No. 21-1690

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

WAL-MART STORES EAST, L.P., doing business as
Wal-Mart Distribution Center #6025,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Wisconsin, No. 3:18-cv-00783-bbc
The Honorable Barbara B. Crabb, District Court Judge

RESPONSE BRIEF FOR APPELLEE

Anne M. Voigts
KING & SPALDING LLP
601 South California Avenue
Suite 100
Palo Alto, CA 94304
(650) 422-6700
avoigts@kslaw.com

Marisa C. Maleck
Counsel of Record
Kathryn A. Running
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
mmaleck@kslaw.com
krunning@kslaw.com

Counsel for Appellee

January 10, 2022

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: EEOC v. Wal-Mart Stores East, L.P.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Wal-Mart Stores East, L.P.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

CA7: Jackson Lewis P.C.: Susan Zoeller; King & Spalding LLP: Marisa C. Maleck, Anne M. Voigts, Kathryn Running

W.D. Wisc.: Jackson Lewis P.C.: Susan Zoeller; and see attached

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Walmart Inc.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

WSE Management, LLC (general partner); WSE Investment, LLC (limited partner)

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Marisa C. Maleck Date: 01/10/2022

Attorney's Printed Name: Marisa C. Maleck

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: King & Spalding LLP, 1700 Pennsylvania Avenue NW, Suite 200, Washington, DC 20006

Phone Number: (202) 626-9117 Fax Number: (202) 626-3737

E-Mail Address: mmaleck@kslaw.com

United States Court of Appeals
for the Seventh Circuit

APPEARANCE &
CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: *EEOC v. Wal-Mart Stores East, L.P.*

Attachment

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

W.D. Wisc:

Jackson Lewis P.C.: Jonathan E. Sacks, Ronald S. Stadler, Leeann Simpkins, Melissa Taft, Robert F. Seidler, and Zachary A. Ahonen

Quarles & Brady LLP: Christopher L. Nickels, William A. Walden

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: EEOC v. Wal-Mart Stores East, L.P.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Wal-Mart Stores East, L.P.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

CA7: Jackson Lewis P.C.: Susan Zoeller; King & Spalding LLP: Marisa C. Maleck, Anne M. Voigts, Kathryn Running

W.D. Wisc.: Jackson Lewis P.C.: Susan Zoeller; and see attached

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Walmart Inc.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

WSE Management, LLC (general partner); WSE Investment, LLC (limited partner)

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Anne M. Voigts Date: 01/10/2022

Attorney's Printed Name: Anne M. Voigts

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: King & Spalding LLP, 601 South California Avenue, Suite 100, Palo Alto, CA 94304

Phone Number: (650) 422-6710 Fax Number: (650) 422-6800

E-Mail Address: avoigts@kslaw.com

United States Court of Appeals
for the Seventh Circuit

APPEARANCE &
CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: *EEOC v. Wal-Mart Stores East, L.P.*

Attachment

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

W.D. Wisc:

Jackson Lewis P.C.: Jonathan E. Sacks, Ronald S. Stadler, Leeann Simpkins, Melissa Taft, Robert F. Seidler, and Zachary A. Ahonen

Quarles & Brady LLP: Christopher L. Nickels, William A. Walden

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: EEOC v. Wal-Mart Stores East, L.P.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Wal-Mart Stores East, L.P.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

CA7: Jackson Lewis P.C.: Susan Zoeller; King & Spalding LLP: Marisa C. Maleck, Anne M. Voigts, Kathryn Running

W.D. Wisc.: Jackson Lewis P.C.: Susan Zoeller; and see attached

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Walmart Inc.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

WSE Management, LLC (general partner); WSE Investment, LLC (limited partner)

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Kathryn Running Date: 01/10/2022

Attorney's Printed Name: Kathryn Running

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: King & Spalding LLP, 1700 Pennsylvania Avenue NW, Suite 200, Washington, DC 20006

Phone Number: (202) 626-9266 Fax Number: (202) 626-3737

E-Mail Address: krunning@kslaw.com

United States Court of Appeals
for the Seventh Circuit

APPEARANCE &
CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-1690

Short Caption: *EEOC v. Wal-Mart Stores East, L.P.*

Attachment

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

W.D. Wisc:

Jackson Lewis P.C.: Jonathan E. Sacks, Ronald S. Stadler, Leeann Simpkins, Melissa Taft, Robert F. Seidler, and Zachary A. Ahonen

Quarles & Brady LLP: Christopher L. Nickels, William A. Walden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

STATEMENT OF JURISDICTION

The Statement of Jurisdiction submitted by Appellant Equal Employment Opportunity Commission (EEOC) is correct, except insofar as EEOC seeks to separately challenge the denial of its summary judgment motion. EEOC Br. 1; 7th Cir. R. 28(b). This court lacks jurisdiction under 28 U.S.C. § 1291 to review the district court's denial of summary judgment. *Via v. LaGrand*, 469 F.3d 618, 622 (7th Cir. 2006).

PRELIMINARY STATEMENT

The Pregnancy Discrimination Act of 1968 (PDA) provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). As the Supreme Court held in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1350 (2015), in enacting the PDA, Congress did not intend to grant pregnant workers "an unconditional most-favored nation status," such that employers who provide some workers with an accommodation must provide similar accommodations to all pregnant workers, irrespective of any other criteria. Instead, the Supreme Court held that disparate-treatment law under the PDA, like disparate-treatment law more generally, "normally

permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so." *Id.*

Here, EEOC alleged that Walmart intentionally discriminated against Alyssa Gilliam and 12 other pregnant associates, two of whom were later dismissed from the action for discovery-order violations. Those allegations were based on Walmart's Temporary Alternate Duty (TAD) Policy, which authorized temporary, light-duty accommodations for up to 120 days. Until October 2017, eligibility for TAD was based on a single factor, unrelated to pregnancy or gender: whether or not the associate had suffered an on-the-job injury. If they had, they were eligible. If not, they were not. The TAD Policy did not apply to non-pregnant or pregnant associates who were injured *off* the job or to non-pregnant or pregnant associates with disabilities. But pregnant and non-pregnant associates alike with *work-related* injuries were eligible for TAD. It is undisputed that the Company offered TAD only to those injured on the job to speed recovery time, decrease costs and legal exposure related to the worker's

compensation system, and increase morale and loyalty. EEOC presented no evidence of contrary motive or pretext.

As the district court correctly concluded, under *Young*, the TAD Policy did not intentionally discriminate against pregnant women, and there was no triable issue of fact. Even though pregnant and non-pregnant associates without on-the-job injuries were ineligible for TAD, the district court reasoned, Walmart offered them *other* accommodations. Before Walmart made TAD available to pregnant associates without on-the-job injuries in 2017, those associates could—like any other associate with medical restrictions arising from a non-work-related cause—seek alternate accommodation under Walmart's nationwide Accommodation in Employment (ADA) Policy.

On appeal, EEOC challenges the district court order granting summary judgment to Walmart, as well as two of the district court's discovery rulings. Those challenges are meritless.

First, EEOC cannot carry its burden of establishing intentional discrimination, as required to prevail on a disparate treatment theory of liability. *Young*, 135 S. Ct. at 1355–56. Far from establishing a "heightened" standard that switches the burden of persuasion to the

defendant, *Young* reaffirmed the decades-old test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That test simply requires defendants facing pregnancy-discrimination allegations to articulate "legitimate, nondiscriminatory reasons" for denying accommodations to pregnant associates. *Young*, 135 S. Ct. at 1354 (quoting *McDonnell Douglas*, 411 U.S. at 802). Walmart did just that, which shifted the burden to EEOC to establish pretext or otherwise show intentional discrimination. *Id.* at 1355.

As the district court correctly concluded, EEOC did not meet that burden. *Young* provides that a plaintiff can create a genuine issue of material fact about pretext "by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* at 1354. But that's not what EEOC did here. Instead, EEOC compared the percentage of non-occupationally injured pregnant associates accommodated under the TAD Policy (0%) with the percentage of occupationally injured associates accommodated under the policy (100%). EEOC argued that the differential resulting from this artificial equation established pretext and thus intentional discrimination. But this

argument frames the question in a way that guarantees EEOC's preferred outcome. It's also *not* the question *Young* requires plaintiffs to answer.

Young asks plaintiffs whether their employer accommodates a large percentage of non-pregnant workers, but not a large percentage of pregnant workers. *Id.* EEOC didn't purport to answer that question and, instead, ignored all the other associates with disabilities or off-the-job injuries who were *also* ineligible for TAD. Indeed, EEOC presented no evidence about the percentage of non-pregnant workers who were not injured on the job but were either offered accommodations or not required to take leave, much less that that percentage was substantial. This Court should reject EEOC's attempt to make an end run around *Young* and affirm the district court's grant of summary judgment for Walmart.

Second, the district court did not abuse its discretion by striking two claimants as sanctions for EEOC's repeated violations of its discovery orders. The district court granted EEOC's request that it, rather than Walmart, request and produce medical records from claimants and their medical providers. But after EEOC repeatedly violated court-ordered discovery deadlines concerning these records, the district court granted

Walmart's motion to strike two claimants. The district court did so, however, only *after* repeatedly warning EEOC that it could be sanctioned for its history of untimely document productions, and after two more violations of the court's deadlines. Even if unintentional, EEOC's pattern of repeated noncompliance justified sanctions, and the district court did not abuse its discretion by allowing the case to proceed while striking two claimants.

Third, the district court did not abuse its discretion by denying EEOC's motion to compel additional non-documentary discovery into the reasons for Walmart's 2017 changes to its TAD Policy and the identities of the responsible decisionmakers beyond what the court had already allowed. The district court's decision was reasonable because the requested information would be irrelevant to the intentional discrimination question and inadmissible under Federal Rule of Evidence 407's prohibition on the use of subsequent remedial measures to establish culpability. Furthermore, EEOC cannot show that the ruling caused actual and substantial prejudice, as required to secure reversal of a discovery ruling. For these reasons, this Court should affirm the district court.

STATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment to Walmart on EEOC's claims that Walmart violated the Pregnancy Discrimination Act by excluding pregnant associates from its TAD Policy, where (a) Walmart offered legitimate, nondiscriminatory reasons, unrelated to pregnancy or gender, for limiting TAD eligibility solely to workers with occupational injuries; and (b) EEOC did not carry its burden of establishing pretext under the *McDonnell Douglas* framework as articulated in *Young*.

2. Whether the district court abused its discretion by striking two claimants after (a) EEOC requested that it, rather than Walmart, request and produce medical records from claimants and their providers, but repeatedly violated court-ordered deadlines for producing those records; (b) the court warned EEOC that it could face sanctions for additional violations; and (c) EEOC then again violated the court's discovery orders, prejudicing Walmart.

3. Whether the district court abused its discretion by denying EEOC's motion to compel the production of non-documentary information relating to Walmart's decision to expand the TAD Policy in

2017 to include pregnant associates, given that the court allowed EEOC to obtain documentary discovery on those same issues and the requested information would be inadmissible under Federal Rule of Evidence 407.

STATEMENT OF THE CASE

A. Walmart Offered Different Accommodations to Associates During the Relevant Time Period Depending on Whether Their Medical Restrictions Arose from Occupational or Non-Occupational Causes.

EEOC sued Walmart on behalf of a number of female associates at Distribution Center #6025 in Menomonie, Wisconsin. Those associates allegedly experienced pregnancy-based discrimination after being denied accommodations EEOC claimed were available to other associates who were similar in their ability or inability to work.[1] R.1 at 1; Supp.Appx.32 ¶ 3. Distribution Center associates process items for distribution to Walmart stores. Supp.Appx.32 ¶¶ 5–6. That work involves manual labor such as loading, unloading, and packing a wide range of products. Supp.Appx.32–33 ¶¶ 7–8. During the relevant period (September 2014 through October 2017), associates with medical restrictions were eligible

[1] The number of claimants before the district court peaked at 19 but decreased to 13 by September 4, 2020. R.81-3 at 3; R.128 at 1. Eleven claimants remained by September 18, 2020. SA.8–10.

for a series of accommodations related to this heavy work, depending on whether their restrictions arose from occupational or non-occupational causes. A.91 ¶ 2; A.102; R.134-3 at 40:22–25; Supp.Appx.22; Supp.Appx.34 ¶¶ 17–18.

1. Walmart Limited TAD Accommodations to Occupationally Injured Associates.

Walmart accommodated associates with work-related injuries during the relevant period under its TAD Policy. A.91 ¶ 2; A.102. That policy was designed to "provide[] a temporary position or modified job duties to an associate with a work-related injury who has been released to modified duty by the treating physician." A.102. To obtain TAD accommodations, an associate with an occupational injury had to visit a physician to determine whether the associate could return to work with restrictions. A.103. Then, the associate's manager and worker's compensation claims administrator would consult and direct the associate either to keep working their regular job with modifications, or, if the associate's restrictions require eliminating essential job functions, to accept temporary light-duty work. A.102–03; R.134-3 at 24:18–25:14.

Under the TAD Policy, associates with work-related injuries could receive TAD accommodations for up to 90 days. R.134-3 at 22:22–23. If

the associate had not shown progress by that time, they were placed on leave. *Id.* at 22:23–25. But if the occupationally injured associate showed that they could resume regular job functions with another 30 days of light-duty work, then the associate's total TAD accommodations could be extended from 90 days to 120 days. *Id.* at 22:25–23:04.

The version of the TAD Policy in effect during the relevant period explained that the policy's benefits included "[d]ecreased associate recovery time" and sustained productivity; "[l]owered accident costs by reducing the payment of lost wages"; "[r]educed legal exposure by allowing the associate to earn full wages"; "[e]nhanced associate loyalty"; and "[i]ncreased morale of the injured associate." A.102. Under the TAD Policy, Walmart reduced its legal exposure because the associate earned full wages, rather than reduced wages under the Wisconsin worker's compensation system. SA.19. TAD also reduced Walmart's overall costs because Walmart did not have to hire a different associate to do that work. *Id.* According to the Wisconsin Department of Workforce Development, returning to work consistent with medical restrictions speeds up employee recovery from job-related injuries. *Id.*

The TAD Policy applied nationwide, and none of the Distribution Center's administrators, Human Resources personnel, supervisors, managers, or coaches could deviate from the policy by offering TAD accommodations to associates with non-occupational injuries. Supp.Appx.34 ¶¶ 23–26; R.155 at 19:04–07. If Walmart determined that a TAD associate's restrictions arose from non-occupational causes, the associate's TAD accommodations would be revoked. Supp.Appx.34 ¶ 27.

Walmart expanded the TAD Policy to include temporary light-duty accommodations to pregnant associates effective October 13, 2017. R.134-3 at 116:23–118:20; Supp.Appx.29. The revised terms of the policy provide: "If, due to pregnancy, childbirth, breastfeeding, or a related condition, you are unable to perform the essential functions of your job with another reasonable accommodation, you may be eligible for Temporary Alternative Duty (TAD)." Supp.Appx.29. Unlike occupationally injured TAD associates, pregnant associates are not limited to 120 days of light-duty assignment under the revised policy. R.134-3 at 120:12–17; R.155 at 135:01–07.

2. Walmart Offered Pregnant Associates and Other Associates with Medical Restrictions Reasonable Accommodations and Leaves of Absence.

During the relevant time, Walmart made multiple accommodations options available for associates with both pregnancy-related and non-pregnancy-related medical restrictions. Walmart's national "Accommodation in Employment" (ADA) Policy provided reasonable accommodations to associates with disabilities, associates with injuries arising from non-occupational causes, and associates with pregnancy-based medical restrictions "to enable them to perform the essential functions of their jobs, seek new jobs within Walmart and enjoy the benefits of employment." Supp.Appx.22; Supp.Appx.33 ¶ 15. Walmart's Accommodation Service Center determined whether reasonable accommodations for an associate's medical restrictions, pregnancy-related or not, were feasible and warranted. R.134-3 at 42:01–20. Examples of potential reasonable accommodations included "[m]aking existing facilities more accessible," "[p]roviding part-time or modified work schedules," "[c]hanging non-essential job functions," or reassigning the associate to a vacant position for which the associate was qualified within the Distribution Center or at another Walmart facility.

Supp.Appx.23; R.134-3 at 69:09–70:24. The policy did not authorize accommodations that would eliminate essential job functions. Supp.Appx.23.

If reasonable accommodations were unavailable, then associates with medical restrictions could take unpaid leaves of absence under the federal Family and Medical Leave Act (FMLA), Wisconsin's FMLA, and Walmart's personal-leave-of-absence policy. R.134-3 at 40:22–25. If an associate exhausted her leave options but medical restrictions, pregnancy-related or otherwise, still prevented her from resuming her former essential job functions, Walmart would seek to offer the associate job reassignment or other accommodations to facilitate her return to work. Supp.Appx.34 ¶¶ 17–18.

3. Claimants Were Ineligible for TAD During the Relevant Time Period and Instead Received Reasonable Accommodations and Leaves of Absence for Their Pregnancy-Related Medical Restrictions.

During the relevant period, Walmart accommodated each claimant's pregnancy-related medical conditions with reasonable accommodations under the ADA Policy, or leaves of absence. R.157-1 at 77:12–79:22, 135:12–23, 219:03–15 (Gilliam); R.157-5 at 66:11–20,

69:16–70:10; R.158-1 at 1–5 (Anderson); R.157-7 at 109:03–19, 161:22–162:09, 177:15–178:03, 184:08–185:22 (Cigan-Diaz); R.157-8 at 87:10–88:10 (Cliff); R.157-11 at 109:24–110:16, 114:22–115:16 (Horner); R.157-12 at 53:23–54:02 (Kitchenmaster); R.157-14 at 71:08–21, 81:04–82:06, 85:23–86:05, 90:18–91:07 (Kohls); R.110 at 127:10–22, 128:16–129:25, 131:19–132:23 (Lander); R.157-16 at 45:15–46:01, 142:25–143:15, 144:24–145:18 (Lein); R.157-18 at 133:01–16 (Welch); R.157-22 at 86:03–14, 88:13–23 (Wiedmaier). All claimants either received FMLA leave or otherwise took continuous leaves of absence to accommodate their pregnancy-related medical restrictions. *See* R.157-1 at 135:12–23, 219:03–15 (Gilliam); R.157-5 at 66:11–20 (Anderson); R.157-7 at 109:03–19, 161:22–162:09 (Cigan-Diaz); R.157-8 at 87:10–88:10 (Cliff); R.157-11 at 114:22–115:16 (Horner); R.157-12 at 53:23–54:02 (Kitchenmaster); R.157-14 at 71:08–21 (Kohls); R.157-16 at 144:24–145:18 (Lein); R.157-18 at 133:01–16 (Welch); R.157-22 at 86:03–14, 88:13–23 (Wiedmaier); R.110 at 128:16–129:25, 131:19–132:23 (Lander).

Furthermore, some claimants received approval for reduced schedules to accommodate their lifting restrictions. Gilliam received a part-time position as an order filler. R.157-1 at 77:12–79:22. Other

associates received approval to take on reduced schedules to accommodate their lifting restrictions. *See* R.157-5 at 69:16–70:10 (Anderson); R.157-11 at 109:24–110:16 (Horner); R.110 at 127:10–22 (Lander).

B. EEOC Brings Suit Against Walmart.

EEOC's discrimination claim against Walmart originated with an administrative complaint that claimant Alyssa Gilliam filed with the agency in August 2015. R.23-1 at 2–3. EEOC investigated and determined that there was reasonable cause to believe that Walmart violated Title VII by allegedly failing to accommodate Gilliam's request for temporary light duty under the TAD Policy during her pregnancy. R.32-1 at 2–3. Conciliation failed, so EEOC filed this lawsuit in September 2018. R.1 ¶¶ 6–10, 21–22.

