

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

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Anna Hauck,	(Human Rights Act Case No. 9801008431
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Charging Party,	(<i>Final Agency Decision</i>
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versus	(
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Wal-Mart Stores, Inc.,	(
dba Wal-Mart #1872,	(
	(
Respondent.	(

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on January 13, 1998. She alleged that respondent, Wal-Mart Stores, Inc, doing business as Wal-Mart #1872, discriminated against her on the basis of her sex)pregnant female(when it removed her from her job as a cashier/service desk clerk because of a lifting restriction resulting from her pregnancy. On September 23, 1998, the department gave notice Hauck’s complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties mutually agreed to permit the department to retain jurisdiction of this case for more than 12 months after the complaint filing.

On January 28, 1999, this contested case hearing convened in Helena, Montana. Hauck was present, represented by Peter Michael Meloy, Meloy & Morrison. Wal-Mart, represented by William J. Speare, Moulton, Bellingham, Longo & Mather, P.C., designated its store manager, Cas Sprouffske, as its attending representative. Sprouffske attended the second day of hearing. The hearing

examiner granted Wal-Mart's motion to exclude witnesses. Leota McBride, Anna Hauck, Karen Kupke Timmerman, Valerie McAlister and Cas Sprouffske testified as witnesses called by Hauck. Brett Busse, Robin Alley-Hay, Lisa Roope and Cas Sprouffske testified as witnesses called by Wal-Mart. The hearing examiner admitted Hauck's exhibits 1-11 (including 5 and 5-A) without objection. The hearing examiner admitted Wal-Mart's exhibits A, B and F without objection. On January 29, 1999, both parties rested, counsel presented oral argument, and the hearing examiner closed the record.

II. Issues

The key issue in this case is whether Wal-Mart discriminated against Hauck because she was a pregnant female by refusing to accommodate Hauck, either by allowing her to work in her usual positions, or by accommodating her in the same fashion that it accommodated employees with limitations resulting from work-related injuries. A full statement of the issues appears in the Final Prehearing Order)1/20/99(.

III. Findings of Fact

III

1. On April 29, 1997, Wal-Mart hired Hauck at store #1872 in Helena, Montana, as a floor associate, at wages of \$5.00 per hour. Final Prehearing Order, "Facts and Other Matters Admitted," Par. 1.

2. In August 1997, Hauck discovered she was pregnant. She began a struggle with morning sickness. From August through October 13, 1997, Hauck missed one shift of work at Wal-Mart, left work once during a shift, and was tardy for one shift. On October 13, 1997, she received a verbal warning from the assistant manager, Brett Busse, regarding absenteeism. Because she continued to struggle with her morning sickness, Hauck requested a transfer within the store. Wal-Mart assigned her a job as front end cashier in October 1997, with a reduction of hours from full-time to between 25-30 hours a week. Within a month, Wal-Mart shifted

her duties so that she was doing most of her work as a courtesy desk associate)also in the “front”(, with a few hours as a cashier. Hauck preferred the reduced hours due to her morning sickness. She also preferred the courtesy desk associate work rather than the cashier work. Testimony of Hauck and McBride; Exhibit 5-A)record of verbal warning(; Exhibit 10)Attendance Record(.

3. In September, Hauck consulted her doctors regarding her condition. Her Ob/Gyn physician, Dr. Robin Alley-Hay, did not see her at this time, but Dr. Michael Hay, practicing with Dr. Alley-Hay, saw Hauck and restricted her to lifting less than 30 pounds. Dr. Hay gave Hauck this written restriction on September 29, 1997. The reason for the restriction was concern by Hauck’s physicians that during pregnancy the risk of a back injury to Hauck increased if she lifted 30 pounds or more. Hauck immediately provided the restriction to Wal-Mart. Wal-Mart placed it in her personnel file. Testimony of Hauck, McBride, Sprouffske and Alley-Hay; Exhibit F, restriction dated 9/29/97)“May work with lifting restriction of less than 30#“(.

4. The Wal-Mart job descriptions for floor associate, cashier and courtesy desk associate each include a physical requirement that the employee frequently lift up to 50 pounds. At no time did Hauck’s performance in any of the three jobs fall below satisfactory due to any performance problems related to lifting requirements. Testimony of Hauck, McBride, Busse and Sprouffske; Exhibit B)job descriptions, cashier, p. 4, floor associate, p. 4, courtesy desk associate, p. 4(.

