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How to Avoid a $100 Million Dollar ADA Verdict and Other Lessons Learned at Wal-Mart's Expense

Last week, a federal jury ordered Wal-Mart to pay Marlo Spaeth, an employee with Down syndrome, $125 million in punitive damages and $150,000 in compensatory damages for failing to accommodate her disability and terminating her employment. While it would be easy to write-off this verdict as a runaway jury trying to send a message to a company which is, by far, the largest private employer in the United States, there are still lessons to be learned here that apply to employers of all sizes. Whether you employ 150; 1,500 or 1.5 million people, failing to handle employee requests for accommodation (a plea for help, really) in a thoughtful, humane matter has the potential to blow up in your face in a spectacular fashion.



How exactly did Wal-Mart end up with such a massive verdict? If the allegations made by the EEOC are to be believed, the Wal-Mart made mistakes we see all too often when employers are responding to requests for reasonable accommodation under the Americans with Disabilities Act (the ADA). For starters, Wal-Mart apparently changed Ms. Spaeth's hours of work after instituting a computer-based scheduling program in such a manner that her regular routine was disrupted and her ability to get to work was impacted. While such modifications may not pose a challenge to some employees, Ms. Spaeth's condition made adopting to such changes more challenging—a fact Wal-Mart presumably could and should have recognized.

"The jury here recognized, and apparently was quite offended, that Ms. Spaeth lost her job because of needless — and unlawful — inflexibility on the part of Walmart," Gregory Gochanour, EEOC Regional Attorney

Wal-Mart appears to have compounded its mistake by refusing to consider a request for accommodation made by Ms. Spaeth's sister (and guardian) because it was made after the Company terminated Ms. Spaeth's employment. While Wal-Mart has argued that such requests must be made before an employee is terminated, the Court apparently disagreed. Indeed, there is ample federal court precedent holding that employers need not excuse misconduct or poor performance when the request for accommodation is made after discipline is handed out in response to bad acts or substandard work; but an employer that is terminating an employee because it claims it is unable to grant the employee's request for accommodation should exhaust all available options—including transfer to a vacant position (in the Seventh Circuit, at least)—before terminating the

employee. Here, Wal-Mart would have been well-advised to reconsider its decision to terminate Ms. Spaeth once her sister (and guardian) contacted the company to explain what her sister needed and why.

Additionally, Wal-Mart should have considered the unique circumstances presented by this set of facts. While an employee with Down syndrome is not necessarily entitled to preferential treatment under the ADA, an employer presented with a request for an accommodation on behalf of an employee who may have difficulty expressing themselves and/or communicating effectively—whether due to a disability or a language barrier—should seriously consider making allowances for that employee when it comes to engaging in the interactive process with that employee and/or their representatives. Not only will the EEOC investigator evaluating the Company's initial response scrutinize the manner in which the employer responded, but there is no question that jurors are going to expect more from the employer than from the employee and/or their representative. It should thus come as no surprise that this jury handed down a verdict intended to send a clear message to Wal-Mart that it should have done more.

At the end of the day, responding to requests for reasonable accommodation is not rocket science, but it often does require an equal dose of sincerity, creativity, hard work and flexibility. To comply with the ADA and put their organization in a position to ably defend against such claims, employers need to meaningfully engage with the employee and/or their representative and explore reasonable options and alternatives. While the law is quite clear that an employer need only provide a reasonable accommodation and not the specific accommodation requested by the employee, an employer that is perceived as cutting corners or short-circuiting the process runs the risk of receiving a probable cause finding from the EEOC and/or angering jurors such that they end up on the wrong end of a jury verdict. Here, again, Wal-Mart's decision to refuse to engage in the process after Ms. Spaeth's employment may well have been viewed by the jurors as evidence that the Company was not truly attempting to find a workable solution once the computer-based scheduling program went into effect. Finally, it bears mentioning that employers can avail themselves of an affirmative defense (meaning a defense which they have the burden of proving) when faced with failure to accommodate claims in federal court. Under 42 USC 1981a(a)(3), an employer can avoid compensatory and punitive damages if it can establish that it engaged in good faith efforts, in consultation with the employee who asked for the accommodation, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business. In other words, if an employer can show that it truly tried to find an accommodation by engaging with the employee, it can avoid damages even if the process ultimately failed to result in the granting of such an accommodation. This does not mean that an employer can go through the motions and avoid liability. You have to truly try, but if you do, you stand a much better chance of avoiding the fate that befell Wal-Mart at this trial.