DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of	)	
	)	
JOHN SMALLWOOD	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket Number 05-110-P (CN)**
	)	**Final Decision and Order**
NATIONAL RAILROAD PASSENGER CORPORATION	)	
	)	
Respondent.	)	
	)	

BEFORE

Commissioner Deborah Wood
Commissioner Pierpont Mobley
Commissioner Sonjiiah Davis

Administrative Law Judge Dianne S. Harris

For the Complainant

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For the Respondent

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I. INTRODUCTION

This is the Final Decision and Order issued pursuant to the Respondent's Motion for Summary Judgment filed under D.C. Code § 32-501 (9) (2008) and 29 U.S.C. 2611 (11). This matter was certified to the District of Columbia Commission on Human Rights (hereinafter referred to as the "Commission") by the District of Columbia Office of Human Rights (hereinafter referred to as "OHR") on September 16, 2006. The Complainant alleges a violation of D.C. Code § 32-507 (2008) by the Respondent.

II. ISSUE

Whether there is a material fact in issue in resolving the question before the Commission of whether the Respondent violated the District of Columbia Family Medical Leave Act (DCFMLA) when they approved Complainant's leave for doctor's appointments and treatments, but failed to approve his request for leave to have surgery?

III. SUMMARY OF PROCEEDINGS

Respondent, National Railroad Passenger Corporation (Amtrak), filed a Motion for Summary Judgment requesting the Commission find that there is no genuine issue of material fact present in Complainant's claims, and the Respondent is entitled to a judgment as a matter of law. The Complainant has filed an Opposition to Respondent's Motion for Summary Judgment stating there are genuine material facts in dispute.

I. <u>STATEMENT OF THE CASE:</u>

Complainant is employed by the Respondent, Amtrak as a lead service

attendant, a position he has held from 1992 to the present. Amtrak operates passenger trains nationwide. The duties of a lead service attendant are to sell products to passengers riding the trains, keep track of the sales made and turn over the proceeds to the Respondent at the conclusion his or her tour of duty. Complainant's route is the roundtrip run from the District of Columbia to Boston, Massachusetts.

Around 1986 the Complaint was diagnosed with human immunodeficiency virus (HIV). His treating physician has diagnosed him as having a history of Acquired Immune Deficiency Syndrome, Kaposi sarcoma and a history of recurrent condyloma accuminata.

In 2002 the Complainant applied for leave pursuant to the District of Columbia Family Medical Leave Act for health issues related to his suffering with HIV. The Respondent's Human Resources Department notified the Complainant that he had failed to submit the necessary medical documentation from his physician along with his FMLA application form. Respondent's FMLA policies require that employees seeking to be approved for Family Medical leave must provide a doctor's statement verifying the health condition they are requesting leave for. After receiving this notice of non-compliance Complainant presented the necessary documentation from his health provider and his FMLA leave request was granted. In October 2004 Complainant applied for intermittent FMLA leave and provided the required medical certification from his doctor. His request for the FMLA leave was granted for medical treatment and doctor's

appointments only, with the notation that because he worked in the District of Columbia his FMLA entitlement is 16 weeks, 80 workdays or 640 hours in a consecutive 24-month period.

The situation that gives rise to the foregoing claim began on December 2, 2004 when the Complainant e-mailed the Health Services Division of the Respondent's Human Resources Department to indicate he needed 15 days of medical leave to undergo and recover from surgery scheduled for January 13, 2005. The purpose for the operation was not specified in the communication. Attached to the e-mail was an appointment form that stated the date and time the surgery was scheduled to take place and the name of surgeon performing the operation. There was no mention of a diagnosis, whether the surgery would be inpatient or outpatient or what was the expected length of the recovery time would be, all questions routinely addressed in FMLA doctor's verification statements.

Respondent's Health Services Division has the responsibility of insuring that the medical information submitted for FMLA requests are maintained in confidence and that a physician is available to review the documents presented for medical sufficiency.

Respondent has an established written FMLA policy consistent with the District of Columbia Family Medical Leave Act (DCFMLA) and the Federal Medical Leave Act (FMLA). The Complainant was aware and had received a copy of the Respondent's FMLA policy. The policy requires that employees seeking to be

granted FMLA leave must submit a completed form and medical certification from their treating medical provider. Complainant did not initially submit the required completed form or medical certification when he asked for time off to have surgery in January 2005.

