

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

<hr/> Russ Fisk,)	<i>HRC Case No. 0011009548</i>
Charging Party,)	
versus)	<i>Final Agency Decision</i>
Wal-Mart Stores, Inc., d/b/a)	
Wal-Mart #2147,)	
<hr/> Respondent.)	

I. Procedure and Preliminary Matters

Russ Fisk filed a complaint with the Department of Labor and Industry on January 25, 2001. He alleged that Wal-Mart Stores, Inc., a corporation, doing business as Wal-Mart Store Number 2147, discriminated against him on the basis of disability (Friedrich's Ataxia) when it terminated his employment as pharmacy manager on or about August 2, 2000. On May 3, 2001, the department gave notice of a contested case hearing on Fisk's complaint and appointed Terry Spear as hearing examiner.

The hearing examiner heard the contested case hearing in Missoula, Montana, on November 28-29, 2001. Fisk attended with his attorney, William O. Bronson, P.L.L.C. Wal-Mart attended through its designated representative, Gary Lemke, with its attorneys, Keith Strong and John Kutzman, Dorsey & Whitney, L.L.P. The transcript of hearing reflects the witnesses who testified and the exhibits offered and admitted or refused. A copy of the contested case file docket accompanies this decision.

II. Issues

The issue in this case is whether Wal-Mart illegally discriminated against Fisk on the basis of disability (Friedrich's Ataxia) when it terminated his employment as pharmacy manager on or about August 2, 2000. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Wal-Mart Stores, Inc. is a Delaware corporation with its principal place of business in Bentonville, Arkansas. It is qualified to do business in Montana. It operates a chain of retail stores, including several in Montana, and operates pharmacies within these retail stores. One of its Montana retail stores is Wal-Mart Store Number 2147, in Missoula, Montana.

2. Russ Fisk graduated in 1985 from the pharmacy program at the University of Montana. From 1985 to 1989, he worked for Revco at various locations in New Mexico as a pharmacist. He began working for Wal-Mart in 1989 at its store in Albuquerque, New Mexico. In 1994 Fisk transferred to the Missoula store.

3. In August of 1998, the Mayo Clinic diagnosed Fisk as suffering from Friedrich's Ataxia. Friedrich's Ataxia is a disease of the central nervous system that causes a progressive inability to coordinate voluntary movements. The disease typically causes loss of muscle control, unsteadiness in walking, clumsiness and tremors of the hands, a tendency to trip, and slurring of speech. It generally does not impair intelligence or sensory perceptions (aside from balance).

4. Fisk's disease progressively impaired control of his voluntary muscles, resulting in unsteadiness of walking, clumsiness and tremors of the hands, a tendency to trip and slurring of his speech. His disease has not impaired his intelligence and sensory perceptions (aside from balance). The effects of the disease upon him became readily apparent while he worked at Wal-Mart. His disease sometimes confined him to wheelchair mobility, and it was a physical impairment that substantially limited many major life activities. However, his disease in no way impaired or affected his ability to perform the essential functions of the pharmacy manager position at the store.

5. Prior to August 2, 2000, Fisk had worked for Wal-Mart for eleven years. He advanced from a pharmacist position to that of the pharmacy manager of the store. He received numerous awards and honors from Wal-Mart. He was one of the highest paid pharmacists in the state.

6. At all pertinent times, Gary Lemke was the Wal-Mart district pharmacy manager responsible for Wal-Mart's pharmacy operations in Montana and in two stores in northern Wyoming. He was Fisk's direct supervisor. He worked closely with Fisk. Lemke knew Fisk suffered from Friedrich's Ataxia. Lemke liked Fisk and admired his determination not to let his physical condition interfere with his work. Lemke respected Fisk as a pharmacist and as a manager, and trusted him.

7. From time to time, Lemke asked about Fisk's physical condition and invited discussion on accommodations that might assist Fisk. Lemke suggested that Wal-Mart order a motorized scooter which Fisk could operate around the store as a "demo," thereby eliminating any need for him to use his wheelchair or to lean on shopping carts to get around the store. Fisk declined without requesting any alternative accommodation. Lemke also suggested that Fisk sit or lean on a stool behind the pharmacy counter. Fisk tried this but rejected it

after finding that leaning on the counter gave him better stability. Fisk did not suggest any alternative accommodations.