Throughout the lifespan of this action in the district court, EEOC's failure to comply with court-ordered deadlines led to a series of protracted discovery disputes. Because two of the issues on appeal concern those disputes, they are recounted in detail below.

1. Despite Asking the Court to Allow It to Obtain Records from Claimants and Their Medical Providers, EEOC Repeatedly Failed to Timely Produce Claimants' Records.

On December 11, 2019, EEOC informed Walmart that it was adding twelve new claimants and considering the addition of seventeen others. R.54-1 ¶¶ 11–12. This triggered a series of discovery disputes in which EEOC ignored deadlines and failed to disclose relevant documents in a timely fashion.

At the time, the dispositive-motion deadline was on February 14, 2020, but EEOC had not produced medical records for the new and potential claimants. R.60 ¶¶ 4, 10–15, 20–30. Accordingly, Walmart served additional written discovery requests seeking the new claimants' medical records and other relevant information, along with deposition notices. R.60 ¶ 20; R.69-2 ¶¶ 14, 16–17; R.69-4; R.56-1. Rather than cooperate, EEOC exacerbated the logistical difficulties that the parties already faced in meeting the dispositive-motion deadline by disclosing on January 14, 2020 two more claimants (R.54-2 at 2–3) who Walmart moved to exclude. R.53 at 1. The district court, however, gave EEOC more time—setting a deadline for naming new claimants and extending the discovery and dispositive-motion deadlines, with the dispositive-

motion deadline then tentatively set for March 2, 2020. R.63 (text-only order).

Because the parties could not resolve their ongoing disagreements about document production protocol and deposition scheduling, Walmart moved for an emergency telephonic status conference in January 2020. R.60. In a subsequent status report, Walmart recited the ongoing problems with EEOC's discovery management, including the agency's failure to produce Walmart's requested documentation before scheduled depositions, EEOC's inability to ensure that all claimants were available for depositions before the applicable deadlines, and the agency's refusal to make the claimants available for later depositions, even though it had failed to produce their documents before their originally scheduled depositions. R.77 at 2–8.

As of February 4, 2020, EEOC had produced only 151 pages of documents for four of the named claimants combined and none for the rest, forcing Walmart to depose multiple claimants without having reviewed their records. *Id.* at 2, 4, 7.

2. The Magistrate Judge Ruled that EEOC Had to Produce the Claimants' Medical Records at Least Thirty Days Before Their Depositions.

The magistrate judge held a hearing on February 4, 2020, to resolve the disputes. A.1. During the hearing, EEOC agreed to "accept all discovery demands through written discovery for the claimants." A.17 at 17:07–20. The magistrate judge accordingly rejected Walmart's offer to assume responsibility for obtaining the claimants' records directly from their medical providers, holding instead that Walmart would need to rely on EEOC to produce the records and schedule the claimants' depositions. A.39 at 39:05–13. To give Walmart sufficient time to review each claimant's records before her deposition, the magistrate judge ordered EEOC to produce responsive documents to Walmart at least thirty days before each claimant's deposition. A.39–40 at 39:16–40:03. EEOC's counsel did not object to that deadline. *Id.* at 39:20–40:01.

Ultimately, the magistrate judge extended the deadline for claimant discovery to May 1, 2020, and the dispositive-motion deadline to May 15, 2020. R.79 at 1.[2] But during the hearing, the magistrate

[2] The district court later extended the claimant-discovery deadline to August 31, 2020 and dispositive-motion deadline to September 25, 2020 in a text-only order. *See* R.99.

judge repeatedly warned EEOC that it could face sanctions if it continued to cause delays or otherwise violated discovery rulings. A.30 at 30:13–23. The magistrate judge emphasized that those consequences could extend to sanctions if EEOC "was not forthcoming and timely in providing all information it was required to provide about a claimant prior to that claimant's deposition." A.30 at 30:08–12, A.38 at 38:25–39:04.

3. The Magistrate Judge Held a Second Status Conference to Address EEOC's Continuing Discovery-Order Violations.

Weeks after the February 4, 2020 discovery hearing, Walmart moved for another emergency status conference to address EEOC's continuing failure to comply with the discovery rulings. R.81 ¶ 6. Despite the magistrate judge's warnings, as of February 20, 2020, EEOC had still failed to produce responsive records thirty days before six claimants' scheduled depositions. *Id.* ¶¶ 5–6. EEOC had also refused to confirm the remaining claimants' availability for depositions and, instead, proposed waiting to do so until *after* EEOC produced the claimants' records—effectively nullifying the court's requirement that EEOC produce records 30 days before each claimant's deposition. *Id.* ¶ 5;

see also R.81-4 at 1–3; R.81-5 at 1–4; R.81-6 at 1–5; R.81-7 at 1–6. By the time of the filing, EEOC had provided no medical records for fourteen claimants, no non-medical records for fifteen claimants, and (apparently) complete medical records for only one claimant. R.81 ¶ 7.

The magistrate judge scheduled a telephonic hearing. He warned EEOC that if Walmart's complaints proved to be well-founded, "it is likely that the court will strike from this lawsuit any proposed claimant for whom the EEOC does not timely provide the required information and schedule for a timely deposition." R.82 (text-only order). The magistrate judge denied Walmart's renewed request for permission to seek the claimants' medical records directly from their providers. A.66 at 22:04–07. But the magistrate judge noted that the denial "could inure to Walmart's benefit if it were to turn out that the records are incomplete because the Court denied you your twice-requested opportunity to go straight to the providers": "If it turns out you don't have them all and the EEOC did not get them to you, *then that may be a showing of a material, substantive breach that requires striking the claimant*." *Id.* at 22:12–19 (emphasis added).

The magistrate judge also concluded that EEOC had committed yet another discovery-order violation by limiting its production of the claimants' medical records to the period of September 2014 to October 2017, *see* R.83 at 3, as opposed to the longer discovery period of January 2013 through September 2018, *see* R.36 at 29:14–17. The magistrate judge rejected the limitation as erroneous because it was not "sanctioned by the Court." A.63 at 19:09–11; *see also* A.64 at 20:08–12 (confirming that EEOC must produce documents "for that entire time period" to avoid violating the previous order). The judge determined that "technically the EEOC is not complying" with the applicable discovery rulings and was "in peril" of the district court granting a motion to strike. A.63 at 19:13–18.

As for possible sanctions, the magistrate judge stated that while it did not have the power to strike claimants, the district court did, and had shown a willingness to do so. A.56 at 12:22–13:01. He then advised Walmart that it was "free to file a motion to strike any claimant for whom it thinks it has—it has been prejudiced," especially given the magistrate judge's "unequivocal" rulings at the February 4, 2020 hearing and repeated warnings that subsequent failures to comply with court orders

"likely would result in the Court striking claimants from the case." A.57 at 13:11–17.

4. Despite Determining that EEOC Committed Discovery-Order Violations, the District Court Denied Walmart's First Motion to Strike Claimants.

Walmart moved to strike nine claimants in March 2020 because EEOC's ongoing failure to timely produce those claimants' documents before their depositions and to cooperate with deposition scheduling had severely prejudiced it. R.87 at 1–2, 9–10, 12–13. After reviewing the status of EEOC's medical records productions for the claimants, the district court held that EEOC's productions were consistently late and that EEOC "did violate court-ordered discovery production deadlines." A.83–84. The district court nonetheless declined to grant Walmart's motion to strike, determining that such sanctions were unwarranted at that time. A.84.

5. After Additional Discovery-Ruling Violations, the District Court Sanctioned EEOC for Its Pattern of Noncompliance by Striking Two Claimants.

Despite repeated warnings from both the magistrate and district court judges, EEOC continued to violate discovery orders. So on August 28, 2020, Walmart moved to strike claimants Sonnentag and Hayworth.

R.121 at 2. Specifically, EEOC withheld significant pages of Sonnentag's medical records. *Id.* at 6–7. Among other things, EEOC withheld records that revealed that Sonnentag urged her medical provider to require pregnancy-related medical restrictions in August 2017, even though her provider concluded that no restrictions were warranted. *Id.* Another record EEOC withheld revealed that Sonnentag had told her physician that she wanted to begin FMLA leave in October 2017 not because of medical restrictions, but because she wanted to be off work. *Id.* at 7–8; SA.9.

As for Hayworth, EEOC produced "nearly 600 pages of medical records pertaining to Hayworth's pregnancy" at the close of business on August 10, 2020—the day before Hayworth's scheduled deposition. R.121 at 8. Because it was produced the day before the deposition, EEOC's late production once again violated the court-ordered requirement of producing responsive records at least thirty days before each claimant's deposition. *Id.* As the production contained relevant medical records, Walmart was forced to reschedule Hayworth's deposition. *Id.*

Although EEOC did not dispute that it had once again violated the courts' discovery rulings, it argued that sanctions were unwarranted

because its violations were purportedly inadvertent and stemmed from difficulty of reviewing and producing so many medical records. R.130 at 1–4. EEOC also claimed that Walmart was not prejudiced by the delayed productions because Walmart had already obtained Sonnentag's missing records from another source and had deposed Hayworth on August 25, 2020, after receiving EEOC's supplemental production. *Id.* at 4–5.[3]

The district court granted Walmart's motion to strike Sonnentag and Hayworth but denied the other requested relief. SA.8–10. It noted EEOC's long history of discovery-order violations in the lawsuit, including its previous finding "that plaintiff had violated court-ordered discovery production deadlines regarding the pregnancy-related medical [records] of nine claimants." SA.9. Although those violations threatened to prejudice Walmart's ability to meet deadlines for claimants' depositions and dispositive motions, the court noted that at that point it had determined that striking the nine claimants was not necessary, instead granting deposition and dispositive-motion deadline extensions and warning EEOC about possible sanctions should it continue to fail to

[3] The court-ordered cutoff for claimant depositions was August 30, 2020.

meet its court-ordered discovery obligations. *Id.* However, given EEOC's continuing violations of those orders even after the court's repeated admonitions, the court determined that striking claimants was warranted:

> Although I accept plaintiff's assertion that its failures to meet the claimant-related production deadline were inadvertent, it insisted that it be the party in control of obtaining the records, agreeing to suffer the consequences if it could not perform that role. The court has warned plaintiff more than once that claimants would be struck if plaintiff did not produce the claimants' records in a timely manner. Accordingly, I am striking as Hayworth and Sonnentag as claimants.