5. Despite her lifting limitation, Hauck was able to perform satisfactorily in all three positions. She avoided unassisted lifting of as much as 30 pounds. As a floor associate, she worked in software, stocking and putting out clothing, answering phones, helping customers and doing some cashier work. She did not confront the necessity of actually lifting 30 pounds or more. Testimony of Hauck.

6. As a cashier and as a courtesy desk clerk, Hauck found that some of the heavy items had either detachable or two part “tear off”labels she could use to enter the bar codes into the register. She could use a laser reader)“pen” or “gun“(to read the bar codes on some other heavy items. She could manually enter bar codes for other heavy items. If a customer placed a heavy item on the cashier’s counter or

the courtesy counter, she could ask the customer to place it back in a cart or in the corner)courtesy desk only(. If the customer could not place the item on the counter, Hauck used her usual methods for entering the bar codes, and the item would never be lifted at all while at Hauck's station. Testimony of Hauck, McBride and McAlister.

7. If for some reason Hauck could not use her usual methods for reading the bar codes, she could ask for help from either a courtesy clerk, a customer service manager, or another cashier or courtesy desk associate. Hauck either never needed to ask for such help, or was able to obtain it in a timely fashion, since no complaints about her performance came to the attention of management. Testimony of Hauck, McBride and Sprouffske.

8. Hauck could work either the cashier job or the customer desk associate job with lifting restricted to less than 30 pounds, and perform her job satisfactorily. Testimony of Hauck and McBride.

9. In December 1997, front lead customer service manager Leota McBride, Hauck's immediate superior, was working with another Wal-Mart employee who had a lifting restriction. McBride discovered that Hauck also had the 30 pound lifting restriction that had been in her Wal-Mart file since September. Testimony of McBride.

10. Store manager Sprouffske took a short vacation after Christmas 1997. He was out of Montana on that vacation when McBride discovered Hauck's lifting restriction. Sprouffske found out about the restriction by telephone conversation with McBride on December 29, 1997. Sprouffske, Busse and McBride all knew the only reason for the lifting limitation was Hauck's pregnancy. Testimony of McBride, Busse and Sprouffske.

11. Sprouffske instructed McBride that Hauck could not work as a cashier or courtesy desk associate until she had a full release permitting her to lift up to 50 pounds frequently. McBride told Hauck on December 30, 1997. Testimony of Hauck, McBride and Sprouffske.

12. Hauck asked to work in the cashier position, the courtesy desk associate position or the floor associate position. McBride told her she could work some hours as a people greeter, but otherwise could not work without the appropriate release from her physician. Hauck called her doctors, and begged for a release lift up to 50 pounds. Hauck knew she did not need to lift even 30 pounds, but she knew she could not return to her job without the release. Dr. Alley-Hay's nurse told Hauck the previous release still applied. Dr. Alley-Hay approved this message. Hauck could not get the modified release. Testimony of Hauck, McBride and Alley-Hay; Exhibit F, prenatal flow record, 12-30 note.

13. Wal-Mart did not have an available people greeter position in December 1997 or early January 1998. Sprouffske authorized offers to Hauck of some hours of work as a people greeter. He expected to have an opening later in January for a people greeter, but he never offered the position (a part-time position) to Hauck. Sprouffske never authorized anyone to offer the position to Hauck. Sprouffske understood, from his management team, that Hauck had turned down a number of offers of hours as a people greeter. He concluded that she preferred to quit. Testimony of Sprouffske.

14. McBride offered Hauck 3 shifts as a people greeter. When she called to confirm the starting time for the first of the three shifts, she discovered that the shift had been filled. When she came to work for the second shift, on January 3, 1998, she only worked for 2 hours. Wal-Mart called her to offer the third shift on January 9, 1998, at or just after the starting time for the shift. Hauck had already agreed to baby-sit her sister-in-law's children. Testimony of Hauck.

15. After her 2 hour shift on January 3, 1998, Hauck talked to Busse about the people greeter hours. Busse told her that a part-time people greeter position might become available. Hauck told Busse that because the greeter job including helping with shopping carts (gathering them in the parking lot, putting them in rows, getting some out to offer to customers), she found the cashier job easier. Busse told her that her only options were people greeter, maternity leave or termination. Hauck pointed out that her 6 weeks of maternity leave would expire before her baby was born. Busse said nothing, and walked away from her. Testimony of Hauck.

