No. 05-13-00817

**IN THE COURT OF APPEALS**
**FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS**
**AT DALLAS**

TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES,
*Appellant*,

v.

CARLOTTA HOWARD,
*Appellee*.

On appeal from the 160th District Court of Dallas County, Texas,
No. DC-11-13467

# APPELLEE'S BRIEF

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COMES NOW Appellee Carlotta Howard, and offers this brief in response to Appellant's appeal of the denial of its Plea to the Jurisdiction.

## I. TABLE OF CONTENTS

## II. TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**REGULATIONS**

## III. STATEMENT OF THE CASE

This is an interlocutory appeal of the denial of Texas Department of Family and Protective Services' Plea to the Jurisdiction. Carlotta Howard alleges that the Department discriminated against her because of her disability when it terminated her instead of allowing her to use her 72 hours of annual leave to work part-time for two to three weeks until she could return to work full time. (C.R. at 10).

Carlotta Howard filed her original petition on October 20, 2011 and an amended petition on November 10, 2011. (C.R. at 5, 10). The Department answered on November 14, 2011. (C.R. at 18). Discovery in this case ended on September 30, 2012. (C.R. at 21). Trial was originally set for January 14, 2013. On November 30, 2012, the Department filed a motion for summary judgment. (C.R. at 26). Finding genuine disputes of material fact, the trial court denied the Department's motion on January 4, 2013. (C.R. at 353).

On January 14, 2013, the trial was reset by the trial court to March 18, 2013. On February 5, 2013, the Department filed its Plea to the Jurisdiction. (C.R. at 354). On February 22, 2013, the associate judge, applying the lower plea to the jurisdiction standard, found

genuine issues of material fact and denied the Department's Plea. (C.R. at 657). The Department timely appealed that denial on March 5, 2013.

## IV. ORAL ARGUMENT

Pursuant to Texas Rules of Appellate Procedure 38.1(e), Appellee does not request oral argument. The record before the Court clearly establishes that there are genuine issues of material fact regarding each element of Appellee's prima facie case. Appellee has presented evidence that taken as true would allow a reasonable juror to find (1) Ms. Howard was disabled under the Texas Labor Code; (2) the Department knew of Ms. Howard's limitations; (3) Ms. Howard could perform her job with a reasonable accommodation; and (4) that Ms. Howard was terminated instead of being accommodated.

Because the record clearly shows these fact issues, oral argument will not aid in the Court's decisional process.

## V. ISSUES PRESENTED

ISSUE No. 1: Did the trial court err in denying the Department's Plea where Ms. Howard presented medical records and reports showing at least one major life activity was substantially limited?

ISSUE No. 2: Did the trial court err in denying the Department's Plea where Ms. Howard presented evidence that her supervisor and the regional director knew of her limitations and need for accommodation?

ISSUE No. 3: Did the trial court err in denying the Department's Plea where Ms. Howard presented evidence that her supervisor and the regional director believed that Ms. Howard could perform her job part-time for two to three weeks as a reasonable accommodation?

ISSUE No. 4: Did the trial court err in denying the Department's Plea where Ms. Howard presented evidence that her supervisor and the regional director terminated her instead of allowing her to use her 72 hours of annual leave for two to the three weeks until she could return full time?

ISSUE No. 5: Did the trial court err in denying the Department's Plea where it is undisputed that Ms. Howard timely filed a charge of disability discrimination with the EEOC?

## VI. STATEMENT OF 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. (C.R. at 330, item 30 (initial injury rep.); C.R. at 282 (Ogle Dep.)). As a Human Services Technician, Ms. Howard transported children, visited with families, delivered Christmas toys, and performed administrative tasks. (C.R. at 275 (McFarland Dep.)). For the entirety of her employment with the Department, she never had any performance issues. (C.R. at 308-316 (Perf. Revs); C.R. at 275 (McFarland Dep.)). She was never written up or otherwise disciplined for performance issues. (C.R. at 308-316; C.R. at 275 (McFarland Dep.)). 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." (C.R. at 274 (McFarland Dep.)).

### B. Due to a 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. (C.R. at 330, item 20 (Initial injury rep.); C.R. 276 (McFarland Dep.)). While she was delivering those presents, a truck, failing to stop at an intersection, struck her vehicle on the driver's side. (C.R. at 330, item 20; C.R. at 276 (McFarland Dep.)). Ms. Howard was rushed to the emergency room, where she was found to have contusions over multiple body parts and a bruised collarbone. (C.R. at 330 (Initial injury rep.)).

