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Walmart Need Not Change Shift Rotation Practice To Accommodate Religious Beliefs

On March 31, 2021, in a two-one ruling, the U.S. Court of Appeals for the Seventh Circuit held that Walmart was not required to change its assistant manager rotation schedule for a post-offer applicant who needed certain days off as a religious accommodation. *Equal Employment Opportunity Commission v. Walmart Stores East, L.P.,* 992 F.3d 656 (7th Cir. 2021). In doing so, the Seventh Circuit upheld past precedent that Title VII of the Civil Rights Act of 1964 (Title VII), Pub.L. No. 88-352, Title VII, 78 Stat. 253, does not place the burden of accommodation on fellow workers. 992 F.3d at 660.

The Walmart store at issue in this case was in Hayward, Wisconsin, and open 24 hours a day, 7 days a week. 992 F.3d at 657. In Hayward, the peak tourism season is late May to late August, and the store was especially busy on Fridays and Saturdays. The store employed assistant managers to help the manager run the store, and it tried to have assistant managers on site at all times in each department. *Id.* There were eight assistant managers, six of whom worked 5 straight 10-hour days and two worked 4 straight 12-hour days. 992 F.3d at 658.To satisfy employee preference, the store historically rotated weekend shifts for the assistant managers so that they worked (on average) six weekend shifts out of every ten weeks. *Id.* It also employed additional managers and supervisors who worked by the hour, which was a lower rate than the assistant manager position. 992 F.3d at 657.

In April 2016, Walmart offered Edward Hedican a job as one of the eight full-time assistant managers. After receiving the offer, Hedican informed Walmart that as a Seventh-day Adventist he could not work between sundown on Friday and sundown on Saturday. *Id.* This disclosure led Walmart to reevaluate the offer made to Hedican. 992 F.3d at 657 – 658.

Walmart's human resources (HR) manager assessed whether it could reasonably accommodate Hedican in one of the eight assistant manager positions without undue hardship on the store. 992 F.3d at 658. Through this assessment, the HR manager concluded that such an accommodation would either leave the store short-handed on occasion, require it to hire another assistant manager, or require other assistant managers to cover extra weekend shifts, despite their preference for weekends off through the rotating schedule. *Id.* The Walmart store denied Hedican's request based on its determination that these factors would be too burdensome on its business. *Id.* Since the assistant manager position was not an option, the HR manager invited Hedican to apply for one of the hourly management positions. *Id.* Walmart viewed this as a further attempt to satisfy its duty to accommodate his religious practice after determining that it would be an undue hardship to place him in the assistant manager position. *Id.* Walmart relied on the holding in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 53 L.Ed. 113, 97 S.Ct. 2264, 2277 (1977), "[t]o require [an employer] to bear more than a de minimus co

in order to give [an employee] Saturdays off is an undue hardship." Hedican did not apply for an hourly management position. *Id.*

Thereafter, Hedican filed a charge with the Equal Employment Opportunity Commission (EEOC), which decided to prosecute a failure to accommodate claim on Hedican's behalf. *Id.* Per Title VII:

> **The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.** 42 U.S.C. §2000e(j).

Walmart filed a motion for summary judgment that was granted by the district court. *Id.* The judge thought an hourly management job would have been a reasonable accommodation, even though the entry-level pay of that position is lower than the entry-level pay of an assistant manager. 992 F.3d at 659. The judge also believed that interference with the store's rotational system for assistant managers would exceed the de minimus threshold. *Id.* The EEOC filed an appeal.

The EEOC made two primary arguments on appeal: (1) the opportunity to apply for a job is not necessarily an accommodation because Hedican had already been selected for a higher position and there was no guarantee of employment; and (2) there were several accommodations that Walmart could have offered that would have enabled him to be an assistant manager. *Id.* As to the first argument, Walmart responded that it "meant no more than a request that he fill out some papers different from the documents required to assume the position of assistant manager." *See Wright v. Runyon,* 2 F.3d 214 (7th Cir. 1993). Relying on Hedican's statement at deposition that he had no interest in the hourly management positions, the Seventh Circuit rejected the EEOC's first argument because the difference between an offer of an hourly management job and an opportunity to apply for an hourly management job did not matter to the outcome of the lawsuit. *Id.*

Turning to the EEOC's second argument, the first proffered accommodation was to place Hedican in the assistant manager position and let him trade shifts with other assistant managers. *Id.* The Seventh Circuit rejected this because it would not be an accommodation by the *employer,* as Title VII contemplates, and as further supported by the U.S. Supreme Court's holding in *Hardison, supra,* "Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." 992 F.3d at 659.

The Seventh Circuit also rejected the second proffered accommodation to permanently assign Hedican to the four straight 12-hour-day shifts and ensure that it never included Fridays or Saturdays because it would have required more weekend work for the other assistant managers. This would have conflicted with the holdings in *Porter v. Chicago,* 700 F.3d 944, 951 – 953 (7th Cir. 1986), and *Baz v. Walters,* 782 F.2d 701, 707 (7th Cir. 1986), because the accommodation would fall on other workers, not the employer. 992 F.3d at 660.

All the other accommodations proffered by the EEOC would require Walmart to bear more than a de minimus burden when vacations, illnesses, and vacancies reduced the number of assistant managers available. 992 F.3d at 658. It is not a reasonable accommodation for Walmart to accept that some days will be short-staffed. *See Hardison, supra,* 97 S.Ct. at 2277.

The Seventh Circuit affirmed the district court's decision "[b]ecause accommodating Hedican's religious practices would require Walmart to bear more than a slight burden (if he became one of the eight assistant managers), and because Title VII does not place the burden of accommodation on fellow workers." 992 F.3d at 660. The one dissenting justice parted ways with the majority because she thought there was a question of fact as to whether Walmart did enough to explore ways of accommodating Hedican's religion. *Id*. For example, Walmart could consult with the other assistant managers to see if they might be willing to pick up the slack on Friday nights and Saturdays, to see if Hedican was willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, or to revisit the rotational schedule. If not, then offering Hedican the hourly manager position as an accommodation rather than inviting him to apply for the position. *Id.*

Could Walmart have done more? This author supposes so, but existing precedent does not require an employer to do more as such would be more than a de minimus burden on the employer or place the burden of accommodation on fellow workers instead of the employer. If an employer finds itself in a similar position (undue hardship to keep or place the employee in the requested position) and it has another position to offer that is lateral or below the requested position and the individual is qualified for the position, the employer may want to consider offering the position to the applicant/employee instead of inviting him or her to apply for the position. The invitation to apply for a position may be better suited for available, higher-level positions that are open. But for Hedican's deposition statement, the outcome may have been different on this particular argument set forth by the EEOC.

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