



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT MHRC Case Number: E19-0260 March 16, 2020

Pauline Champagne o/b/o Michael Morin<sup>1</sup> (Skowhegan)

v.

Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter (Skowhegan)

### I. Summary of the Case:

Complainant alleged that Respondent discriminated against her son ("Son") based on his disability by denying him a reasonable accommodation. Respondent denied discrimination, stating that Son's request was not reasonable because it did not meet the store's needs. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, an Issues and Resolution Conference ("IRC"), and requests for additional information. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe that Respondent discriminated against Son based on his disability by denying him a reasonable accommodation.

### II. Jurisdictional Data:

- 1) Date of alleged discrimination: June 27, 2019.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 1, 2019.
- 3) Respondent has is subject to the Maine Human Rights Act ("MHRA"), the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) Respondent is represented by Holly Tomchey, Esq. Complainant is represented by Kristin Aiello. Esq.

### III. Development of Facts:

- 1) Complainant provided the following in support of her claim:

Son has [REDACTED] [REDACTED] [REDACTED] disabilities. He has worked for Respondent as a cart attendant since 2001. He has successfully performed the essential functions of his job with the accommodations of a set schedule and a job coach. In Spring 2019, Respondent changed their scheduling system and told Complainant that Son would no longer be able to work his set, modified schedule. Complainant formally requested a

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<sup>1</sup> Complainant is the legal guardian of her adult son, Michael Morin.

reasonable accommodation for Son to continue working his set schedule; the request was denied. Complainant appealed the decision and the appeal was denied. Complainant filed a complaint on behalf of Son based on the denial of a reasonable accommodation.

2) Respondent provided the following in support of its position:

Respondent, a national retailer, developed a new scheduling system for all of its stores. The system tracks customer traffic and other store information and creates employee schedules to maximize efficiency. In Spring 2019, this system was implemented in the store where Son worked. Respondent told Complainant that Son could not continue to work his set schedule because, under the new system, a cart attendant's shift does not start until 10:00 AM and no shifts are less than four hours long. Complainant's request for an accommodation of a modified schedule was denied because it would adversely affect Respondent's ability to meet customer need and other employee schedules.

3) The Investigator made the following findings of fact:

- a) Son has [REDACTED] [REDACTED] disabilities. Son has worked as a cart attendant for Respondent since 2001. His job duties include returning carts from the parking lot to the store, assisting customers with bringing things into or out of the store, and other customer service tasks as needed.
- b) Because of his [REDACTED] disability, Son has a very difficult time understanding and adapting to change and benefits from regularity. Son also has a hard time remaining focused and gets exhausted very quickly. Complainant testified at the IRC that Son goes to bed at 5:30 or 6:30 p.m. because he requires so much sleep. Son also has some [REDACTED] when doing physical activity.
- c) Throughout his employment, Son has worked the same schedule and been assisted by a job coach. He works Monday, Wednesday, and Friday from 8:15-11:30 AM. These accommodations have allowed him to perform the essential functions of his job. Son has received consistent, positive performance reviews and annual raises during his employment.
- d) In the Spring of 2019, Respondent implemented a new scheduling software that tracks the customer and sales traffic to create a schedule for employees. An employee enters their availability and the system generates a schedule based on the store's needs. An employee is never guaranteed a set schedule and no shifts are less than four hours long. According to the system's calculations, a cart attendant shift should not start before 10:00 AM, because of low customer traffic in the morning.
- e) In March 2019, Respondent told Complainant that, because of the new system, Son would no longer be able to work his set schedule. Complainant filed a request for an accommodation for a set schedule, the use of a job coach, and the use of a cart mule.<sup>2</sup> Complainant provided a letter from Son's medical provider that stated, in part, that:

[Son] requires reasonable accommodation of a modified, set schedule each week...I recommend that he continue with the same modified schedule of approximately 3-3.5 hours per day, three days per week. I believe that increasing his hours would be difficult and mentally exhausting for him...In addition, it is

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<sup>2</sup> The cart mule is a device used to push shopping carts. Son's medical provider stated the mule could assist both with Son's [REDACTED] and help improve his focus and efficiency while working.

my understanding that the state of Maine has only funded about 11.25 hours for a job coach per week.

See Exhibit A.

