GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

COMPLAINANT,
Complainant,

v. Docket Number: 14-141-P (CNTR)

EEOC # 370-2013-01575

PREEMINENT PROTECTIVE SERVICES,
Respondent.
_____/

FINAL RULING ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

I. OVERVIEW

Preeminent Protective Services ("Respondent" or "Preeminent") filed a Motion requesting the Commission on Human Rights ("Commission") to grant summary judgment in its favor as to the discrimination claims asserted by Complainant. Resp. Mot. Summary Judgment (April 2, 2015) [hereinafter "Motion"]. Specifically, Preeminent contends that Complainant has provided no evidence that she was discriminated against in terms of reasonable accommodation or based on her disability but in fact was terminated, pursuant to its policies and procedures, for sleeping on post and that when the decision to terminate was made Preeminent had no knowledge whatsoever of Complainant's HIV positive status. *Id.* Complainant, in response, alleges that disputes of material fact exist concerning her claims, and that the Preeminent failed to engage in any interactive process upon learning of her HIV positive status, such that summary judgment must be denied. Compl.'s Opp. at 1, 2 (April 17, 2015). Upon careful consideration of the parties' memoranda, the applicable law, and the entire record herein,

and for the reasons set forth below, the Commission grants summary judgment in favor of Preeminent as to Complainant's disability discrimination claim.

II. STATEMENT OF THE CASE

On June 26, 2013, Complainant filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act as amended ("ADA"). Compl. Charge at 2 (June 26, 2013). Complainant alleges that she was discriminated against on the basis of her disability when Preeminent terminated her without engaging in the interactive process required to determine whether a reasonable accommodation existed for her disability. Complainant's termination occurred four days after she was found sleeping during her shift. This matter was transferred to the District of Columbia Office of Human Rights ("OHR") pursuant to the OHR-EEOC work-sharing agreement. OHR conducted an investigation into the allegations of discrimination and issued its findings in a Letter of Determination. Letter of Determination (August 27, 2014) [hereinafter "LOD"]. The LOD found probable cause to believe Preeminent subjected Complainant to discrimination on the basis of Complainant's disability when Preeminent terminated Complainant's employment, and also found probable cause to believe Preeminent failed to accommodate Complainant's disability when, after learning of Complainant's disability, it maintained its decision to terminate her employment, in violation of the D.C. Human Rights Act ("DCHRA"). LOD at 14. OHR certified this matter to the Commission on Human Rights for a public hearing.[1]

[1] Proceedings before the Commission on Human Rights are *de novo,* and therefore, we do not rely on findings of fact or conclusions of law stated in LOD. As such, Complainant's reliance on the LOD to prove facts or create factual inconsistencies is misplaced.

III. STATEMENT OF ISSUES

Whether, on the basis of the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Preeminent is entitled to judgment as a matter of law on the claim that Complainant suffered discrimination through disparate treatment on the basis of her disability.

Additionally, whether on the basis of the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Preeminent is entitled to judgment as a matter of law on the claim that Preeminent failed to accommodate Complainant.

IV. FINDINGS OF FACT[2]

1. In April 2012, Complainant was hired as an armed Special Police Officer ("SPO") by Preeminent. Resp. Ex. A at Tr. 13.
2. Complainant's duties included patrolling assigned posts and making sure doors and windows were secured. Resp. Ex. C at 3.
3. On April 11, 2012, Complainant received and acknowledged receipt of Preeminent's Employee Handbook and Preeminent's Health Requirements. Resp. Ex. D; Resp. Ex. E.
4. During Complainant's employment, Preeminent maintained policies pertaining to sleeping on post and health related issues. Resp. Ex. G.
5. Preeminent's Employee Handbook Section 6.5 states the following with respect to sleeping on post:
    a. Because of the seriousness of this infraction both for the company and the employee this policy will be mentioned in several areas in the handbook.

[2] The following facts are material facts as to which there is no issue in dispute. *Cf.* D.C.R. Civ. P. 56 (c).

b. Any employee found sleeping, not alert or non-responsive to call by voice, phone or 2 way radio while on duty will be subject to disciplinary action, up to and including termination.

Resp. Ex. G.