SA.11. At the same time, the district court declined to grant Walmart's request for a discovery or dispositive-motion deadline extension, to award costs, or permit Walmart to obtain remaining medical records directly from claimants' medical providers. *Id.*

C. The District Court Granted in Part EEOC's Motion to Compel the Production of Documents Related to Walmart's 2017 Expansion of TAD Eligibility to Pregnant Associates and Denied Its Request for Non-Documentary Evidence.

In a separate discovery dispute, EEOC moved to compel responses to an interrogatory instructing Walmart to "identify the employees responsible for the changes" to Walmart's TAD Policy in 2017, along with requests for production seeking documents related to "why the policy

originally excluded pregnant employees" and "why the policy was changed to include pregnant employees." R.102 at 3–4. EEOC claimed that this information might clarify Walmart's alleged "bias toward pregnant women" and thereby prove "critical" for EEOC's ability to satisfy its burden of showing pretext. *Id.* at 3–4. Walmart opposed the motion, arguing that its reasons for expanding TAD eligibility to pregnant associates in 2017 were irrelevant and inadmissible under Federal Rule of Evidence 407's prohibition on the use of subsequent remedial measures to prove culpability. R.104 at 2.

The magistrate judge granted in part and denied in part EEOC's motion. A.89–90. He authorized EEOC to discover "any nonprivileged documents that explain why Walmart changed its TAD Policy" in October 2017. A.90. However, the magistrate judge noted that EEOC's justification for the request "verges on speculation" and that "it is extremely unlikely that EEOC will be allowed to use at trial any evidence about why Walmart changed its TAD Policy" because it would likely be, as Walmart had argued, irrelevant and inadmissible under Federal Rule of Evidence 407. A.89.

EEOC objected to the magistrate judge's order in August 2020. Although EEOC now contends on appeal that the discovery sought was potentially relevant to punitive damages, it did not raise that issue in the district court. *See generally* R.114.

The district court confirmed that EEOC "could seek non-privileged documents relating to why the [TAD] policy originally excluded pregnant women," along with non-privileged documents relating to the later change in policy. SA.3–4. But the district court was not persuaded that the magistrate judge committed clear error by denying EEOC's request to "inquire into who was responsible for the changes in the temporary alternative duty policy or what training may have occurred after *Young* was decided." SA.4. The court also refused to compel Walmart to make a witness available to testify about those topics at a Rule 30(b)(6) deposition. *Id.* It declined to do so because the magistrate judge's order authorized the discovery of *documents* only, and EEOC had not satisfied its burden of demonstrating that the ruling was clearly erroneous or contrary to law. *Id.*

D. The District Court Granted Walmart's Summary Judgment Motion Because EEOC Did Not Demonstrate a Genuine Issue of Material Fact Whether Walmart Intentionally Discriminated Against Pregnant Associates.

After the parties cross-moved for summary judgment, the district court granted summary judgment for Walmart and denied EEOC's motion. SA.14. Applying the *McDonnell Douglas* framework, as articulated in *Young*, 135 S. Ct. at 1345, the district court first determined that EEOC had established a *prima facie* case of discrimination. SA.26–30. But it granted Walmart's summary judgment motion (and denied EEOC's) because EEOC failed to carry its burden of showing pretext at step three. SA.28, SA.30–44. As the district court correctly explained, under *Young*, "a plaintiff 'may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden"—thereby "giv[ing] rise to an inference of intentional discrimination." SA.33–34 (quoting *Young*, 135 S. Ct. at 1354). EEOC argued it satisfied that standard because Walmart failed to (1) "allege[] any burden" from accommodating pregnant associates

under the TAD Policy and (2) "compare its actual burden to the burden placed on pregnant women." SA.34. The district court rejected EEOC's argument because it would turn the standard of proof on its head and "shift the burden back to defendant at the pretext stage, which is not appropriate." *Id.*

The district court also rejected EEOC's "significant-burden" balancing analysis at step three because the agency erroneously compared the percentage of pregnant associates who received TAD assignments (0%) with the percentage of occupationally injured associates who received TAD assignments (100%). SA.33–34. The court determined that EEOC misidentified the relevant group of comparators, which encompasses *all* associates "similar in their ability or inability to work." SA.32, 35. The correct group of comparators under *Young* would thus include non-occupationally injured or disabled associates. SA.35. Because EEOC did not present evidence about the percentage of *all* the claimants' comparators (including non-occupationally injured or disabled associates) who were provided light-duty accommodations, the agency failed to show that Walmart significantly burdened pregnant associates by accommodating them under its Accommodation in Employment Policy

rather than the TAD Policy. *Id.* The court held that EEOC did not carry its burden of establishing pretext, granted Walmart's summary judgment motion, and denied EEOC's. SA.44.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a summary judgment *de novo*. *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 955 (7th Cir. 2021).[4] When reviewing a summary-judgment decision, evidence is viewed in the light most favorable to the nonmoving party, and inferences are construed in the non-movant's favor. *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016) (citing Fed. R. Civ. P. 56(a)). That said, the non-moving party is "not entitled to the benefit of inferences that are supported only by speculation or conjecture." *Id.*

This Court reviews discovery rulings and sanctions orders for abuse of discretion. *Kuttner v. Zaruba*, 819 F.3d 970, 974 (7th Cir. 2016) (discovery rulings); *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637,

[4] Although this Court lacks jurisdiction to consider the denial of EEOC's summary judgment motion (*see*, *supra*, Statement of Jurisdiction), the trial court did not err in denying that motion. That motion was properly denied because EEOC did not raise a genuine dispute of material fact, let alone one that would enable it to succeed as a matter of law.

647 (7th Cir. 2011) (sanctions orders). That standard requires affirmance "unless the judge's ruling lacks a basis in law or fact or clearly appears to be arbitrary." *Kuttner*, 819 F.3d at 974. "A decision constitutes an abuse of discretion when it is not just clearly incorrect, but downright unreasonable"—even if this Court would have come to a different decision if deciding the issue on a clean slate. *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999) (quoting *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997)). Moreover, even if the district court abused its discretion by denying a discovery request, this Court "will not grant any relief 'absent a clear showing that the denial of discovery resulted in actual and substantial prejudice.'" *Kuttner*, 819 F.3d at 974 (quoting *e360 Insight, Inc.*, 658 F.3d at 644).

SUMMARY OF ARGUMENT

I. The Court should affirm the district court's summary judgment order. The TAD Policy was pregnancy-neutral, and eligibility for it turned solely on whether an associate was injured at work. Walmart offered multiple legitimate, nondiscriminatory reasons for limiting the TAD Policy to associates with work-related injuries based on that single factor, unrelated to pregnancy or gender, and thus satisfied

its burden at step two of the modified *McDonnell Douglas* framework announced in *Young*. To the extent that EEOC argues that *Young* established a "heightened" or "more specific" burden of production for defendants at step two, that conflicts with *Young*'s reaffirmation that in pregnancy discrimination lawsuits—just as in other Title VII actions—the plaintiff always bears the ultimate burden of proof. Finally, EEOC did not come close to showing at step three either that Walmart imposed a significant burden on its pregnant associates or that Walmart's legitimate, nondiscriminatory reasons were not sufficiently strong to justify any purported burden.

II. The district court also did not abuse its discretion by sanctioning EEOC for its pattern of noncompliance with discovery rulings. EEOC asked that it be the conduit for obtaining discovery from the claimants and their medical providers, and the district court granted its request. But rather than facilitating discovery, EEOC frustrated it. Worse yet, EEOC did so again and again, despite repeated warnings about the potential penalties for continued discovery violations.

III. Finally, the district court did not abuse its discretion by denying EEOC's motion to compel non-documentary discovery related to

Walmart's changes to its TAD Policy and the identities of those responsible for such changes. The district court permitted EEOC's requests for non-privileged documents explaining why Walmart changed its policy and rejected additional discovery because EEOC could not show that the magistrate judge committed clear error or ruled contrary to law. EEOC's new arguments, raised for the first time on appeal, are waived.

ARGUMENT

I. EEOC Did Not Carry Its Burden of Showing that Walmart Intentionally Discriminated Against Pregnant Associates.

Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of" or "on the basis of" sex. 42 U.S.C. § 2000e-2(a)(2). The PDA modified that prohibition of sex-based discrimination. Its first clause clarifies that discrimination "because of sex" encompasses discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Id.* § 2000e(k). The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

Like other Title VII discrimination claimants, plaintiffs may prove a PDA claim under either a disparate treatment or disparate impact theory of liability. *Young*, 135 S. Ct. at 1345. Here, EEOC chose to proceed under a disparate treatment theory, which requires a plaintiff to show that an employer "intentionally treated a complainant less favorably than employees with the complainant's qualifications but outside the complainant's protected class." *Young*, 135 S. Ct. at 1345 (cleaned up). To prevail on that disparate treatment theory, EEOC needed to establish that "the protected trait actually motivated the employer's decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

Disparate treatment may be shown either by direct evidence of discrimination or, if no such evidence is available, by relying on the *McDonnell Douglas* burden-shifting framework. *Young*, 135 S. Ct. at 1345 (citing *McDonnell Douglas*, 411 U.S. 792). EEOC claimed that Walmart's TAD Policy did not provide accommodations for pregnancy-related lifting restrictions. As the district court noted, the parties "agree[d] that there is no direct evidence of discrimination . . . ." SA.27. Thus, the district court properly applied the *McDonnell Douglas*

framework, as set forth in *Young*, to EEOC's pregnancy discrimination claim. *Young*, 135 S. Ct. at 1354.

