Nos. 22-3202, 23-1021

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee/Cross-Appellant,

v.

WAL-MART STORES EAST, LP,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 17-cv-00070

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS CROSS-APPELLANT

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INTRODUCTION

In its cross-appeal, EEOC argued that the district court abused its discretion by denying nearly all of EEOC's requested injunctive relief because the court: (1) improperly shifted the burden to EEOC to show the discriminatory conduct was unlikely to recur; (2) ignored abundant evidence that Walmart's violations were likely to recur; and (3) improperly subjected all of EEOC's requested relief to the more stringent standard for "obey-the-law" injunctions and then failed to consider whether those heightened standards were satisfied.

Walmart fails meaningfully to rebut any of these arguments. First, Walmart argues that the district court did not improperly shift the burden, but it does not persuasively counter the court's explicit finding that "*EEOC* has not shown" the illegal conduct may resume. Second, Walmart insists that any future violations are unlikely because EEOC did not establish a pattern or practice of discrimination, but no such pattern is required for injunctive relief. And it is clear on this record that future violations are likely. At trial, Walmart defended its actions by arguing that the company had no obligation to provide Spaeth, or any employee, with a permanent schedule modification, and the company's senior managers even testified

that Walmart's policies prohibit such accommodations. Walmart points to nothing suggesting that these same managers—still employed by Walmart—will do anything but continue to deny permanent schedule accommodations to disabled employees in the future.

Finally, Walmart contends that the district court only subjected certain of EEOC's requests to the more stringent standard for obey-the-law relief, making discrete findings that each request was inappropriate for separate reasons. But the court made no such discrete findings, instead lumping EEOC's requests together as "for the most part, directives that Walmart obey the law" and denying them largely on this basis. And Walmart's own objections to EEOC's individual requests are unpersuasive because each request is narrowly tailored to the violations established here and necessary to avoid similar violations in the future. Accordingly, this Court should reverse and remand for entry of an appropriate injunction.

ARGUMENT

I. Walmart is incorrect that the abuse-of-discretion standard precludes EEOC's arguments for reversal of the denial of injunctive relief.

Walmart claims EEOC's arguments for reversal "fail[] under the standard of review" in light of the "broad discretion" afforded to the

district court. Walmart-Br.47 (citation omitted).[1] While an abuse-of-discretion standard is deferential, a district court's discretion under this standard is not limitless. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (district court's discretion to deny equitable relief in Title VII cases is "hardly . . . unfettered by meaningful standards or shielded from thorough appellate review"). Instead, a district court abuses its discretion where it commits legal error, ignores relevant evidence, or fails to consider governing factors. *See Bridges v. United States*, 991 F.3d 793, 799 (7th Cir. 2021) ("A decision that rests on an error of law is always an abuse of discretion."); *Jardien v. Winston Network, Inc.*, 888 F.2d 1151, 1159 (7th Cir. 1989) ("A trial court can abuse its discretion when it overlooks essential evidence or fails to consider relevant factors.").

Walmart claims that EEOC merely "quibbles with the district court's balancing of equitable factors" or contests the "weight" the district court assigned to relevant evidence, Walmart-Br.47, 53 (internal quotation marks

[1] Citations to "Walmart-Br._" and "Walmart-Supp.App._" refer to Walmart's Combined Reply/Response Brief (Dkt. 25) and Supplemental Appendix (Dkt. 26-1). Citations to "EEOC-Br._" and "EEOC-App._" refer to EEOC's Opening Brief as Cross-Appellant (Dkt. 19) and Appendix (Dkts. 20, 21). Citations to "SA._" refer to the Short Appendix attached to Walmart's opening brief (Dkt. 14). Citations to "Walmart-App._" refer to the Appendix submitted with Walmart's opening brief (Dkt. 15-1).

omitted), but that is incorrect. First, EEOC argues not that the district court improperly *weighed* relevant evidence but that the court *disregarded* certain evidence entirely. As explained below, the district court failed to acknowledge evidence that is highly probative of likelihood of recurrence, including testimony from senior Walmart managers that Walmart's policies prohibit permanent schedule accommodations. *Infra* pp. 8-12. The district court abused its discretion by "overlook[ing] [this] essential evidence." *Jardien*, 888 F.2d at 1159.

The district court committed several other legal errors that constitute an abuse of discretion. First, as explained in EEOC's opening brief, EEOC-Br.68-69, the district court impermissibly shifted the burden to EEOC to show likelihood of recurrence, denying injunctive relief because "*EEOC* ha[d] not shown that the proven illegal conduct may be resumed." SA.18 (emphasis added) (internal quotation marks omitted). Walmart appears to acknowledge that reversing the burden in this manner would constitute legal error but argues that the court did not do so here. Walmart-Br.46-47. Walmart's interpretation of the court's decision is unconvincing. Contrary to Walmart's claim, the court never "concluded that Walmart had shown that the conduct . . . in this case could [not] possibly persist in the future."

Walmart-Br.37 (internal quotation marks omitted) (alterations in original). The district court made no finding that Walmart satisfied its burden, nor did it identify any affirmative showing made by Walmart at all. SA.17-20. Instead, the court pointed solely to purported deficits in *EEOC*'s showing, ultimately concluding that "*EEOC* has not shown" a likelihood of recurrence. SA.18 (emphasis added). This reversal of the burden is a legal error that amounts to an abuse of discretion.

