

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

Sherri Lynn Staats,	(Human Rights Act Case No. 9801008292
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Charging Party,	(<i>Final Agency Decision</i>
	(
versus	(
	(
Wal-Mart, Inc.	(
)Store No. 1872, Helena, Montana(,	(
	(
Respondent.	(

I. Procedure and Preliminary Matters

Sherri Lynn Staats filed a Human Rights Act complaint with the Department of Labor and Industry on September 2, 1997. She alleged that Wal-Mart, Inc.)store No. 1872, Helena, Montana(discriminated against her on the basis of her disability when it denied her a reasonable accommodation. The department gave notice Staats' 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.

The contested case hearing convened on January 19, 1999, in the small courtroom, fifth floor, Federal Building, Helena, Montana. Staats was present with her attorneys, J. Cort Harrington and Fredrick F. Sherwood. Wal-Mart was present through its designated representative, Helena store manager Cas Sprouffske, with Wal-Mart's attorney, K. Kent Koolen. The hearing examiner excluded witnesses on Wal-Mart's motion. Sherri Lynn Staats, Irene Martello, Valerie McAlister, Leota McBride and Anna Hauck testified as witnesses called by Staats. Cas Sprouffske

testified as a witness called by Wal-Mart. The parties stipulated to the admission of Staats' exhibits 1 through 6 and 11 through 14. The parties stipulated to the admission of Wal-Mart's exhibits A, B and D. During the course of hearing, the hearing examiner admitted Staats' exhibits 7, 9, 10-1, 15 and 16, and Wal-Mart's exhibit F without objection. The hearing examiner admitted Staats' exhibit 8 over foundation and relevance objections by Wal-Mart. At the close of hearing on January 19, 1999, counsel presented oral closing arguments.

II. Issues

The key issue in this case is whether Wal-Mart discriminated against Staats by insisting that an ability to lift up to 50 pounds was an essential job function of the cashier job, for which no reasonable accommodation was possible. A full statement of the issues appears in the final prehearing order)1-14-99(.

III. Findings of Fact

III

1. On September 22, 1990, Wal-Mart hired Staats in its Store No. 1587 in Modesto, California, as a Courtesy Desk, Layaway, Sales Floor, Cashier and Customer Service Manager)CSM(. Staats transferred to Wal-Mart's Store No. 1872 in Helena, Montana, as a cashier, in October 1992. Staats' starting wage in 1990 was \$5.00 per hour. She received satisfactory evaluations and raises. At the time of her discharge, her wage was \$7.33 per hour. The Helena Wal-Mart store has from 240 to 270 employees depending upon the season. Testimony of Staats and Sprouffske; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 1.

2. Staats suffers from neurofibromatosis, a neurologic disease. In April 1996, she was in an automobile accident. Thereafter, her physician restricted her from heavy lifting. When she first had that restriction, Wal-Mart assigned her to jobs other than cashier for a few days. She returned to her full regular duties within a week. She provided Wal-Mart with a full release without lifting restrictions on December 24, 1996, some months after she had returned to her job as cashier. In May of 1997,

Staats' doctors again restricted her lifting, this time for 7 days. Wal-Mart assigned her to jobs other than cashier until the doctors removed this short-term lifting restriction on May 19, 1997. On June 3, 1997, her physician again restricted her to no more than 25 pounds lifting. She continued to work as a cashier. Testimony of Staats, McBride)the lead customer service manager(and Sprouffske; Exhibit D, work release dated 4/24/96)10 pound lifting restriction(; Exhibit D, work release dated 12/24/96)no restrictions(; Exhibit D, lifting restriction dated 5/12/97)no heavy lifting or extending head backwards for 7 days(; Exhibit D, release from lifting restriction dated 5/19/97(; Exhibit D, lifting restriction dated 6/3/97)lifting restricted to 25 pounds for the next month(; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 2.

