

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)		
	)		
CATHERINE LITTLEJOHN,	)	Charge No.	1996CF2873
Complainant,	)	EEOC No.	N/A
	)	ALS No.	9929
and	)		
	)		
WAL-MART STORES,	)		
Respondent.	)		

**ORDER**

This matter having previously come before the Commission by a Panel of three pursuant to a Recommended Order and Decision, the Respondent's Exceptions filed thereto, and the Complainant's Reply to the Respondent's Exceptions; the Commission having heard oral argument relative to the exceptions on February 14, 2001.

Prior to the issuance of an Order and Decision, two of the three members of the Commission Panel of February 14, 2001 left the Commission. Thereafter, the matter, including the transcript of the February 14, 2001 oral argument, was resubmitted to the Commission by a Panel of three for its determination.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

**IT IS HEREBY ORDERED:**

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on **January 28, 2000**, has become the Order of the Commission.

<b>STATE OF ILLINOIS</b>	)	
	)	
<b>HUMAN RIGHTS COMMISSION</b>	)	<b>Entered this 4<sup>th</sup> day of November 2009</b>

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Yonnie Stroger

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AND	)	
	)	
WAL-MART STORES, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me on the Affidavit of Martin J. Lucas For Petition Of Attorneys Fees In The Matter Of Catherine Littlejohn v. Walmart Stores, Inc., filed on November 12, 1999. Respondent has not filed any response regarding attorney's fees although given time to do so. The matter is now ready for decision. Administrative Law Judge Norma Barnes-Euresti, who had heard this matter and issued a Recommended Liability Determination on October 21, 1999, has left the Commission's employment. Hence, the issue of the appropriate amount of attorney's fees needs to be decided by another administrative law judge.

CONTENTIONS OF THE PARTIES

Complainant, through an affidavit of her counsel, requests attorney's fees of \$6,275.00 and costs of \$14.55. Respondent's position is unstated.

### FINDINGS OF FACT

1. Complainant has requested compensation for the work of attorney R. Andrew Hahn at the rate of \$150 per hour and compensation for the work of attorney Martin J. Lucas at the rate of \$200 per hour. The requested hourly rates are reasonable.

2. She requests compensation for a total of 33.5 hours of work. The requested number of hours is reasonable.

3. Complainant has requested compensation for costs totaling \$14.55. Complainant failed to provide any explanation of these requested costs.

### CONCLUSIONS OF LAW

1. Pursuant to Section 8A-104(G) of the Illinois Human Rights Act, as a successful complainant, Complainant is entitled to an award of reasonable attorney's fees. 775ILCS 5/8A-104(G).

2. Because of its failure to file a response to Complainant's motion for attorney's fees, Respondent has waived the issue of such fees.

### DETERMINATION

Complainant is entitled to attorney's fees in the requested amount of \$6, 275.00.

### DISCUSSION

In the Recommended Liability Determination entered in this matter, Complainant was given leave to file a request for attorney's fees and costs. She was advised that such request should be set forth in a motion and detailed affidavit. Complainant filed only an affidavit of one of the two attorneys who represented her in this matter.

The affidavit failed to provide any information regarding the experience of Complainant's

two counsel. The affidavit merely stated that the time of one attorney, who had left the firm in March, 1998, “would be billed at \$150.00 per hour” and that the time of the affiant “is billed at \$200.00 per hour.” Thus, with regard to the requested hourly rate, Complainant’s submission is not in full compliance with Clark and Champion National Bank, 4 Ill. HRC Rep. 193 (1982). The requested rates, however, are within the range of recent attorney’s fees awards of the Commission. See, e.g., Des Mangles and American Dental Association, \_\_\_ Ill. HRC Rep. \_\_\_ (1996CF0870, July 20, 1999); Johnson and Alert Construction Company, \_\_\_ Ill. HRC Rep. \_\_\_ (1994CF1296, July 20, 1999); Savaglio and Stone Fabrication Shop, \_\_\_ Ill. HRC Rep. \_\_\_ (1996CA0201, June 30, 1999). Moreover, because of its failure to file any response to the fee request, Respondent here has waived the issue of attorney’s fees. Mazzamuro and Titan Security, Ltd., \_\_\_ Ill. HRC Rep. \_\_\_ (1989CN3464, October 21, 1991). Therefore, it is recommended that the requested rates be accepted.

The total requested number of hours, 33.5, is very reasonable for a case which had discovery and a public hearing. The affidavit here included a list of the descriptions of the work performed, the dates the work was done and the amount of time the work took.

