

Walmart's Accommodation in Employment Policy and Pregnancy/Disability Discrimination:

A Backgrounder

By: A Better Balance & the National Women's Law Center

I. The Legal Challenge to Walmart's Pregnancy Discrimination

Attorneys from A Better Balance, the National Women's Law Center, and Mehri & Skalet, PLLC filed an EEOC charge in January of this year alleging a pattern and practice of pregnancy discrimination by Walmart, on behalf of an individual and a nationwide class of similarly situated workers. The charge seeks relief for affected individuals, as well as a change in policy.

The individual on whose behalf the claim is brought was advised by her doctor not to lift more than twenty-five pounds or climb ladders during the latter months of her pregnancy. In her last trimester, Walmart required her to provide a note from her doctor setting out her restrictions. She complied and, that same day, was placed on unpaid leave and not permitted to continue working at Walmart. This was despite her objection that she could continue working if provided with reasonable accommodations and wished to do so. Walmart refused to accommodate her even though Walmart accommodates workers with a broad array of disabilities and workers with on-the-job injuries. The period of unpaid leave had significant financial consequences for her and her family.

We know that our client's experience is not an isolated incident. Over the past year and a half, A Better Balance and the National Women's Law Center have spoken to many Walmart associates and former Walmart associates who were denied reasonable accommodations that they needed in order to continue working safely during pregnancy, based on a Walmart accommodations policy that discriminated against pregnant women.

For example, in 2012, A Better Balance heard from a 28-weeks-pregnant Walmart worker in the Midwest who was sent home after handing in a doctor's note that stated she should not climb or carry 8-foot ladders due to risk of preterm contractions and risk of fall that these tasks posed. She could still use 6-foot ladders and perform all other aspects of her job. She was also willing to transfer to any other position in the store that didn't require climbing ladders (such as cashier). In fact, she knew that a non-pregnant worker who had hurt her back when she fell off of a high ladder had been transferred to the fitting room. However, Walmart denied her requests. According to Walmart, she did not qualify for an accommodation because she did not have a disability. Instead, she was forced onto a leave of absence, resulting in a loss of critical income.

Based on interviews we conducted with many other Walmart workers over several months and documents setting out Walmart's accommodation policies, we knew that (1) Walmart had a policy of refusing to provide reasonable accommodations for pregnancy-related disabilities and forcing pregnant women off the job instead, in violation of the Americans with Disabilities Act (ADA) and (2) Walmart had a policy of not treating pregnant workers as well as other workers

similar in their ability or inability to work, in violation of the Pregnancy Discrimination Act (PDA). In fact, Walmart's written Accommodation in Employment policy specifically indicated that pregnant workers were not eligible for the same reasonable accommodations available to workers with disabilities, despite the fact that the PDA requires employers to treat pregnant workers as well as those who are similar in their ability or inability to work.¹

The EEOC charge explains this legal violation further: Walmart's Accommodation in Employment policy divided workers who may need some changes at work into two categories: those with "medical conditions" and those with "disabilities." The policy explicitly categorized pregnancy as a "medical condition." According to the policy, associates with disabilities were eligible for "reasonable accommodations" so that they can enjoy the benefits of employment. On the other hand, workers who needed a change at work because of a medical condition, such as pregnancy, were only eligible for "job aids or environmental adjustments."

What difference did this make? According to Walmart's policy, workers with disabilities who had a medical need for a change at work were entitled to a broad set of reasonable accommodations—a change in policy, practices, or work environment, *explicitly including* changing non-essential job functions and reassignment to a vacant position, among other accommodations. On the other hand, workers with medical conditions, including pregnant workers, who had a medical need for a change at work were only entitled to a change in practices or work environment, *explicitly excluding* transferring a portion of a job to another associate, light duty, or reassignment.

There were two big problems with this policy. First, by categorizing pregnancy as a medical condition, the policy strongly suggested that workers with pregnancy-related disabilities were not eligible for the broad set of reasonable accommodations for which workers with other disabilities were eligible. Indeed, in other documents Walmart stated that a pregnant worker could not have a disability for purposes of this policy because of the temporary nature of any conditions related to her pregnancy. Refusing to accommodate this category of disabilities violated the ADA, which requires employers to make reasonable accommodations for disabilities, including temporary disabilities and disabilities related to pregnancy.