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. (C.R. at 320, item 21 (Dr. status rep.); C.R. at 243, 238 (Howard Dep.)). These injuries impacted her range of motion, caused back spasms, and exacerbated her pre-existing vision problems. (C.R. at 232, 236-237 (Howard Dep.)). 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." (C.R. at 275: 16-25 (McFarland Dep.)).

As a consequence of these injuries, Ms. Howard was placed on a daily regimen of medicines to treat her pain. (C.R. at 228, 229-230, 233, 247-251 (Howard Dep.)).

### C. Ms. Howard kept the Department informed of her injuries through faxes, letters, status reports, doctor's notes, and phone calls.

The car accident was reported to the Department on the same day it happened, December 16, 2008, to Ami Labrecque. (C.R. at 330, items 29, 40, 41 (Initial injury rep.); C.R. at 254 (Black Dep.). Ms. Labrecque, who provided Human Resources for the Department, filled out the initial injury report. (C.R. at 330, item 40 (Initial injury rep.)). Three weeks later, on January 6, 2009, Ms. Labrecque notified Nicole Ogle that Ms. Howard was out on Workers' Compensation. (C.R. at 328 (Jan. 6, 2009 email to Ogle)). Ms. McFarland also informed Nicole Ogle of Ms. Howard's injuries. (C.R. at 278 (McFarland Dep.)).

At the same time, Nicole Ogle, known to be "[v]ery--not friendly . . . a bit intimidating," became Ms. Howard's new supervisor. (C.R. at

279: 2-4 (McFarland Dep.); C.R. at 301 (Term. Rec.)). In December 2008, as part of a departmental reorganization, Ms. Howard was transferred to Unit 70, which was under Ms. Ogle's supervision. (C.R. at 301 (Term. Rec.); C.R. at 277 (McFarland Dep.)). At the time of Ms. Howard's accident, Ms. Ogle herself was on statutorily protected maternity leave. (C.R. at 302 (Term. Rec.)). In February 2009, Nicole Ogle returned from maternity leave and contacted Ms. Howard, telling Ms. Howard to send her a doctor's note regarding the injuries suffered from the accident. (C.R. at 302-303 (Term. Rec.)).

Throughout the coming months, Ms. Howard and her doctor kept Nicole Ogle informed of her condition. (C.R. at 320-326 (Doctors' notes and status reports; C.R. at 285-286 (Ogle Dep.)). She provided medical documentation and status updates every time such documents were requested by Ms. Ogle. (C.R. at 302 (Term. Rec.)). 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 each time; no alternatives were ever 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. (C.R. at 235 (Howard Dep.); C.R. at 286 (Ogle Dep.); C.R. at 255, 264-265 (Black Dep.); C.R. at 336 (HHR manual)). The Department requires employees to request accommodations directly from their own supervisors. (C.R. at 336 (HHR manual); C.R. at 286 (Ogle Dep.); C.R. at 255, 264-265 (Black Dep.)). The handwritten letter addressed to Ms. McFarland stated, "I probably can return before Jan 19, 09, but on lite [sic] duties". (C.R. at 348 (Jan. fax to McFarland)). The Department, in violation of its own procedures, did not respond to this request. (C.R. at 336 (HHR manual) (stating procedures).

Ms. Howard then directly requested an accommodation from Nicole Ogle in June 2009. (C.R. at 333-334 (June 1, 2009 email from Ogle); C.R. at 286 (Ogle Dep.)). Again, Ms. Howard asked for light duty. (C.R. at 333-334 (Email from Ogle*)*; C.R. at 242 15-16 (Howard Dep.) "I asked Ms. Ogle can I just sit at the office and do stuff and do the visits." (Howard Dep.)). Ms. Ogle neither accepted this accommodation nor suggested any alternatives. (C.R. at 289:4 (Ogle Dep.)) "I wouldn't know what those alternatives are." (Ogle Dep.)).

In July 2009, Nicole Ogle again contacted Ms. Howard. (C.R. at 302 (Term Rec.)). Ms. Ogle knew that Ms. Howard wanted to return to work because Ms. Howard had just requested an accommodation from her in June. (C.R. at 333-332 (June 1, 2009 email from Ogle); C.R. at 286 (Ogle Dep.)). 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 to her. (C.R. at 287: 20-22 (Ogle Dep.)).