Second, as explained in EEOC's opening brief, the district court committed legal error by characterizing EEOC's requested relief as "for the most part, directives that Walmart obey the law," SA.17, and subjecting this relief to the more stringent standards governing obey-the-law injunctions. EEOC-Br.81-85. Walmart appears to agree that the vast majority of EEOC's requests are not obey-the-law in nature but argues that the district court only applied the more stringent obey-the-law standard "to certain of EEOC's requests" while "provid[ing] multiple other reasons to deny all of EEOC's requests based on the ordinary injunction standard." Walmart-Br.52. But this reading of the court's decision is again unconvincing. The court did not confine application of the obey-the-law standard to only "certain" requests, parsing out which provisions it

believed to be obey-the-law and which it did not. To be sure, the court said that EEOC's requested relief "for the most part" constituted obey-the-law directives, SA.17—suggesting it believed some provisions not to be obey-the-law—but it nevertheless subjected *all* of EEOC's requested relief to the more stringent obey-the-law standard. And many of the court's "other reasons," Walmart-Br.52, for denying relief—such as concerns about breadth or burden—were in fact intertwined with the erroneous assumption that EEOC sought obey-the-law injunctive provisions. *See* SA.17 ("An injunction *that does no more than order a defeated litigant to obey the law* raises several concerns, including overbreadth and vagueness.") (emphasis added) (internal quotation marks omitted); SA.18 ("*This type of obey-the-law injunction* burdens the Court . . . and . . . bypass[es] the normal administrative and adjudicative processes . . . .") (emphasis added) (internal quotation marks omitted). Walmart is thus incorrect that "appl[ication] [of] the obey-the-law standard" was confined to "one paragraph of [the] opinion." Walmart-Br.52.

Finally, as explained in EEOC's opening brief, EEOC-Br.86-89, the district court compounded this error by failing to apply the relevant factors that govern whether obey-the-law relief is warranted. These factors

examine whether the plaintiff has been reinstated, the responsible supervisors remain employed, and the circumstances convince the court that voluntary compliance will not be forthcoming. *See, e.g.*, *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 842-43 (7th Cir. 2013). The district court did not articulate this legal test or apply these factors here.[2] SA.17-20. The closest the court came was to acknowledge that "the managers involved with the discrimination are still employed by Walmart." SA.18. But the court erroneously dismissed this as an "[in]sufficient reason to grant the injunction" rather than as a factor favoring obey-the-law relief. SA.18. The court's "fail[ure] to consider [these] relevant factors" amounts to an abuse of discretion. *Jardien*, 888 F.2d at 1159.

[2] Walmart is incorrect that the relevant factors cut against an obey-the-law injunction. Walmart-Br.53-54. Although Spaeth has not presently availed herself of reinstatement, the responsible supervisors remain employed by Walmart, and there is every indication that Walmart's voluntary compliance will not be forthcoming absent an injunction. *Infra* pp. 8-12.

II. The district court abused its discretion in denying injunctive relief because Walmart failed to show its illegal conduct could not possibly persist in the future.

A. Walmart's illegal conduct is likely to recur because its senior managers continue to believe that permanent schedule accommodations are impermissible.

As discussed in EEOC's opening brief, EEOC-Br.69-73, senior Walmart managers insisted—even at trial—that the company's policies do not permit schedule accommodations that are permanent in nature or require deviating from computer-generated schedules. And Walmart took the litigation position at trial that the company had no obligation to provide permanent schedule accommodations to Spaeth or other associates. Walmart's refusal to acknowledge its obligations under the ADA strongly suggests that violations will recur absent injunctive relief.

First, Lee Spude—who at the time of trial served as regional director of Walmart's Region 53, Walmart-App.264—testified that Walmart's policies "contemplate offering short-term minor changes or adjustments to availability or preferences, *but in no way are we obligated in any way to offer permanent long-term scheduling changes*." EEOC-App.153 (emphasis added). In response, EEOC counsel presented Spude with Walmart's accommodation guidelines, *see* Walmart-Supp.App.87-91, and asked him to

confirm that they "say that long-term scheduling accommodations are a possibility." EEOC-App.153-54. Spude replied, "I don't recall that at all" and proceeded to read aloud language from the guidelines that he believed foreclosed "approvals of set schedules, guaranteed hours, or creating special schedules." EEOC-App.154. EEOC counsel then directed Spude to Walmart's "Accommodation in Employment" policy, which states that reasonable accommodations can include "modified work schedules," Walmart-Supp.App.83, and asked him to confirm that "nothing in Walmart's policy . . . says that long-term modified schedules will not be provided," Walmart-Supp.App.67-68. But Spude doubled down on his prior assertion, repeating that the guidelines he just read prohibit long-term schedule modifications. Walmart-Supp.App.68.