16. From her conversations with Sprouffske, Busse, McBride and other management employees at Wal-Mart, Hauck believed that she could stay on leave until she was ready to return to Wal-Mart after her baby was born in April. She knew that medical leave and then maternity leave could be provided. She also knew that she would lose her job at Wal-Mart if she found other work while on leave. She could not afford to take the extended leave. Testimony of Hauck; Exhibit 1, Leave of Absence policy, p. 12 "Outside Employment."

17. Hauck received no more offers of hours as a people greeter after the third of McBride's calls. Sometime later in January, she was shopping in Wal-Mart, and a management employee, RayEllen Johnson, stopped her and asked her to go see Sprouffske and sign a form about her former employment. Hauck signed the completed "exit interview" form. On the form, Sprouffske checked "due to health)includes pregnancy(" as the reason for voluntary termination. The form also includes "refused offer of work." Testimony of Hauck; Exhibit 9)exit interview(.

18. Sprouffske knew Hauck wanted to work as a courtesy desk associate and cashier until she had her baby. He knew she believed she could do the work. He knew of no problems or complaints with her work in three different positions at Wal-Mart since her doctors imposed the lifting limitation. He consulted with Wal-Mart legal counsel regarding the limitation. Both the job descriptions for the three jobs and the Wal-Mart "Matrix of Essential Job Functions" stated that accommodations would be considered for persons with disabilities unable to perform one or more essential job functions. Sprouffske took no action to investigate how often, if ever, Hauck would be required by her lifting restriction to obtain assistance from another Wal-Mart employee and delay a customer while awaiting that assistance. Sprouffske did not consider that Hauck's lifting restriction resulted from her pregnancy. Testimony of Sprouffske; Exhibit A and Exhibit B.

19. Karen Kupke Timmerman worked for Wal-Mart in the Helena store as the courtesy desk manager. In January 1998 she fell in the parking lot and broke her leg. Her physicians released her for limited work on February 23, 1998. At that time she was still using a wheelchair. Wal-Mart immediately provided her with a part-

time job in the personnel office doing filing, computer scheduling, interviews, application reviews and reference checks. On March 19, 1998, she returned to full-time work, using crutches except at work, and using her wheelchair at Wal-Mart. She worked in the cash office most of the time, working at the courtesy desk for up to 3 hours first thing in the morning and while courtesy desk associates took breaks and lunch. She began working in courtesy desk associate position without her wheelchair in the first week of April 1998. Her physicians prohibited any lifting until March 18, 1998. Effective March 18, 1998, she could lift up to 35 pounds. She was able to perform her job at the courtesy desk by relying upon customers and fellow employees to assist her when lifting was necessary. Testimony of Timmerman.

20. Valerie McAlister worked at Wal-Mart as a front end cashier from January 1997 to November 1997. While working at Wal-Mart, she was diagnosed with Grave's Disease. Among other symptoms, she had difficulty standing and intermittent lifting restrictions. She notified Wal-Mart of the diagnosis. She asked Wal-Mart for a stool or chair, because of the difficulty standing. Wal-Mart refused to permit her to use a stool or chair. She kept working as a cashier. She leaned against her work-stations frequently. When she brought formal lifting restrictions to Wal-Mart)twice for 3 days of work, once for 10 days of work(she was assigned as a people greeter until the restrictions expired. At no time while working at Wal-Mart could she lift a 30 pound item, but she could and did perform her job without lifting any items weighing 30 pounds or more. Testimony of McAlister.

21. Wal-Mart modified job descriptions to create lighter duty positions only for employees injured in industrial accidents. Wal-Mart made greeter positions available to employees injured in industrial accidents who needed light duty jobs while recuperating. Wal-Mart might offer greeter positions to impaired employees who had not been injured at work, if such a position was open and otherwise available at the time, but Wal-Mart had no policy requiring such offers. Wal-Mart would not modify job descriptions to create lighter duty positions for employees impaired other than in industrial accidents. Wal-Mart treated Hauck as it treated any other employee with a limitation that did not result from work-related injury or disease. Testimony of Sprouffske

22. Wal-Mart unreasonably required Hauck to take leave because of her pregnancy, and required that leave for an unreasonably long period of time since Hauck could perform her job. Testimony of Hauck.