8. In late 1999 or early 2000, the store manager told all the Missoula employees, including Fisk, not to park in the customer parking area close to the door. The store manager did not single Fisk out when he gave this instruction. This direction was consistent with directions Fisk had heard other Wal-Mart store managers with whom he had worked give to employees in the store and other Wal-Mart stores. Fisk did not object to the direction. He did not ask to be exempted from it. He did not report that his physical condition required him to park next to the store. Fisk stopped parking next to the store and began using his wheelchair to get from his vehicle to and from the store. He did not report to Wal-Mart that using his wheelchair was unsatisfactory.

9. Fisk did not need to park in the customer parking area to perform the essential functions of his position. Using his wheelchair to get in and out of the store did not interfere with his ability to perform the essential functions of his job. However, parking near the door would have made it easier for Fisk to enter and leave the store. Fisk did not ask to park near the door because he was afraid that the store manager would retaliate against him.

10. Fisk was able to work with the existing facilities. His performance as pharmacy manager in the store seemed well above average to Lemke, his immediate supervisor.

11. Fisk and the pharmacists he supervised were responsible for accurately filling customers' prescriptions. He was responsible for compliance by the personnel he supervised with all applicable Wal-Mart policies.

12. Some of the medications dispensed by Fisk or by pharmacy personnel under his supervision had the potential to cause death or serious injury if the pharmacy improperly filled prescriptions for those medications. The risk of harm to customers included such business risks as potential monetary liability to injured customers and decreased profitability resulting from publicity about any improper prescription filling. In addition, improper filling of prescriptions could expose Wal-Mart to legal liability including limitation, suspension or revocation of licenses to operate a pharmacy as well as monetary liability to regulatory agencies. Operating a chain of stores across the country, Wal-Mart adopted uniform practices and procedures to address and avoid or at least minimize such risks and exposures.

13. Wal-Mart defined a "prescription incident" as "any mistake that a Customer brings to the attention of Pharmacy or store personnel."

14. Wal-Mart did not immediately discharge pharmacists who were involved in prescription incidents. Instead, Wal-Mart provided additional training to them to identify and correct habits and practices that may have contributed to the incidents. The training occurred at district training stores and then, if the pharmacist continued to have incidents, at Wal-Mart's home office in Bentonville, Arkansas. Wal-Mart paid the cost of sending pharmacists who needed additional accuracy training to these stores. Wal-Mart paid the pharmacists their regular compensation for the time spent at the district training store. Wal-Mart paid their travel and lodging costs.¹

15. For Wal-Mart's training system to work, Wal-Mart had to identify the pharmacists having incidents, in order to require them to undertake the additional training. To accomplish this goal, Wal-Mart's written policies required pharmacists who discovered prescription incidents to report them immediately by phone to their district pharmacy manager. The pharmacist who discovered the error was then to fill out a "Prescription Incident Report" form and mail it to the district pharmacy manager within 24 hours of discovering the error.

16. Wal-Mart had a written policy discussed with all newly-hired pharmacists, warning that "failure to report a known incident may jeopardize your liability insurance, your legal representation, and your position with the company." A similar warning about the consequences of failing to report known incidents appeared in Wal-Mart's Prescription Filling Accuracy Lesson.²

17. Wal-Mart's Pharmacy Operations Manual directed that any pharmacist who discovered an incident was to "call your District Manager immediately after taking care of any pressing issues with the Customer." The Pharmacy Operations Manual further directed pharmacy personnel to:

Complete a Prescription Incident Report form. The Pharmacist responsible for the error completes the form. If this Pharmacist is not present the day of discovery, the Pharmacist on duty fills out the form, and promptly contact[s] the responsible Pharmacist. Mail to your District Manager within 24 hours.

18. The Operations Manual warned in bold type that "failure to follow these procedures will result in termination." On July 10, 1989, Fisk signed an acknowledgment that "I have/will read and understand the pharmacy

¹ The training stores in Fisk's district were Butte, Montana and Sheridan, Wyoming.

² Wal-Mart had both manual and computerized accuracy training resources available to pharmacists within their stores.

operations manual. I will comply with the policies and procedures stated in this manual.” As pharmacy manager, Fisk had continuous access to the Pharmacy Operations Manual.