- f) The accommodations of a job coach and the cart mule were granted,<sup>3</sup> but the set, modified schedule was denied. Respondent wrote that:

Your specific request was denied because establishing a set schedule would impact the company's ability to provide the necessary level of services to our customers, adversely affect the schedules of other associates, and/or cause disruption in customer service scheduling.

See Exhibit B.

- g) Complainant appealed the decision and the appeal was denied. Respondent offered that Son could restrict his availability in the scheduling system, but this would not guarantee him the same schedule every week and it would not get him hours during the time of day when he is able to work.<sup>4</sup> Complainant offered to extend two of Son's shifts to four hours and work a the third shift of 3.5 hours.<sup>5</sup> Respondent did not accept this modification.
- h) Respondent has allowed Son to continue to work his set schedule but has not formally granted him the accommodation. There was some delay in Complainant's use of the cart mule due to mechanical issues with the cart mule itself. At the time of the IRC, the store manager provided that Son was using the cart mule. Son has continued to work with his job coach.

#### IV. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statutes ("M.R.S.") § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Pursuant to the MHRA, unlawful discrimination includes "[n]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity." 5 M.R.S. §§ 4553(2)(E), 4572(2).

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<sup>3</sup> Complainant argued that Son was also denied the use of the mule because there was a delay before he was able to use it during his shifts. Respondent provided that it was having trouble with the mule and it would only operate on its fastest speed. Once those issues were resolved, Son was able to use the mule.

<sup>4</sup> This offer of an alternative to his set schedule cannot be considered an "alternative accommodation" because they simply offered what all employees are able to do in the scheduling system. It was not a modification in their policy but rather an explanation of how the scheduling system worked.

<sup>5</sup> This is the maximum amount of hours Son can work each week with a job coach. As was mentioned in the medical provider's letter, the job coach is only funded for 11.25 hours a week

- 3) To establish this claim, it is not necessary for Complainant to prove intent to discriminate on the basis of disability. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999). Rather, Complaint must show (1) that Son is a “qualified individual with a disability” within the meaning of the MHRA; (2) that Respondent, despite knowing of Son’s physical or mental limitations, did not reasonably accommodate those limitations; and (3) that Respondent’s failure to do so affected the terms, conditions, or privileges of Son’s employment. *See id.*
- 4) The term “qualified individual with a disability” means “an individual with a physical or mental disability<sup>6</sup> who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.” 5 M.R.S.A. § 4553(8-D). Examples of “reasonable accommodations” include, but are not limited to, making facilities accessible, “[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters. . . .” 5 M.R.S.A. § 4553(9-A).
- 5) In proving that an accommodation is “reasonable,” Complainant must show “not only that the proposed accommodation would enable [Son] to perform the essential functions of [his] job, but also that, at least on the face of things, it is feasible for the employer under the circumstances.” *Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001). It is Respondent’s burden to show that no reasonable accommodation exists or that the proposed accommodation would cause an “undue hardship.” *See Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261 (Me. 1989). The term “undue hardship” means “an action requiring undue financial or administrative hardship.” 5 M.R.S. § 4553(9-B).
- 6) Complainant established that Son is a person with a qualified disability, he was denied a reasonable accommodation necessary to perform the essential functions of his job, and the failure to do so has affected the terms, conditions, and/or privileges of Son’s job, with reasoning as follows:
  - a. The letter provided by Son’s medical provider, and attached as Exhibit A to this report, is very thorough and clear. There is more than adequate explanation as to why the requested accommodations are necessary for Complainant to perform the essential functions of his job. Son has been successfully performing his job with accommodations since 2001. Complainant’s request that her Son be able to continue to perform his job the same way he has for over 18 years is reasonable.
  - b. Respondent argued that much of the investigation in this case was irrelevant because Complainant has been allowed to continue to work his requested schedule. However, the denial of the reasonable accommodation is still Respondent’s position. There has been no action by Respondent to grant the accommodation and Respondent continued to argue that the accommodation was not reasonable. Simply because they have not followed through with the denial, does not erase that the discriminatory action occurred.
- 7) Respondent has failed to meet its burden to show that granting the accommodation would create an undue hardship with reasoning as follows:

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<sup>6</sup> The MHRA defines “physical or mental disability,” in relevant part, as “a physical or mental impairment that: (1) Substantially limits one or more of a person’s major life activities; (2) Significantly impairs physical or mental health; or (3) Requires special education, vocational rehabilitation or related services.” 5 M.R.S. § 4553-A.