Walmart claims that Spude agreed that "there is nothing [in Walmart's policies that] says [such accommodations] are not provided." Walmart-Br.47 (quoting Walmart-Supp.App.68) (first alteration in original). But, as just noted, that quote comes not from Spude but from EEOC counsel; Spude instead *refused* to agree to that premise. Walmart-Supp.App.68 (Spude asserting that "what I've already read to you" "in the guidelines specifically" prohibits such accommodations). Walmart also

attempts to dismiss Spude's testimony as simply indicating that he was not "personally aware of such accommodations being given[.]" Walmart-Br.48. To be sure, Spude—and other managers—repeatedly asserted that Walmart *never* granted permanent schedule accommodations in practice, which is itself troubling. EEOC-App.86, 127, 130, 153; Walmart-App.238. But Spude's testimony went further, specifically asserting that Walmart's policies *preclude* such accommodations. The fact that Spude—a regional manager charged with overseeing approximately 30,000 employees and with "ensur[ing] that [Walmart is] effectively following [its] processes," EEOC-App.140; Walmart-App.265—believes permanent schedule accommodations are impermissible all but guarantees he will continue to deny such accommodations to disabled associates under his purview in violation of the ADA. *See Bruso v. United Airlines, Inc.*, 239 F.3d 848, 864 (7th Cir. 2001) (fact that "upper echelon of management felt free to ignore [company's] policies in the past" should raise doubt that "those same members of management will abide by them in the future").

Senior Walmart managers also testified that the company-wide directive to obey computer-generated schedules precluded them from adjusting individual schedules for any reason. Assistant Manager Julia

Stern identified a company-wide "directive . . . from the home office" that meant "we were to . . . run [the schedules] as they were generated and not make adjustments to them[.]" Walmart-App.177. Co-Manager Bonnie Ohlsen expressed a similar understanding. EEOC-App.114 (agreeing that company-wide directive prohibited adjusting schedules).

Walmart claims this directive "only required managers to stop the previous practice of manually scheduling each associate's shifts, not to cease providing reasonable scheduling accommodations for associates[.]"[3] Walmart-Br.48. But this is not how Walmart's managers understood this directive. Instead, these managers repeatedly cited this directive to justify the refusal to consider Spaeth's accommodation requests. EEOC-App.252 (Ohlsen told Spaeth's family that Spaeth's "hours were changed because of our system needing to fill the shifts we had open and not creating a shift as we could do in the past. They did not see that our system generated shifts *and we could not adjust them*.") (emphasis added); EEOC-App.14-15 (when Stevenson asked about restoring Spaeth's prior schedule, Stern said "the

[3] As support, Walmart cites Spude's testimony explaining that Walmart required managers to stop manually scheduling shifts, but that testimony says nothing about the permissibility of making exceptions to computer-generated schedules for reasonable accommodations. Walmart-Supp.App.58-59.

computer generates the schedules and there's nothing they can do about it"); EEOC-App.115-16 (Ohlsen explaining that "[w]e followed the direction from the home office" in declining to adjust Spaeth's shift). Stern and Ohlsen remain employed by Walmart, EEOC-App.85-86, 100, and their belief that they cannot deviate from computer-generated schedules makes it highly likely they will deny such requests in the future. *See EEOC v. Ilona of Hung., Inc.*, 108 F.3d 1569, 1579 (7th Cir. 1997) (upholding injunction where responsible supervisors remained employed); *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1254 (11th Cir. 1997) (illegal conduct likely to recur where responsible individuals "remain[ed] in the same supervisory positions . . . without . . . having been disciplined for their behavior").

Moreover, while Walmart's litigation position on appeal is that it simply did not understand that Spaeth needed an accommodation, *see, e.g.*, Walmart-Br.50, below Walmart insisted to the jury that the company had no obligation to provide the sort of permanent schedule accommodation at issue here. *See* EEOC-App.172 (Walmart's counsel asserting during closing argument that "[t]he idea that Walmart is going to give somebody a permanent fixed schedule is not something that they do"); EEOC-App.171

(district court taking issue with Walmart's position "that there's never a need for a change of schedule as an accommodation"). EEOC pointed this out in its opening brief, EEOC-Br.18, 89, and Walmart is silent on this issue in its response. Walmart's steadfast refusal to admit to any wrongdoing or need for change further indicates that the violations here are likely to recur. *Ilona of Hung.*, 108 F.3d at 1579 (injunction warranted where defendants "insisted throughout th[e] litigation" that they did nothing wrong); *Massey Yardley*, 117 F.3d at 1254 (fact that "no one at the company seems to have admitted to any wrongdoing" indicated likelihood of recurrence).[4]

The district court did not acknowledge the foregoing evidence that Walmart managers understood company policy to forbid the very type of permanent schedule accommodation improperly denied here. Walmart suggests that the court's general reference to its "careful consideration of the facts underlying this case" was meant to *sub silentio* reject this

[4] Walmart's refusal to acknowledge its ADA obligations also undercuts its argument that the "'substantial verdict' and 'publicity' in this case" will provide a "strong incentive" to comply with the ADA. Walmart-Br.40 (quoting SA.19). Walmart has not identified any corrective measures it took in response to the verdict but has instead continued to challenge the verdict and insist it did nothing wrong, "render[ing] meaningless [its] suggestion that [the] jury award will have a deterrent effect." *EEOC v. Boh Bros. Constr. Co., LLC*, No. 09-cv-6460, 2011 WL 3585599, at *2 (E.D. La. Aug. 16, 2011), *aff'd*, 731 F.3d 444 (5th Cir. 2013) (en banc).

testimony for unexplained reasons. Walmart-Br.48-49 (quoting SA.17). But this vague gesturing to the entirety of the "facts underlying this case" is insufficient to establish that the court did in fact consider this relevant evidence, or to permit "thorough appellate review" of the court's rationale (if any) for finding this testimony unpersuasive. *Albemarle*, 422 U.S. at 416; *see Sottoriva v. Claps*, 617 F.3d 971, 976 (7th Cir. 2010) (district court abuses its discretion by providing "mere conclusory statement" rather than "a rendering of reasons in support of a judgment"); *Wilson v. S&L Acquisition Co.*, 940 F.2d 1429, 1438 (11th Cir. 1991) (per curiam) (a district court "refus[ing] to grant equitable relief . . . must carefully articulate its rationale"; "[f]ailure to follow this mandate is an abuse of discretion") (internal quotation marks omitted).