19. Wal-Mart provided preprinted forms entitled “Prescription Incident Reports.” Each such form stated, “Call your D.M. [district manager] immediately—U.S. Mail all copies to your D.M.’s home within 24 hours.”

20. Fisk told his staff to report all prescription incidents to him, and that he would handle them. Brian Huseby, one of the pharmacists under Fisk’s supervision, suspected that Fisk was not reporting incidents to Lemke. Huseby believed that Fisk had been involved in enough incidents to require a trip to a district training store, yet Wal-Mart had not required such a trip. Huseby began to keep track of incidents, and to make copies of documents regarding the incidents, so he would be able to prove that Fisk was not reporting prescription incidents to Lemke.

21. In June 2000, a customer presented a prescription for Lotensin in 20 milligram tablets. Fisk or a pharmacy trainee for whom he was responsible dispensed 10 milligram tablets to the customer instead of 20 milligram tablets. The customer paid for this medication. Subsequently the customer’s daughter called and notified the pharmacy staff of the error. Fisk suspected that the customer actually had filled the prescription at Shopko and was trying to trick Wal-Mart into exchanging Shopko’s 10 milligram tablets for Wal-Mart’s 20 milligram tablets. Fisk did not try to verify his suspicion with Shopko. Huseby called Shopko and learned that Shopko reported never filling any prescriptions for this particular customer. Fisk did not fill out a Prescription Incident Report or call district manager Lemke.

22. On July 9, 2000, a customer presented a prescription for Lortab in 7.5 milligram tablets. Fisk filled the prescription. He dispensed generic Lortab 5 milligram tablets instead of 7.5 milligram tablets. The customer paid for the medication and took three of the tablets before discovering the error. The customer returned to Wal-Mart and reported the incident to Huseby. Huseby filled out a Prescription Incident Report and called Fisk. Fisk told Huseby to leave the form in Fisk’s box and Fisk would “take care of it.” Fisk neither called Lemke about the incident nor mailed the form to Lemke.

23. On July 31, 2000, Lemke came to the store for a routine visit. He learned from the store manager (who learned from Huseby) of a remark Fisk had made to another member of the pharmacy staff. Huseby claimed that because he considered the remark possible sexual harassment, he had a duty to report it. Wal-Mart’s Sexual Harassment/Inappropriate Conduct policy

required any third party with information about such conduct to report it to management.

24. Wal-Mart's policy required "prompt action" on any such complaint and provided that every complaint would be investigated. In compliance with the policy, Lemke began investigating the sexual harassment issue by interviewing Fisk's staff about it on August 1, 2000.

25. Near the end of the employee interviews on August 1, 2000, before he interviewed Huseby, Lemke believed the sexual harassment investigation would result in him giving Fisk either a written warning or a "decision-making day."³

26. During Lemke's interview of Huseby, Huseby told him that Fisk had been instructing the staff not to report prescription incidents. Huseby informed Lemke of four specific incidents (including the two incidents described in findings 19 and 20) as proof of his allegations. Lemke asked if Huseby had documentation. Huseby said that he did and that he would bring it to Lemke the next day.

27. On the evening of August 1, 2000, Fisk called Lemke at Lemke's hotel room to discuss the sexual harassment investigation. During the conversation, Lemke told Fisk that he had learned of several prescription incidents Fisk had not reported, and that Fisk would have to address those allegations.

28. On the morning of August 2, 2000, Huseby gave Lemke documentation concerning the four prescription incidents. This was the first time Lemke had heard of any of these incidents. Lemke called Mary Sutton, Pharmacy Regional Personnel Manager, at Wal-Mart's home office in Bentonville. Sutton told Lemke that if Fisk admitted to knowing of any of the four incidents and not reporting them, Lemke would have to dismiss Fisk.

29. Lemke then met with Fisk. He asked Fisk what he had decided to do after thinking about the preliminary sexual harassment findings. Fisk said he believed some kind of written warning was in order. Lemke then showed Fisk the documentation he had received from Huseby regarding the four prescription incidents, and asked if Fisk had known of any of these four

³ A "decision making day" involved sending the employee home with pay to think about whether he or she wanted to continue in Wal-Mart's employment. If the employee did decide to continue in employment, he or she had to submit a written commitment not to let the problem recur in the future.

incidents. Fisk denied knowing of two of the incidents, but admitted to knowing of the Lotensin and Lortab incidents. Lemke asked Fisk if he knew Wal-Mart's policy regarding mandatory reporting of all prescription incidents. Fisk replied that he knew the policy and then accurately described it. Lemke asked if Fisk had any explanation for failing to report these incidents. Fisk was unable to provide one.