On December 4, 2004 the Health Services Division forwarded Complainant's December 2, 2004 e-mail requesting leave to Barbara Hancock, Director of Human Resources for her review. Ms. Hancock sent a written response to the Complainant on December 7, 2004 informing him that he had not complied with the Respondent's FMLA policy in submitting his request for medical leave. In her letter, Ms. Hancock gave Complainant the choice of filling out a FMLA form and submitting it with medical documentation from his physician or giving Doctor Timothy Pinsky, M.D. of the Health Services Division permission to contact his medical provider for further clarification. The letter specified that either option was to be exercised by December 22, 2004. The Complainant did not comply with this request. On December 11, 2004 he sent a letter to Doctor Malva Reid, M.D., Senior Director of Health Services stating his request for FMLA leave had been denied by Ms. Hancock and informing her that the medical condition he was suffering from was genital warts. He did not include in his correspondence verification of this health condition from his medical provider, as requested by Ms. Hancock. On December 29, 2004 the Complainant filed the foregoing Complaint with the District of Columbia Office of Human Rights (OHR) stating he had been discriminated against on the basis of his sexual orientation (homosexual) and disability (HIV) and that the

Respondent failed to accommodate his disability by denying his request for leave for his upcoming surgery.

On January 4, 2005 Ms. Hancock sent the Complainant a letter stating that he had not provided further medical clarification as requested and as a consequence of his failure to submit the requested information or grant Doctor Pinsky permission to speak directly with his doctor, there was insufficient information to approve his FMLA request.

On January 27, 2005 Complainant sent Doctor Reid a letter from Doctor Stahl, M.D., his treating physician documenting that the Complainant's surgery was for the removal of genital warts, the medical term is condyloma. The estimated recovery time from the surgery was listed as 7 to 10 days with the restriction that he would be unable to work. Although his HIV – positive status did not directly cause this health concern it was determined that the compromise to his immune system from the disease (HIV) placed him at significant risk for a recurrence of condyloma. The documentation received from Doctor Stahl was reviewed by Doctor Pinsky and on February 10, 2005 the Complainant's FMLA request was approved by the Respondent.

Complainant stopped coming to work on or around February 27, 2005 and on May 5, 2005 the Complainant underwent outpatient surgery. He returned to work on July 7, 2005 after being absent from the job for 19 weeks. Complainant did not provide medical documentation to justify his extensive absence, but Respondent placed him on medical leave of absence rather than on absent without

leave status which would have subjected him to possible disciplinary action.

On June 3, 2006 OHR issued a Letter of Determination (LOD) finding probable cause to believe that Respondent violated the District of Columbia Family Medical Leave Act when they approved Complainant's leave for doctors' appointments and treatments, but failed to approve Complainant's leave request for surgery. The LOD found no probable cause for the Complainant's charges he had been discriminated against on the basis of sexual orientation or disability or that the Respondent had failed to accommodate his disability.

II. <u>STANDARD OF REVIEW</u>:

A Summary Judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter law. *Celox Corporation v. Catrell*, 477 U.S. 317 (1986). In deciding summary judgment motions, courts view the evidence in the light most favorable to the non-moving party. See *Anderson v. Liberty Lobby Incorporated*, 477 U.S. 242 (1986). To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *Beard v. Goodyear Fire and Rubber Company, 587* A.2d 195 (D.C. 1991). The Commission will grant a summary judgment only if the moving party is entitled to judgment as a matter of law upon facts not in dispute. *Ferguson v. Small,* 225 F. Supp. 2d 31 (D.D.C. 2002). If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, the burden shifts to the non-moving party to show that such an issue exists.

Beard, **supra citing** ***Landow v. Georgetown-Inland West Corporation,*** **454 A.2d 310 (D.C. 1987). The moving party's initial showing can be made by pointing out there is lack of evidence to support the non-moving party's case.** ***Beard,*** **supra, citing** ***Celotex,*** **supra. In opposing a summary judgment, a party may not rely on vague allegations but instead must present specific facts showing that there is a genuine issue for trial.** ***Graff v. Malawar,*** **592 A.2d 1038 (D.C. 1991). The non-moving party party must do more than simply ". . .show that there is some metaphysical doubt as to the material facts."** ***Jones v. Blake Construction Company, Incorporated,*** **2002 U.S. District LEXIS 17032 (September 10, 2002). Conclusive allegations by the non-moving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment** ***Beard,*** **supra, 587 A.2d 195 (D.C. 1991) citing** ***Mosely v. Second New St. Paul Baptist Church,*** **534 A.2d 346 (D.C. 1987). Furthermore, the "existence of a factual dispute [will not] defeat a summary judgment motion when the dispute does not concern a genuine issue of material fact."** ***Anderson,*** **supra at 247. To be material, the fact must be capable of affecting the outcome of the litigation; to be genuine the issue must be supported by admissible evidence sufficient for a reasonable finder of fact to decide in favor of the nonmoving party. Id. Thus an adverse party must set forth facts showing that there is a genuine issue for trial.** ***Beard,*** **supra at 199. In keeping with these principles, the Commission will examine Respondent's Motion for Summary Judgment.**

III. <u>ISSUE BEFORE THE HEARING EXAMINER:</u>

1. ***Whether the Respondent violated the District of Columbia Family Medical Leave Act (DCFMLA) when the Respondent approved Complainant's leave for***

doctor's appointments and treatments, but failed to approve Complainant's request for leave to have surgery?

