LAW OFFICES
Trister, Ross, Schadler & Gold, PLLC
1666 CONNECTICUT AVENUE, N.W., FIFTH FLOOR
WASHINGTON, D.C. 20009
PHONE: (202) 328-1666
FAX: (202) 204-5946
www.tristerross.com

MICHAEL B. TRISTER
(1941-2018)

GAIL E. ROSS
B. HOLLY SCHADLER
LAURENCE E. GOLD
ALLEN H. MATTISON†
DAVID M. WACHTEL*
KAREN A. POST
†ALSO ADMITTED IN MARYLAND
*ALSO ADMITTED IN CALIFORNIA AND MARYLAND

JESSICA ROBINSON†
Of Counsel
KATHY S. STROM+
Of Counsel
+ALSO ADMITTED IN NEW YORK AND MARYLAND
JOSEPH W. STEINBERG‡
‡ALSO ADMITTED IN MINNESOTA
SARAH E. NASON*
JOHN O. SAWYKO*
*ALSO ADMITTED IN NEW YORK

By Email
June 23, 2020

Joseph Kopyto
Investigator III, PHRW
Montgomery County Office of Human Rights
21 Maryland Avenue, Suite 330
Rockville, MD 20850
Joseph.kopyto@montgomerycountymd.gov

Re: *Bansah v. Sam's Club*
OHR Case Number E-06846
EEOC Charge Number 531-2020-00159

Dear Mr. Kopyto:

Wolanyo Bansah has retained the law firm of Trister, Ross, Schadler & Gold PLLC to represent her in this case.

In 2009, Ms. Bansah was diagnosed with a brain tumor and had surgery. After her surgery, in 2010, she had her first seizure and was later diagnosed with epilepsy. Her physician informed her that cold temperatures are one of the things that can trigger her seizures. She can minimize her risk by wearing warm clothing such as a jacket and scarf.

On March 15, 2017, Ms. Bansah began working as an Overnight Merchandiser for Sam's Club in Gaithersburg, Maryland. Sam's Club is owned by Walmart ("Sam's Club" or "Respondent").

Ms. Bansah worked for Sam's Club without incident for more than two years, until July 2019. Sam's Club then discriminated against Ms. Bansah by insisting that she work in the freezer, instead of room temperature areas where she had always worked in the past. She explained that she had epilepsy and would be at risk in cold temperatures. Sam's Club denied her the reasonable accommodation of working her normal duties and did not even engage in the interactive process to find a suitable accommodation. Sam's Club placed Ms. Bansah on unpaid leave, where she remained, for more than half a year, until she herself suggested an accommodation that would allow her to return to work. She lost seven months of pay and seeks the assistance of the Montgomery County Office of Human Rights to recover it.

Ms. Bansah's case meets all of the elements of a disability discrimination claim based on failure to accommodate: (1) she has a disability within the meaning of the ADA; (2) her employer had notice of the disability; (3) she could perform the essential functions of her job with a reasonable accommodation; and (4) her employer declined to make such an accommodation. *See Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015).

I. Factual Background.

Ms. Bansah began working for Sam's Club ("Respondent") as an Overnight Merchandiser on March 15, 2017. On May 15, 2019, Respondent changed the scheduling and job title for Ms. Bansah's position, which meant she began working afternoons as a "Merchandising Associate." As Respondent admits, Ms. Bansah's job duties did not change as a result of the May 2019 schedule and title change. Ms. Bansah's regular job duty was to stock shelves containing dry goods, such as cereal.

On July 13, 2019, Ms. Bansah's supervisor, Store Manager Rosa Gibboney, directed her to work in the freezer. This was the first time any manager at Sam's Club directed Ms. Bansah to work in the freezer. Ms. Bansah informed Ms. Gibboney she could not work in the freezer because of her epilepsy. Ms. Gibboney refused to reassign Ms. Bansah to a different task and instead directed Ms. Bansah to go home. At no time was Ms. Bansah issued a coat, told she would be issued a coat, or told she could wear her own coat, when working in the freezer.

