1] This broad definition of disability and preference for inclusion rather than exclusion brings the Texas Labor Code in line with Federal anti-discrimination law. In 2008, Congress amended the ADA to broaden its coverage. *Molina v. DSI Renal, Inc.,* 840 F.Supp.2d 984, 993 (W.D. Tex. 2012) (citing Pub. L. No. 110-325, 122 Stat. 1554). In doing so, it expanded its definition of "disability." *Id*. "This expansion was undertaken in response to court decisions that Congress felt 'had created an inappropriately high level of limitation necessary to obtain coverage under the ADA.'" *Id*. As such, Congress clarified that "substantially limits" did not mean 'significantly restricted', *Id*., and it expanded the definition of major life activities to include major bodily functions. 42 U.S.C.A. § 12102 (2)(b). It also unambiguously stated that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations [. . .]. [T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Molina*, 840 F.Supp.2d at 993 (citing Pub. L. No. 110-325, 122 Stat. 1554). Thus, the ADAAA, like the Texas Labor Code, directs that "[t]he definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." *Id*.

Here, there is no genuine dispute about what physical impairments Ms. Howard suffers from: a cervicothoracic sprain, a lumbosacral dorsal sprain, lumbar radiculitis, cervical radiculitis, right and left arm ligament injuries, and left shoulder contusions. (Status report at 95; Howard Dep. at 11-12). These impairments substantially limited Ms. Howard's ability to perform the major life activities of walking, standing, lifting, bending, and seeing, at least. (Status report at 95; Howard Dep. at 11-12). Moreover, her injuries substantially limited the operation of her muscular and nervous systems, which are major bodily functions. Ms. Howard's physical impairments impacted her range of motion, caused back spasms, and exacerbated her vision problems. (Howard Dep. at 7, 11-12). Because of these injuries, Ms. Howard was placed on a daily regimen of medication. (Howard Dep. at 3-5, 8, 22-26).

Therefore, these conditions qualify as a disability under the Texas Labor Code. Consequently, Ms. Howard is entitled to summary judgment on this issue, as there is no genuine dispute about this element.

II. Carlotta Howard was otherwise qualified to work as a Human Services Technician III because she was able to perform the essential functions of the job with a reasonable accommodation.

An "otherwise qualified individual" is defined as an individual who is able to perform the essential functions of the position with or without a reasonable accommodation. *Davis v. City of Grapevine*, 188 S.W.3d 748, 765-66 (Tex. App. – Fort Worth 2006, no pet.); 42 U.S.C. §12111(8) (analogous federal statute defining "qualified individual with disability" the same way). In order to establish that an

employee is qualified, an employee must show that he or she: (1) "satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.," and (2) can perform the essential functions of the position held or desired, with or without reasonable accommodation. 29 C.F.R. §1630.2(m) App.; *Davis,* 188 S.W.3d at 765-66.

In this case, it is undisputed that Carlotta Howard is an otherwise qualified person with a disability. Ms. Howard satisfies the prerequisites for the Human Services Technician III job because she possesses the appropriate educational background, employment experience, and skills for the position. Moreover, Ms. Howard can perform the essential functions of her job with the reasonable accommodation she requested.

A. *Ms. Howard satisfies the prerequisites for the Human Services Technician III job because she possesses the appropriate educational background, employment experience, and skills for the position.*

It is undisputed that the plaintiff satisfied the prerequisites for her position in the Department. A court's determination of whether an employee has met this burden is a straightforward determination of basic qualifications. *See Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505-06 (5th Cir. 1988); *Gold v. Exxon Corp.*, 960 S.W.2d 378, 382 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (applying *Bienkowski* in determining whether an employee was 'qualified' under the Texas Commission on Human Rights Act). To satisfy this element, it is enough to show that the employee "continued to possess the necessary qualifications for his job at the time of the adverse action." *Bienkowski,* 851 F.2d at 1506.

Here, according to the documents produced by the Department, Ms. Howard met the prerequisites for her job. These included having a valid Texas Driver's license, graduating from high school, and having one year of full-time social services experience. (Job reqs. at 6). According to Ms. Howard's application, she has a valid Texas driver's license, an Associate's Degree from Hancock College in Santa Maria, CA, and was a full time social services assistant prior to joining the Department. (Job app. at 67-71). Because Ms. Howard continued to possess these qualifications at the time she was fired, she meets the prerequisites for her job.