Finally, Complainant has requested \$14.55 in costs. This is a modest amount. The Complainant, however, did not say what these costs are for. It is a well-settled Commission position that costs such as photocopying, faxing, telephone calls and postage are overhead charges that are normally a part of an attorney’s hourly rate, and such expenses are not deemed compensable unless a complainant provides evidence that her attorneys routinely charge their clients for such expenses. Johnson and Alert Construction Company, \_\_\_ Ill. HRC Rep. \_\_\_ (1994CF1296, July 20, 1999); Johnson and Chicago-Read Mental Health Center and Illinois

Department of Human Services, \_\_\_ Ill. HRC Rep. \_\_\_ (1995CF1530, June 21, 1999). Based on lack of information, I cannot find that the costs requested here are compensable costs.

RECOMMENDATION

Based on the foregoing, it is recommended that an Order be entered awarding Complainant the following relief:

A. That Respondent be ordered to pay Complainant the sum of \$6, 275.00 as attorney's fees reasonably incurred in the prosecution of this matter; and

B. That Complainant receive all other relief recommended in the Recommended Liability Determination entered in this matter of October 21, 1999.

ENTERED: January 28, 2000

BY: \_\_\_\_\_  
JANE F. BULARZIK  
CHIEF ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: )  
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CATHERINE LITTLEJOHN, )  
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 Complainant, )  
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and ) CHARGE NO(S): 1996CF2873  
 ) EEOC NO(S):  
 ) ALS NO(S): 9929  
WAL-MART STORES, INC., )  
 )  
 Respondent. )

RECOMMENDED LIABILITY DETERMINATION

On May 1, 1997, a Complaint was filed on behalf of Complainant, Catherine Littlejohn. A public hearing was held on the allegations of the Complaint on May 19, 1999. Subsequently, the parties filed post-hearing and reply briefs. The matter is now ready for decision.

CONTENTIONS OF THE PARTIES

Complainant contends that Respondent terminated her because she was handicapped, in violation of Section 2-102(A) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq.(1992) ("Act"). Respondent asserts that it terminated Complainant because her handicap could not be accommodated.

## FINDINGS OF FACT

Those facts marked with asterisks are facts to which the parties stipulated or facts which were alleged in the Complaint and admitted in the Answer. The remaining facts are those which were determined to have been proven by a preponderance of the evidence at public hearing on the matter. Assertions made at the public hearing which were not addressed herein were determined unproven or were determined to be immaterial to this decision. The findings are as follows:

1. Respondent hired Complainant around 1989 or 1990 to work in its receiving department. The work at the receiving dock was a physically demanding position.

2. Complainant has a physical disability due to asthma and her lower back, which places a limitation on lifting, standing, walking, sitting, twisting.

3. Complainant has suffered from and been actively treated for asthma for approximately 35 years.

4. Complainant currently treats with Dr. Theodore Kavales, an internist, for her asthma.

5. Complainant treated her asthma with steroids and asthma inhalers before and while working for Respondent.

6. Complainant's asthma symptoms could be prompted by strenuous lifting or air conditions.

7. Her symptoms included tightness in the chest, coughing,

and wheezing.

8. Complainant would limit her work at Wal-Mart's receiving dock and would be put in less strenuous areas to avoid asthma symptoms.

9. Sometime in 1994, Complainant interviewed at the Respondent's Joliet Sam's Club for a cashier position and was told some lifting was required but the extent was not defined.

10. Complainant began working for Respondent on April 13, 1994, as a part-time cashier in its Sam's Club in Joliet, Illinois.\*

11. Complainant averaged 25 hours per week in this position.

12. On September 25, 1994, Respondent evaluated Complainant's performance as satisfactory and gave her a raise. \*

13. As a cashier she found she was expected to lift bags of salt that weighed forty pounds or more and fifty-pound blocks of salt from carts or flatbeds. Also, there was dog food and other heavy items. \*

14. This work caused coughing, wheezing and a lot of trouble catching her breath.

15. Her doctor was extremely concerned that her condition was getting worse.

16. In October of 1994, Complainant's doctor ordered no lifting whatsoever. Complainant provided Respondent with a copy of her doctor's lifting restriction.

17. In light of this restriction, Complainant was provided with an accommodation for her physical disability; namely, Complainant was assigned as a door greeter and sometimes would work at other positions such as a cashier in the liquor department where she claimed the work was less strenuous. After Complainant had been given her first physical restriction in 1994, there were still occasions when she might lift heavier objects, meaning fifteen or twenty pounds.

18. Complainant received another satisfactory review in March, 1995, and received a pay raise.\*

19. In September or October of 1995 Complainant was given a work restriction for asthma limiting her lifting to fifteen pounds.

\*

20. Complainant provided an updated work restriction note to Pat Moreland ("Moreland"), assistant manager, around September, 1995. The updated restriction was for 15 lbs. lifting maximum.

21. Complainant's supervisor at the time, Barbara Foster ("Foster"), began assigning Complainant to the people or door greeter position, a job with no lifting requirements, upon receipt of the note.

22. The door greeter job is considered a "light duty" job. Employees with work-related injuries are often assigned to this job.\*

23. No one for Respondent complained about Complainant's work

while Foster assigned her jobs less physically demanding than the cashier position.

24. Complainant averaged 25 hours per week as a door greeter in calendar year 1995.

25. Phyllis Redfern ("Redfern") became Complainant's supervisor in December, 1995. \*

26. In January, 1996, Complainant was hospitalized for an illness which was diagnosed as being diabetes.

27. Complainant returned to work on January 28, 1996. During a meeting with Jeff Kulesa ("Kulesa"), the store manager, and Redfern, Complainant was informed by Redfern that she was preparing to reschedule Complainant for service as a cashier. Complainant objected to being moved back to the cashier position, based upon her lifting restrictions. Redfern informed Complainant that she could not return to work without a full release.\*

28. Respondent's position was confirmed by a letter of February 13, 1996, to Complainant requiring a full release within 72 hours or the Respondent would consider her absence a job abandonment.\*

29. In February of 1996 Complainant submitted a note which gave no restrictions based upon her diabetes.

30. She in fact did try to get a release from her lifting restrictions but was unsuccessful.\*

31. On February 19, 1996, Redfern and Kulesa told the

Complainant that if she could not perform the essential functions of the cashier job, they would not schedule her as a cashier. Further, they told her they would let her know within thirty days whether they could assign her as a store greeter. At this time Complainant could only have performed the cashier's position with assistance in lifting. Complainant could still perform the door greeter position without accommodation.\*

32. Complainant was told by her supervisor, Redfern, and Kulesa that she had thirty days to either get a full release from asthma restrictions and, if not, she would be discharged.\*

33. When Complainant could not obtain a release, Respondent placed her on involuntary medical leave of absence. Respondent does not have a written policy for that employment status.\*

34. Complainant's personnel file indicated that within six months prior to this time that Complainant had three coachings or criticisms of her job performance.

35. "Coaching" is a Wal-Mart term that means a supervisor points out an employee's shortcoming in performance and then urges the employee to do better.

36. After the passing of thirty days, in March 1996, Complainant was told she was discharged because she could not perform the essential function of the cashier's job and that they no longer could accommodate her with the door greeter position or other light duties.

37. Respondent's decision to fire Complainant was not related to any "coaching" issues related to her employment or to any issues of absenteeism.

38. Complainant was earning \$7.31/hr. at the time of her termination.

39. Complainant earned \$1,000.00 in 1996.

40. Complainant has been unable to obtain steady employment with equivalent hours and pay.

#### CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (1992) ("Act").

2. Respondent is an "employer" as defined by section 2-101(B) (1) (a) of the Act and is subject to its provisions.

3. Complainant established by a preponderance of the evidence that her handicap was the motivating factor in Respondent's decision to fire her.

4. As a proximate result of the discrimination, Complainant suffered lost wages in the amount \$29,971. No award should be made for emotional distress.

5. The Complainant is a prevailing party, entitled to attorney's fees under the Act.

#### Determination

The preponderance of the evidence adduced at public hearing

sustained the complaint.

## Discussion

### Standards of Proof

A complainant can establish a case of discrimination through either direct evidence that an adverse action was taken for discriminatory reasons or by indirect evidence. McDonnell-Douglas v. Green, 411 U.S. 793 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); adopted by the Illinois Supreme Court and the Commission in Zaderaka v. Illinois Human Rights Commission, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

The direct method of proving discrimination entails providing evidence which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569 (7th Cir. 1989). In the employment discrimination context, direct evidence relates to what an employer did and/or said regarding a particular employment decision. Where there is direct evidence of discrimination, it is unnecessary to use the three-part Burdine analysis. Gregan and Rock Island Housing Authority, \_\_\_ Ill.HRC Rep. \_\_\_, (1989CF1173, June 29, 1992).

If there is no direct evidence, than the indirect route must be used. The method of proving a charge of discrimination through indirect means is well established. The indirect method requires,

first, that the complainant set forth a *prima facie* case by presenting evidence sufficient, if otherwise unexplained, to raise an inference of unlawful discrimination. Once the complainant does so, a rebuttable inference of discrimination arises. If complainant meets this initial burden, the burden of production, not proof, shifts to the respondent to articulate a non-discriminatory reason for its actions. Once the respondent does so, the burden shifts back to the complainant to prove that the respondent's articulated reason is merely a pretext for unlawful discrimination. The burden of proof at all times remains upon the complainant. Zaderaka, 131 Ill.2d at 172, 545 N.E.2d at 684.

#### Direct Evidence

Complainant argues that she has direct evidence of discrimination. Complainant claims that Respondent's requirement that she present an unrestricted release from her doctor or be fired constitutes direct evidence of discrimination.

Respondent concedes that it required her to provide an unrestricted release and that it terminated her, or "reduced" her position, for her failure to do so. Respondent argues that such action did not constitute handicap discrimination because Complainant admits that she could not perform the essential functions of the cashier position.

Complainant acknowledges that she in fact could not perform the essential functions of the cashier position because it

implicated her lifting restrictions. However, Complainant points to the fact that she had been accommodated for fifteen months in the door/person-greeter position, and that such position did not implicate her lifting restrictions.

After fifteen months, the door greeter position could be considered Complainant's position, and not the cashier position. Accordingly, the case must be analyzed from the perspective of whether she could perform the position of door greeter with or without an accommodation.

It is undisputed that Complainant could perform the functions of the door greeter position without an accommodation. Complainant argues that Respondent did not decide to terminate her from the door-greeter position until after she had been additionally diagnosed with diabetes. Respondent argues that after the December rush that it did not have a need for as many door greeters, and that is why she was to be transferred back to the cashier position.

I did not find Respondent's argument to be credible. While it is true that all of the employees who handled the Christmas rush might not be needed after it is over, Complainant had been in the door greeter's position for over fifteen months. I do not believe that the December rush for 1995 started over fifteen months before her termination. Instead, I believe that Respondent came up with this excuse after Complainant's hospitalization for diabetes. Accordingly, I recommend that a decision be issued in Complainant's

favor.

Complainant's Proof on Damages

Having found that Complainant established her case on liability, the next question to be addressed is the question of damages. The prevailing party is presumptively entitled to full back pay. Matthews and Chicago Export Packing Co., 3 Ill. HRC Rep. 147 (1972).

Respondent made no arguments whatsoever on the issue of back pay. I construe this lack of argument to indicate that they concede that Complainant proved damages in the sum of the requested \$29,971.00.

However, there is a presumption that back pay will make a complainant whole and so damages for emotional distress should not be awarded unless the Complainant can establish more than ordinary suffering. Howell and Bradford Securities Processing Services, \_\_\_ Ill. HRC Rep. \_\_\_ (1977BN0216, August 18, 1998). Complainant has not met this burden. Therefore, I do not recommend an award for emotional distress.

Other Relief

In addition to the above-granted relief, Respondent should be ordered to cease and desist from further handicap discrimination. Also, Complainant requested reinstatement in her Complaint but not in her brief. Since it was in her Complaint, I am assuming that this requested relief is still at issue and so recommend that she

be reinstated.

RECOMMENDATION

I recommend that the Complaint in this matter be sustained and the Complainant be awarded the following relief:

1. That Respondent cease and desist from further handicap discrimination against its employees;

2. That Respondent pay Complainant the sum of \$29,971 in back pay;

3. That Respondent reinstate Complainant to the position of door greeter;

4. That Respondent pay to Complainant reasonable attorney's fees and costs incurred as a result of the civil rights violation alleged herein;

5. The Complainant's request for fees and costs should be set forth in a motion and detailed affidavit meeting the requirements of Section 5300.765 of the Commission's rules and Clark and Champaign National Bank, 4 Ill. HRC Rep. 193 (1982). Such affidavit must be filed within 21 days of this Recommended Liability Determination;

6. Should Respondents contest the amount of fees and costs in Complainant's Petition, Respondents have 21 days after service of said petition in which to file written objections to the petition pursuant to Section 5300.765(c) of the Commission's Rules;

7. Complainant's failure to file a petition as outlined in

paragraph 5 will be construed as Complainant's waiver of attorney's fees and costs;

8. Respondents' failure to file written objections to the fee petition as outlined in paragraph 6 will be construed as an absence of an objection to the amounts of fees and costs requested;

9. Recommendations 1 through 4, are stayed pending issuance of a Recommended Order and Decision, in which the issues of fees and costs shall be resolved.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
NORMA BARNES-EURESTI  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

ENTERED: October 21, 1999