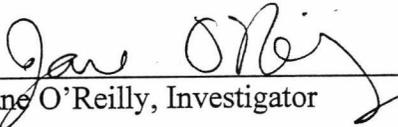
- a. Complainant has been performing the same job tasks with the same weekly schedule for over 18 years. Since the new scheduling system was implemented, there has been no change in his job tasks or his productivity. The store manager testified at the IRC that he has not observed Son being idle during his shift, and none of his managers have reported there was not work for Son to do during his shift. Complainant's request that her Son be able to continue to perform his job the same way he has for over 18 years is reasonable.
- b. Respondent refused to provide the requested financial information to support that the modified schedule created a financial burden. Therefore, the record does not contain any evidence that the schedule created an undue financial hardship. Additionally, it is hard to imagine one individual working fewer than 12 hours a week could have a significant impact on Respondent financially.
- c. Respondent provided the only administrative burden is that it requires a manager to manually enter Son's schedule each week. At the IRC, the human resource manager stated that it is not "super difficult" to change the schedule. The mere inconvenience created by going around the new system does not create an undue administrative hardship.
- d. Respondent took the position that if they modify for one employee they will have to "modify for all." This argument lacks merit. A reasonable accommodation is by its very nature a deviation from standard practice and would only apply in situations involving an employee with a disability. Making this exception is exactly what the law requires employers to do.

8) Discrimination on the basis of disability because of denial of a reasonable accommodation is found.

#### IV. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

- 1) There are **Reasonable Grounds** to believe that Walmart Stores, Inc.; Walmart Stores East, L.P.; Walmart Supercenter discriminated against Pauline Champagne o/b/o Michael Morin on the basis of disability; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3)

  
Jane O'Reilly, Investigator

[REDACTED]

SENT VIA FAX TO [REDACTED]  
AND SENT VIA EM [REDACTED]

April 2, 2019

[REDACTED]

[REDACTED]

Re: Reasonable Accommodations for Michael Morin  
Job Coach, Modified Work Schedule, Use of Mule  
Claim: B983042319-0001-01

Dear Accommodation Service Center:

I am writing on behalf of Michael D. Morin ("Mike"), with regard to his disability and need for reasonable accommodation at work. Mike is a patient of mine at [REDACTED].

[REDACTED]

[REDACTED]

Mike has [REDACTED]. His [REDACTED] substantially limits major life activities including, for example, thinking, communication, caring for himself, learning, concentration and reading; and substantially limits major bodily functions, including brain functions. Mike's [REDACTED] requires special education, vocational rehabilitation and related services. Mike is an individual with a disability pursuant to the Americans with Disabilities Act and the Maine Human Rights Act.

I am aware that Mike is employed at Walmart as a Cart Attendant. It is my understanding that he has been employed as a Cart Attendant at Walmart for nearly 18 years, and has been successful in his employment. He has expressed to me many times how much he loves his job and going to work, which is clearly a source of pride for him.

I have reviewed the attached Walmart document, "Job Description Cart Attendant." After having carefully reviewed this document, and considering Mike's long term employment, my personal knowledge and treatment of him, and my education and experience as a physician specializing in caring for individuals with disabilities, it is my opinion that Mike is able to do the

essential functions of the job of Cart Attendant, with reasonable accommodations. The reasonable accommodations that Mike requires include the continued provision of a job coach and a modified, set schedule. In addition, I recommend that Mike be permitted use of the mule to move carts.

First, Mike requires a job coach as a reasonable accommodation. [REDACTED]

[REDACTED] Having a job coach as an accommodation reduces or eliminates these limitations and allows him to do his essential job functions. A job coach can effectively assist Mike with such things as reminding him of his job duties, assisting him with staying on task and staying occupied during down time, training him on new tasks or methods of doing things, prioritizing tasks, and assisting him with communication with customers and Walmart associates and supervisors. Mike is able to work with others, and to follow direction and be redirected, therefore, a job coach is an effective accommodation for him in his work as a Cart Attendant.