B. Walmart's counter-arguments are unpersuasive.

Walmart offers three arguments for why a likelihood-of-recurrence finding remains inappropriate despite this ample evidence that senior Walmart managers continue to believe they have no obligation to provide permanent schedule accommodations to disabled employees: (1) EEOC established no "pattern or practice of discrimination"; (2) Walmart has "robust antidiscrimination and accommodations policies"; and (3) granting

an injunction would not "forward the purposes of the ADA." Walmart-Br.11. Each argument is unpersuasive.

1. Walmart is incorrect that a "pattern or practice" of discrimination is required for a likelihood-of-recurrence finding.

Walmart's argument that EEOC must "present[] . . . evidence" of a "pattern or practice of discrimination" in order to obtain a likelihood-of-recurrence finding, Walmart-Br.11, improperly shifts the burden to EEOC and, in any event, is foreclosed by this Court's case law. While "pattern or practice" evidence may confirm that an injunction is warranted, it is "not a necessary element" for establishing entitlement to an injunction. *EEOC v. Wal-Mart Stores, Inc.*, 38 F.4th 651, 661-62 (7th Cir. 2022). This Court has repeatedly "stated that a successful discrimination plaintiff need not demonstrate that his employer engages in a pattern or practice of discrimination in order to receive injunctive relief." *Bruso*, 239 F.3d at 864 (collecting cases) (district court abused its discretion in denying injunction based on purported lack of "systematic retaliation") (citation omitted); *see also AutoZone*, 707 F.3d at 840-44 (explaining "widespread discrimination" is not required and affirming region-wide injunction without pointing to discrimination beyond claimant's case).

The proper emphasis, as this Court has stressed, is not on evidence of *past* violations but instead on possible *future* violations. *AutoZone*, 707 F.3d at 840 ("Because the determinative judgment is about the employer's potential *future* actions, the EEOC need not prove that the employer *previously* engaged in widespread discrimination . . . .") (emphasis added); *see Ilona of Hung.*, 108 F.3d at 1579 (agreeing that although EEOC "had produced no evidence of past discrimination," concerns "remained . . . with the possibility of future discrimination" because, *inter alia*, employer admitted to no wrongdoing and responsible managers remained employed). Here, the testimony of senior Walmart managers that the company's policies prohibit permanent schedule accommodations is ample evidence that Walmart will continue improperly to deny such accommodations in the future, especially since Walmart's litigation position below was that it has no obligation to provide such accommodations. *Supra* pp. 8-13. This evidence is sufficient; EEOC has no further burden to "identify any other associate[s]" who suffered similar violations in the past. Walmart-Br.38 (emphasis omitted).

EEOC nonetheless *did* submit admissible evidence below of "other ADA complaints against Walmart like EEOC's allegations in this case,"

contrary to Walmart's assertion otherwise. Walmart-Br.37. As discussed in EEOC's opening brief, EEOC-Br.77-78, several of these complaints allege—just as here—that Walmart denied disabled employees schedule accommodations based on the company-wide directive prohibiting deviation from computer-generated schedules. For example, one lawsuit filed in Maine alleged that Walmart refused a schedule accommodation for a long-time employee "because of a new computerized scheduling system" under which "set schedules are not permissible." EEOC-App.305-06. In denying Walmart's motion to dismiss in that case, the district court relied on testimony from a regional manager that deviating from computer-generated schedules violates company policy. *Me. Hum. Rts. Comm'n ex. rel. Champagne v. Wal-Mart Stores E., L.P.*, No. 1:21-cv-50, 2021 WL 6064020, at *2-3 (D. Me. Dec. 22, 2021) (discussing manager's testimony that altering plaintiff's schedule "is not something that we are supposed to be doing" because "if we modify for one, we have to modify for all"). Similarly, the declaration of disability rights attorney Monica Murphy describes the experiences of several clients in Wisconsin whom Walmart denied schedule accommodations following the company-wide directive to obey computer-generated schedules. EEOC-App.289-91. Other lawsuits filed in

Oklahoma and Maine similarly alleged a refusal to grant schedule accommodations to disabled employees. EEOC-App.311-24.

The district court did not discuss or acknowledge any of this evidence. SA.17-20. Walmart contends the district court rejected this evidence based on a finding that it was (1) forfeited, (2) hearsay, and (3) factually distinguishable from this case. Walmart-Br.50. But the district court did not cite any of these objections; it simply remained silent as to the existence of this evidence. And, in any event, each of Walmart's objections is unavailing. First, EEOC did not forfeit reliance on this evidence by submitting it in support of its reply brief below. Because it was *Walmart*'s burden to establish that the violations here could not possibly persist, it was proper for EEOC to wait until its reply brief to respond to the arguments Walmart "affirmatively put forward as part of its defense, consistent with its burden[.]" Walmart-Br.46. In its opposition below, Walmart attempted to meet its burden by asserting that "there is no evidence of other ADA complaints against Walmart similar to the EEOC's allegations here." R.257 at 9. EEOC appropriately responded to this assertion in its reply brief by offering evidence of similar ADA complaints. R.260 at 6-7. And the district court did not deem this evidence forfeited,

instead permitting Walmart to file a sur-reply that addressed the rebuttal evidence EEOC submitted. SA.25; R.267.

Second, the evidence is not hearsay because it was not offered "to prove the truth of the matter asserted in the statement," Fed. R. Evid. 801(c)(2), *i.e.*, that Walmart *did in fact* improperly deny reasonable accommodations. *Cf. Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) (news article was inadmissible hearsay where "offered to prove the truth of its contents"). Instead, EEOC offered this evidence to rebut the purported absence of "other ADA *complaints*" against Walmart alleging similar violations. R.257 at 9 (emphasis added). The evidence is admissible to show the existence of such complaints in the public record, regardless of whether the allegations therein remain "unproven."[5] Walmart-Br.51.

Third, Walmart's unexplained claim that these complaints are "factually distinguishable" is baseless. Walmart-Br.50-51. As discussed

[5] All four lawsuits EEOC cited below, EEOC-Br.77-78; EEOC-App.298-337, ultimately settled. *See Mashburn v. Wal-Mart Stores E., LP*, 4:17-cv-337 (N.D. Okla.), R.26; *McLean v. Wal-Mart Stores E., LP*, 2:21-cv-120 (D. Me.), R.16; *Miles v. Wal-Mart Stores, Inc.*, 4:20-cv-4001 (D.S.D.), R.13, 14; *Me. Hum. Rts. Comm'n ex. rel. Champagne v. Wal-Mart Stores E., L.P.*, 1:21-cv-50 (D. Me.), R.59. Three settled without judicial ruling, and one settled following denial of Walmart's motion to dismiss. *See Me. Hum. Rts. Comm'n ex. rel. Champagne v. Wal-Mart Stores E., L.P.*, No. 1:21-cv-50, 2021 WL 6064020 (D. Me. Dec. 22, 2021).

above, *supra* pp. 17-18, many of these complaints are precisely analogous to this case, alleging that Walmart denied permanent schedule accommodations based on the same company-wide directive regarding computer-generated scheduling at issue here.

2. Walmart's formal policies do not establish that the illegal conduct could not possibly persist.

Walmart next argues that its "robust antidiscrimination and accommodations policies" "defeat[] any justification for injunctive relief." Walmart-Br.38. But most of these policies do not touch upon the ADA's reasonable-accommodation mandate at all, much less enshrine the obligation to provide permanent schedule accommodations. For example, the "Discrimination & Harassment Prevention Policy" Walmart relies upon just broadly "prohibits discrimination or harassment based on disability" and other protected characteristics, without specifying any obligation to provide reasonable accommodations. Walmart-Br.39; Walmart-Supp.App.79-81. And the fact that Walmart purportedly trains its *employees* on these policies and informs them of their right to request accommodations, Walmart-Br.39, is irrelevant because the allegation here is that Walmart's *management* fails to understand or comply with the ADA's

requirements. Moreover, Walmart took the position below that it had *no* legal obligation whatsoever to provide Spaeth a permanent schedule accommodation. *Supra* pp. 12-13.

Walmart also notes that it has an Accommodation Service Center (ASC) meant to help managers process accommodation requests. Walmart-Br.39. But the ASC is of no use if managers improperly deny permanent schedule accommodations without consulting the ASC based on the belief that they are flatly prohibited, as Walmart managers did here. EEOC-App.48, 66-67, 117 (managers agreeing they failed to forward Spaeth's requests to ASC). And the "[e]thics hotline" Walmart touts, Walmart-Br.39, was also unhelpful here, given that the ethics manager who reviewed Spaeth's case upheld her termination, provided no accommodation, and deemed the only necessary remedial action to be counseling managers to be *more* stringent in enforcing Walmart's attendance policies. EEOC-App.235.

The only relevant policies Walmart identifies are its "Accommodation in Employment" policy and its written accommodation "guidelines." Walmart-Br.38-39 (citing Walmart-Supp.App.82-83, 87-91). But these are the precise policies that Spude insisted contemplated only

short-term and not long-term schedule modifications. *Supra* pp. 8-10. And, despite these formal policies, Walmart managers uniformly attested that the company *never* grants permanent schedule accommodations in practice and that managers cannot deviate from computer-generated schedules. *Supra* pp. 10-12. The "mere policy statement[s]" Walmart cites were not "sufficient to remedy [Spaeth's] situation," nor are they likely to protect against future violations given this "systemic failure to properly implement" them in practice. *AutoZone*, 707 F.3d at 844. This Court should reject Walmart's invitation to rely on the bare existence of these formal policies without scrutinizing Walmart's actual compliance. *Id.* at 843-44 (existence of formal policies insufficient to insulate employer from injunction given management's non-compliance); *Bruso*, 239 F.3d at 864-65 (district court abused its discretion by denying injunctive relief based on "formal policies" without considering company's non-compliance).

Beyond these two formal policies that Walmart's own senior managers believe preclude the very sort of accommodations improperly denied here, Walmart submitted no affirmative evidence to discharge its burden. Walmart did not, for example, submit data showing that the company routinely grants disabled employees permanent schedule

accommodations, which might have suggested this case was "somehow different from the norm."[6] *AutoZone*, 707 F.3d at 840 (citation omitted). Nor did Walmart submit any evidence showing it has ever enforced its formal policies, clarified to managers that its existing policies do encompass permanent schedule accommodations, or implemented additional policies to safeguard against future violations. *Id.* at 843 (lack of "evidence showing that [employer] had enforced its policy" supported injunction); *EEOC v. Dolgencorp, LLC*, 277 F. Supp. 3d 932, 957 (E.D. Tenn. 2017) (absence of evidence that employer "implemented any additional policies or procedures to prevent future ADA violations" supported injunction), *aff'd on other grounds*, 899 F.3d 428 (6th Cir. 2018). Walmart falls far short of meeting its burden to demonstrate that the illegal conduct here "could [not] possibly persist in the future." Walmart-Br.37 (quoting *AutoZone*, 707 F.3d at 840).

[6] Walmart vaguely asserts that it "grants many reasonable accommodations each year through its Accommodations Service Center both in Wisconsin and throughout the country." Walmart-Br.38 (citing Walmart-Supp.App.53-54). But the cited testimony simply references the ASC's existence; it does not provide any data regarding the number of accommodations granted or even make a generalized assertion that Walmart regularly grants such accommodations. Walmart-Supp.App.53-54.

3. Contrary to Walmart's assertion, an injunction would advance the ADA's purposes.

Walmart claims that an injunction "would not forward the purposes of the ADA" because Walmart made only "an honest mistake" about Spaeth's need for accommodation. Walmart-Br.40, 50 (internal quotation marks omitted). But the jury found to the contrary, concluding that Walmart knew Spaeth needed an accommodation due to her disability and yet denied her repeated accommodation requests, fired her, and refused to reinstate her. EEOC-App.282-83. In making equitable determinations, this Court is "bound by [the jury's] factual findings," and thus cannot rely on Walmart's version of the facts, which the jury soundly rejected. *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995); *see also Massey Yardley*, 117 F.3d at 1254 (rejecting employer's arguments against injunctive relief that were "in large part contradicted by the jury's finding[s]").

Walmart also argues that an injunction does not serve the ADA's purposes in the absence of "discriminatory animus." Walmart-Br.40 (citation omitted). But animus is not required for an ADA violation. The ADA's reasonable-accommodation mandate is not directed at "whether the employer harbored invidious intent (or discriminatory animus) toward the

employee" but rather whether "the employer failed to act" affirmatively to provide a necessary accommodation. *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 797 (10th Cir. 2020) (en banc). Walmart's managers could have no antipathy toward disabled individuals but still violate the ADA by failing "to treat an employee with a disability differently, *i.e.*, preferentially," as the ADA requires. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002); *see* Walmart-App.322 (Stern stating that "it would not be fair to adjust shift times for [Spaeth] and not for other associates"); EEOC-App.253 (Castro recounting that Spaeth's family believed Walmart had to "cater to [her] needs"); EEOC-App.15 (when Stevenson asked Stern to adjust Spaeth's schedule, Stern said "[n]ope, I have to treat everybody the same"). Walmart's claimed lack of animus against Spaeth does not guarantee (or even suggest) that it will refrain from denying accommodations to disabled employees in the future based on a belief about the impropriety of "preferential treatment." An injunction designed to protect against such future improper denials resoundingly serves the ADA's purposes.

III. Walmart is incorrect that EEOC's individual requests for relief are overly broad, redundant, or otherwise inappropriate.

Walmart next argues that "each of EEOC's particular injunctive-relief requests . . . fails on its own specific terms, . . . as the district court appropriately found." Walmart-Br.37. As an initial matter, the district court did not find that "each of EEOC's particular injunctive-relief requests" should fail. Instead, the district court lumped EEOC's requests together as "for the most part, directives that Walmart obey the law," and denied them largely on this basis. SA.17. The objections Walmart offers to each specific request for relief are thus Walmart's alone, and they fail to show that the district court properly exercised its discretion in denying injunctive relief. Walmart offers several overarching objections that rest on infirm legal premises, *infra* at Section III(A), and its remaining objections to each specific request for relief are unavailing, *infra* at Section III(B).

A. Walmart's overarching objections to EEOC's requests rest on infirm legal arguments.

1. The requested provisions are tailored to this case.

Walmart claims that several of EEOC's requests are "not 'tailored to the particulars of th[is] case,'" Walmart-Br.43-45 (quoting *AutoZone*, 707 F.3d at 843), because EEOC established only a "unique incident" (rather

than a widespread pattern) of discrimination, Walmart-Br.43-45 (quoting SA.17). This "tailoring" objection is just a repackaging of the erroneous claim that EEOC must show "pattern or practice" evidence to be entitled to the relief it seeks. *Supra* pp. 15-16. Nor does the "tailoring" language Walmart cites from *AutoZone* stand for this proposition. *AutoZone*'s reference to inadequate tailoring described an instance where the conduct enjoined (retaliation) was entirely dissimilar from the violation established (discrimination). 707 F.3d at 843 (describing facts in *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989)). *AutoZone* in no way suggested that extending an injunction beyond the individual claimant in the absence of evidence of widespread discrimination would give rise to inadequate tailoring. To the contrary, *AutoZone* approved region-wide injunctive relief without such evidence, recognizing that "EEOC need not prove that the employer previously engaged in widespread discrimination, and injunctive relief is appropriate even where the [EEOC] has produced no evidence of discrimination going beyond the particular claimant's case." *Id.* at 840 (internal quotation marks omitted) (alteration in original).