That framework generally proceeds in three steps: (1) the plaintiff must make out a *prima facie* case of discrimination; (2) the defendant must then articulate a legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must show that the proffered reason is in fact a pretext for intentional discrimination.[5] *Id.* at 1353–54. Under the burden-shifting framework established by *Young*, a plaintiff alleging pregnancy discrimination may, as noted above, reach a jury at step three by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden"—instead "giv[ing] rise to an inference of intentional discrimination." *Id.* at 1354.

The district court correctly concluded that Walmart met its burden at stage two, and EEOC had not carried its burden at stage three of presenting evidence that Walmart intentionally discriminated against the claimants by limiting TAD-eligibility to only associates with work-

[5] This appeal concerns only the second and third steps.

related injuries (whether pregnant or not). For these reasons, this Court should affirm the district court's grant of summary judgment for Walmart.

A. Walmart Offered Legitimate, Nondiscriminatory Reasons for Limiting TAD Eligibility to Associates with Occupational Injuries.

EEOC's claim that Walmart did not explain why it limited TAD eligibility to associates with work-related injuries ignores the extensive record in this case. Walmart articulated multiple reasons for limiting TAD eligibility to associates with occupational injuries based on the objectives identified in the TAD Policy. These included "[d]ecreas[ing] associate recovery time," "[l]ower[ing] accident costs by reducing the payment of lost wages," "[r]educ[ing] legal exposure by allowing the associate to earn full wages," "[e]nhanc[ing] associate loyalty," and "[i]ncreasing morale of the injured associate." A.102; *see also* Supp.Appx.35 ¶¶ 28–29. Those legitimate and nondiscriminatory reasons satisfy Walmart's burden at step two. *Young*, 135 S. Ct. at 1354; *Legg v. Ulster Cnty.*, 820 F.3d 67, 75 (2d Cir. 2016) (compliance with state worker's compensation law constituted a legitimate, nondiscriminatory

reason for excluding pregnancy-related medical conditions from an accommodations policy).

Two of those objectives (reduction of costs and legal exposure) arise from Wisconsin's Worker's Compensation Act, which holds an employer liable for lost wages when an employee sustains an injury in the course of employment. Wis. Stat. §§ 102.04–05, 102.07, 102.43. The Act requires employers to compensate employees with work-related injuries who become partially or totally disabled, with the amount owed generally calculated based on the employee's lost wages. *Id.* § 102.43. But if the employer makes a good-faith offer of suitable employment that accommodates the occupationally injured employee's medical restrictions and the employee rejects that offer without reasonable cause, the employer is no longer liable for compensating the employee during the disability period. *Id.* § 102.43(9)(a). Offering occupationally injured associates fully paid light-duty accommodations under the TAD Policy therefore minimized an occupationally injured associate's lost wages because of a work-related disability—and reduced Walmart's costs and legal exposure. Supp.Appx.35 ¶¶ 28–29. That was also consistent with the Wisconsin Department of Workforce Development's guidelines, which

emphasize the value of facilitating an occupationally injured employee's return to work "as soon as possible after injury" through temporary light-duty assignments. Supp.Appx.14.

Nevertheless, EEOC claims that Walmart's reasons are insufficient and offers a litany of arguments challenging them. EEOC Br. 30–35. None succeeds.

1. *Young* Did Not Establish a "Heightened" Burden of Production at Step Two of the *McDonnell Douglas* Framework.

EEOC begins by arguing that *Young* established a "heightened" or "more specific burden of production" at step two. *Id.* at 31–32. EEOC and its *amici* articulate two versions of that burden, requiring a defendant to: (1) show "why, when the employer accommodated so many, could it not [also] accommodate pregnant women," *id.* at 31 (quoting *Young*, 135 S. Ct. at 1355); and (2) explain why it excluded pregnancy-related medical conditions from the accommodations policy at issue, rather than merely explaining its reasons for limiting eligibility to a subgroup of non-pregnant employees, *id.* at 31–32; *Amici* Br. 11–15 (arguing that employers must offer a "sufficiently strong" reason to exclude pregnant workers). In fact, neither *Young* nor Title VII

precedent more generally supports either proposal, and no court of appeals has adopted this heightened standard. This Court should not be the first.

1. The first version of the burden proposed by EEOC and its *amici* is a transparent attempt to shift the ultimate burden of proof from the plaintiff EEOC (where it belongs) to the defendant Walmart (where it does not). For example, EEOC relies on *Young*'s statement that "[u]ltimately" the question is "whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination." EEOC Br. 31 (quoting *Young*, 135 S. Ct. at 1344). EEOC follows up with an equally misplaced and irrelevant quotation, contending that after *Young*, courts "must analyze the 'strength of the [employer's] justification' by considering 'why, when the employer accommodated so many, could it not [also] accommodate pregnant women.'" *Id.* (quoting *Young*, 135 S. Ct. at 1355) (brackets omitted). But neither quotation addresses the question of whether *defendants* must make a heightened showing at *step two*. Such a requirement would be inconsistent with *Young*, which makes clear repeatedly that plaintiffs retain the burden of proving intentional

discrimination in PDA lawsuits, while saying nothing about requiring defendants at step two to make a heightened showing. 135 S. Ct. at 1354 ("[T]he plaintiff may reach a jury on this issue *by providing sufficient evidence* that the employer's policies impose a significant burden on pregnant workers.") (emphasis added); *see also id.* ("The plaintiff can create a genuine issue of material fact as to whether a significant burden exists."); *id.* at 1355 ("[T]he continued focus on whether *the plaintiff has introduced sufficient evidence* to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines.") (first emphasis added).

EEOC's and its *amici's* position also conflicts with longstanding Title VII doctrine, which provides that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added). For example, as an alternative to the *McDonnell Douglas* framework, this Court applies a different test that focuses on "whether the totality of the evidence shows discrimination." *Igasaki*, 988 F.3d at 958. Either approach, however, requires the plaintiff to carry the

ultimate burden of proof. *Vega v. Chi. Park Dist.*, 954 F.3d 996, 1004 (7th Cir. 2020) ("A plaintiff can prove discrimination through various types of circumstantial evidence."). EEOC and its *amici* invite this Court to undo that precedent and improperly shift the burden of proof away from where it has always been: on the plaintiff. This Court should reject that unwarranted invitation.

EEOC counters that at least a "more specific burden of *production* finds support in the Supreme Court's analysis of the PDA's text" in *Young*. EEOC Br. 31 (emphasis added). Not so. *Young* relied on decades-old precedent as the basis for a defendant's duty to justify its failure to accommodate pregnancy-related medical conditions by articulating "'legitimate, nondiscriminatory' reasons for denying her accommodation," without ever mentioning or adopting a "heightened" standard at step two. 135 S. Ct. at 1354 (quoting *McDonnell Douglas*, 411 U.S. at 802). And the Court noted that its interpretation of the PDA "is consistent with longstanding interpretations of Title VII," *id.* at 1353, which also do not impose the "heightened" burden that EEOC advocates for here. *Burdine*, 450 U.S. at 257–58 (step two does not require a defendant "to introduce evidence which, in the absence of any evidence of

pretext, would *persuade* the trier of fact that the employment action was lawful"). Other appellate courts have applied *Young*'s burden-shifting framework without imposing a heightened standard at step two. *Legg*, 820 F.3d at 73; *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1285 (11th Cir. 2020) (per curiam). This Court should do the same.

2. At other points, EEOC and its *amici* frame the "heightened" standard in a second way: in step two, they claim, *Young* requires employers to expressly articulate its reasons for excluding pregnant employees from the accommodations at issue, rather than merely explaining their reasons for offering the benefit to certain non-pregnant employees. EEOC Br. 30; *Amici* Br. 13–15. But *Young* provides that an employer facing allegations of pregnancy discrimination must "justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation." 135 S. Ct. at 1354. Explaining why the allegedly discriminatory policy limited eligibility to a subgroup of non-pregnant employees is an appropriate way of justifying its refusal to accommodate the plaintiff. *Legg*, 820 F.3d at 75.

EEOC's and its *amici's* arguments to the contrary also rest on a distinction without a difference. Explaining "why [a defendant] provided a benefit to non-pregnant employees" and "why it *excluded* pregnant employees from the benefit" are two sides of the same coin. EEOC Br. 30; *Burdine*, 450 U.S. at 254 (step two requires the defendant to "produc[e] evidence that the plaintiff was rejected, *or someone else was preferred*, for a legitimate, nondiscriminatory reason" (emphasis added)). Consider the situation here. Walmart limited its TAD Policy to occupationally injured associates to minimize their recovery time, reduce Walmart's costs and legal exposure in the process, and enhance associate loyalty—objectives that arose from the largely unique set of costs, liability, and risk of low workplace morale that Walmart faces from associates with occupational injuries. A.102; *supra* at 34–35. The implication is clear. Walmart's TAD Policy during the relevant period did not accommodate medical restrictions arising from non-work-related injuries (including lifting restrictions of any kind, whether related to pregnancy or not) because associates without occupational injuries did not expose Walmart to the same liability and costs as those who did. Even if step two required defendants to explain why they excluded pregnancy-related medical

conditions (rather than why they provided a benefit just to those injured on the job), Walmart has done just that by articulating legitimate, nondiscriminatory reasons for limiting TAD eligibility to associates with restrictions arising from occupational injuries.