"The District of Columbia Family Leave Act (DCFMLA) is designed to protect the employment benefits and seniority of an employee who takes medical leave." ***Harrison v. Children's Medical Center,*** **678 A.2d 572 (D.C. 1996). The DCFMLA provides eligible employees with a total of 16 workweeks of medical leave over a 24-month period when an employee becomes unable to perform the functions of his or her position due to a serious health condition for as long as the employee is unable to perform the functions of his or her position. D.C. Code § 32-503 (2008 Edition).**

A serious health condition includes "a physical or mental illness, injury or impairment that involves: (A) Inpatient care in a hospital, hospice, or residential health care facility; or (B) Continuing treatment or supervision at home by a health care provider or other competent individual." ***Harrison*** **at 576, n. 10; D.C. Code § 32-501 (9) (2001 Edition). An employer may request medical certification from a qualified health care provider, or a serious health condition of either an employee or family member of an employee D.C. Code § 32-504(a) (2001 Edition).**

The certification shall include: (1) the date on which the serious health condition commenced, (2) the probable duration of the condition (3) the appropriate medical facts within the knowledge of the health care provider that would entitle the employee to take leave under this chapter, and (4) a statement that the employee is unable to perform the functions of the employee's position. Both family and medical leave may be taken intermittently when the leave is necessitated by the serious

health condition of an employee or family member. D.C. Code §§ 32-502 and 32-503 (2008 Edition).

In order to establish a prima facie case of a violation of the DCFMLA the Complainant must prove the following: (1) he had a serious health condition; (2) his health condition rendered him unable to perform the functions of his job ; (3) he provided his employer with reasonable notice of his need to take leave and the reasons for doing so; (4) the employer wrongfully denied the leave; and (5) he suffered a legal injury as a result of the denial. See D.C. Code §32-507 (2001 Edition); *Ragsdale v. Wolverine World Wide, Incorporated*, 535 U.S. 81, 89 (2002) and *Pendarvis v. Xerox*, 3 F. Supp. 2d 53, 55 (D.D.C. 1998).

IV. ARGUMENT:

In order to establish a prima facie case that the Respondent violated the DCFMLA by denying the Complainant's request for leave under FMLA the Complainant must establish a prima facie proving each of the five elements: (1) he had a serious health condition; (2) his health condition rendered him unable to perform the functions of his job ; (3) he provided his employer with reasonable notice of his need to take leave and the reasons for doing so; (4) the employer wrongfully denied the leave; and (5) he suffered a legal injury as a result of the denial.

A. Did the Complainant have a serious health condition within the meaning of the DCFMLA?

The health condition that gave rise to the Complainant's request for FMLA was genital warts (condyloma) for which the Complainant was to undergo a surgical

procedure to have them removed. Complainant's treating physician stated the Complainant would need 7 to 10 days to recover from the operation. Although the Complainant is HIV positive, the condyloma is a condition that is not caused by HIV.

The Hearing Examiner finds that the ailment of condyloma (genital warts) is indeed a serious health condition pursuant to DCFMLA for the following reasons. This condition required surgery and a recuperation period of approximately 7 to 10 days. Complainant's doctor noted that the Complainant would be unable to work for those 7 to 10 days. The DCFMLA defines serious health condition as a physical or mental illness that involves continuing medical care. Although the DCFMLA does not define continuing medical care, the Federal Family Medical Leave Act regulations and case law, upon which the District of Columbia statute is based, does provide some persuasive authority on the subject. *Chang v. Institute for Public-Private Partnerships, Incorporated*, 846 A.2d 318, 327 (D.C. 2004).

Under the Family and Medical Leave Act regulations, 29 C.F.R. § 825.114 (a) (2) (2003) "continuing treatment" may include any one or more of the following: a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: (A)Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a

a provider of health care services (e.g., physical therapist) under orders of, or on referral by a health care provide; or (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider. In keeping with the above-cited DCFMLA and Federal FMLA regulations the Complainant is found to have met the first element of the prima facie case, having a serious health condition.

B. Did the Complainant's health condition render him unable to perform the functions of his job?

The Complainant has established the second element of his prima facie case, that the serious health condition (condyloma) that he suffered from rendered him unable to perform his duties. It is undisputed that his health provider determined the best form of treatment of a condition that compromised his already susceptible immune system was to have surgery and that this operation would render him unable to perform the functions of his job 7 to 10 days. In keeping with the Family and Medical Leave Act regulations, 29 C.F.R. § 825.114 (a) (2) (2003) being unable to work for more than three consecutive days due to a serious health condition constitutes a person not being able to perform the functions of his or her job.