30. Lemke then dismissed Fisk from Wal-Mart's employment and filled out a written Exit Interview. The Exit Interview stated:

Investigation by Pharm-DM found 2 separate RX incidents not reported per Co. policy. RPh (Russ Fisk) admitted to not report these to D.M. & Asst. Mgr Anna Keegan. See RX # 676548 & 4434066.

31. Lemke signed this interview as supervisor. Anna Keegan signed it as a witness. Fisk signed it as the employee in question. Fisk did not object during his final meeting with Lemke that the reason given for his dismissal was pretextual or that his physical condition played any role in the decision.

32. After discharging Fisk, Wal-Mart replaced him with the assistant pharmacy manager Cheryl Herman, who had worked under Fisk's supervision. Herman was not disabled.

IV. Opinion

The Montana Human Rights Act prohibits (with exceptions irrelevant to this case) employment discrimination because of a person's physical disability. §49-2-303(1)(a) MCA. A disability is an impairment that substantially limits one or more of a person's major life activities, a record of such an impairment or a condition the employer regards as such an impairment. §49-2-101(19)(a), MCA.

Fisk proffered evidence of discriminatory animus and statements involving the store manager. He did not present proof that the store manager played any role in deciding upon his discharge. The only part the store manager played was that of a pawn for Huseby.⁴ Since Fisk had no credible

⁴ By notifying the store manager of alleged sexual harassment of an intern by Fisk, Huseby triggered an investigation. In that investigation Huseby would and did have a private interview with the district manager, an ideal time to accuse Fisk of failure to report prescription incidents now that Huseby had amassed documentation of that failure.

direct evidence of discriminatory animus due to his Frederick's ataxia, his claims are subject to the indirect evidence analysis.

The Human Rights Act prohibitions of discrimination mirror those of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Where there is no direct evidence of discrimination, Montana uses the three tier standard of proof from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).⁵

The first tier of *McDonnell Douglas* required Fisk to prove his prima facie case by establishing four elements:

(i) that he belongs to a [protected class] . . .; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [his] qualifications, he was rejected; and (iv) that, after [his] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, supra.

The *McDonnell Douglas* standard of proof is flexible rather than rigid. The four elements will not woodenly apply to every claim, but instead adapt to the nature of the proof proffered.⁶

For his disability discrimination claim Fisk needed to prove that (1) his disease fit the statutory definition of a disability; (2) he was qualified to continue as the store's pharmacy manager; (3) despite his qualifications Wal-Mart fired him and (4) Wal-Mart replaced him with another pharmacist who had no better qualifications and no disability.

Fisk's disease clearly constituted an impairment that substantially limited one or more of his major life activities, although it had not resulted in any pertinent limitations upon his performance as pharmacy manager. Thus, Fisk proved he had a disability. As a long-term employee with a good

⁵ *E.g.*, *Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, 38 P.3d 836, (2001); *H.A.I. v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman S.D.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

⁶ *Cf.*, *Martinez, supra, citing Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

employment record, Fisk was qualified to continue as the store's pharmacy manager. Indeed, despite either a written warning or a "decision making day" because of the alleged sexual harassment, Fisk still had a bright career ahead of him. Wal-Mart did fire Fisk, and did replace him with the store's assistant pharmacy manager, Keegan, who did not have a disability. Fisk proved his prima facie case.