6. Complainant was diagnosed with HIV on March 20, 2013 and hospitalized. Compl. Ex. 1 at 1.
7. Complainant returned to work on April 15, 2013. Compl. Ex. 1 at 1.
8. Complainant, previously uninsured, was approved for Medicaid on May 29, 2013, and filled her prescription for Atripla, HIV medication, that day. Resp. Ex. A at Tr. 38.
9. On May 28 or May 29 Complainant informed her supervisor, Employee 1, that she was taking a new medication for cancer and asked for a day off so she could adjust to the medication. Resp. Ex. A at Tr. 39-41.
10. Complainant received the requested time off. *See id.*
11. On June 6, 2013, Complainant fell on post while at work and hurt her knee. She was prescribed Flexiril and Motrin for her injury. Resp. Ex. C at 3.
12. On June 8, 2013 Complainant fell asleep while on shift. Resp. Ex. C at 3.
13. Employee 2, Complainant's supervisor for this shift, witnessed Complainant sleeping on post at 4:07 A.M. and photographed her sleeping with his company issued phone. Resp. Ex. L at 1; Resp. Ex. C at 3.
14. Enployee 2 spoke with Employee 3, who reported that Complainant was asleep when she arrived to give Complainant her thirty minute break at approximately 12:49 on June 9, 2013. Resp. Ex. L at 2.

15. Reports from Guardtrax, the movement monitoring system utilized by Preeminent, indicate Complainant's inactivity during the time indicated by Employee 3 on June 9, 2013. Resp. Ex. O.
16. Complainant did not notify a supervisor that she was taking medicine that made her drowsy at any point prior to or during her June 8/9, 2013, shift. Resp. Ex. H.
17. Complainant did not read the Code of Conduct and was not aware of the requirement that she notify a supervisor of any medications taken prior to the start of a shift. Resp. Ex. C at 2.
18. Employee 2 submitted an investigation report to Employee 1 on June 9, 2013, detailing his witnessing Complainant asleep during her shift. Resp. Ex. L; Resp. Ex. F at 1.
19. On June 10, 2013, Complainant's Supervisor Employee 1 determined that Complainant should be terminated for sleeping on post based upon the evidence presented by supervisor Employee 2 and Complainant was informed that she should not come in to work and would need to attend a meeting on June 12. Resp. Ex. F at 1.
20. Complainant first informed Employee 1 that she was HIV positive on June 11 or 12, 2013. Resp. Ex. A at Tr. 41; Resp. Ex. F at 2.
21. Complainant first provided medical documentation to Employee 1 on June 12, 2013, at her termination hearing. These documents did not reflect her HIV status, but only contained the medications relating to her June 6 worker's compensation claim. Resp. Ex. A at Tr. 42; Resp. Ex. F at 2; Resp. Ex. K at 1, 4.
22. On June 12, 2013, Complainant was terminated for sleeping on post. Resp. Ex. C at 2; Resp. Ex. F.

23. Preeminent's practice regarding enforcement of its policy for sleeping on post is to terminate when corroborating proof of the infraction is available and to engage in lesser disciplinary measures in situations without corroboration. Resp. Ex. F at 2
24. Preeminent terminated Comparator 1, Comparator 2, Comparator 3, and Comparator 4 with corroborating proof. Resp. Ex. S; Resp. Ex. F at 2.
25. The individuals identified in Finding of Fact 24 were not known to the Preeminent to have a disability. Resp. Ex. F at 2.
26. Without corroborating proof Preeminent did not terminate employees identified as Comparator 5, Comparator 6, Comparator 7, and Comparator 8. Resp. Ex. F at 2.

V. DISCUSSION

Summary judgment may be granted when the pleadings and evidence demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Mixon v. Wash. Metro Transit Auth.,* 959 A.2d 55, 57 (D.C. 2008); *Campbell v. Noble,* 962 A.2d 264, 266 (D.C. 2008). All evidence and the inferences drawn from it, however, must be considered in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute over a material fact is genuine when, upon review of the evidence, a reasonable factfinder could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

By pointing out the absence of evidence to support the nonmoving party's case, the moving party can demonstrate that there is no genuine issue as to any material fact, thus entitling it to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party may not rest on mere allegations, but "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587, *see also Bias v. Advantage*

Intern., Inc., 905 F.2d 1558, 1561 (D.C.Cir.1990) ("The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts…[it] must come forward with 'specific facts showing that there is a genuine issue for trial."'(*quoting Matsushita,* at 586)).

In employment discrimination cases, summary judgment is appropriate "where either evidence is insufficient to establish a *prima facie* case, or, assuming a *prima facie* case, there is no genuine issue of material fact that the defendant's articulated non-discriminatory reason for the challenged decision is pretextual." *Paul v. Fed. Nat'l Mortgage Ass'n*, 697 F. Supp. 541, 553 (D.D.C. 1988).

A. Disparate Treatment based on Disability

The DCHRA makes it an unlawful discriminatory practice to "discharge…or otherwise to discriminate against any individual…based upon disability." D.C. CODE § 2-1402.11. In deciding disability discrimination cases brought under the DCHRA, the court follows cases decided under analogous federal law. First, a complainant must prove by a preponderance of the evidence a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If that burden is met, the employer must produce evidence of a nondiscriminatory reason for its action. *Id*. If the employer makes that showing, the complainant must then demonstrate that the reason offered is a pretext for intentional discrimination. *See Texas Dept. of Commun. Affairs v.* Burdine, 450 U.S. 248 (1981).