C. Did the Complainant provide his employer with reasonable notice of his need to take leave and the reasons for doing so?

The Respondent's FMLA policies which mirror the DCFMLA regulations and of which the Complainant had knowledge of prior to filing the foregoing leave request, specifically state the employee requesting FMLA must submit a filled out

FMLA form and medical documentation from their medical provider in order to have their FMLA request approved. Complainant had filed a previous FMLA request in 2002 with the Respondent where he had failed to attach medical documentation from his treating physician and the Respondent's Department of Human Services had notified him of this deficiency whereupon he had provided the the necessary information and his application was approved. In October 2004 the Complainant filed a second FMLA request and supplied the requisite certification from his doctor and his application was granted.
It is therefore abundantly clear that the Complainant knew he was required to provide medical documentation of his serious health condition to the Respondent in order to have his FMLA request granted.

On December 2, 2004 the Complainant sent an e-mail to the Respondent's Health Services Group indicating he needed 15 days off to undergo an operation scheduled for January 13, 2004. Attached to his correspondence was a doctor's slip noting the day, time and name of the doctor scheduled to perform the surgery with no further information provided. He did not turn in a completed FMLA form nor did he submit medical certification as required verifying his serious health condition and the need for him to take off from work.

Respondent's Human Resources Department sent the Complainant a letter in response to his request dated December 7, 2004 advising him that his FMLA request was deficient and giving him two options to remedy the deficiency. The first option was to provide a certification form completed by his physician. His

second option was to authorize a doctor on staff with the Health Services Group to confer with his doctor concerning the particulars of his FMLA request. The Respondent was given until December 22, 2004 to respond. The Complainant not only did not reply to this correspondence, but took neither option offered to him in the letter. On the contrary he sent a letter dated December 11, 2004 to Doctor Reid of the Health Services complaining his request for leave had been turned down, which was not the case.

When the Complainant had not responded by December 22, 2004 the Respondent sent him a second letter dated January 4, 2005 stating that there was insufficient information upon which to approve his request for FMLA leave. On January 27, 2005 the Complainant submitted the requested medical documentation from his doctor and Respondent approved his FMLA leave.

Based on the undisputed facts it is evident Complainant did not provide reasonable notice of his request to take leave or the reasons for taking the leave for time in question. The D.C. Code §32-502 (a) (4) (2008 Edition) states "An employer may require that a request for family leave under §32-502 (a) (4) of medical leave under §32-503 be supported by a certification issued by the health care provider of the employee or family member. The employee shall provide a copy of the certification to the employer." The Complainant was aware of this requirement as he had applied for FMLA leave on two prior occasions and he was sent correspondence from the Respondent reminding him of this requirement.

There is no evidence that the Complainant's FMLA leave request was ever denied and Respondent's January 4th letter merely put him on notice that there was not enough information provided upon which to make a decision to approve his application. Once the employer was provided medical documentation from the Complainant's treating physician his FMLA request was granted without further delay.

D. Did the Complainant suffer legal injury as a result of his FMLA request not being approved initially?

Under the DCFMLA the Complainant is allowed 16 weeks of leave every 24 months. In this case the Complainant went out on FMLA from February 27, 2005 through July 7, 2005 for a total of 19 weeks despite his doctor's prognosis he would only need seven to ten days. It is duly noted that the Complainant did not have his surgery until May 5, 2005, but did not return to work until two months later without medical verification from his treating physician that he needed more time off to recover. Based on the facts in evidence the Complainant received 17 weeks more of FMLA leave than he was entitled to. There is no evidence pursuant to *Ragsdale*, supra at 81, 90-91 that the Complainant was prejudiced by the Respondent's alleged violation of the DCFMLA. He received all his salary, employment benefits and compensation he was due.

Complainant argues that he was forced to take money from his Railroad Retirement Account to support himself because the Respondent wrongfully denied his FMLA request in December of 2004. He maintains that the Respondent's refusal caused him to experience a delay in obtaining a new

surgical date and required him to take more time off from work. The use of these benefits, he contends will require him to work for a longer period of time to make up for the money withdrawn from his retirement and to acquire the 30 years of service he needs to retire. It is determined that the Complainant was the party who elected to take a longer period of leave than his own treating physician recommended and said was necessary for him to recover from surgery. If he was forced to withdraw money from his retirement due to being on a medical leave of absence that was his choice and not due to the actions of the Respondent. Accordingly the Complainant's argument that he suffered legal injury when his FMLA was not initially granted is found to be without merit.

IV. CONCLUSION

For the foregoing reasons the Respondent, National Railroad Passenger Corporation's Motion for Summary Judgment is granted on July 14, 2008.

Deborah Wood, Commissioner
Pierpont Mobley, Commissioner
Sonjiah Davis, Commissioner