2. Walmart's claim of voluntary compliance with the law is unavailing.

Walmart contends that several of EEOC's requests are unnecessary because "there is no evidence" that Walmart's "voluntary compliance" with the law "will not be forthcoming." Walmart-Br.41-45 (citation omitted). Not only is this a repackaging of Walmart's unpersuasive likelihood-of-recurrence argument, *supra* pp. 14-25, but it also employs the more stringent obey-the-law standard that Walmart appears to concede should not govern the bulk of EEOC's requested relief. Walmart-Br.52-53. *Compare AutoZone*, 707 F.3d at 842-43 (obey-the-law injunction warranted only if court is "convince[d] . . . that voluntary compliance with the law will not be forthcoming"), *with id.* at 840 (ordinary injunctive relief warranted unless employer meets burden to show illegal conduct "could [not] possibly persist in the future") (citation omitted).

3. Walmart is incorrect that the geographic scope of the requested relief is too broad.

Walmart also objects that EEOC's requested relief is too broad because it extends either company-wide (Requests 1 and 2), or region-wide (Requests 3-7), Walmart-Br.42-45, whereas the illegal conduct here was purportedly confined to "a single store." Walmart-Br.42. But, as EEOC

explained in its opening brief, EEOC-Br.76-77, company-wide relief is warranted because Walmart's refusal to grant Spaeth's accommodation requests stemmed in large part from a *company-wide* policy precluding exceptions to computer-generated schedules. And, with respect to region-wide relief, Spude's managerial role is co-extensive with the relief requested, as he oversees all "114 stores and . . . 30,000 associates" in Region 53. Walmart-Br.43; EEOC-App.140, 149. In addition, the illegal conduct occurred with the knowledge and approval of senior managers at the national and regional levels. EEOC-Br.78-80.

Walmart offers no meaningful response to this argument, other than to claim that EEOC "misread[s] . . . the record" because Walmart made only "an honest mistake" about Spaeth's need for accommodation. Walmart-Br.50. But this argument, as explained above, *supra* p. 24, is foreclosed by the jury's contrary findings.

Nor, contrary to Walmart's assertion, Walmart-Br.52 n.7, did EEOC forfeit its argument that the evidence, at minimum, supports injunctive relief as to the Manitowoc store. The broader request EEOC made below for company- or region-wide relief plainly encompasses the narrower

corollary of store-level relief. And the district court would have discretion on remand to craft an appropriate geographic scope for the injunction.

B. Walmart's remaining objections are unpersuasive.

1. Request 1: Enjoining Walmart from relying on the permanent nature of an accommodation as a basis for denial

EEOC's first injunctive-relief request sought to enjoin Walmart from denying reasonable accommodations in the absence of undue hardship "on the ground that the accommodations . . . are indefinite, long-term, or permanent." EEOC-App.285. Walmart claims this is an "obey-the-law" injunction, Walmart-Br.53 n.8, but that is incorrect. The requested relief does not simply restate Walmart's existing legal obligations but instead fleshes out with greater specificity what Walmart is required to do, focusing on the precise obligation to provide permanent or long-term schedule accommodations that Walmart's own managers fail to comprehend. *See* EEOC-Br.81-85.

Walmart additionally maintains this request is overbroad because it "seeks to enjoin Walmart to obey the *entirety* of the ADA's reasonable-accommodations provisions[.]" Walmart-Br.41. But this reads out key limiting language from EEOC's request, which does not seek to enjoin

Walmart from denying reasonable accommodations writ large but instead from doing so "*on the ground that the accommodations . . . are indefinite, long-term, or permanent*." EEOC-App.285 (emphasis added). Contrary to Walmart's claim, this request is *precisely* tailored to the violations established here, given the ample evidence that Walmart's managers believe such permanent accommodations are impermissible. *Supra* pp. 8-12.

2. Request 2: Clarification of company policies regarding permanent accommodations

EEOC's second request sought to require Walmart "to modify its accommodation policies to clarify that indefinite, long-term, or permanent disability accommodations are available to Walmart employees in the absence of undue hardship." EEOC-App.286. Walmart contends this provision is unnecessary and redundant because "Walmart's policies *already* contemplate '[m]odified work schedules' as a 'reasonable accommodation,' without distinction between short-term or long-term schedule modifications." Walmart-Br.42 (quoting Walmart-Supp.App.83). But Walmart does not deny that this policy nowhere affirmatively states that long-term schedule accommodations are permissible. And, even if this

is the proper reading of Walmart's policies, it is *not* the reading adopted by Walmart's senior managers. *Supra* pp. 8-12. Given the clear misunderstanding of Walmart's formal policies, EEOC's requested clarification of these policies cannot plausibly be deemed superfluous.