3. Wal-Mart requires cashiers to lift up to 50 pounds. Wal-Mart considers this an essential job function of the cashier's job, and requires that new applicants with disabilities "must be able to perform the essential job functions either unaided or with the assistance of a reasonable accommodation." The quoted language appears in the first page of the Wal-Mart Stores Matrix of Essential Job Functions)Exhibit B(, in the explanation of the essential functions matrix. Testimony of Staats, Martello, McAlister, McBride, Hauck and Sprouffske; Exhibit A, "cashier job description," page 3; Exhibit B, "Wal-Mart Stores Matrix of Essential Job Functions," page 1; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 6.

4. Staats was able to work as cashier despite her lifting restrictions. During her tenure with Wal-Mart, she did have customers arrive at her station with an item too heavy for her to lift. She was always able either to detach the bar code for reading and processing, to enter manually the bar code, or to obtain assistance with the item from the customer, a courtesy clerk or another Wal-Mart employee such as another cashier or a customer service manager. Staats did not lift items weighing up to 50 pounds. Staats at times was unable to lift items up to 50 pounds. Yet, with these limitations she was able to perform as a cashier and obtain satisfactory evaluations. She knew other Wal-Mart employees who before Sprouffske became manager had worked the cashier job without being able to lift up to 50 pounds. Staats never lifted or attempted to lift an item in the 30 to 50 pound range after October of 1996. Her work during that time was satisfactory. In this particular

store, the requirement of being able to lift up to 50 pounds was not an essential job function for a cashier. In this particular store, a minimal accommodation permitted a person unable to lift items in the 30 to 50 pound range to work satisfactorily as a cashier. Testimony of Staats and McBride.

5. Sprouffske came to the Helena store as manager just days after Staats' June 3, 1997, lifting restriction. He was not aware of her lifting restrictions, although the limitation was in Staats' personnel file. Testimony of Sprouffske.

6. On or about Friday, June 20, 1997, Staats felt faint and dropped to her knees while walking within the store at work. She thought the episode resulted from not eating breakfast, but her supervisor required her to leave work after the episode. She made an appointment to see a neurologist in Great Falls. Staats worked light duty on Saturday, took her usual days off)Sunday and Monday(and returned to her cashier position on Tuesday, June 24, 1997. She worked Tuesday without incident. On Wednesday, June 25, 1997, Staats experienced a brief bout of unconsciousness in the break room, after approximately 2 hours at work. She was told she appeared to have had a seizure. The personnel manager gave her a ride home. After this bout of unconsciousness Wal-Mart required Staats to obtain a medical release before returning to work. Testimony of Staats; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 3.

7. After Staats saw the neurologist in Great Falls, she attempted to return to work. The neurologist prescribed medication, and gave her a release to return to work with the same restrictions as before. Staats informed Wal-Mart of this and provided the work release. She worked a full shift, on light duty, on Sunday, July 6, 1997. She came to work on Monday, July 7, 1997. She was in the break room preparing to start her shift when the assistant manager told her that she could not return to work until Wal-Mart knew "what was going on." Testimony of Staats; Exhibit D, work release dated 7/3/97)"Mrs. Staats may work with same conditions as before."(.

8. Staats contacted Sprouffske. He told her that she could not return to work until she had a release consistent with Wal-Mart's lifting requirements for the cashier

position)up to 50 pounds(. He also expressed concern about her apparent seizure. He told her she needed to take a medical leave. Testimony of Staats and Sprouffske.

9. On July 17, 1997, Staats submitted a Request for a Leave of Absence)medical(. The request contained her physician's certification, signed by Ronald K. Hull, M.D., indicating continuous leave beginning 6/24/97, with an unknown date of return. Staats requested the note from Dr. Hull to support her medical leave request, because Sprouffske told her she could not work with the lifting restriction. She believed she could perform the cashier job, based upon her successful job performance in the past. Wal-Mart granted her leave request. Testimony of Staats and Sprouffske; Exhibit 4)leave request of 7/17/97(; Exhibit 1)Wal-Mart leave of absence policy(; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 4.