On July 16, 2019, Ms. Bansah provided medical documentation stating she could not work in the freezer. Ex. 1. She also signed a medical release giving her health care provider permission to release information, both verbally and/or in writing, concerning her medical condition to Respondent. Ex. 2. The instructions on the form explained it allowed Respondent to "promptly obtain additional clarification, information, and/or documentation from your health care provider." *Id.*

On July 22, 2019, Respondent – through Sedgwick Claims Management Services ("Sedgwick") – sent Ms. Bansah a letter stating they were unable to accommodate her. Ex. 3. Respondent claimed Ms. Bansah could not be accommodated in her current position because her restrictions prevented her from performing one or more essential job functions – namely, that she was required to "work in areas requiring exposure to varying temperatures, extreme heat or cold, and/or wet, damp, or drafty conditions, while [her] health care provider states [she] cannot work in "cold/cooler/freezer." *Id.*

The July 22 letter claimed there "is no reasonable accommodation" that would enable Ms. Bansah to perform the essential functions of her job. This is hard to believe, because Ms. Bansah had been working in the store for more than two years, shelving cereal. Sam's Club, through Sedgwick, offered to accommodate Ms. Bansah by reassigning her to a different position in her facility, but only if a suitable position became available. *Id.* Sedgwick stated it would conduct a search on her behalf for a suitable open position in her facility, and noted that she could apply for suitable positions in other facilities. *Id.*

The July 22 letter did not suggest that Respondent and Ms. Bansah could meet, talk, or otherwise engage in an "interactive process" to determine whether Ms. Bansah could be accommodated in her current position. *Id.* Instead, Respondent claimed there was no way to accommodate her; offered her an accommodation of reassignment; and informed her she could call the Accommodation Service Center to appeal the decision. *Id.*

In a letter dated October 9, 2019, Respondent informed Ms. Bansah her reassignment leave would end on October 14, 2019. Ex. 4. The letter stated that "as a continued accommodation of your medical condition, you may be able to remain on leave of absence in accordance with company policy." *Id.* The letter did not mention any other possible accommodation, nor did it invite Ms. Bansah to discuss other possible accommodations with Respondent. *Id.* It also did not state Ms. Bansah could return to her current position, with or without an accommodation. *Id.*

On November 5, 2019, Ms. Bansah sent the Walmart CEO, C. Douglas McMillon, a letter asking to come back to work. Ex. 5. Her short letter made plain that she believed Walmart had mistreated her because of her medical condition. *Id.* She began:

> I have been a loyal and hard-working Merchandizer at Sam's Club (Facility #6653) in Gaithersburg, Maryland for the past 21/2 years. 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.

She ended the letter:

> Please tell these people Walmart respects the rights of all of its employees, including people like me with epilepsy. Please tell them to let me go back to work!

Id.

On December 3, 2019, Ms. Bansah received a call from Ms. Gibboney, who asked her to come back to work that afternoon. Ms. Gibboney also asked Ms. Bansah why she wrote to the Walmart CEO and asked him to help her get her old job back. Ms. Bansah replied that she wanted to work.

Before Ms. Bansah could actually work any hours at Sam's Club, on December 9, 2019, Ms. Gibboney told Ms. Bansah that Sedgwick Claims Management Services, which rejected her accommodation request in July 2019, again rejected her for the Merchandizer job she had done at the store for the past 2.5 years. As such, Ms. Bansah was denied assignment and was not allowed to come back to work.

On February 4, 2020, Ms. Bansah contacted Respondent and asked if she could return to the store and would work in the freezer, if Sam's Club would issue her a warm jacket.

On February 26, 2020, Respondent sent Ms. Bansah a letter stating a determination was made to allow her to wear a jacket while being around the freezer/cooler area as an exception to the Work Place Standards Dress Code policy and applicable business unit guideline requirements. Ex. 6.

Ms. Bansah returned to work shortly after February 26, 2020, but was not in fact assigned to the freezer. She has been shelving cereal and other products for the past four months, the same job she had always done for Sam's Club.

Ms. Bansah was not provided a reasonable accommodation until late February 2020 – approximately seven (7) months after she requested accommodation. Ms. Bansah could have been accommodated in July 2019 had Respondent given her a coat to wear when working in the freezer, but Respondent failed to make a good faith effort to engage in the interactive process and never asked Ms. Bansah if any accommodation would have enabled her to work in the freezer. Instead, Respondent placed Ms. Bansah on an unpaid leave of absence without any engagement in the interactive process and failed to offer her an appropriate accommodation until she took it upon herself to work out a solution.

II. Working in the freezer was not an essential job duty of Ms. Bansah's position.

Respondent contends an essential function of Ms. Bansah's position was the ability to work in the freezer, but that is not true.

An individual qualifies for protection under the ADA when she, "with or without accommodation, can perform the essential functions of the employment position that such individual holds." 42 U.S.C. § 1211(8). In the context of the ADA, "[n]ot all job requirements or functions are essential." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015). Essential functions of a job include only those "that bear more than a marginal relationship to the job at issue." *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994) (internal quotation marks omitted); *see also* 29 C.F.R. § 1630.2(n)(1).