EEOC and its *amici* also ground their misreading of step two in the PDA's legislative overruling of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). EEOC Br. 31–32, *Amici* Br. 8–11. But that argument fares no better than their others. *Gilbert* concerned a pregnancy-discrimination challenge to a company plan that offered "nonoccupational sickness and accident benefits" to all employees without accommodating pregnancy-related absences. 429 U.S. at 128. *Gilbert* determined that the policy did not violate Title VII because it excluded pregnancy "on a neutral ground—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those." *Young*, 135 S. Ct. at 1353 (discussing *Gilbert*). Congress enacted the PDA with the intent of "overturn[ing] both the holding and the reasoning of the Court in the *Gilbert* decision"—and thus the Supreme Court held that the PDA must be interpreted to ensure that under it, *Gilbert* would come out differently. *Id.* According to EEOC and its *amici*, though, the PDA's

statutory purpose bars justifications of the type that Walmart presented here. They contend that a justification that merely "explains why the employer conferred a benefit on non-pregnant employees" without showing "why the employer excluded pregnant employees from that same benefit" is insufficient at step two because it "is the type of justification that the *Gilbert* employer could have asserted." EEOC Br. 32.

Once again, not so. The PDA's overruling of *Gilbert* does not require the wholesale rejection of neutral justifications for limiting benefit policies to certain (as opposed to only) non-pregnant employees with a special claim to the accommodations at issue. Indeed, *Young* confirmed as much, given the Court's refusal to read the PDA as granting an unconditional "most-favored-nation" status to pregnant employees that would require employers who provide some workers with an accommodation to also provide similar accommodations to all pregnant workers, irrespective of any other criteria. 135 S. Ct. at 1349–50. Rather, sometimes employers have good reason for affording differential treatment to subgroups of employees based on "differences arising out of special 'causes.'" *Id.* at 1350.

That's the situation here. Walmart owes a special duty to accommodate associates injured in the course of their employment—both to reduce its costs and legal exposure under state worker's compensation laws and to protect against the low morale and high employee turnover that would inevitably result from an employer's refusal to accommodate employees injured on the job. *See supra* at 34–35. Affirming the sufficiency of Walmart's justifications at step two would not jeopardize the PDA's overruling of *Gilbert*. The special-duty justification for limiting TAD to job-related injuries here was not present in *Gilbert*, because the accommodations in that case excluded *only* pregnant women (and included individuals with restrictions arising from nonoccupational causes). 135 S. Ct. at 1349–50.

2. Walmart Offered Multiple Legitimate, Nondiscriminatory Reasons that Satisfy Its Burden at Step Two.

As explained above, Walmart articulated multiple legitimate, nondiscriminatory reasons that sufficiently explain why TAD eligibility was limited to occupationally injured associates during the relevant time. EEOC's challenges to the sufficiency of those reasons are unavailing.

EEOC begins by claiming that Walmart essentially waived its workers-compensation-law argument, contending that: "Walmart did not actually rely on that justification" in its response to EEOC's interrogatory requesting that Walmart identify its reasons for excluding pregnancy-related medical restrictions from TAD, "instead pointing to the TAD Policy itself." EEOC Br. 33; *see also* A.97–98. That's wrong. The TAD Policy articulated all of Walmart's reasons for accommodating occupationally injured associates including "[l]ower[ing] accident costs by reducing the payment of lost wages" and "[r]educ[ing] legal exposure by allowing the associate to earn full wages." A.102. Those two objectives clearly referred to the costs and liability that Walmart faces under state worker's compensation laws like Wisconsin's, which require employers to compensate employees for the lost wages incurred from partial or total disability caused by an occupational injury. *See supra* at 34–35.

Next, EEOC argues that, in any event, compliance with state worker's compensation laws is an insufficient justification at step two, and that the Second Circuit in *Legg* erred by determining otherwise. EEOC Br. 33–34 (citing *Legg*, 820 F.3d at 75). EEOC's position conflicts with *Young*, which rejected the most-favored-nation reading of the PDA

precisely because the Supreme Court wanted to leave room for employers to provide exclusive benefits to employees with restrictions arising from "special 'causes.'" 135 S. Ct. at 1350. Moreover, as the Second Circuit noted in *Legg*, *Young* implied that compliance with a state worker's compensation law satisfies step two of the burden-shifting framework because the defendant in *Young* relied on that very justification, and the Supreme Court remanded only on the *third step*: whether the plaintiff established pretext. *Legg*, 820 F.3d at 74–75; *see also Young*, 135 S. Ct. at 1355–56.

In a one-sentence rebuttal, EEOC rejects *Legg*'s reasoning: "*Young*'s warning that certain rationales will not satisfy step 2 must carry some meaning." EEOC Br. 34 (citing *Young*, 135 S. Ct. at 1354). But that does not undermine the sufficiency of Walmart's state-worker's-compensation justification. The portion in *Young* to which EEOC refers simply precludes defendants from exclusively relying on a cost- or convenience-based reason at step two as a basis for differential treatment of pregnant employees. 135 S. Ct. at 1354 ("[C]onsistent with the Act's basic objective, that reason [at step two] normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant

women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."). *Young* says nothing suggesting that an employer's objectives of complying with and reducing its legal exposure under a state worker's compensation law, for gender neutral reasons, would be similarly insufficient. Far from it: *Young* suggests that such justifications would be sufficient for the reasons given above. *See supra* at 45.

Next, EEOC tries to undermine Walmart's remaining justifications by claiming that they "only explain why Walmart provided TAD to occupationally injured employees, not why it refused to provide TAD to women needing the same accommodations due to pregnancy." EEOC Br. 32–33. This argument repeats the same error that EEOC made in the heightened-standard argument: it artificially distinguishes Walmart's reasons for *providing* accommodations to occupationally injured associates from Walmart's reasons for *excluding* non-occupationally injured associates, pregnant or not, from those same accommodations, when the two sets of reasons are the same. Walmart offered light-duty accommodations exclusively to occupationally injured associates in response to the unique liability, costs, and risks presented

by on-the-job injuries. A.102. Those same reasons explain why Walmart excluded associates with non-work-related injuries or conditions, pregnancy-related or otherwise, from TAD eligibility.

EEOC appears to partially concede the point because it then claims that "*[a]t least one* of these justifications—increasing morale and loyalty—could also apply to pregnant employees." EEOC Br. 33 (emphasis added). But EEOC is wrong about that too. It is true that accommodating medical restrictions from nonoccupational causes, including pregnancy, can generally increase morale and loyalty. But that does not mean that the workplace-morale justification applies to pregnancy-related medical restrictions with the same force as restrictions arising from occupational injuries. Again, employers owe a unique duty to employees who sustain injuries (and stand to lose wages) from occupational activities done *at the employer's* behest. That unique duty explains both why Walmart limited TAD eligibility to occupationally injured associates (and no one else, pregnant or not) *and* why Walmart excluded all associates without work injuries (pregnant or not) during the relevant period.

Doubling down on its argument, EEOC notes that Walmart extended TAD eligibility to pregnant associates in 2017 "to create a positive working environment for pregnant associates and management' and to treat pregnant employees as 'valuable member[s] of the team.'" EEOC Br. 33 (quoting R.150-1 at 3). EEOC argues that Walmart's explanation for the expansion confirms that the workplace-morale justification would have applied to pregnant associates just as it did occupationally injured associates. *Id.* But EEOC cannot rely on such statements because they are inadmissible under Federal Rule of Evidence 407, which bars the use of subsequent remedial measures to prove culpability. *Dennis v. Cnty. of Fairfax*, 55 F.3d 151, 154 (4th Cir. 1995) ("[V]oluntary remedial acts are no basis for subsequent liability."). Adopting EEOC's contrary approach would create a perverse incentive for employers to "affirmatively ignore" discrimination complaints (or avoid expanding benefits) to avoid potential liability. *Id.* Moreover, even if the language from the revised accommodations policy were admissible (which it is not), it does not undermine Walmart's other legitimate, nondiscriminatory justifications for providing a special set of

accommodations to only occupationally injured associates under the prior TAD Policy.

As a last-ditch effort, EEOC claims that Walmart's justifications are insufficient because it "could have offered light duty to all pregnant women without any operational impact." EEOC Br. 34 (citing R.154 at 10, 29; R.155 at 8, 35). But that gets the record wrong. The first citation (R.154) refers to the deposition testimony of a former worker's compensation coordinator who provided information about how Walmart revised its policy to accommodate pregnancy, while the second (R.155) refers to the deposition of a Human Resources associate who testified that Walmart did not cap the number of associates who could be accommodated under the TAD Policy during the relevant time. Neither shows that Walmart could have expanded TAD eligibility to accommodate pregnancy-related medical restrictions during that period "without any operational impact." EEOC Br. 34.

While it is true that a cost justification is by itself insufficient to carry an employer's burden at step two, *Young*, 135 S. Ct. at 1354, it does not follow that an employer must show that including pregnant employees in the accommodations policy at issue would have been cost-

prohibitive to prevail at step two (or on the ultimate question of liability). EEOC cites no case requiring such a showing, and *Young* certainly does not support it. Walmart is accordingly under no obligation to make such a showing here.

3. Walmart Provided Sufficient Information About Its Justifications for Limiting TAD Eligibility to Occupationally Injured Associates to Lay the Groundwork for Step Three.

EEOC relies on *EEOC v. Target Corp.*, 460 F.3d 946 (7th Cir. 2006), to argue that Walmart failed to carry its burden of providing enough information about its justifications for this Court and EEOC to "'identify what evidence might' satisfy step 3 of the inquiry." EEOC Br. 35 (quoting *Target Corp.*, 460 F.3d at 958). But *Target* is readily distinguishable because the company's proffered explanation was so vague and generic. That case involved allegations of racial discrimination against African-American applicants for managerial positions. 460 F.3d at 949–50. This Court determined that the defendant did not meet its burden at step two of the burden-shifting framework because the defendant simply asserted that the applicant "did not meet the requirements for an ETL position, and therefore [the company] elected not to hire him." *Id.* at 958 (cleaned up). That "explanation" was insufficient because it failed to "frame the

dispute such that EEOC can respond to [the defendant's] asserted reason with specific evidence that this reason was a pretext for a discriminatory motive." *Id.* Without a "clear statement as to which requirements [the applicant] lacked," the Court reasoned, EEOC would be hard pressed to produce evidence that sheds "light on whether [the company] honestly believed that [the applicant] was not qualified." *Id.*

This case is nothing like *Target*. Unlike the defendant there, Walmart identified a series of specific justifications for limiting TAD accommodations to occupationally injured associates. A.102; Supp.Appx.35 ¶¶ 28–29; *see supra* at 36–38. Those concrete, specific reasons are a far cry from summarily asserting that a member of a protected class failed to meet some combination of unspecified qualifications for a sought-after position, as in *Target*, 460 F.3d at 958.