B. *Ms. Howard can perform the essential functions of the job with a reasonable accommodation.*

It is undisputed that Carlotta Howard could perform the essential functions of her job with a reasonable accommodation. The term "essential functions" means duties that "bear more than a marginal relationship to the job at issue." *LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294, 300 (Tex. App. – Beaumont 2007, no pet.) (citing *Chandler v. City of Dallas,* 2 F.3d 1385, 1393 (5th Cir.1993)). There are several factors that courts consider when determining which duties are "more than marginal." *LeBlanc*, 232 S.W.3d at 300 (citing *Ketcher v. Wal-Mart Stores, Inc.*, 122 F.Supp.2d 747, 753 (S.D. Tex. 2000)). In particular, courts defer to an employer's determination of whether or not an employee could perform his or her job with a reasonable accommodation when considering essential functions. *Davis*, 188 S.W.3d 763-64 (giving deference to defendant's determination of essential functions); *Ketcher,* 122 F.Supp.2d at 753 (finding the defendant's determination of

whether plaintiff could perform essential tasks as conclusive); *Herrera v. CTS Corp*., 183 F. Supp. 2d 921, 926 (S.D. Tex. 2002) (giving substantial deference to employer's determination of essential functions); 29 C.F.R. § 1630.2(n)(3).

Here, Plaintiff's regional director and supervisor admitted that she could perform the essential functions of her job with the accommodation she requested. Lisa Black, the Regional Director, who terminated Ms. Howard, stated that Ms. Howard could perform the essential functions of her job with the requested accommodation: "[Howard] could have performed it four hours a day. She could have if her doctor said so." (Black Dep. at 45-46). Ms. Howard's doctor, in fact, did provide the Department with a note saying that she could perform her duties for four hours a day; and, the Department saw the note. (Term letter at 80: "On October 9, 2009 you provided a note from your doctor stating that you would be able to return to work on October 12, 2009 working only four hours a day."). At the same time, Ms. Howard's supervisor, Nicole Ogle, stated that her unit would have run normally if Ms. Howard was given the accommodation she asked for. (Ogle Dep. at 65). In fact, when Ms. Howard was terminated, nobody filled the position for years. (Ogle Dep. at 57-58)

Furthermore, Ms. Howard was not terminated because of an inability to perform the essential functions of her job. (*See* Term letter at 80-81; Black Dep. at 44:23-25 "Q. She was not terminated for performance issues? . . . A. No."). Instead, the Department alleges that Ms. Howard was terminated because she did not have enough leave hours to accommodate for her work restrictions. (Term letter at 80;

Black Dep. at 32). In fact, Ms. Howard's director contends that if Ms. Howard had had enough leave, she would not have been terminated. (Black Dep. at 32-33: "[W]hat would have happened if she hadn't exhausted her leave? . . . A. She – we wouldn't have even been in this place to recommend dismissal. She had exhausted all of her leave.").

It is undisputed that Carlotta Howard could perform the essential functions of her job. The Department's regional director and one of its supervisors testified that Ms. Howard could indeed perform those functions with the accommodation she requested and that it would not affect the unit. Furthermore, the Department does not contend that Ms. Howard was terminated because she was unable to perform these functions. Therefore, Plaintiff is entitled to summary judgment on this element, as there is no genuine dispute that Ms. Howard could have performed her job with a reasonable accommodation.

III. The Texas Department of Family and Protective Services knew of Carlotta Howard's disability but failed to provide her with a reasonable accommodation, in violation of the Texas Labor Code.

It is undisputed that the Department failed to accommodate Ms. Howard's known physical disability. In Texas, an employer must make "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability." Tex Lab. Code Ann. §21.128. In this case, the Department was aware of Ms. Howard's disability, Ms. Howard requested an accommodation, the requested accommodation was reasonable and not unduly

burdensome, and the Department refused to accommodate her. As no material question of fact exists on this issue, Plaintiff is entitled to summary judgment.

A. *The Department was aware of Ms. Howard's disability*.

It is undisputed that the Department knew about Ms. Howard's disability and the physical limitations it caused. In order for an employer to be liable for failing to accommodate an employee, the employer must have knowledge of the limitations that need to be accommodated as a result of the disability. *Davis v. City of Grapevine*, 188 S.W.3d 748, 758 (Tex. App. – Fort Worth 2006, pet. denied). In this case, Ms. Howard directly notified the department of her physical limitations multiple times.