Second, the PDA requires that: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work."ⁱⁱ This means that if workers with disabilities are getting "reasonable accommodations," then pregnant workers who are similar in their ability to work must also receive them. They cannot be treated as second-class citizens eligible only for a smaller pool of "job aids or environmental adjustments."

While under Walmart's policy (and under federal law), workers with disabilities were entitled to a reasonable accommodation unless it would pose an undue hardship, Wal-Mart held pregnant workers to a much higher standard: they were only eligible for the more limited category of job aids or environmental adjustments when the aid or adjustment would be "easily achievable" and would have "no negative impact on the business." It seems that even a *de minimis* cost could constitute a "negative business impact" under this policy. As a result, a pregnant worker with morning sickness who needed a temporary modification of her work hours, for example, might

be denied such a modification under Walmart's policy if the adjustment had any negative business impact, as might be the case if a less-experienced worker would have to cover some of her shifts. Alternatively, rearranging work hours would certainly not be an undue hardship for Walmart, and someone with a disability who needed the accommodation thus would be entitled to it. The result was a completely different set of available accommodations for these two groups of workers whom the law mandates must be treated the same.

In January 2013, a full year before the EEOC charge was filed, A Better Balance wrote to Walmart's general counsel, alerting him to some of the ways in which Walmart's treatment of pregnant workers violated the law.

II. Walmart Announces New Policy to Better Comply with the Americans with Disabilities Act.

In a January 2014 letter responding to A Better Balance's concerns, over a year after its letter was sent, Walmart Chief Global Diversity Officer stated that Walmart had "made necessary adjustments" to their policy in order to be in compliance with the ADA. On March 5th, just weeks after we filed the class pregnancy discrimination charge against Walmart, and soon after Walmart shareholders proposed a resolution to improve Walmart's pregnancy accommodation policies, Wal-Mart announced a new Accommodation in Employment Policy for all United States employees.

With this revision, Walmart has taken an important step in updating its policy to better comply with the Americans with Disabilities Act, which was amended in 2008 to cover employees with temporary disabilities, including those with pregnancy-related disabilities. Walmart's new policy explicitly states that temporary disabilities caused by pregnancy are covered under its disability policy and that associates with temporary disabilities caused by pregnancy are eligible for reasonable accommodations. We applaud Walmart's progress in amending its policy to meet the requirements of the ADA.

III. Unfortunately, Walmart's Policy Change Continues to Evade Its Obligation To Comply with the Pregnancy Discrimination Act

While Walmart's Revised Policy represents an important improvement, it still does not clearly meet the requirements of the Pregnancy Discrimination Act. Walmart asserts in a letter to the Securities and Exchange Commission that "the Revised Policy defines disability to include pregnancy, and thus allows pregnant associates to be granted reasonable accommodation in the same manner as other disabled associates." This is inaccurate.

The Revised Policy does not "define[] disability to include pregnancy." Instead, the Revised Policy defines disability to include "a temporary disability caused by pregnancy."

Under the Revised Policy, Walmart has committed to accommodate those pregnant workers with disabilities—as it must under the ADA. But Walmart's Revised Policy does not indicate a similar commitment to comply with the PDA. Over and over again, Walmart has failed to accommodate pregnant workers including those in need of preventive restrictions such as

limiting heavy lifting or staying hydrated. Under the new policy, Walmart may continue to evade its obligations to pregnant workers by denying accommodations to those pregnant workers who do not meet Walmart's definition of "disability."

Pregnant women may be advised by their medical providers to limit heavy lifting, for example, or to take other steps at work to prevent future health problems for themselves and their pregnancy. For some of these women, the cause of their limitation is pregnancy itself—not a disease or injury or complication related to pregnancy. But these women have the same medical need for reasonable accommodation, such as reassignment or changes in job duties, as workers with injuries or diseases or other complications. They have the same ability to work. As a result, they too are entitled to reasonable accommodations under the PDA since Walmart has a duty to accommodate workers similar in their ability to work under the ADA.