Implementing regulations for the ADA provide guidance both as to what might qualify as an essential function and as to what type of evidence can help establish what those essential functions are. *See* 29 C.F.R. § 1630.2(n). Among others, 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." *Id.* § 1630.2(n)(3). The regulations also provide three examples of situations where a function can be essential: 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). Sam's Club, in fact, is a large store with a large workforce, Ms. Bansah was not hired specifically to work in the freezer, and she had no special expertise there.

Despite Respondent's contention, working in the freezer was not an essential function of Ms. Bansah's position. The regulations note that the "inquiry into whether a particular function is essential initially focuses on whether the employer *actually requires* employees in the position to perform the functions that the employer asserts are essential." 29 C.F.R. pt. 1630, app. § 1630.2(n) (emphasis added). But from March 15, 2017 until July 13, 2019, Ms. Bansah was *never* directed to work in the freezer, and Respondent admits her job duties did not change when her job title changed in May 2019. For over two years, Ms. Bansah's regular job duties consisted of stocking shelves in dry goods areas of the store – namely stocking cereal. Further, others in Ms. Bansah's position routinely performed the entirety of their duties without working in the freezer. As Ms. Bansah never spent any time working in the freezer throughout her employment with Respondent, it is unclear how a task Ms. Bansah was never previously asked to perform could be considered "essential."

III. Respondent failed to engage in the interactive process.

If Respondent had made a good-faith effort to engage in the interactive process with Ms. Bansah, Ms. Bansah could have been accommodated in July 2019 – and avoided being placed on unpaid leave for approximately seven (7) months – by receiving the same accommodation she was afforded seven months later.

The ADA prohibits an employer from discriminating "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Such discrimination can occur when an employer fails to accommodate the known disability of a qualified employee. *Id.* § 12112(b)(5). For an employee to be a "qualified individual" under the ADA, she must be able to "perform the essential functions of the employment position," either "with or without reasonable accommodation." *Id.* § 12111(8). A reasonable accommodation "is one that 'enables a qualified individual with a disability to perform the essential functions of a position.'" *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 580 (4th Cir. 2015). Assuming, for the sake of argument, that working in the freezer was an essential function of Ms. Bansah's position, Sam's Club should have offered – and seven months later did approve – a reasonable accommodation that would have allowed Ms. Bansah to work in the freezer.

Under the ADA, an employer has "a good-faith duty to engage with [its employee] in an interactive process to identify a reasonable accommodation." *Stephenson v. Pfizer, Inc.*, 641 F. App'x 214 (4th Cir. 2016); 29 C.F.R. § 1630.2(o)(3).[1] This duty is triggered when an employee communicates her disability and desire for an accommodation. *Jacobs*, 780 F.3d at 581. Respondent failed to engage in the interactive process in July 2019 when Ms. Bansah originally requested reasonable accommodation. Instead of excusing her from working in the freezer – a duty she was asked to perform only once since she began working for Respondent in March 2017

[1] Under Maryland law, employers are required to undertake an individualized assessment of the employee's abilities to perform the essential functions of a job, and Maryland law *explicitly* provides that failure to conduct an individualized assessment constitutes an unlawful employment practice. *See Adkins v. Peninsula Reg'l Med. Ctr.*, 119 A.3d 146, 164 (Md. Ct. Spec. App. 2015); COMAR § 14.03.02.04(B)(3).

– or engaging in the interactive process to determine whether she could be accommodated, Respondent improperly determined Ms. Bansah could not be accommodated in her current position, would not allow her to come back to work in her current position, and placed her on unpaid leave while it searched for a reassignment. Forcing an employee to take leave while another accommodation would permit her to continue working is not an effective accommodation.[2] *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).

An employer is liable for failure to engage in the interactive process when a good faith interactive process would have led to an accommodation that would enable the individual to perform the job's essential functions. *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 347 (4th Cir. 2013) (internal citations omitted). While Respondent's July 22 letter claimed no reasonable accommodation would enable Ms. Bansah to perform the essential functions of her position, this is demonstrably false. If Respondent had engaged in the interactive process with Ms. Bansah – or contacted her health care provider to obtain additional clarification or information about Ms. Bansah's limitations pursuant to the signed medical release form – Respondent could have come up with an appropriate accommodation, such as assigning Ms. Bansah to shelve cereal or work in other areas of the store, or allowing Ms. Bansah to wear a heavy coat when required to work in the freezer.[3] Instead, Respondent relied on a one-line written explanation on the Accommodation Medical Questionnaire document in determining Ms. Bansah could not be accommodated, and failed to discuss Ms. Bansah's accommodation request with either Ms. Bansah or her health care provider. *See* Ex. 1, Ex. 2.