Fisk's proof of his prima facie case raised an inference of discrimination regarding the decision to fire him, shifting the burden to Wal-Mart. Wal-Mart met that burden of production of evidence by articulating a "legitimate, nondiscriminatory reason for" Fisk's discharge. *McDonnell Douglas* at 802. Wal-Mart satisfied the requirements of this second tier of *McDonald Douglas*. It met Fisk's prima facie case by presenting a legitimate reason for its decision to terminate his employment. That legitimate reason was Fisk's disregard of Wal-Mart policy regarding the immediate reporting of pharmacy incidents. Fisk's conduct meant that no pharmacist in the store would be a candidate for training, because of lack of reporting of the incidents.⁷ Wal-Mart could not protect its customers or itself from prescription errors because Fisk prevented Lemke from learning of such errors. Wal-Mart presented substantial credible evidence of a legitimate business reason to fire Fisk, putting his prima facie case at issue. *Texas Dep. of Com. Aff. v. Burdine*, 450 U.S. 248, 255-56, (1981); *Vortex Fishing Systems, op. cit.*; *Hafner v. Conoco, Inc.*, 268 Mont. 396, 404, 886 P.2d 947, 952 (1994); *Johnson, op. cit.*, 734 P.2d at 212.

After Wal-Mart produced a legitimate, nondiscriminatory reason for its actions, Fisk had the opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by Wal-Mart were only a pretext for discrimination, in the third and final tier of the *McDonald Douglas* analysis. *Vortex, supra*; *Hafner* at 405, 886 P.2d at 953.

Fisk argued that Wal-Mart did not previously "coach" or write-up Fisk for this problem, terminating his employment without any warning for a minor infraction. However, Fisk neither proved that any other Wal-Mart store pharmacy manager had received any lesser discipline for the same conduct, nor rebutted Wal-Mart's evidence that the infraction was major rather than minor.

Fisk also asserted that because Lemke consulted with corporate headquarters before firing Fisk, the grounds for termination were not clear even

⁷ Ironically, one of the first to go to a training store once pharmacy personnel in the store again followed Wal-Mart policy was Huseby, who had already attended a training session in Butte by the time of the hearing.

though based on specific provisions of company policy manuals. However, Fisk did not prove that Lemke or any other district pharmacy manager would ordinarily fire a pharmacy manager without first consulting with higher corporate authority. In addition, the testimony in this case persuaded the hearing officer that Lemke consulted with Simmons in a vain effort to find a way not to fire Fisk over his failure to report pharmacy incidents. Lemke's respect for Fisk as an employee led him to look for a way to retain Fisk.

Finally, Fisk testified that he believed it was within his discretion as the pharmacy manager to decide not to report some pharmacy incidents. His testimony was credible in one respect—he did believe he had that discretion. Nonetheless, his testimony was incredible in the critical respect that the overwhelming evidence of record established that Wal-Mart did not extend any such discretion to its pharmacy managers. Indeed, the substantial evidence of record proved that no reasonable pharmacy manager could believe that Wal-Mart intended him to exercise any such discretion. Fisk's inexplicable decision to depart from policy, at risk of losing his career, was not a reasonable one, and not one for which Wal-Mart was responsible.

Fisk's failure to follow procedure caused his firing. It might not have come to such a severe conclusion but for the machinations of Huseby, but Fisk himself gave Huseby the necessary ammunition. If Huseby had raised the issue as soon as he learned of it, Lemke could have counseled Fisk and gotten him back to following Wal-Mart policy. By gathering documentation and waiting to raise the issue until he could prove past failures to report, Huseby set the stage to insure that his boss would lose his job.

Huseby's denial of any personal animosity toward Fisk was frighteningly credible. His suggestion that he acted to protect himself and Wal-Mart's customers was not so credible. Huseby accomplished his boss' downfall, not out of professional disagreement or personal dislike, but simply because he saw the opportunity to do it. Fisk, with a progressive neurological disease that debilitates him more over time and now with a discharge for cause on his employment record, may never recover the professional status he previously enjoyed. Huseby has gained nothing except a different boss and a training trip to Butte. Literature is replete with tragedies written about events such as these, but under the law applicable to these facts, Wal-Mart did not illegally discriminate against Fisk.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Wal-Mart Stores, Inc., a corporation, doing business in Missoula, Montana, as Wal-Mart Store Number 2147, did not illegally discriminate against Russ Fisk by reason of his disability (Friedrich's Ataxia) when it terminated his employment on August 2, 2000. §49-2-507 MCA.

VI. Order

1. Judgment is found in favor of respondent Wal-Mart Stores, Inc., and against charging party Russ Fisk on the charge that respondent discriminated against charging party on the basis of disability (Friedrich's Ataxia) when it terminated his employment as pharmacy manager on or about August 2, 2000.

2. The department dismisses the complaint.

Dated: March 21, 2002.

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry