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By Email

November 8, 2024

Loretta J. Garcia, JD, MS
Manager of Enforcement Programs
Montgomery County Government's Office of Human Rights
21 Maryland Avenue, Suite 330
Rockville, Maryland 20850
loretta.garcia@montgomerycountymd.gov

Re: *Bansah v. Sam's Club/Walmart*
531-2020-00159 E-06846

Dear Ms. Garcia,

This letter responds to the October 1, 2024, request for reconsideration ("Request") submitted by the Respondent, Sam's East, Inc. ("Walmart" or "Respondent").

On October 4, 2024, we asked MCGOHR to dismiss the Request on procedural grounds. We have not received a response, so we now submit this opposition for the file.

The request for reconsideration is not only improper because the County Code does not allow it. The Request is meritless.

The Request is meritless because it includes no new evidence to support reversal of the MCGOHR finding. The Request consists only of statements that the Respondent either made or could have made in its original response to the Complaint.

As you know, this case arose on July 13, 2019, when Respondent sent Ms. Wolanyo Bansah home from work without pay, rather than give her a simple accommodation like a warm coat and hat to wear in the freezer or, even simpler, let her keep working shelving products in other parts of the store, as she had done for the previous two years and would do for the next four years. Ms. Bansah respectfully told the manager, Rosa Gibboney, that she could not work in the cold because the cold could trigger a seizure.

Ms. Gibboney, however, insisted that Ms. Bansah work in the freezer. Ms. Bansah, on her own, contacted Respondent's agent, Sedgwick Management Services, Inc. ("Sedgwick"), which, on July 22, 2019, issued a "Final Determination" stating that "we are unable to accommodate you

in your current position because your restrictions prevent you from performing one or more essential job functions.”

Ms. Bansah then requested assistance from Maryland Legal Aid and became a client with Robert McGarrah, a Pro Bono Attorney, on September 24, 2019. Mr. McGarrah had many unsuccessful calls with Ms. Gibboney and Sedgwick staffers from September 24, 2019, to November 5, 2019, when he drafted a letter for Ms. Bansah to Walmart CEO, C. Douglas McMillan, stating:

Despite my epilepsy, I work hard at my job and love it, but when my supervisor suddenly told me this past July that I had to work in the freezer, I explained that my doctor said working there would trigger an epileptic seizure.

I gave him (sic) and the Sedgwick Claims Management Services people all my medical information, but they still say I cannot go back to work. They put me on leave and I need to work to pay my bills. Not only that, but I can't get unemployment or SSDI since I'm listed as a Walmart employee.

I really want to go back to work and do my best for Walmart.

Ms. Bansah sent the letter to Mr. McMillan. On December 2, 2019, Ms. Gibboney called her and told her to come back to the store but also asked Ms. Bansah why she wrote to the Walmart CEO. Ms. Bansah replied that she wanted to work.

When Ms. Bansah returned, Ms. Gibboney said that Sedgwick again rejected her for the Merchandizer job. Ms. Bansah was not allowed to return to work.

The only piece of information in the Request that was new to us was the uncorroborated allegation that an unnamed person from Sedgwick offered Ms. Bansah the opportunity to wear insulated gloves in the Sam's Club freezer and that she turned that down.

Respondent presents no record of any conversation with Sedgwick about gloves.

Neither Ms. Bansah nor Mr. McGarrah recall Sedgwick or Respondent saying anything about gloves.

We did not receive Respondent's original Position Statement, but on May 13, 2020, the MCGOHR investigator sent us his summary of the Position Statement. The summary said nothing about gloves.

But most important, gloves would not have accommodated and protected Ms. Bansah because her epilepsy can be triggered by exposing her whole body to cold, not just her hands.

Finally, even if MCGOHR assumes, just for the sake of argument, that Respondent's agent did mention gloves to Ms. Bansah in July 2019, that would not excuse Respondent's failure to keep engaging in the interactive process to find a way to bring Ms. Bansah back to work before she missed seven months of pay. As noted in our June 23, 2020, response to the Investigator, forcing an employee to take unpaid leave while another accommodation would permit her to continue working is not an effective accommodation. See *Compl. v. Lew*, EEOC Appeal No. 0120141118 (2016); *Woodson v. Int'l Business Machines, Inc.*, No. C-05-3387, at *8-9 (N.D. Cal. Nov. 20, 2007).

Although it is not new, we also wish to respond to Respondent's defense that work in the freezer was an "essential function" of Ms. Bansah's job. Her six years of experience says that it wasn't. As addressed in our June 23, 2020 letter to the Investigator: not all job requirements or functions are essential under the ADA. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015). Among other things, evidence of whether a job function is essential includes, but is not limited to, "[t]he employer's judgment," "[w]ritten job descriptions prepared before . . . interviewing applicants for the job," "[t]he amount of time spent on the job performing the function," "[t]he consequences of not requiring the incumbent to perform the function," "the work experience of past incumbents in the job," and "the current work experience of incumbents in similar jobs." See 29 C.F.R. § 1630.2(n)(3). A function can be essential when: the job exists specifically to perform the function; the small size of the workforce requires all employees to be able to perform the function; and the employee is hired for her expertise in performing the highly specialized function. 29 C.F.R. § 1630.2(n)(2). Walmart has a large store with a large workforce, Ms. Bansah was not hired specifically to work in the freezer, and of course she had no special expertise in the freezer. She had not worked there.

We disagree with the MCGOHR finding of "no retaliation." But because the County Code does not allow for motions for reconsideration, we expect to raise that during the hearing process.

Loretta Garcia
Manager of Enforcement Programs
November 8, 2024
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For the foregoing reasons, we respectfully request that you deny Walmart's Request for Reconsideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Wachtel', written in a cursive style.

David Wachtel
Attorney for Wolanyo Bansah

As counsel, I affirm the
foregoing statements attributed to me:

Robert McGarrah, Jr.
Robert McGarrah

cc: Wolanyo Bansah
Robert McGarrah, Esq.
Littler Case Smart Responses
Bethany Ingle, Esq. (Littler)
Christopher Benton, Esq. (Littler)