10. Staats thought that she was eligible for a medical leave of up to one year. Sprouffske considered her lifting restriction temporary. He interpreted the Wal-Mart medical leave policy to allow leave for as much as a year so long as the employee was convalescing. He also believed that if Staats' lifting restriction became permanent, she would then have 30 days within which to accept any available position consistent with her lifting limitation. Staats and Sprouffske did not communicate and share these beliefs with each other. Testimony of Staats and Sprouffske; Exhibit 1)Wal-Mart leave of absence policy(and Exhibit 2)Wal-Mart associate reassignment/transfer due to medical disability policy(.

11. Sprouffske consulted with the home office and with Wal-Mart's in-house legal counsel. He reviewed the Wal-Mart job descriptions and the Wal-Mart essential job functions matrix. He concluded that Wal-Mart had already decided that every requirement in the job descriptions and the matrix was an essential job function. He interpreted the documents to mean that Wal-Mart had already decided that no accommodation was possible that would permit an employee to work as a cashier, or in any other job within the store, unless that employee could perform all the requirements in the job descriptions and the matrix. He concluded that Staats was not eligible and qualified for any job that by its description required lifting beyond her lifting restriction. Testimony of Sprouffske.

12. Sprouffske had worked for Wal-Mart in management positions for 6 years. He had 27 years of experience in retail sales. He knew that courtesy clerks, customers and other Wal-Mart personnel (other cashiers or customer service managers) were often available to assist a cashier with heavy items. He knew that detachable bar codes and manual reading of bar codes were available means for a cashier to avoid heavy lifting. He also knew, from his experience, that sometimes no one would be immediately available to assist when a customer unable or unwilling to lift a heavy item arrived at a cashier's station. He believed the resultant delay important enough so that no reasonable accommodation would suffice. He did not ascertain how often Staats or any other cashier in the Helena store actually had to lift items beyond Staats' lifting limitations, nor how Staats and others had satisfactorily performed as cashiers with lifting limitations inconsistent with the job description. He considered Staats unqualified for the cashier position, because of her lifting restriction.

Testimony of Sprouffske.

13. On August 1, 1997, Dr. Allen Weinert released Staats to return to work with a 35 pound lifting restriction. Sprouffske understood this still to be a temporary restriction. He asked Staats in August 1997, either directly or through McBride, if she would be interested in a part-time greeter position that might be available. Staats told him, either directly or through McBride, that she needed full-time work. The part-time greeter position had no guaranteed hours. A range of fewer than 8 to 20 hours might be available. Testimony of Staats, McBride, Hauck and Sprouffske; Exhibit D, work release dated 8/1/97; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 5.

14. Before the end of October 1997, several full-time positions consistent with Staats' lifting restriction became available. Staats inquired at the store about these positions, to the extent that she learned of them. Members of the Wal-Mart management team told her informally that Wal-Mart would not consider her for any of these positions. She never applied for any of them. Sprouffske did not consider her for any of these available positions. He would not have considered her for any of them even if she had applied. Testimony of Staats and Sprouffske.

15. From the end of October 1997, no full-time position consistent with Staats' restriction became available until after Wal-Mart terminated her employment on January 22, 1998. Testimony of Staats, McBride and Sprouffske; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 8.

16. On or about October 23, 1997, Dr. Weinert signed a permanent lifting restriction of 35 pounds. As a result, Sprouffske considered Staats to be eligible only for a 30-day extension of her medical leave, in which she could accept any available Wal-Mart position consistent with her limitations. He considered her unqualified with the lifting restriction for her cashier position. He again offered her a part-time greeter job, which she again refused. Testimony of Sprouffske; Exhibit D, release dated 10/23/97; Final Prehearing Order, "Facts and Other Matters Admitted," Par. 7.

17. In December of 1997, Sprouffske directed Staats to present another request for medical leave, this time for 30 days. She prepared the request in accord with his directions. He approved it. Testimony of Staats and Sprouffske; Exhibit 5)leave request of 12/24/97(.

18. Staats worked 34-40 hours per week while employed in the Helena Wal-Mart store, or approximately 1,930 hours per year)37 times 52.143(. She earned \$7.33 per hour when Wal-Mart stopped her employment on July 7, 1997, and she lost 407 hours of work from July 7 to September 22, 1997. With successful continued performance, she would have earned \$7.65 an hour for 1,930 hours from September 22, 1997, until September 22, 1998. With successful continued performance, she would have earned \$7.95 per hour for 1,300 hours from September 22, 1998 until May 31, 1999. Her wage loss is \$28,082.81. Testimony of Staats; Exhibit 7)lost earnings(.

19. After Wal-Mart refused to return Staats to a full-time position, she sought disability and vocational rehabilitation benefits. Based on Wal-Mart's refusal to return her to work, she believed she could not find an employer willing to hire her with her limitations. She represented to vocational rehabilitation that she could not return to her prior employment. She is currently in a training program that she expects successfully to complete in May 1999. She intends to start looking for work

based upon her new qualifications in March 1999. She reasonably expects to find work, and end her wage losses, by the end of May 1999. Testimony of Staats.

20. From July 7, 1997, through September 22, 1997, interest accrued on Staats' lost wages was \$31.48)407 times \$7.33 times 10% divided by 365 [\$0.817 per day] times 77 divided by 2(. From September 22, 1997, through September 22, 1998, interest accrued on wages lost during that time was \$738.23)1930 times \$7.65 times 10% divided by 365 [\$4.045] times 365 divided by 2(. From September 22, 1998, through March 18, 1999, interest accrued on wages lost during that time was \$402.50)830 times \$7.95 times 10% divided by 365 [\$4.548] times 177 divided by 2(. Interest through March 18, 1999, totals \$2,330.99)\$31.48 plus \$442.81 [542 days of interest at \$.817 per day] plus \$738.23 plus \$715.97 [177 days of interest at \$4.045 per day] plus \$402.50(.

21. The Helena Wal-Mart store qualified for an employee bonus, earned by full-time employees in the store for a year in January 1998. The amount earned was \$575.00. Testimony of Sprouffske.

22. Staats invested \$5.00 per pay period in Wal-Mart stock. Wal-Mart paid \$.75 per pay period for her stock purchases. Wal-Mart paid Staats every two weeks. Over the 99 weeks that Staats lost wages, she lost \$37.13. Testimony of Staats.

23. Staats had medical coverage through Wal-Mart for herself only. Since she was discharged, she has incurred medical expenses of \$365.47)Cooperative Health Center(and \$159.00)Helena Ob/Gyn(. She has incurred surgical expenses of \$2,145.00. With a \$250.00 deductible and a 20% co-payment, her medical expenses resulting from loss of her job is \$1,935.58. As a Wal-Mart employee, she also had a prescription card reducing the price of prescriptions. She purchased Lovox, at \$65.00 a month, until her termination in January 1998, and had no loss)since she ceased buying the medication(. She purchases Tegretol, at \$35.00 per month. With her prescription card, she would pay \$10.00 per month for Tegretol, for a loss of \$400.00 over 16 months)February 1998 through May 1999(. As a Wal-Mart employee, she also got a 10% discount on most store purchases. She produced receipts establishing purchases, since her discharge, of \$3,395.80, for a lost discount of \$339.58. No future

loss is proper--she can choose to shop elsewhere. Her total losses for medical, prescription discount and purchase discount are \$2,675.16. Testimony of Staats; Exhibit 8)prescription expenses(; Exhibit 9)medical expenses(.

24. Staats suffered emotional distress because of Wal-Mart's acts. She felt useless and unfit. She feared her inability to support herself. She feared the progression of her disease process, but Wal-Mart's actions aggravated those fears. She was frustrated by the unfairness of Wal-Mart's actions. She has not sought counseling. She has not suffered permanent harm as result of her emotional distress. Staats' emotional distress entitles her to recover \$10,000.00, apart from her other losses. Testimony of Staats.