As Respondent granted Ms. Bansah an accommodation in the form of an exception to the Work Place Standards Dress Code policy – allowing her to wear a jacket while in the freezer/cooler area – in late February 2020, Sam's Club clearly could have found that same accommodation months earlier had it made a good faith effort to engage in the interactive process in July 2019. *See* Ex. 6. Because a reasonable accommodation could have enabled Ms. Bansah to perform the so-called essential functions of her position in July 2019, Respondent is liable for failure to engage in the interactive process. *See, e.g., Harvey v. Jewell*, EEOC Appeal No. 0120132052 (2016) (finding agency could have found a suitable accommodation for complainant had it continued to engage in the interactive process instead of issuing a "take it or leave it" offer and failing to continue with the interactive process in good faith); *Johansson v. Prince George's Cnty. Pub. Sch.*, No. DKC-13-2171, at *23-24 (D. Md. July 7, 2014).

Finally, Respondent's decision to place Ms. Bansah on unpaid "reassignment leave of absence" and its statement that it would conduct a search for suitable open positions in her

---

[2] Further, EEOC regulations state that a "prohibited action" against an employee regarded as disabled includes "placement on involuntary leave." 29 C.F.R. § 1630.2(l)(1).

[3] "An employer cannot escape liability simply because the employee does not suggest a particular reasonable accommodation that would assist [her]." *Adkins v. Peninsula Reg'l Med. Ctr.*, 119 A.3d 146, 163 (Md. Ct. Spec. App. 2015) (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 (3d Cir. 1999). Instead, "[t]he employer must work with the employee to determine what accommodation would help." *Id.*

facility, while suggesting Ms. Bansah apply for positions in other facilities, was not an effective accommodation. *See* Ex. 3. Forcing an employee to take 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).

Instead, Sam's Club should have considered reassigning Ms. Bansah to stock other parts of the store, other than the freezer. Reassignment is a recognized reasonable accommodation. *See* Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC Notice No. 915.002 (Oct. 17, 2002) ("EEOC Guidance"). EEOC also notes that, absent undue hardship, an employer is required to search throughout its entire organization when searching for a job to reassign an employee into. *See* EEOC Guidance at Q.27. EEOC and the courts also recognize that reassignment means the employee gets the vacant position if she is qualified for it – not that she is permitted to compete for a vacant position. *See* EEOC Guidance at Q.29; *EEOC v. M&T Bank*, Civil No. ELH-16-3180 (D. Md. Sept. 10, 2019); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1301 (D.C. Cir. 1998).

IV. Respondent retaliated against Ms. Bansah by continuing her unpaid reassignment leave of absence after she wrote to the President of Walmart.

The ADA provides that "no person shall discriminate against any individual" for engaging in protected opposition or participation activity. 42 U.S.C. § 12203(a). To prevail on a claim of retaliation, a plaintiff must show that (1) she engaged in protected activity; (2) her employer took an adverse action against her; and (3) a causal connection existed between the adverse activity and the protected action. *Jacobs*, 780 F.3d at 578 (internal citations omitted). Ms. Bansah engaged in protected activity when she wrote to the Walmart President and CEO. *Jacobs*, 780 F.3d at 578; Ex. 5.

To satisfy the second element of an ADA retaliation claim, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). In *Burlington Northern*, the Supreme Court held that the anti-retaliation provision "protects an individual . . . from retaliation that produces an injury or harm," and recognized that loss of compensation could qualify as such an injury or harm. *Id.* at 67, 73.

Respondent retaliated against Ms. Bansah by refusing to allow her to come back to work on December 9, 2019, weeks after Ms. Bansah sent the Walmart CEO a letter asking to come back to work. *See* Ex. 5. Though Ms. Gibboney initially asked Ms. Bansah to return to work on December 3, 2019, Ms. Gibboney also asked Ms. Bansah why she wrote to the Walmart CEO for help in getting her old job back, showing she knew Ms. Bansah had engaged in legally protected activity. Days later, on December 9, Ms. Gibboney told Ms. Bansah that Sedgwick again rejected her for the Merchandizer job and that she was not allowed to come back to work.

* * *

For the reasons stated above, we request that the Office of Human Rights find that Sam's Club discriminated against Ms. Bansah on the basis of her disability and retaliated against her.

Sincerely,

David Wachtel, Esq.
Attorney for Wolanyo Bansah

Enclosures
cc: Ms. Wolanyo Bansah (by email)