23. Wal-Mart gave Hauck increases in her hourly wage over time. By December 1997, Hauck received \$5.65 per hour. Testimony of Hauck.

24. While employed at Wal-Mart, Hauck also worked providing adult respite care and "Hab" work)with a deaf client(. She continued this work after leaving Wal-Mart, as she would have had she remained with Wal-Mart. She did look for other work after leaving Wal-Mart. She found some work while still pregnant, of a very limited nature, and earned \$93.00, in addition to \$11.30 for the two hours as a people greeter for Wal-Mart on January 3, 1998. These were her only wages to replace earnings she would have received from Wal-Mart after December 29, 1997. Testimony of Hauck; Exhibit 11)Hauck damages(.

25. Hauck gave birth on April 21, 1998. Her physicians recommended an 8 week recuperation before returning to work. Hauck felt she was ready to work after 6 weeks. She started work with U.S. West on July 20, 1998. Her earnings at that job exceed her projected Wal-Mart wages. Testimony of Hauck.

26. Lisa Roope worked at the Helena, Montana, Wal-Mart store until two days before she delivered her child in 1998. She had no lifting restrictions. Roope, working as a cashier, might encounter a need to lift an item weighing more than 50 pounds once a year. If the item was too heavy for her, she would ask for help from another employee. She might encounter a need to lift an item weighing more than 30 pounds perhaps 2 to 3 times a month. Testimony of Roope.

27. From December 30, 1997 to April 21, 1998, Hauck lost \$2,583.46)30 hours per week times \$5.65 per hour times 15.857 weeks(. From April 21, 1998 to June 16, 1998)8 weeks(Hauck would have been on unpaid leave had she remained an employee of Wal-Mart. From June 16, 1998 to July 20, 1998 Hauck lost \$1,097.78)40

hours per week times \$5.65 per hour times 4.857 weeks(. Testimony of Hauck; Exhibit 11)Hauck damages(.

28. From December 31, 1997 to April 30, 1998, Hauck lost the use of \$2,583.46 of wages, and prejudgment interest during that time was \$42.48)\$2,583.46 times 10% divided by 365 days times .5 times 120 days(. From May 1, 1998 through March 18, 1999, prejudgment interest on those lost wages was \$227.98)\$.708 per day times 322 days(. From June 16, 1998, to July 31, 1998, prejudgment interest on lost wages of \$1,097.78 was \$6.77)\$1,097.78 times 10% divided by 365 days times .5 times 45 days(. From August 1, 1998, through March 18, 1999, prejudgment interest on these lost wages was \$69.23)\$.301 per day times 230 days(. Total prejudgment interest to date is \$346.46.

29. Hauck suffered emotional distress as a result of Wal-Mart's acts. She has struggled with fear and financial insecurity. She has not sought counseling, although she did consult Drs. Hay and Alley-Hay regarding her depression. She has not suffered permanent harm as result of her emotional distress. Hauck's emotional distress entitles her to recover \$2,500.00, apart from her other losses.

IV. Opinion

The Montana Maternity Act makes it unlawful to require an unreasonably long maternity leave. §49-2-310 MCA. Wal-Mart could not treat Hauck less favorably than any other class of employees for "commencement and duration of leave" because she was pregnant. 24.9.1206 ARM.

Wal-Mart argued that Hauck had a temporary lifting restriction, neither a disability nor a necessary result of pregnancy. Wal-Mart argued that therefore it had not illegally discriminated against her. These arguments have been considered and rejected in other cases. *Auchenbach v. Village Health Care Center*, Mont. Human Rights Comm. Case No. 9401006303)1996(; *Miller-Wohl Co., Inc. v. Commissioner*, 214 Mont. 238, 692 P.2d 1243)1984(; *vac'd and remnd'd*, 479 U.S. 1050, 107 S.Ct. 919, 93 L.Ed.2d 972)1987(; *jdgmnt reinst'd*, 228 Mont. 505, 744 P.2d 871.