IV. Opinion

Montana law prohibits employers from discriminating against employees based on disability. §49-2-303)1)a(MCA. Discrimination because of disability includes failure to make reasonable accommodation. No accommodation is reasonable if it involves either undue hardship to the employer or danger to the health or safety of any person, including the claimant. §49-2-101)19)b(MCA.

Wal-Mart conceded at hearing that Staats was disabled.¹ Wal-Mart both asserted an undue hardship in accommodating Staats and defended on the basis that it could not safely return her to work except as a greeter. Staats established her prima facie case, by direct evidence. Wal-Mart took adverse employment action, interrupting her continued employment, because of her disability. Wal-Mart defended its action on the basis that although under the Human Rights Act it is unlawful to discriminate, in hiring or employment, against a person because of physical disability, there is no discrimination when the particular employment may subject the person with a disability to physical harm. *See, e.g., Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703, 707-8)1998(.

¹ She was disabled, because Wal-Mart regarded her as disabled. §49-2-101)19)a)iii(MCA.

Both undue hardship to the employer and risk of harm to the disabled employee are affirmative defenses. Wal-Mart carries the burden of proving these defenses. 24.9.605 and 24.9.606 A.R.M.

Wal-Mart failed to prove that undue hardship would result from having a cashier who was unable to lift up to 50 pounds. Wal-Mart Store No. 1872 never attempted to evaluate whether such a hardship would occur. Instead, relying upon company policy and his prior experience, the store manager assumed there would be such a hardship. He ignored the realities of the store. This store already had employed Staats and others with lifting restrictions inconsistent with the job descriptions and matrix. This store had done so without any observable hardship.

Montana requires an employer who asserts the affirmative defense of safety to perform an independent assessment to determine the reasonable probability that substantial harm would result from accommodation of the disability. 24.9.606)7(and)8(A.R.M. Montana also follows the ADA guidelines regarding reasonable accommodation)including the safety defense(. 24.9.605)4(A.R.M.

The defense that the claimant would constitute a direct threat to her own health and safety involves factors including the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will recur and the imminence of potential harm. 29 C.F.R. 1630.2)r(. The federal guidance to this regulation emphasizes the necessity for a high probability of substantial harm. A high steel worker with an inner ear problem that destroys his sense of balance may be at too great a risk despite reasonable accommodations, for example, but the stress of a job which could trigger recurrent mental problems)for an employee with a past history of disabling periodic mental problems(might not be a justifiable basis for termination "for the employee's own good." The defense that the claimant's "own good" precludes her employment requires expert testimony. ADA Technical Assistance Manual §IX. Treating Sprouffske as an expert, the trier of fact can still elect to disregard his opinions and rely upon the evidence of actual experience in this store.

The federal regulations provide procedures for compliance with the reasonable accommodation requirement, following the statute itself. 42 U.S.C. §12111(b). A suggested procedure for engaging in reasonable accommodation)from Guidance 29, C.F.R. 1630.9(instructs that the employer:

1. analyze the particular job involved and determine its purpose and essential functions;
2. consult with the individual with a disability to ascertain the precise job-related limitations imposed by an individual's disability and how those limitations could be overcome with reasonable accommodation;
3. in consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
4. consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employer and employee.

Similarly, the ADA Technical Assistance Manual provides the factors used to determine whether a particular job function)which an employee with a disability is unable to perform in the normal fashion(is an essential function. This is a critical determination, because an employee precluded from performing essential functions by a disability is much more "on the bubble" for discharge. For one example set forth in the Manual, a job in a warehouse, unloading product from trucks and putting it in the appropriate place, could be analyzed to *not* require lifting, if use of a dolly or hand-truck would permit an employee with a bad back to transport the product from the truck to the warehouse without lifting. According, again, to guidance, 29 C.F.R. 1630.2(n)(, factors to be used to resolve a controversy about whether a particular job function is "essential" are:

1. Whether the position exists to perform a specific function)for example, a position of proofreader cannot be modified to accommodate a blind person(;
2. The number of other employees available to perform the specific job function or among whom the job function can be distributed)the trier of fact can consider evidence of peak demand periods for the particular function(;

3. The degree of skill or expertise required to perform the specific task;
- and
4. The amount of time spent performing the specific task generally.

Wal-Mart argues that since Staats never asked for an accommodation it had no duty to investigate. This argument misses the point, specifically addressed in *Reeves*)953 P.2d at 711(, that if the employer believes an employee expressly willing to continue work is unable to work, that belief must be supported by an independent investigation.

Wal-Mart relied upon the job descriptions and the matrix. It is possible that the corporation had information about individualized assessments sufficiently similar to Staats' situation as to be relevant. Wal-Mart did not present evidence of any individualized assessments. Instead, Wal-Mart relied upon policies that required individualized assessments, without undertaking any individualized assessment. Confronted with an employee who had already worked satisfactorily with limitations more restrictive than the job description, Wal-Mart did not investigate the need for accommodation, let alone the safety or hardship involved in accommodation. Wal-Mart never reached the steps detailed in both *Reeves* and the federal guidelines, and never bothered to determine whether the alleged risk was real, or whether the alleged essential job function of lifting up to 50 pounds could be modified.

Wal-Mart also argued that Staats' condition worsened after she ceased working at Wal-Mart. On this basis, Wal-Mart argued that at some point Staats became unable to work at Wal-Mart, and could not claim damages thereafter. Again, this defense involves proof that Staats could not perform, with or without an accommodation, the genuine essential functions of her job. The evidence, by medical records and Staats' testimony, did not support such a finding.

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)10b(MCA. The wages Staats lost during the time she could have worked at Wal-Mart are

clearly part of the resulting harm she suffered. Pre-judgment interest is properly 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(. Staats' 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.² 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.³

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509)7(MCA.
2. Respondent Wal-Mart, Inc.)Store No. 1872, Helena, Montana(unlawfully discriminated in employment by refusing charging party Sherri Lynn Staats accommodation for her physical disability from July 7, 1997, and refusing to return her to a full-time position. §49-2-303)a(MCA.
3. Pursuant to §49-2-506)10)b(MCA, Staats is entitled to the sum of \$28,082.81 for past and future lost wages and \$37.13 for stock purchases. She also lost the sum of \$575.00 for an employee bonus. Prejudgment interest on her lost wages is \$2,330.99. Her losses for medical expenses, pharmacy expenses and purchase

² *Carey v. Phipus*, 435 U.S. 247, 264, at ftnt. 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(.

³ *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(.

discounts total \$2,675.16. Staats is also entitled to the sum of \$10,000.00 for emotional distress.

4. Affirmative relief is necessary in this case. §49-2-506)1(a) MCA. Wal-Mart Store No. 1872 must refrain from engaging in any further unlawful discriminatory practices. Wal-Mart Store No. 1872 must hereafter follow Wal-Mart's written policies and procedures, and must hereafter engage in an independent assessment of the risk of substantial harm, including the probability and severity of potential injury in the actual circumstances of the individual employee, taking into account all relevant information regarding the work and medical history of the individual employee with the disability before taking adverse employment action regarding accommodation. Within 60 days of the entry of this order, Wal-Mart Store No. 1872 must submit to the Human Rights Bureau a plan of action to assure compliance with this paragraph. Within 60 days after the Human Rights Bureau approves)with or without suggested modifications(the plan of action, Wal-Mart Store No. 1872 must file written proof with the Human Rights Bureau that it has adopted and is implementing the plan)with any suggested modifications(. Wal-Mart Store No. 1872 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, Staats is the prevailing party.

VI. Order

1 Judgment is found in favor of Sherri Lynn Staats and against Wal-Mart Store No. 1872 on the charge of illegal discrimination in employment because of disability.

2 Wal-Mart Store No, 1872 is ordered to pay Sherri Lynn Staats the sum of \$33,701.09.

3 Wal-Mart 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