To establish a *prima facie* case of disparate treatment in employment under the DCHRA, a complainant must show that: (1) she is a person with a protected trait; (2) she was qualified for her position; (3) she suffered adverse employment action; and (4) the adverse action occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Siddique v.*

Macy's, 923 F. Supp. 2d 97, 103 (D.D.C. 2013); *see Wallace v. Eckert, Seamans, Cherin & Mellott, LLC*, 57 A.3d 943, 953 (D.C. 2012)(quoting *McDonnell Douglas*, 411 U.S. at 802). To prove the fourth element, a complainant can present evidence showing that similarly situated employees were treated more favorably. *McManus v. MCI Communications Corp.*, 748 A.2d. 949, 954 (D.C. 2000)(citing *O'Donnell v. Associated Gen. Contractors of America, Inc.*, 645 A.2d 1084, 1087 (D.C. 1994)).

Complainant has met her burden of establishing a *prima facie* case of discrimination based on disparate treatment. Complainant is a person with HIV. *See* Compl. Ex. 1 at 1. The Supreme Court has held that HIV is a disability within the meaning of the ADA. *See Bragdon v. Abbot*, 524 U.S. 624 (1998). Complainant's qualification for the position is unchallenged. Complainant suffered adverse action when she was terminated from her position. Lastly, Complainant pointed to evidence of similarly situated individuals employed by Preeminent who were treated more leniently when caught sleeping on shift. Compl. Ex. 1 at 2; Compl. Ex. 2 at 85. Complainant's evidence showed that another employee, Comparator 6, was caught sleeping on post but was only suspended for two weeks, not terminated. *Id.* Complainant established a *prima facie* case of discrimination based on her disability. Consequently, the burden shifts to Preeminent to articulate a legitimate nondiscriminatory reason for its decision to terminate Complainant.

Preeminent's reason for terminating Complainant was that she was caught sleeping on her shift in violation of company policy, and there was proof beyond the supervisor's word to confirm the situation. Resp. Mot. Summary Judgment at 2. Preeminent does not dispute that four officers, identified as Comparator 5, Comparator 6, Comparator 7, and Comparator 8, were written up for sleeping on shift and were ultimately not terminated. Resp. Ex. F at 2. However, Preeminent explains, in uncontroverted affidavit testimony, that it will not terminate an employee for sleeping on shift

unless there is conclusive proof beyond the supervisor's word establishing that the employee was asleep, in an effort to avoid a situation of one employee's word against another. *Id.* Preeminent confirms that in every circumstance where the fact of an officer sleeping on post was conclusively established with corroborating proof, such as with pictures, the officer was terminated. *Id.*; *see also* Resp. Ex. S. Preeminent supports this assertion with uncontroverted affidavit testimony and an employment record collectively identifying Comparator 1, Comparator 2, Comparator 3, and Comparator 4 as individuals without known disabilities who were terminated in accordance with the policy. *See id.*

In Complainant's case, conclusive proof was provided confirming her sleeping during her shift. Employee 2 witnessed and photographed Complainant sleeping with his company issued phone while conducting post-checks. Resp. Ex. L at 1. The Guardtrax report for the evening also reveals a period of inactivity that corroborates with the time the photograph was taken, in addition to an earlier period of inactivity corroborating the report of a second officer, Employee 3, who reported that Complainant was asleep when she arrived to give Complainant her thirty minute break at 12:49 AM that night. Resp. Ex. L at 2; Resp. Ex. O. Pursuant to company policy, Preeminent terminated Complainant based on the conclusive proof in the form of pictures and Guardtrax Reports, that she was asleep while on duty. Resp. Ex. F at 1.

Preeminent has proffered a legitimate, nondiscriminatory reason for terminating Complainant. Therefore, to prevail, Complainant must provide evidence that the nondiscriminatory reason proffered by Preeminent was pretext for intentional discrimination. Complainant has not met this burden. Complainant has not provided any evidence showing Preeminent has failed to terminate an officer where conclusive proof indicated the employee was sleeping on shift or has in any other way applied their policy in a discriminatory fashion. Nor has Complainant controverted or challenged the

affidavit testimony of Preeminent's agent Employee 1, only referring to it as self-serving. *See* Compl. Opp. at 8.

B. Failure to Accommodate

For a complainant to establish a *prima facie* case of discrimination based on a failure to accommodate, the plaintiff must establish (1) that she is disabled within the meaning of the Act; (2) the employer is aware of the disability; (3) the complainant could perform essential functions of her position with reasonable accommodation; and (4) complainant requested and was denied a reasonable accommodation. *Davis v. George Washington Univ.*, 26 F. Supp. 3d 103, 113 (D.D.C. 2014); *Scarborough v. Natsios*, 190 F.Supp.2d 5, 19 (D.D.C. 2002).

Complainant fails to establish a *prima facie* case for discrimination based on a failure to accommodate. While Complainant has certainly established the first element of the *prima facie* case, that she is disabled within the meaning of the act due to her HIV positive status, and the third element is unchallenged, Complainant failed to establish the second and fourth elements of the *prima facie* case. Element two requires the employer to be aware of Complainant's disability. Employee 1, Complainant's supervisor, was not made aware of Complainant's HIV positive status until June 11, 2013, at the earliest, whereas the decision to terminate Complainant was made on June 10, 2013. Resp Ex. A Tr. 41; Resp Ex. at 1). Moreover, Complainant never provided any medical documentation to Employee 1 confirming her HIV positive status. Resp. Ex. A Tr. at 42. Complainant presented Employee 1 with medical record which only referred to her worker's compensation claim, and did not indicate her HIV positive status. *Id.*; Resp. Ex. K. These documents were provided on June 12, 2013 at Complainant's termination meeting. Resp. Ex. A Tr. at 42. At no point before her termination meeting did Complainant inform Employee 1 of her disability, making him unaware of that fact at the time the termination decision was made.

Nor did Complainant request an accommodation for her disability, which would trigger the requirement for an interactive process that the probable cause finding of disability discrimination for failure to accommodate was based on. *See Sparrow v. Dist. of Columbia Office of Human Rights*, 74 A.3d 698, 705 (D.C. 2013). It is well settled law that"[A]n underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant employer has denied." *Flemmings v. Howard Univ.*, 198 F.3d 857, 861) (D.C. Cir. 1999); *Davis v. George Washington Univ.*, 26 F. Supp. 3d 103, 114 (D.D.C. 2014); *see also Woodruff v. LaHood*, 777 F.Supp.2d 33, 40 (D.D.C.2011) ("The burden ... lies with the disabled employee to request any needed accommodation."). An employer must reasonably accommodate only the known limitations of an employee who is otherwise a qualified individual. *See Saunders v. Galliher and Huguely Associates, Inc.*, 741 F.Supp.2d 245, 249 (D.D.C. 2010).

In May 2013, Complainant asked Employee 1 for time off to adjust to a new medication which she said she was taking for cancer. Compl. Ex. 1. She did not tell Employee 1 that she had HIV because she feared the stigma that goes along with the disease. *Id.* Employee 1 approved Complainant's request and she was able to take time off. Resp. Ex. A Tr. at 59. Apart from the day off to adjust to her new medication, Complainant never asked for an accommodation for her disability. Resp. Ex. A Tr. at 72. At best, Preeminent was informed only of Complainant's disability, her HIV status, at the time of her termination, and not of any request for or possible accommodation, which is legally insufficient to establish a request for accommodation. *See Davis v. George Washington Univ.*, 26 F. Supp. 3d 103, 114 (D.D.C. 2014) (where a claim did not lie after plaintiff employee informed employer of his disability, but did not request an

accommodation.). Consequently, Complainant never asked for a reasonable accommodation for her HIV status.

Because Preeminent was never made aware of Complainant's disability, and because Complainant never asked Preeminent for a reasonable accommodation, Complainant has failed to establish a *prima facie* case of disability discrimination based on a failure to accommodate. Consequently, the claim cannot stand.

VI. CONCLUSIONS OF LAW

On the basis of the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Preeminent is entitled to judgment as a matter of law on the claim that Complainant suffered discrimination through disparate treatment on the basis of her disability.

Additionally, on the basis of the undisputed material facts established by a preponderance of the evidence and considered in the light most favorable to Complainant, Preeminent is entitled to judgment as a matter of law on the claim that Preeminent failed to accommodate Complainant.

VII. ORDER

After having reviewed the proposed decision, record, and conferring the Commission Tribunal hereby issues this Final Order. The Tribunal finds that Preeminent Protective Services' Motion for Summary Judgment should be **GRANTED.**

It is hereby **ORDERED** that this matter is **DISMISSED WITH PREJUDICE**.

So Ordered this 19th day of August, 2016

/s/*Motoko Aizawa*
Commissioner Motoko Aizawa

/s/*Alberto Figueroa-Garcia*
Commissioner Alberto Figueroa-Garcia

/s/*Karen Mulhauser*
Commissioner Karen Mulhauser