Wal-Mart gave the same treatment to all employees with temporary conditions unrelated to industrial injuries, but different treatment to employees with temporary conditions related to industrial injuries. Although this disparate treatment may generally be legal, Hauck's limitations resulted solely from her pregnancy. Had Hauck suffered an industrial injury resulting in the same restrictions, Wal-Mart would have provided opportunities for her to work with those restrictions. Failing to offer such opportunities for the temporary restrictions resulting from her pregnancy was illicit disparate treatment. This disparate treatment discriminated against a pregnant woman. Wal-Mart had to offer Hauck the same options as a worker with the same restrictions as a result of industrial injury. *See, Auchenbach and Miller-Wohl Co., Inc.*

Hauck proved that she could perform her jobs, as cashier and as customer service desk associate, with her lifting restrictions. The issue for this case is not whether a pregnancy-related temporary lifting restriction is a disability. But since Hauck could perform her jobs, requiring her to take maternity leave or medical leave because of her pregnancy-related limitation is unreasonable, and involves an unreasonably long mandatory leave. §49-2-310(4) MCA.

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to correct the discriminatory practice and to rectify any resulting harm to the complainant. §49-2-506(1)(b) MCA. The wages Hauck lost during the time she could have worked at Wal-Mart are clearly part of the resulting harm she suffered. Pre-judgment interest is part of the award to compensate for her lost income. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B.Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987).

The power and duty to award money for emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (Mont. 1993). Hauck's testimony proved her distress. Once a claimant proves violation of civil rights statutes, the claimant can recover for emotional harm that occurred as a

result of the respondent's unlawful conduct.¹ The claimant's testimony alone can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192)9th Cir. 1991(. The trier of fact can infer that the emotional harm did result from the illegal discrimination.²

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509)7(MCA.
2. Respondent Wal-Mart Stores, Inc., doing business as Store No. 1872)"Wal-Mart"(unlawfully discriminated in employment against Anna Hauck on the basis of her sex)pregnant female(when it removed her from her jobs)cashier and service desk associate(and required her to take an unreasonably long leave of absence, because of a lifting restriction due to pregnancy. §49-2-303)1)0a(and §49-2-310)4(MCA.
3. Pursuant to §49-2-506)1)0b(MCA, Hauck is entitled to the sum of \$3,681.24 for lost wages, the sum of \$346.46 for prejudgment interest on lost wages, and the sum of \$2,500.00 for emotional distress.
4. Affirmative relief is necessary in this case. §49-2-506)1)0a(MCA. Wal-Mart must refrain from engaging in any further unlawful discriminatory practices. Wal-Mart must hereafter provide to pregnant females with resultant limitations the same accommodations and employment opportunities it makes available to employees with the same limitations as the result of industrial injuries. Wal-Mart must hereafter refrain from requiring pregnant females to take unreasonably long leaves of absence because of lifting restrictions that do not preclude them from satisfactorily performing their jobs. Within 60 days of the entry of this order, Wal-Mart must submit to the Human Rights Bureau a plan of action to assure compliance with this

¹ *Carey v. Phipps*, 435 U.S. 247, 264, at n. 20)1978(; *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225)D.C. Cir. 1984(; *Seaton v. Sky Realty Company*, 491 F.2d 634)7th Cir. 1974(; *Brown v. Trustees of Boston Univ.*, 674 F.Supp. 393)D.C.Mass. 1987(; *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475)1984(; *Hy-Vee Food Stores v. Iowa Civ.Rights Comm.*, 453 N.W.2d 512, 525)Iowa, 1990(.

² *Carter*, *supra*; *Seaton*, *supra*; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172)1985(; *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, *rev. denied*, 287 Ore. 129)1979(; *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314)1970(.

paragraph. Within 60 days after the Human Rights Bureau approves)with or without suggested modifications(the plan of action, Wal-Mart must file written proof with the Human Rights Bureau that it has adopted and is implementing the plan)with any suggested modifications(. Wal-Mart must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as an employer, or at once cease doing business in Montana as an employer.

5. For purposes of §49-2-505)4(, MCA, Hauck is the prevailing party.

VI. Order

1. Judgment is found in favor of Charging Party Anna Hauck and against Respondent Wal-Mart Stores, Inc., d/b/a Store No. 1872.

2. Wal-Mart Stores, Inc., d/b/a Store No. 1872, is ordered to pay to Anna Hauck the sum of \$6,527.70.

3. Wal-Mart Stores, Inc., d/b/a Store No. 1872 is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 4.

Dated: March 18, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