Because Walmart articulated legitimate, nondiscriminatory reasons for limiting TAD eligibility to occupationally injured associates during the relevant period, the burden thus shifted to EEOC to show that Walmart's justifications were pretextual, under *Young*'s step three.

B. EEOC Did Not Carry Its Burden of Showing that Walmart's Legitimate, Nondiscriminatory Reasons Were a Pretext for Intentional Discrimination on the Basis of Pregnancy.

Step three of the *McDonnell Douglas* framework requires a Title VII plaintiff to show that the employer's proffered legitimate, nondiscriminatory reasons for its actions "are in fact pretextual." *Young*, 135 S. Ct. at 1354. Under *Young,* a plaintiff alleging pregnancy discrimination "may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, *and* that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden"—thereby "giv[ing] rise to an inference of intentional discrimination." *Id.* (emphasis added).

One way to establish such a "significant burden" would be to "provid[e] evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* If an employer were to accommodate a significantly larger percentage of non-pregnant workers than pregnant ones similar in their ability or inability to work, the disparity would

support an inference that the employer is singling out employees with pregnancy-related medical restrictions for disfavor. *Id.* at 1354–55.[6]

EEOC offers multiple arguments for why it had carried its burden of proving pretext at step three. None succeeds.

1. *Young*'s Balancing Test Does Not Weigh in EEOC's Favor.

EEOC argues that *Young*'s balancing test comes out in its favor because Walmart denied light-duty accommodations under the TAD Policy to 100 percent of pregnant associates while granting light-duty accommodations to 100 percent of associates with work-related injuries who were similar in their ability or inability to work. EEOC Br. 11–12. In other words, EEOC compares the percentage of accommodated pregnant associates (0%) to the percentage of accommodated occupationally injured comparators (allegedly 100%) and argues that the disparity is significant enough to show pretext. *Id.* Not so.

That comparison misapplies *Young* because EEOC incorrectly identifies the relevant group of non-pregnant comparators. EEOC

[6] But even if they had managed to show such a significant disparity, a plaintiff would still have to show that the employer's legitimate, nondiscriminatory reasons were not sufficiently strong to justify the burden.

defines the comparator pool based on two criteria: (a) those who had similar medical restrictions compared to the pregnant claimants (*i.e.*, those who were similar in their ability or inability to work); *and* (b) were eligible for the TAD Policy. EEOC Br. 11–12. But that approach is inconsistent with *Young*'s balancing test, which is based on the percentage of accommodated pregnant workers as compared to the percentage of accommodated "non-pregnant workers"—where the identities of the non-pregnant comparators are not defined solely based on eligibility for the allegedly discriminatory policy at issue. 135 S. Ct. at 1354–55 (remanding to consider whether UPS provided more favorable treatment to at least some employees whose situation "cannot reasonably be distinguished" from the pregnant plaintiffs).

To define the non-pregnant comparators so narrowly would answer the question before it is asked—and make that portion of the third step a nullity. If EEOC's contrary approach were to prevail, the third step would come out in plaintiffs' favor in every single PDA case arising from an employer's allegedly discriminatory exclusion of pregnant employees from an accommodations policy. On the one hand, a policy's categorical exclusion of pregnancy-related conditions that did not arise on the job

would guarantee that zero pregnant plaintiffs have been accommodated. And on the other, limiting the pool of comparators to only those who are eligible for the very policy at issue would ensure that 100 percent of the "comparators" would have been accommodated—even if, as here, non-pregnant employees were also excluded from the policy. The only way for an employer to avoid Title VII liability for pregnancy discrimination would thus be to cover pregnancy-related medical restrictions in every accommodations policy—regardless of the legitimate, nondiscriminatory reasons an employer might have to provide exclusive benefits to employees with restrictions arising from "special 'causes.'" *Young*, 135 S. Ct. at 1350. The result would grant pregnant employees the very "most-favored-nation" status that *Young* rejected. *Id.*

To correctly apply *Young*'s balancing test, EEOC instead needed to compare (a) the proportion of accommodated pregnant employees, with (b) the proportion of accommodated non-pregnant employees who were similar in their ability or inability to work—with the latter group encompassing employees with *both* occupational and nonoccupational injuries, as well as those with disabilities. *Id.* But EEOC did not develop a record on this issue and cannot make that showing here. Indeed, as the

district court noted, it was "undisputed that *all* workers not injured on the job were subject to the same rules regarding job transfers, reassignments, and leave"—whether pregnant or not. SA.36. The most EEOC can offer is that 100 percent of occupationally injured associates were accommodated with light-duty assignments under the TAD Policy, EEOC Br. 37–38—a fact that says nothing about the proportion of total non-pregnant comparators which Walmart accommodated.

EEOC's response to this objection is to blame Walmart for the agency's own mistake: "Walmart did not make a showing that any specific member of these groups [*i.e.*, non-pregnant comparators requiring accommodations due to disability or nonoccupational injury] was similar to pregnant employees in their 'ability or inability to work.'" EEOC Br. 38. That response is meritless. Once again, EEOC seeks to reverse the ultimate burden of proof. Walmart does not have to prove that the balancing test comes out in its favor. Rather, EEOC bears the burden of showing pretext at step three and thus must produce evidence about the proportion of non-pregnant comparators who were accommodated with light-duty assignments. *Young*, 135 S. Ct. at 1355. It did not.

Moreover, to the extent that EEOC appears to dispute whether employees with nonoccupational injuries and other disabilities are comparable to pregnant employees, that position is inconsistent with EEOC's argument at step one of the burden-shifting framework. In its step-one argument, EEOC agreed that "'the comparator analysis under the PDA focuses on a single criterion—one's ability to do the job,' and not how the limitation arose." EEOC Br. 30 (quoting *Lewis v. City of Union City*, 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (en banc)). That principle also applies at step three and requires EEOC to produce some evidence regarding the proportion of comparators who were accommodated—no matter how their disabilities or medical conditions arose.

Finally, EEOC claims that it "was not required to develop statistical data as to the percentage of non-pregnant workers accommodated" here because *Legg* reversed the grant of summary-judgment to the defendants, despite the record's being "unclear . . . whether the [employer] accommodated a large percentage of non-pregnant employees." EEOC Br. 38 (quoting *Legg*, 820 F.3d at 76). But *Legg* does not help EEOC.

To begin with, *Legg* acknowledged that "[a] policy that requires nearly all workers to use sick leave when injured or ill rather than be accommodated on the job with light duty is not an unreasonable one." *Legg,* 820 F.3d at 78. *Legg* nonetheless reversed the grant of summary judgment because defendants had relied on *inconsistent* justifications for excluding pregnant employees from the light-duty accommodations at issue, including encouraging employees to accumulate sick time, promoting the safety of pregnant women and their unborn children, and avoiding the increased costs associated with providing light-duty accommodations for pregnancy. *Legg*, 820 F.3d at 75 (citing *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013) (inconsistencies in employer's justification suggest pretext)). By contrast here, as the district court found, EEOC "has not cited examples of [Walmart] failing to follow its own TAD or ADA policies, offering inconsistent explanations for its TAD [P]olicy, or offering inconsistent explanations for denying job transfers or assignments to pregnant workers with medical restrictions." SA.39.

2. EEOC Has Not Offered Other Evidence Showing Pretext.

EEOC also identifies a series of other factors that allegedly support a showing of pretext. None suffices.

First, EEOC claims that Walmart's accommodation of associates with disabilities through its ADA Policy constituted further evidence of intentional discrimination because "Walmart never accommodated EEOC's claimants in the same way." EEOC Br. 39. To the contrary, in text and in practice, the ADA Policy accommodated medical restrictions arising from pregnancy just as it would disabilities arising from nonoccupational causes and, thus, does not show that Walmart singled-out pregnancy-related medical restrictions for disfavor. Supp.Appx.33 ¶ 15. To the extent that EEOC seeks to argue that the policy "in practice" failed to accommodate pregnant associates to the same extent that it did non-pregnant ones, it offers no more than baseless speculation and inadmissible hearsay, which cannot meet its burden. EEOC Br. 39–40. *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int'l, Inc.*, 533 F.3d 555, 562 (7th Cir. 2008) (disregarding affidavits opposing summary judgment that lacked personal knowledge and were based on speculation

and hearsay); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 735–36 (7th Cir. 2001) (affirming trial court's striking of inadmissible hearsay from summary judgment consideration); *Bradley v. Work*, 154 F.3d 704, 707 (7th Cir. 1998) ("[T]o the extent that the proffered evidentiary materials contain inadmissible hearsay, lay opinions, speculations, or conclusions, they are stricken."); Fed. R. Civ. P. 56(e)(1).

Second, EEOC argues that *Young* left open the possibility of reliance on other, nonstatistical forms of evidence, including testimony from the claimants about their alleged garden-variety emotional distress. EEOC Br. 40–41. But such testimony does not have any bearing on the key question at step three: whether the plaintiff can create a genuine issue of material fact as to whether the defendant's purportedly legitimate justifications were pretextual, and that the defendant in fact intended to discriminate on the basis of pregnancy. *Young*, 135 S. Ct. at 1355. Furthermore, conceivably *any* claimant alleging pregnancy discrimination could allege garden-variety emotional distress. If that were enough to show a "significant burden" at step three, then virtually every pregnancy-discrimination plaintiff would prevail under *Young* so long as they can survive step one. Again, such a result would amount to

granting pregnant employees the very "most-favored-nation" status that *Young* rejected, and this Court should reject EEOC's position for that reason.

Third, the anecdotal testimony does not support EEOC's pretext showing either. EEOC Br. 41. Walmart's TAD Policy was *nationwide* in scope, and no Distribution Center personnel possessed the discretionary authority to deviate from it. Supp.Appx.34 ¶¶ 23–26; R.155 at 19:04–07. Anecdotal allegations of *local* managers making disparaging comments are thus irrelevant to the ultimate question in a pregnancy-discrimination lawsuit like this one: whether the employer (Walmart) intentionally discriminated "against pregnant employees" by excluding all associates injured or disabled for non-work-related reasons from the TAD Policy at issue. *Young*, 135 S. Ct. at 1355.

3. Even If Walmart Could Be Said to Have Burdened Pregnant Associates (Which It Did Not), the Burden Is Not Particular to Pregnant Associates and Is Outweighed by Walmart's Legitimate, Nondiscriminatory Reasons for Its Actions.

Nor, for that matter, can EEOC undermine Walmart's legitimate, nondiscriminatory justifications and thus establish that any alleged burden outweighs the justifications for excluding pregnant associates

from TAD. *Young*, 135 S. Ct. at 1355. EEOC claims that Walmart's justifications "necessarily fail because they were even weaker than the cost and convenience justifications disapproved in *Young*." EEOC Br. 42. But that has it backwards. *Young* involved a pregnancy discrimination claim against an employer that excluded pregnant employees from light-duty accommodations. 135 S. Ct. at 1344. Despite excluding pregnant employees from the policy, the employer in *Young* allegedly extended light-duty accommodations to a wide range of non-pregnant employees, including: occupationally injured employees; employees who were permanently disabled under the Americans with Disabilities Act; and "drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident" including as a result of a DUI. *Id.* at 1346.

The *Young* defendant's inclusion of such a disparate group of non-pregnant employees precluded it from relying on the set of justifications that Walmart presents here—all of which arise from the unique set of liability, costs, and risks of reduced productivity and low workplace morale that employers face from associates with work-related injuries. *See supra* at 34–35. Walmart's case is accordingly far more compelling

than the one in *Young* because (a) Walmart's justifications arise from a special duty to accommodate medical restrictions caused by occupational injury, and (b) Walmart did not accommodate subgroups of non-pregnant associates whose restrictions were caused by nonoccupational injuries or other disabilities unrelated to pregnancy. Thus, any "burden" from this pregnancy-neutral policy was not particular to pregnant workers, but was shared by all associates, pregnant or not, who were not injured on-the-job.

EEOC then repeats four of its prior arguments that purportedly undermine the strength of Walmart's legitimate, nondiscriminatory justifications for limiting TAD eligibility to occupationally injured associates. EEOC Br. 42–43. Those arguments do not improve with repetition, and none of them undermines Walmart's justifications for all the reasons provided above in Part I.B.

In sum, EEOC did not carry its burden of providing evidence that Walmart's legitimate, nondiscriminatory reasons for limiting TAD eligibility to only occupationally injured associates were in fact a pretext for discriminating against pregnant associates. The Court should affirm the district court's grant of summary judgment.

II. The District Court Did Not Abuse Its Discretion by Striking Two Claimants After Repeatedly Warning EEOC that Continuing Discovery-Order Violations Could Lead to Sanctions.

The district court also did not abuse its discretion by striking two claimants as sanctions for EEOC's pattern of noncompliance with the court's discovery orders. To prove otherwise, EEOC must show that "no reasonable person would agree with the trial court's assessment of what sanctions are appropriate." *Maynard v. Nygren*, 372 F.3d 890, 893 (7th Cir. 2004) (quoting *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992)). EEOC cannot clear that high bar.

EEOC begins by arguing that the district court improperly granted Walmart's motion to strike without making a requisite finding of fault or specifying the basis for granting sanctions (Rule 37(b)(2)(A) or its inherent authority). EEOC Br. 45–47. Neither contention undermines the district court's decision.

When a district court imposes sanctions for a party's misconduct under *either* Rule 37(b)(2)(A) *or* its inherent authority, it is required "to find that the responsible party acted or failed to act with a degree of culpability that exceeds simple inadvertence or mistake" before "choos[ing] dismissal as a sanction for discovery violations." *Ramirez v.*

T&H Lemont, Inc., 845 F.3d 772, 776 (7th Cir. 2016). EEOC argues that sanctions were improper because the district court conceded that EEOC's production delays were "inadvertent" and therefore its repeated noncompliance did not rise to the level of "fault" that would warrant dismissal. EEOC Br. 47. But, despite EEOC's arguments to the contrary, imposing sanctions does not require a showing of willfulness, intent, or bad faith on the part of the sanctioned party. Rather, sanctions are warranted so long as "the sanctioned party was guilty of 'extraordinarily poor judgment' or 'gross negligence.'" *Ramirez*, 845 F.3d at 776.

As the district court found, EEOC was guilty of exactly that. In its sanctions order, the court described EEOC's history of repeated discovery-order violations, including EEOC's failure to abide by its commitment to provide responsive documents for each claimant at least thirty days before her deposition, SA.8; the district court's previous findings that EEOC "had violated court-ordered discovery production deadlines regarding the pregnancy-related medical [documents] of nine claimants," SA.9; and the two subsequent additional violations based on EEOC's late production of responsive documents for the stricken claimants, *id.* The court then noted that EEOC had conceded that it

"missed the court-ordered deadlines," and that it had done so despite repeated warnings from the court that "claimants would be struck if plaintiff did not produce the claimants' records in a timely manner." SA.10–11.

The district court's reference to EEOC's late productions being "inadvertent" does not undermine the basis for sanctions. While an isolated, inadvertent failure to comply would not warrant dismissal, that changes "as soon as a pattern of noncompliance with the court's discovery orders emerges." *Newman v. Metro. Pier & Exposition Auth.*, 962 F.2d 589, 591 (7th Cir. 1992). Accordingly, this Court "review[s] a sanction not in isolation but in light of the entire procedural history of the case." *e360 Insight, Inc.*, 658 F.3d at 643 (cleaned up). Once a party is found to have repeatedly violated discovery orders, as was the case here, "the judge is entitled to act with swift decision"—including by issuing sanctions as severe as dismissal. *Newman*, 962 F.2d at 591.

Next, EEOC argues that even if the district court did make an implicit finding of fault, such a finding is unsupported by the record and therefore an abuse of discretion. EEOC Br. 48. That is wrong. As the district court noted, there is ample evidence showing EEOC's pattern of

repeated, prejudicial noncompliance. SA.8–11; *see also* A.30 at 30:13–23, 38:25–39:04; R.82; A.66 at 22:12–19.

Finally, EEOC claims that "the district court's dismissal sanction was insupportable because it was not 'proportionate to the circumstances.'" EEOC Br. 49 (quoting *Donelson v. Hardy*, 931 F.3d 565, 569 (7th Cir. 2019) (per curiam)). To the contrary, a "plaintiff's failure to comply with discovery orders is properly sanctioned by *dismissal* of the suit." *Newman*, 962 F.2d at 591 (emphasis added) (dismissal affirmed where plaintiff violated two discovery orders requiring her to appear for depositions); *Jennings v. Principi*, 114 F. App'x 224, 226–27 (7th Cir. 2004) (no abuse of discretion where district court dismissed pro se litigant's case because of her repeated failures to comply with the discovery schedule). The existence of less serious alternatives does not make imposing more serious sanctions an abuse of discretion, especially when those more serious sanctions fall short of dismissal. *Newman*, 962 F.2d at 591.

III. The District Court Did Not Abuse Its Discretion by Denying EEOC's Motion to Compel Non-Documentary Evidence Regarding Walmart's 2017 Expansion of TAD Eligibility to Pregnant Associates.

The final issue arises from the magistrate judge's order granting in part and denying in part EEOC's motion to compel additional information about changes to the TAD Policy. R.102 at 3–4. The magistrate judge authorized EEOC to seek "any nonprivileged documents that explain why Walmart changed its TAD Policy" but not non-documentary discovery on those same issues. A.89–90. The district court appropriately affirmed the magistrate judge's ruling because EEOC had failed to show that the magistrate judge committed clear error or ruled contrary to law. SA.3–4.

That decision was not an abuse of discretion. EEOC's primary argument to the contrary is that the district court erred by purportedly failing to appreciate the significance of the defendant's burden to "explain[] why it excluded pregnant employees from a benefit and whether [its] justifications are adequate." EEOC Br. 52. EEOC's legal argument fails for the same reasons provided in Part I.B. And even if EEOC's statutory reading were correct (which it is not), it does not follow that restricting discovery to documentary evidence was an abuse of

discretion—especially because the information would be inadmissible under Federal Rule of Evidence 407.

EEOC claims for the first time on appeal that non-documentary discovery was potentially relevant to punitive damages, EEOC Br. 52, but it waived that argument by not raising it below. *United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000). Even if it is not waived, EEOC has not shown that denying that additional discovery "resulted in actual and substantial prejudice," as required to obtain relief. *Kuttner*, 819 F.3d at 974 (quoting *e360 Insight, Inc.*, 658 F.3d at 644). EEOC cannot make that showing because the magistrate judge authorized extensive documentary discovery on the applicable issues. Again, the requested information would be inadmissible under Federal Rule of Evidence 407's prohibition on the use of subsequent remedial measures to prove culpability. The Court should affirm the district court's order.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's grant of summary judgment for Walmart, as well as its sanctions order and discovery ruling.

Respectfully submitted,

s/ Marisa C. Maleck

Marisa C. Maleck
Counsel of Record
Kathryn A. Running
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
mmaleck@kslaw.com
krunning@kslaw.com

Anne M. Voigts
KING & SPALDING LLP
601 South California Avenue
Suite 100
Palo Alto, CA 94304
(650) 422-6700
avoigts@kslaw.com

Counsel for Appellee

January 10, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because it contains 13,348 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: January 10, 2022

s/Marisa C. Maleck
Marisa C. Maleck

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Marisa C. Maleck
Marisa C. Maleck