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Jeffrey Sussman

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# WALMART'S DISCRIMINATION WOES

*By:* JEFFREY SUSSMAN

Steven Bradley, like other Wal-Mart job applicants felt he would perform well at his job.<sup>1</sup> Unlike most applicants, however, Bradley has cerebral palsy,<sup>2</sup> and he believes his condition caused the retailer to decline his employment application.<sup>3</sup> Bradley's suit remains alive after the US Court of Appeals for the Eighth Circuit reversed the lower court's summary judgment decision on February 13, 2007.<sup>4</sup> The EEOC alleged that the world's largest retailer violated the Americans with Disabilities Act when it failed to hire Bradley.<sup>5</sup> This suit is one of two high profile discrimination cases pending against Wal-Mart.

It all started when Bradley applied for a "greeter" position at his local Wal-Mart store.<sup>6</sup> Bradley believes Wal-Mart did not want to offer him a reasonable accommodation to use his wheelchair and crutches.<sup>7</sup> The Americans with Dis-

abilities (“ADA”) act makes it unlawful to deny “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”<sup>8</sup>

Bradley filed a complaint with the EEOC after contacting the Commission to offer himself as a witness in a similar disability claim brought by the EEOC against Wal-Mart.<sup>9</sup>

“Bradley would pose a ‘direct harm’ to himself and others if he worked as a greeter or a cashier,” argues Wal-Mart.<sup>10</sup> According to federal law, “A ‘direct threat’ is defined as a ‘significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.’”<sup>11</sup>

“The biggest risk is the fact that [Bradley’s] legs are not capable of holding him without arm support,” stated Dr. Chris Fevurly an expert for the retail giant.<sup>12</sup> “Bradley is ‘very wide when he uses his crutches . . . twice the length of a normal person depending on the area where he is,” Fevurly stated.<sup>13</sup>

Bradley admittedly relies on crutches or a wheelchair to get around.<sup>14</sup>

The Eighth Circuit inferred from this testimony that “Bradley could pose an ‘obstacle’ to those coming in and out of the store.”<sup>15</sup> However, the court pointed out that Wal-Mart’s expert did not address what effect Bradley’s use of a wheelchair would have on his ability to do the job.<sup>16</sup>

The EEOC and Bradley refuted this expert’s testimony and claimed that, with a few “reasonable” accommodations, Bradley could complete the job’s task as good, if not better, than other individuals.<sup>17</sup>

“This man was very well qualified to work at Wal-Mart, but the company tried to cover up its discrimination,” stated the EEOC.<sup>18</sup> A jury will now get a chance to decide this case on its merits.<sup>19</sup>

Wal-Mart maintains what it calls an “Equality of Opportunity Policy.”<sup>20</sup> The store “will not tolerate discrimination in employment on the basis of race, color, age, sex, sexual orientation, religion, disability, ethnicity, national origin, marital status, veteran status, or any other legally-protected status.”<sup>21</sup>

Bradley's case before the Eighth Circuit wasn't the first time Wal-Mart faced ADA discrimination claims.<sup>22</sup> In December 2001, Wal-Mart agreed to pay \$6.8 million to settle a different disability discrimination suit brought by the EEOC.<sup>23</sup> That suit alleged that a pre-employment questionnaire the retailer used to screen applicants violated the ADA.<sup>24</sup> That suit further alleged that several disabled employees were wrongly dismissed and others with disabilities were denied reasonable accommodations.<sup>25</sup>

Wal-Mart's current discrimination woes are not limited to disability issues.<sup>26</sup> Just one week prior to Eighth Circuit's opinion in Bradley's case, a three-judge panel at the Ninth Circuit granted class certification to greater than two million women who allege they were victims of sex-based discrimination.<sup>27</sup> This case represents the largest sex-discrimination suit ever brought against a business.<sup>28</sup> The lawsuit contends that promotions and raises are more freely and generously given to male employees.<sup>29</sup>

Not surprisingly, Wal-Mart strongly disagreed with the decision.

"The panel's decision contradicts numerous decisions from the Supreme Court and the Ninth Circuit itself," said Theodore Boutrous, Jr., lead counsel for Wal-Mart.<sup>30</sup> "The plaintiff's lawyers persuaded the panel to accept a theory that would force employers to make decisions based on statistics, not merit, and would deny employers their basic due process rights."<sup>31</sup>

Critics of Wal-Mart saw the rulings differently.

"Now two courts have ruled this trial should go forward," said Brad Seligman, the lawyer and executive director of the Impact Fund, which is representing the plaintiffs.<sup>32</sup> "I expect they will attempt to further appeal, but I have great confidence the women will get their day."<sup>33</sup>

Seligman believes that "no amount of PR or spin is going to allow Wal-Mart to avoid facing its legacy of discrimination."<sup>34</sup>

NOTES

- 1 See *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561 (8th Cir. 2007).
- 2 *Id.* at 563
- 3 *Id.* at 565.
- 4 *Id.* at 572.
- 5 *Id.* at 562.
- 6 *Id.* at 563.
- 7 *Id.* at 566-67.
- 8 42 U.S.C. § 12112(b)(5)(a) (1991).
- 9 E.E.O.C., 477 F.3d at 565.
- 10 *Id.* at 568.
- 11 *Id.* at 571. *Accord* 42 U.S.C. 12182 (b)(3) (1991) (Stating that “[t]he term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”).
- 12 E.E.O.C., 477 F.3d at 572.
- 13 *Id.*
- 14 *Id.* at 563.
- 15 *Id.* at 572.
- 16 *Id.*
- 17 *Id.*
- 18 Press Release, E.E.O.C., Appeals Court Orders Trial of EEOC Disability Suit Against Wal-Mart (Feb. 13, 2007) *available at* <http://www.eeoc.gov/press/2-13-07.html> (last visited Mar. 12, 2007).
- 19 *Id.*
- 20 Equality of Opportunity Policy, Wal-Mart, *available at* <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=12> (last visited Mar. 12, 2007).
- 21 *Id.*
- 22 Associated Press, *Appeals Court says EEOC can sue Wal-Mart*, BUSINESSWEEK.COM, Feb. 14, 2007, *available at* <http://www.businessweek.com/ap/financialnews/D8N9NLE80.htm> (last visited Mar. 12, 2007).
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 Amy Joyce, *Wal-Mart Loses Bid to Block Group Bias Suit: Appeals Court Allows 2 Million Women to Seek Compensation Over Discrimination in Pay, Promotions*, WASHINGTON POST, Feb. 7, 2007, at D01.
- 27 *Id.*
- 28 *Id.*
- 29 Press Release, Wal-Mart, Wal-Mart Will Seek Further Appellate Review in Gender Class Action Lawsuit (Feb. 6, 2007) *available at* <http://walmartfacts.com/articles/4798.aspx> (last visited Mar. 12, 2007).
- 30 *Id.*
- 31 Joyce, *supra* note 26.
- 32 *Id.*
- 33 *Id.*
- 34 *Id.*