Second, Mike requires reasonable accommodation of a modified, set schedule each week. This is important for a number of reasons. Due to Mike's [REDACTED] [REDACTED]. He requires predictability and regularity in his day in order to function effectively in his job. Further, Mike has been very successful with working a reduced hour schedule for many years, and I recommend that he continue with the same modified schedule of approximately 3 - 3.5 hours per day, three days per week. I believe that increasing his hours would be difficult and mentally exhausting for him, as more demands would be put on his maintaining focus. In addition, it is my understanding that the State of Maine has only funded about 11.25 hours for a job coach per week. If Walmart schedules Mike for more hours than he is provided for job coaching, he will be deprived of the effective accommodation of a job coach.

Finally, I recommend that Mike be permitted to use cart retrieval equipment, including for example, an electric cart pusher, or "mule." This accommodation is necessary due to both his [REDACTED] [REDACTED]. It is my understanding that Mike currently moves carts by hand. Use of the mule would mean a reduction in physical exertion and will likely lessen the difficulties he had [REDACTED]. Use of a mule will also assist him with his limitations in focus, and will increase his efficiency by allowing him to move more carts at once without having to do them all by hand. I believe he can be trained to use the mule with the assistance of his job coach.

If I can provide additional information regarding Mike's disability and need for reasonable accommodation, please let me know. [REDACTED]

[REDACTED]  
[REDACTED]

April 30, 2019

Michael D. Morin  
[REDACTED]

RE: Accommodation Request - Alternative Accommodation  
Claim: B983042319-0001-01

Dear Michael:

The Accommodation Service Center (ASC) has reviewed your request for accommodation. It is important to us that we partner with you to address your request for accommodation, as Walmart strives to reasonably accommodate all associates with disabilities. Because your specific request could not be approved, the company is offering you the following alternative accommodation(s) that would be effective and allow you to remain in your position:

- A determination has been made to approve your request to allow you to use the "mule" while at work.
- You are approved to receive assistance from your Job Coach to develop a training plan to provide one-on-one instructions and/or demonstrate how to complete specific tasks and/or assignments and provide written task instructions if needed.
- You may alter your availability in the scheduling system. However, we cannot guarantee that you will receive your preferred schedule and limiting the hours for which you are available to work may result in a reduction in the number of hours for which you are scheduled.

Your specific request was denied because establishing a set schedule would impact the company's ability to provide the necessary level of services to our customers, adversely affect the schedules of other associates, and/or cause disruption in customer service scheduling.

If a reasonable amount of time passes and you feel the accommodation is not effectively working, please let us know. You can do this by submitting the attached Request for Reconsideration form or by contacting your Facility Manager or Personnel Representative. When you submit the request, please let us know how you think we can best accommodate you and why this accommodation is not effective. You are also welcome to submit any additional medical information at that time, if desired.

While we encourage you to accept this alternative accommodation(s), you may have other options such as applying for a transfer or taking leave (if eligible). If you do not accept this alternative accommodation and your medical restrictions do not allow you to continue working in your current position without the accommodation, leave time may also be granted as an on-going accommodation of your medical condition. You are also encouraged to suggest another alternative accommodation option to your Facility Manager.

The alternative accommodation is intended for the purpose of reasonably accommodating your medical restriction. You are still required to perform all of your position's essential functions and meet the productivity requirements set by your management team. Please be advised that the company reserves the right to revisit at any time to review the effectiveness of the accommodation, its impact on business operations and co-workers, and/or if there is a material change in either your situation or in the business needs of the facility.

If you desire to take leave, file a leave and/or Short Term Disability (STD) claim, please visit the Associate Benefits Toolkit on the WIRE or [www.WalmartOne.com](http://www.WalmartOne.com) to submit an online request using [REDACTED] on-line tool, "ViaOne Express" from a personal or public access computer. If you do not have access to the internet, you may also [REDACTED] [REDACTED]

You should inform your manager and work with ASC if you have a change to your medical condition or restrictions. This will allow us to explore whether there are reasonable accommodations available that will assist you in performing your job or additional jobs in your facility.

**You may appeal this decision by calling ASC. If you desire to submit a Request for Reconsideration, we ask that you do so within 30 days of your notification of ASC's initial determination.**

Please partner with your Facility Manager to discuss your next steps.

For further assistance regarding the accommodation process, you may view the Accommodation Policy Frequently Asked Questions (FAQ's) document on the Ask ADA site on the WIRE>Knowledge Center > Business Support > Retail Depts > Personnel > People or email us at [REDACTED] you may also contact us by phone at [REDACTED]

Sincerely,

[REDACTED]  
Accommodation Service Center