This ambiguity in Walmart's Revised Policy continues to harm pregnant workers. For example, according to court documents, Walmart has a policy of disallowing employees (other than cashiers) to carry water bottles while they are working.ⁱⁱⁱ According to Walmart's Revised Policy, it is not at all clear whether Walmart would change this policy to allow a pregnant employee to carry a water bottle if she had a doctor's note showing she needed it in order to stay hydrated and avoid potential pregnancy complications, unless she could show she already had a pregnancy-related illness or injury or complication.^{iv} Without this accommodation, this worker would be forced to either jeopardize her health by not staying hydrated or to leave work, jeopardizing her economic security. A worker who needed to increase his water intake as the result of a disability, on the other hand, would be entitled to a reasonable accommodation including a policy change, and thus presumably would be permitted to carry a water bottle—allowing him to stay at work.

As another example, according to Walmart's Revised Policy, a healthy pregnant worker whose doctor ordered her to stay off the eight-foot ladder to avoid injury to herself and her pregnancy might *still* not be entitled to a reasonable accommodation, even though she had the same medical need for an accommodation as a worker unable to climb an eight foot ladder because of a disease or injury, and the same ability to work. This is fundamentally unfair—and discriminatory.

The PDA requires Walmart to accommodate pregnant women with limitations in their ability to work—including limitations that arise out of pregnancy itself, rather than a pregnancy-related illness or injury—because it accommodates non-pregnant individuals with disabilities who are similar in their ability to work. Walmart must further revise its policy to make clear that it will provide reasonable accommodations to workers who have a medical need for them, regardless of whether the need arises out of pregnancy or illness or injury.

IV. Walmart Must Implement an Enforceable Policy That Is 100% Compliant with the Law and Make Whole the Victims of Its Discrimination.

As detailed in our 2013 joint report, "It Shouldn't Be A Heavy Lift: Fair Treatment for Pregnant Workers,"^v which included the story of a Walmart worker, more than thirty-five years after it became illegal to discriminate against an employee because of her pregnancy, many pregnant

women still face unfair treatment at work. Many pregnant women will never need any changes at work—but some will, especially those who are in physically demanding or strenuous jobs.

Based on the stories we have heard from women across the country, published court cases, and a recent survey, we know that pregnant women are routinely fired, pushed onto unpaid leave, or are otherwise punished just because they need a modest accommodation, such as a stool to sit on, a water bottle to stay hydrated, or a temporary reprieve from heavy lifting in order to stay healthy and employed. This means that pregnant workers are often treated worse than employees who need similar accommodations because of disabilities. This is not only unfair, it's also illegal. Low-wage pregnant workers are particularly vulnerable, since they are the least likely to have access to flexible workplace practices and policies.

This problem affects the economic security of women and families, since women now make up almost half the workforce, are working later into their pregnancies than ever before, and are breadwinners for their families. Pregnant workers simply cannot afford to be out of work for months or to lose their jobs. Protecting the rights of pregnant workers is also a public health measure. Women who cannot sacrifice their income are often forced to continue working under dangerous or hazardous conditions, jeopardizing their own health and the health of their babies. No woman should have to choose between her job and a healthy pregnancy.

Although a Walmart's revised policy represents a positive step forward, Walmart must further amend its policies to make clear that they will comply with the PDA and provide pregnant workers with the same accommodations provided to those who are similar in their ability to work. We call on Walmart to enter into an enforceable agreement that will ensure that all Walmart workers are provided with the reasonable accommodations that they are entitled to under the law and that victims of its previous discriminatory policy are made whole.

ⁱ In addition, Walmart's written policy and practice of providing temporary alternative duty or light duty to workers with on-the-job injuries, but not to pregnant workers, is facially discriminatory against women and has a disparate impact on female employees.

ⁱⁱ 42 U.S.C. § 2000e(k); see also 29 C.F.R. § 1604, App. Q. & A. 5. ("An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc.").

ⁱⁱⁱ See Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669 at *1 (D. Kan. June 9, 2009) ("After Plaintiff became pregnant, Defendant changed its policy to prohibit non-cashier employees from carrying water bottles, and it told Plaintiff to stop carrying one.")

^{iv} See id.

^v For the full report: <http://www.abetterbalance.org/web/images/stories/ItShouldntBeAHeavyLift.pdf>.