Instead, on July 27, 2009, Nicole Ogle sent an email to her supervisor, Larry Barnes, asking him what she should do about Ms. Howard. (C.R. at 333 (July 27, 2009 email)). 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. (C.R. at 333 (July 27, 2009 email); C.R. at 244 (Howard Dep.)). April Gonzales was Ms. Howard's caseworker at the Department of Assistive and Rehabilitative Services. (C.R. 241 (Howard Dep.)). After discussing the issue with Ms. Howard, Ms. Gonzales asked Nicole Ogle for an accommodation on Ms. Howard's

behalf. (C.R. 244 (Howard Dep.); C.R. at 333 (July 27, 2009 email)). During her conversation with Ms. Ogle, April Gonzales specifically asked what could be done to save Ms. Howard's job. (C.R. at 333 (July 27, 2009 email)). 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. (C.R. 285 (Ogle Dep.)).

### E. Instead of accommodating Ms. Howard by allowing her to use some of her 72 hours of annual leave, the Department terminated her.

Ms. Howard met with Lisa Black, her regional director, on September 28, 2009 after receiving a recommendation for termination. (C.R. at 305 (term. letter); C.R. at 281-282 (Howard Dep.)). 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. (C.R. at 305 (term. letter); C.R. at 239-240 (Howard Dep.)). She asked to work four hours a day for a short period of time. (C.R. at 260 (Black Dep.); C.R. at 246

(Howard Dep.)). She explained that she still had 72 hours of leave available. (C.R. at 246 (Howard Dep.)). Ms. Black did not discuss Ms. Howard's request or any alternative accommodations. (C.R. at 260 (Black Dep.)). Instead, she only asked for a doctor's note. (C.R. at 265 (Black Dep.)). Ms. Howard complied.

On October 9, 2009, Ms. Howard provided the Department with the requested note. (C.R. at 318 (Med. Release); C.R. at 268 (Black Dep.); C.R. at 245 (Howard Dep.)). The doctor's note released Ms. Howard to work for four hours a day. (C.R. at 318 (Med. Release); C.R. at 245 (Howard Dep.)). On October 12, Ms. Howard discussed this medical release with Lisa Black's assistant, Melissa Hobbs. (C.R. at 332 (Oct. 12, 2009 email to Ms. Black)). 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. (C.R. at 262-263 (Black Dep.)).

During that conversation, Ms. Howard begged the Department to work with her. (C.R. at 332 (Oct. 12, email to Ms. Black)). However, the Department refused to discuss accommodation options with her.

(C.R. at 266-267: "Q: What did Child Protective Services do when she asked to be worked with? . . . A: We dismissed her." (Black Dep.)) Ms. Black did not give Plaintiff time to get another doctor's note. (C.R. at 332 (Oct. 12, 2009 email from Ms. Black); C.R. at 266 (Black Dep.)). Ms. Black did not attempt to verify whether Plaintiff needed the requested accommodation for only two to three weeks. (C.R. at 267 (Black Dep.)). Ms. Black did not offer any alternative accommodations to Ms. Howard. (C.R. at 266 (Black Dep.)). Ms. Black also did not offer to let Ms. Howard use her 72 hours of annual leave as an accommodation. (C.R. at 264 (Black Dep.)). Instead, the Department fired her. (C.R. 266-267). 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." (C.R. at 242: 2-5 (Howard Dep.)).

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." (C.R. at 261: 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. (C.R. at 261: 10-14 (Black Dep.)) "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. (C.R. at 290: "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.); 283: "Q: And how did your unit operate during that time [without a case aide]? Did it operate normally? A: Uh-huh." (Ogle Dep.)).

### F. The Department continues to misstate crucial facts in order to hide fact issues from this Court.

This is the third time that the Department has made statements of alleged fact that are directly contradicted by the evidence and has omitted relevant facts from its briefs.[1]

[1] The Department first misstated the facts in its original motion for summary judgment (C.R. at 35). After Ms. Howard pointed this out, the Department misstated these same facts in its Plea to the Jurisdiction. (C.R. at 359-60). Ms. Howard pointed this out to the Court again and the Plea was denied. (C.R. at 657). Once again, the Department has misstated these facts. "The duty of honesty and candor a lawyer owes to the appellate court includes fairly portraying the record on appeal . . . While a lawyer may challenge the legal effect of unfavorable facts, he may not misrepresent them to the court." *Schlafly v. Schlafly*, 33 S.W.3d 863, 873-74 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

The Department on several occasions asserts as facts statements that are directly contradicted by the evidence the Department cites to. On page 7 of its brief, the Department states that during the September 28, 2009 meeting between Ms. Howard and Ms. Black, "Plaintiff indicated that she would be unable to return to work and that she would provide Ms. Black with a work release from her doctor." (Appellant's Br. at 7 (citing C.R. 479)). This statement is false. Page 479, cited by the Department, does not discuss this meeting.[2] However, the termination letter given to Ms. Howard and cited by the Department in its two previous motions for this proposition directly contradicts this assertion. (*See* C.R. at 474 or 305).

In reality, during that meeting, Ms. Howard informed Lisa Black that she would be able to return to work with a reasonable accommodation and would provide a doctor's note saying as much. Ms.

[2] C.R. 479 contains pages 10-13 of Ms. Black's deposition, which does not discuss the September 28, 2009 meeting. Significantly, this is not the same document cited by the Department in its previous filings to support this statement. In both its Plea to the Jurisdiction and its Motion for Summary Judgment, the Department cited to Ms. Black's termination letter, which is found at C.R. 474 or 305. (*See* Department's previous filings at C.R. at 35, 359). The termination letter directly contradicts the Department's contentions. (*See* C.R. at 474).and its Motion for Summary Judgment, the Department cited to Ms. Black's termination letter, which is found at C.R. 474 or 305. (*See* Department's previous filings at C.R. at 35, 359). The termination letter directly contradicts the Department's contentions. (*See* C.R. at 474).

Black, herself admits this is what actually happened in her letter terminating Ms. Howard's employment, explicitly stating:

> "I met with you on September 28, 2009. At that time, you explained that you were *able* to return to work and would provide a doctor's note indicating such. 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."

(C.R. at 305 (Term. Letter)). (emphasis added). Therefore, the Department's own evidence contradicts its statements.

On page 8 of its brief, the Department states, "Plaintiff testified that she asked Lisa Black to be accommodated by awarding her with a secretarial job 'until [she] could get it together.'" (Appellant's Br. at 8 (Citing Howard's Dep. at 391, 417 and Reporters Record at 27)). This is also false. Not once during Ms. Howard's lengthy deposition did she ever say that she had asked Ms. Black, Ms. Ogle, or Ms. McFarland for a new job, let alone a secretarial position. Furthermore, the Department's cite to the Reporter's Record contains only argument by the Department's attorney and no evidence. (*See* R.R. at 27). But even there, the Department's attorney does not say Ms. Howard asked for a secretarial job. (*See* R.R. at 27).

What Ms. Howard actually said in her deposition was that she asked Ms. Ogle, not Ms. Black, if she could "do just office work for now until I could get it together." (C.R. at 391 at 72: 12-13 (Howard Dep.)). Ms. Howard then went on to explain that her position with the Department already included supervising on-site family visits and administrative work that she could do while she was weaned off medication. (C.R. at 391 at 72: 15-24 (Howard Dep.)). Ms. Howard was not asking the Department for a new job or even a job transfer, but simply to limit her duties to the non-driving functions of her job for two to three weeks, which had been done for other employees. (C.R. at 111 at 35 (McFarland Dep.)) (stating that light duty had been done for at least one other employee of the Department)).

It is also important to note that the Department has failed to provide any evidence that either Ms. Ogle or Ms. Black considered Ms. Howard's request for light duty to be a request for a new or different position. In fact, as previously cited, Ms. Ogle and Ms. Black stated the requested change was reasonable. (*See* C.R. at 261, 290). Therefore, the Department's attempt to characterize this request for a reasonable

accommodation as a request to be awarded "a secretarial job" is disingenuous at best.

### G. The Department omits numerous material facts from which a reasonable juror could find in favor of Ms. Howard.

The following facts create a fact issue, but were conveniently omitted by the Department in its brief:

1. Every time the Department requested a doctor's note or other documentation, Ms. Howard provided the requested information promptly. (C.R. at 285-286 (Ogle Dep.)). The Department received information in April, May, June, July, twice in September, and October. (C.R. at 320-326 (Doctors' notes and status)).
2. Lisa Black agreed that Carlotta Howard could have performed the essential functions of her job for four hours a day for up to a month. (C.R. at 261 (Black Dep.)).
3. Nicole Ogle also agreed that Ms. Howard could have performed her job duties in four hours a day. (C.R. at 290 (Ogle Dep.)).
4. Lisa Black knew that the requested accommodation would only be for two to three weeks. (C.R. at 261 (Black Dep.)).

5. Lisa Black said that Ms. Howard could have had that accommodation for up to a month. (C.R. at 261 (Black Dep.)).
6. Ms. Black stated that the accommodation would have been possible even if Ms. Howard did not have any leave hours left. (C.R. at 261 (Black Dep.)).
7. Carlotta Howard asked Lisa Black and her assistant, Melissa Hobbs, if they wanted her to provide a note from her doctor that stating that the requested modified schedule would only be for two to three weeks. (C.R. at 332 (Oct. 12, 2009 email to Ms. Black)).
8. Nicole Ogle said that her unit would have been able to run smoothly even if they had granted Ms. Howard's request. (C.R. at 290 (Ogle Dep.)).
9. Ms. Howard's job position remained unfilled for years after she had been dismissed. (C.R. at 282-283 (Ogle Dep.)
10. No one referred Ms. Howard to the accommodation request policy, the form she had to fill out for such a request, the appropriate request procedure, or even the employee handbook. (C.R. at 285: "I didn't even know the form existed." (Ogle Dep.);

(294: "Q. Okay. And did you refer her to policy? A. No, huh-uh." (Black Dep.)).

11. The Department did not engage in the interactive process. At no point did anyone suggest a reasonable alternative.

    a. Ms. McFarland never responded to the fax sent by Plaintiff.

    b. Ms. Ogle did not offer any alternatives in any of her meetings with Plaintiff. (C.R. at 289 (Ogle Dep.)).

    c. Ms. Black did not offer any alternatives in any of her meetings with Plaintiff. (C.R. at 266 (Black Dep.)).

    d. Ms. Ogle did not suggest any alternatives to April Gonzalez. (C.R. at 285 (Ogle Dep.)).

Because these omitted facts show a genuine dispute of material fact, the Defendant's Plea cannot be granted.

## VII. SUMMARY OF THE ARGUMENT

Ms. Howard has presented evidence from which a reasonable juror could find for Ms. Howard on each element of her prima facie case: (1) Ms. Howard is disabled; (2) The Department knew of her limitations; (3) Ms. Howard could perform her job with a temporary reasonable accommodation; and (4) the Department terminated her instead of accommodating her.

Concerning Ms. Howard's disability, Ms. Howard presented evidence that she suffers from back injuries, back muscle sprains, and vision problems. A reasonable juror could also find that these injuries caused Ms. Howard a great deal of pain and impacted her range of motion, caused back spasms, and exacerbated pre-existing vision problems. A reasonable juror could find that these injuries substantially limited Ms. Howard's ability to perform the major life activities of walking, standing, lifting, bending, seeing, and the operation of her nervous system and musculoskeletal system, which are major bodily functions. Because a reasonable juror could find these

things, Ms. Howard has presented evidence that she has a disability. The Department's Plea cannot be granted on this issue.

Concerning the Department's knowledge of Ms. Howard's limitations, a reasonable juror could find that Ms. Howard presented evidence that she directly informed her employer of her disability and limitations, her doctor informed the Department of her disability and limitations, her supervisor repeatedly requested and was provided with doctors' notes regarding Ms. Howard's disability and limitations, and the regional director was provided with a medical release written by Ms. Howard's doctor. Because a reasonable juror could find these things, Ms. Howard has presented evidence that her employer knew of her disability and limitations. The Department's Plea cannot be granted on this issue.

Concerning Ms. Howard's ability to perform her job with a reasonable accommodation, a reasonable juror could find that allowing Ms. Howard to use her 72 hours of annual leave to work a reduced schedule for two to three weeks would allow her to perform her job.

Concerning Ms. Howard's termination instead of accommodation, a reasonable juror could find that the failure to accommodate Ms.

Howard led to her termination because the termination letter written by Ms. Lisa Black states that she is being terminated because she asked for an accommodation.

Finally, Ms. Howard has properly exhausted her disability discrimination claims because she timely filed a charge of disability discrimination with the EEOC.

Because there is a fact issue regarding each element of Ms. Howard's claim and that Ms. Howard's claim is administratively exhausted, the Department's Plea to the Jurisdiction must be denied and the trial court's ruling affirmed.

## VIII. STANDARD OF REVIEW

The standard for a plea to the jurisdiction is lower than the standard for summary judgment. In a plea to the Jurisdiction, the Court does not consider the merits of the plaintiff's case. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). The Supreme Court of Texas has held that a Court's inquiry "*must not* involve a significant inquiry into the substance of the claims." *Mission Consol. Indep. Sch Dist. v. Garcia*, 372 S.W.3d 629, 637-38 (Tex. 2012) (emphasis added). If jurisdictional facts implicate the merits of a claim, then a fact issue regarding the elements of that claim ends the inquiry and defeats the plea. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625-26 (Tex. 2010) ("If the evidence creates a fact question regarding the jurisdictional issue, then the trial court was correct in denying the plea to the jurisdiction.").

In a plea the Court focuses only on the pleadings and the evidence pertinent to the jurisdictional inquiry. *Id.* The Court must take as true all evidence favorable to the nonmovant. *See Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). The Court must also indulge in every reasonable inference favorable to the nonmovant

and resolve all doubts in favor of the nonmovant. *Id*. If there exists a genuine issue of material fact, the Plea must be denied. *Id*.

Finally, the Court should construe the pleadings liberally in favor of conferring jurisdiction. *See Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam).

## IX. ARGUMENT

### A. Ms. Howard presented evidence of back injuries, ligament damage, muscle spasms, and shoulder contusions that affect her nervous system, range of motion, and cause back spasms, creating a fact issue concerning whether Ms. Howard is disabled under the Texas Labor Code.

Ms. Howard has presented evidence that creates a fact issue as to each element of her disability discrimination claim.

#### *1. A reasonable juror could conclude that Ms. Howard has a disability under the Texas Labor Code because of the voluminous evidence regarding Ms. Howard's medical conditions.*

The first element of a failure to accommodate case is that the plaintiff must have a disability under the Texas Labor Code. *Davis v. City of Grapevine*, 188 S.W. 3d 748, 758 (Tex. App. Fort Worth 2006, pet. denied). It cannot be disputed that the Texas Labor Code, which incorporates the 2008 ADA Amendments, applies to this dispute. Under the Texas 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 new 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*.

Here, Ms. Howard has produced significant evidence showing that she has a disability under the Texas Labor Code. Among other things Ms. Howard has produced evidence that she suffers from a cervicothoracic sprain, a lumbosacral dorsal sprain, lumbar radiculitis, cervical radiculitis, right and left arm ligament injuries, and left shoulder contusions. (C.R. at 320 (Status report); C.R. at 236-237 (Howard Dep.)). These impairments substantially limited Ms. Howard's ability to perform the major life activities of walking, standing, lifting, bending, and seeing. (C.R. at 320 (Status report); C.R. at 236-237 (Howard Dep.)). Moreover, her injuries substantially limited the operation of her muscular and nervous systems, which are major bodily functions (*Id).* Ms. Howard has produced evidence that her physical impairments impacted her range of motion, caused back spasms, and exacerbated her vision problems. (C.R. at 232, 236-237 (Howard Dep.)); (*see also* C.R. at 321-325, C.R. at 332-334). Based on this evidence, a reasonable juror could find that Ms. Howard had a disability under the

Texas Labor Code. Therefore, the Department's Plea to the Jurisdiction cannot be granted on this issue.

Contrary to the unsupported assertions of the Department, all of these injuries are well documented in the evidence produced during discovery by Defendant, including in the Letter from Southwestern Medical Center to the Department, January 26, 2009 (C.R. at 322); letter from Zegarelli to the Department (C.R. at 321); letter from Zegarelli to the Department on September 23, 2009 (C.R. at 323); Return to Work Certificate 9/30/2009 (C.R. at 324), Second letter from Southwestern Medical Center to the Department 9/4/09 (C.R. at 325); Initial Injury report (C.R. at 330); several internal memos and emails (C.R. at 332-334); and Ms. Howard's own deposition testimony. Based on this evidence a reasonable juror could find that Ms. Howard had a disability under the Texas Labor Code.

*2. A reasonable juror could find that Ms. Howard's medical records and doctors' notes show a record of disability.*

"[E]vidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong." 29 C.F.R. § 1630, App. According to the Department's own brief, the typical records that show

a record of disability include medical and employment records. (Appellant's Br. at 13-14); *see also* 29 C.F.R. § 1630, App. A person falls under this definition "even if a covered entity does not specifically know about the relevant record." 29 C.F.R. § 1630, App.

Here, Ms. Howard and the Department have both produced evidence showing that Ms. Howard has a record of an impairment. Among other things, Dr. Zegarelli, Ms. Howard's treating physician, contacted the Department through letters and return to work certificates and Workers' Compensation Status reports in April, June, September, and October of 2009. (C.R. at 320-325). From this evidence a reasonable juror could find that Ms. Howard had a record of disability. Therefore, Defendant's plea must be denied and the trial court's ruling affirmed.

3. *For a fourth time, the Department uses the wrong definition of disability, misstates the EEOC regulations, and cites abrogated case law.*

The Department has now argued four times,[3] without citing any authority, that an outdated definition of disability that ceased to be effective on September 1, 2009 applies to Ms. Howard's October 16,

[3] The Department argues abrogated law and outdated statutes in its Response to Plaintiff's Motion for Summary Judgment, its Motion for Summary Judgment, its Plea to the Jurisdiction, and its Appellate Brief in this Court.

2009 termination. Without explaining why the current statutory definition does not apply, the Department proceeds for a fourth time to misstate EEOC regulations and rely solely on abrogated case law.

Despite having been corrected by Ms. Howard each and every time,[4] the Department continues to misstate the law, saying that to have a disability under the Texas Labor Code, a person must be "significantly restricted" in his or her ability to perform a major life activity. (Appellant's Br. at 11). However, the United States Congress and the Texas Legislature have repealed this incorrect standard. *See* ADA AMENDMENT'S ACT OF 2008, PL 110-325, Septemeber 25, 2008, 122 stat 3553 ("[D]efining the term 'substnatially limits' as 'significantly restricts' [is] inconsistent with congressional intent."); Tex. Lab. Code § 21.0021(a) (requiring a broad definition of disability); 42 U.S.C.A. § 12102(A). The Equal Employment Opportunity Commission has also discarded the "significantly restricts" standard as well and eliminated it from the interpretive regulations of the ADA. 29 C.F.R. § 1630.2 (j)(1)(ii).

[4] Ms. Howard has pointed out the Department's errors in her response to Defendant's Motion For Summary Judgment, her reply to Defendant's Response to her own motion for summary judgment, her response to Defendant's plea to the jurisdiction, and during oral arguments for both the summary judgment and the plea to the jurisdiction.

Despite being made aware of these changes by Ms. Howard, the Department still insists on citing the EEOC regulations even though they directly contradict the Department's arguments. In fact, the specific section cited by the Department in support of the "significantly restricts" standard explicitly states that "[a]n impairment *need not prevent, or significantly or severely restrict*, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.2 (j)(1)(ii) (emphasis added), compare Appellant's Brief (citing 29 C.F.R. § 1630.2 for proposition that a person must be "significantly restricted").

Similarly, all of the cases that Defendant cites regarding the definition of disability apply the abrogated "significantly restricts" standard. *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999); *Pryor v. Trane Co.,* 138 F.3d 1024, 1027 (5th Cir. 1998); *Dupre v. Charter Behavioral Health Sys. of Lafayette Inc.,* 242 F.3d 610, 614-15 (5th Cir. 2001); *Little v. Texas Dept. of Criminal Justice*, 148 S.W.3d 374, 383 (Tex. 2004); *Taylor v. Principal Fin. Group, Inc.,* 93 F.3d 155, 164 (5th Cir. 1996); *Blanks v. Sw. Bell Communications, Inc.*, 310 F.3d

398, 401 (5th Cir. 2002). Therefore, the Department's plea cannot be granted on this issue and the trial court's decision should be affirmed.

### B. Ms. Howard presented evidence of doctors' notes, status reports, and requests for accommodations to the Department, creating a fact issue concerning whether the Department was on notice of Ms. Howard's disability and her need for an accommodation.

The Department's plea must be denied because there is a fact issue regarding whether the employer had notice of the employee's disability, which is the second element of the prima facie case. *See Davis*, 188 S.W.3d at 758.

Ms. Howard has presented evidence that the Department received many doctor's notes, status reports, and other information regarding Ms. Howard's disability. *See* Facts, subsection C, supra. Taking this evidence as true, a reasonable juror could find that the Department knew of Ms. Howard's disability. Further, Ms. Howard has presented evidence that indicates she asked for an accommodation on many occasions. *See* Facts, subsection D, supra. Indeed, the termination letter itself admits that Ms. Howard asked for an accommodation. (C.R. at 301-306). Taking this evidence as true, a reasonable juror could find that the Department knew of Ms. Howard's need for an accommodation.