Ms. Howard directly informed her supervisor, Nicole Ogle, about the physical limitations that resulted from her car accident. (Ogle Dep. at 59:23-24 "[S]he told me she was suffering from back pain."). Ms. Howard informed the HR department and the regional director, Lisa Black, about her disability. (Term letter at 80). Additionally, it was readily apparent that Ms. Howard had several physical limitations that required accommodation. (Black Dep. at 33-34: "It was obvious that, you know, she had been in a wreck and, obviously, she was under a doctor's care [. . .]. She talked about being in pain."; McFarland Dep. at 51:15-25 "she was in a lot of pain. And she couldn't go to the bathroom. I mean I remember she wanted to go to the bathroom, and they wouldn't let her go to the bathroom. . . . they didn't want to move her."). The Department also received numerous doctor's reports,

notes and documents detailing Ms. Howard's disability and recovery. (*See* Initial injury rep. at 105; Dr. notes at 95-101).

There is no genuine dispute that the Department knew of Howard's disability.

B. Ms. Howard requested an accommodation, triggering the Department's duties under the Act.

It is undisputed that Ms. Howard requested an accommodation from the Department. An employee with a disability must ask his or her employer for an accommodation. Tex. Lab. Code Ann. §21.128. Once a request has been made by an otherwise qualified employee, the employer has a duty under the Texas Labor Code to reasonably accommodate that employee, unless it is unduly burdensome. *Id*. Moreover, the employee's request triggers the employer's duty under the state to engage in a "flexible, interactive process that involves both the employer and the qualified individual with a disability." *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (citing 29 C.F.R. §1630.9 App). During this process, both parties should discuss the employee's needed accommodation and attempt to arrive at an appropriate accommodation. *See Loulseged v. Akzol Nobel, Inc.,* 178 F.3d 731, 735-36 (5th Cir. 1999); 29 C.F.R. §1630.9 App. A failure to engage in this process is evidence of disability discrimination. *See Loulseged*, 178 F.3d at 736 (explaining that the duty to engage in the interactive process is "a means to the end of forging a reasonable accommodation."); *Beck v. Univ. of Wisconsin Bd. of Regents,* 75 F.3d 1130, 1135–36 (7th Cir.1996) ("Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the

other party determine what specific accommodations are necessary. . . . A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.").

Here, Ms. Howard requested an accommodation at least five different times. She first requested one from the Department in January 2009 via fax. (Jan. fax to McFarland at 123). Since this first request went unanswered, in June 2009, Ms. Howard directly asked Nicole Ogle for an accommodation. (June 1 2009 email from Ogle at 108-09; Ogle Dep. at 62, Howard Dep. at 17). Ms. Ogle neither accepted this accommodation nor suggested any alternatives. (Ogle Dep. at 63-64). Still, Ms. Howard continued requesting accommodations. After she met with Ms. Ogle, she asked her caseworker at the Department of Assistive and Rehabilitative Services, April Gonzalez, to speak with Ms. Ogle on her behalf. (June 1 2009 email from Ogle at 108-09; Howard Dep. at 19). However, instead of accommodating Ms. Howard, the Department fired her. Therefore, the department failed to fulfill its duties under the Texas Labor Code. Tex. Lab. Code Ann. §21.128 ("It is an unlawful employment practice for a respondent covered under this chapter to fail or refuse to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability. . . .").

C. *The requested accommodation was reasonable.*

It is undisputed that the accommodation that Ms. Howard requested was reasonable. Generally, an accommodation is a change "to an employer's procedures,

facilities, or performance requirements. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 314 (5th Cir. 1997). Such an accommodation is reasonable if it will enable a qualified individual with a disability to perform the essential functions of his or her job. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 399, (2002); *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 92 (Tex. App. – Austin 1995, no writ) (clarifying that the 'reasonableness' of an accommodation should be evaluated "in terms of the plaintiff's ability to do the job."). In order to prevail in a failure to accommodate claim, an employee must demonstrate only that an accommodation "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S at 391.

Ms. Howard requested light duty and part-time work for a short period to several times. *See* Facts Section D, supra. Not only was the requested accommodation in this case reasonable on its face, but the Department's own management has testified to its reasonableness. As mentioned above, Lisa Black, the person who dismissed Ms. Howard, admitted that Ms. Howard could have performed the essential functions of her job with the requested accommodation. (Black Dep. at 45). The regional director stated at her deposition that "[Howard] could have performed it four hours a day. She could have if her doctor said so." (Black Dep. at 45-46).[2] In addition, Ms. Howard's supervisor, Nicole Ogle, stated that her unit would have run normally if Ms. Howard were given the

[2] Ms. Howard's doctor did say so and Ms. Black was aware of this. (Term. letter at 80).

accommodation she asked for. (Ogle Dep. at 65). Thus, no material question of fact exists at to whether Ms. Howard's requested accommodation was reasonable.

D. The requested accommodation was not an undue burden.

The Department has failed to produce any evidence that shows that accommodating Ms. Howard would be an undue burden. Once an employee has shown that the requested accommodation was reasonable, an employer is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, unless the employer shows that doing so would "impose an undue hardship on the operation of the business of the respondent." Tex. Lab. Code Ann. §21.128. An undue hardship is "an action requiring significant difficulty or expense." 42 U.S.C. §12111(10)(A); *see also* 29 C.F.R. §1630.2(p)(1). An undue hardship must be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business. *See Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 91 (Tex. App.—Austin 1995, no writ) (applying federal disability discrimination case law and related regulations to a state law claim). Here, the Department cannot produce any evidence that the accommodation Ms. Howard requested would be unduly burdensome.

Not only has the Department failed to produce any evidence of undue burden, it has done the opposite. As explained above, Ms. Howard's supervisor, Nicole Ogle, admitted that the division would run smoothly even if Ms. Howard had been granted her accommodation. (Ogle Dep. at 65). The director of the unit also stated

that Ms. Howard could have had up to a month of part time duty even if she did not have leave left to accommodate such absences. (Black Dep. at 36).

E. The Department refused to accommodate Ms. Howard.

It is undisputed that the Department refused to accommodate Ms. Howard. In Texas, an employer that fails to make "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability" violates the anti-discrimination provisions of chapter 21 of the Texas Labor Code. Tex Lab. Code Ann. §21.128.

In this case, the Department never accommodated Ms. Howard. They did not even attempt to engage in the interactive process. *See* Facts Section D. The Department did not respond to Ms. Howard's initial written request. *Id*. The Department did not respond to her second request made. *Id*. The Department did not consider any of her requests. *Id*. Instead, the Department dismissed Ms. Howard without even considering the possibility of accommodating her. *Id*. The Department has violated the Texas Labor Code. Ms. Howard is entitled to a summary judgment on this issue.

F. The Department's refusal to accommodate Ms. Howard resulted in her dismissal, an adverse employment action.

The final element that Ms. Howard must establish in her failure to accommodate claim is that she suffered an adverse action because the Department refused to accommodate her. *See Davis*, 188 S.W.3d at 758. Here, it is undisputed that Ms. Howard was terminated when she asked for an accommodation. (See D18: "On October 9, 2009 you provided a note from your doctor stating that you would be

able to return to work on October 12, 2009 working only four hours per day . . . you do not have the leave balances to accommodate these restrictions. I have made the decision to terminate you from Child Protective Services."). It is also undisputed that the Department did not suggest any alternative accommodations that could be made. (Black Dep. at 59: "Did Child Protective Services make any counteroffer to her? . . . A: No, sir;" Ogle Dep. at 52-53: "I wouldn't know what those alternatives are."). It is undisputed that Ms. Howard was not otherwise accommodated. (Term. letter at 80-81). Consequently, the Department's failure to accommodate Ms. Howard resulted in her termination. (Term. letter at 80).

Therefore, it is undisputed that Ms. Howard suffered an adverse action because the Department refused to accommodate her. Plaintiff is entitled to summary judgment on this issue because there is no genuine issue of material fact regarding this element.

VI.
CONCLUSION

For the foregoing reasons, there is no genuine dispute with regards to each element of Plaintiff's failure to accommodate claim.

Therefore, Plaintiff respectfully requests this court enter summary judgment in favor of Plaintiff and set a hearing to determine damages and attorneys' fees.

Respectfully submitted,
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By: _/s/ Colin Walsh___
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CERTIFICATE OF SERVICE

I certify that on November 28, 2012, I sent a true and correct copy of the foregoing to counsel for State of Texas, Texas Department of Family and Protective Services, Madeleine Connor, PO Box 12548, Austin, TX 78711 via certified mail.

/s/ Colin Walsh
Colin Walsh