In fact, the Department even concedes in its own brief to this Court, its Plea to the Jurisdiction, its Motion For Summary Judgment and response to Plaintiff's Motion For Summary Judgment that the Department knew of Ms. Howard's limitations. According to their own briefs, Ms. Howard told her supervisor that "she now had blurred vision and continued pain in her back". (Appellant's Br. at 4) The Department also concedes that Ms. Howard provided doctor's notes to it. (Appellant's Br. at 13: "Ms. Howard submitted a few notes from her doctor . . . ."). Taking the evidence in the light most favorable to Ms. Howard, a reasonable juror could find that the Department knew of Ms. Howard's limitations.

### C. Ms. Howard presented evidence that both her supervisor and the regional director thought she could perform her job with a reasonable accommodation of working four hours a day for two to three weeks, creating a fact issue concerning whether Ms. Howard was otherwise qualified for her position.

The Department's Plea should be denied because Ms. Howard's supervisor and regional director admitted that Ms. Howard was otherwise qualified, which is the third prima facie element. *See Davis,* 188 S.W.3d at 758. 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. *Id.*; 42 U.S.C. §12111(8) (analogous federal statute defining "qualified individual with disability" the same way).

Concerning whether an employee can perform the essential functions of a position, courts defer to an employer's determination of whether an employee could perform the job with a reasonable accommodation. *Davis*, 188 S.W.3d 763-64 (giving deference to defendant's determination of essential functions); *Ketcher vs Wal-Mart Stores, Inc.,* 122 F.Supp.2d 747, 752 (S.D. Tex 2000) (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, Ms. Howard's supervisor and the regional director for the Department have stated that Ms. Howard would have been able to perform the essential functions of her job with a modified work schedule of four hours a day. (C.R. at 270-271 (Black Dep.); C.R. at 290 (Ogle Dep.)). The Department does not dispute this fact. Therefore, contrary to the bold assertion of the Department's attorney, the Department

itself believed that at least one reasonable accommodation existed for Ms. Howard's disability.

Furthermore, the Department admits that this accommodation would have been reasonable for up to a month. (C.R. at 261: "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." (Black Dep.)). Again, this concession by the Department shows at least one reasonable accommodation existed that would allow Ms. Howard to perform her job duties.

Thus, a reasonable juror could find that Plaintiff could perform all of her essential functions with a reasonable accommodation. Therefore, the Department's Plea cannot be granted on this issue.[5]

### D. Ms. Howard has fully exhausted all of her disability discrimination claims.

First, Ms. Howard's claims have been administratively exhausted. The test for exhaustion of claims is merely whether or not the administrative agency could reasonably be expected to investigate the claims. *Lopez v. Texas State Univ.*, 368 S.W.3d 695, 702 (Tex. App.—

[5] The Department does not contend that Ms. Howard has failed to meet the fourth element of her prima facie case, which requires showing an adverse action. *See Davis,* 188 S.W. 3d at 758. In any event, Mr. Howard has satisfied this element because it is undisputed that she was terminated. (C.R. at 305 (term. letter)).

Austin 2012, pet. denied) ("[W]e conclude that Lopez exhausted her race-discrimination claim because that claim could reasonably be expected to grow out of the administrative agency's investigation of her claim that TSU discriminated against her because she is Hispanic.").

Here, there is no real argument that the EEOC would not have investigated Ms. Howard's disability discrimination claim. The facts section of the charge indicates that Ms. Howard was both denied a reasonable accommodation and terminated because of her medical condition. (C.R. at 352 (EEOC Charge)). Furthermore, the disability discrimination box is checked. (*Id.*) Obviously, it would be reasonable to expect the EEOC to investigate disability discrimination based on such a charge.

Second, the Department cites no authority for why Ms. Howard's disability discrimination claims would not be exhausted by filing a disability discrimination charge with the EEOC and TWC. The only case cited is *City of Waco v. Lopez*, which addresses whether a race retaliation claim can be brought under the Texas Whistleblower Act. *See City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008). That issue

is not relevant to Ms. Howard's disability discrimination claim. Therefore, the Department's Plea cannot be granted on this issue.

## X. PRAYER

For the foregoing reasons, the Department's plea should be denied and the trial court's ruling affirmed.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I certify that on August 30, 2013, 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.

/s/ Colin Walsh
Colin Walsh

CERTIFICATE OF COMPLIANCE

I certify that the portion of the foregoing Response subject to a word limit contains 6,244 words as measured by the under signed counsel's word-processing software

/s/ Colin Walsh
Colin Walsh