3. Request 3: Enjoining failure to provide reasonable accommodations in Walmart's Region 53

EEOC's third request sought to enjoin Walmart, within Region 53, "from failing to provide reasonable accommodations to employees with disabilities in violation of the ADA." EEOC-App.286. Walmart claims this "is an impermissibly overbroad 'obey the law' injunction," citing this Court's decision in *AutoZone*. Walmart-Br.43. But *AutoZone* upheld (subject to imposition of a time limit) a region-wide obey-the-law injunction nearly identical to EEOC's request here. 707 F.3d at 841 (provision requiring AutoZone to "make reasonable accommodations to the known physical limitations" of disabled employees working at AutoZone stores within the Central District of Illinois). The Court found such relief appropriate because—just as here—senior managers had ignored the company's accommodation policies and procedures. *Id.* at 843-44. Moreover, because EEOC's request here is confined to the specific violation at issue (denial of

reasonable accommodations)—and does not extend to other ADA violations like discriminatory hiring, firing, or pay—it is more narrowly tailored than many other obey-the-law injunctions this Court has approved. *See Ilona of Hung.*, 108 F.3d at 1578-79 (affirming injunction requiring employer in religious-accommodation case to refrain from "engaging in *any* practice that discriminates on the basis of religion") (emphasis added); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 817 (7th Cir. 1990), *aff'g,* 1988 WL 129329, at *1 (N.D. Ill. Nov. 28, 1988) (enjoining employer in sexual harassment case "from conducting its employment practices in a manner which violates Title VII" writ large).

4. Request 4: Posting notice of verdict and injunction

EEOC's fourth request sought to require Walmart, within Region 53, "to provide notice to all of its employees informing them of the verdict and injunction in this suit and to specifically inform employees of their right to contact the EEOC without fear of retaliation." EEOC-App.286. Walmart claims this provision is redundant "since Walmart already posts its antidiscrimination and accommodations policies in its breakrooms" and "on its intranet." Walmart-Br.44. But EEOC's request did not seek a posting of *Walmart's policies* but instead a posting about the *verdict and injunction*

and the right to contact EEOC without retaliation. This latter information is designed to communicate that non-compliance with federal anti-discrimination law carries serious consequences and to help employees feel comfortable reporting discrimination to EEOC in the future. Similar provisions are a standard component of many injunctions approved by this and other courts. *See, e.g.*, *Gurnee Inn*, 914 F.2d at 817, *aff'g*, 1988 WL 129329, at *1 (requiring employer to post notice of judgment); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 470 (5th Cir. 2013) (en banc), *aff'g in relevant part*, 2011 WL 3648483, at *5 (E.D. La. Aug. 18, 2011) (requiring employer to post notice of verdict); *EEOC v. United Health Programs of Am., Inc.*, 350 F. Supp. 3d 199, 227-28 (E.D.N.Y. 2018) (rejecting argument that anti-discrimination training rendered posting notice of verdict and injunction redundant).

Walmart is also incorrect that EEOC's proposed notice is deficient because it includes the amount of the jury award. Walmart-Br.44. The case Walmart cites took issue with including the jury award in the notice because the employer still intended to move for remittitur. *United Health Programs*, 350 F. Supp. 3d at 228. Moreover, the proposed notice in that case did not disclose the statutory-cap reduction *at all*. *EEOC v. United Health Programs of Am., Inc.*, 14-cv-3673 (E.D.N.Y.), R.210-2 at 19. Here, in contrast,

Walmart concedes that the proposed notice discloses the statutory-cap reduction, Walmart-Br.44; R.254-3 at 2, and the district court already denied Walmart's motion for remittitur.

5. Request 5: Record-keeping and reporting

EEOC's fifth request sought to require Walmart, within Region 53, to notify EEOC of any disability accommodation requests and Walmart's response. EEOC-App.286. Other than reciting the generalized objections discussed above, *supra* pp. 26-30, Walmart makes no argument that this specific relief is improper. Walmart-Br.44-45. And for good reason, given that this Court has approved nearly identical provisions to "ensure[] that [the employer] will implement the anti-discrimination procedure it purports to follow." *AutoZone*, 707 F.3d at 844 (requiring AutoZone to notify EEOC of accommodation requests and company's response); *see Ilona of Hung.*, 108 F.3d at 1578 (approving similar reporting provision).

6. Request 6: Training regarding schedule accommodations

EEOC's sixth request sought to require Walmart, within Region 53, "to provide training to its managers and supervisors regarding the obligation to grant schedule accommodations under the ADA . . . and to remind them that a request for a schedule accommodation . . . cannot be

denied at the store level." EEOC-App.286. Walmart claims its "robust training protocols" make this relief unnecessary. Walmart-Br.45. But, as discussed above, much of Walmart's training is directed toward employees rather than managers or addresses discrimination or harassment more broadly rather than the ADA's reasonable-accommodation mandate specifically. *Supra* pp. 20-21. And, in any event, EEOC does not seek generalized training regarding the ADA's reasonable-accommodation mandate but instead training directed specifically at the obligation to provide schedule accommodations and to refrain from denying such accommodations at the store-level, two obligations senior Walmart managers failed to comply with here. *Supra* pp. 8-12, 21; *see Dolgencorp*, 277 F. Supp. 3d at 963 (existing training did not render additional training unnecessary because several "employees at various levels of the corporate structure" had "little understanding . . . of their obligation to fulfill the ADA's requirements" despite existing training).

7. Request 7: Accountability for non-compliance with Walmart's EEO policies

EEOC's seventh request sought to require Walmart, within Region 53, "to document and evaluate adherence to Walmart's [EEO] policies

during the annual review process" for supervisors and managers. EEOC-App.286. Walmart claims this provision is inadequately tailored because "compliance with Walmart policies was not the violation established in the litigation." Walmart-Br.45 (internal quotation marks omitted). But Walmart repeatedly touts its "robust . . . policies" as a means of communicating relevant legal obligations to management and a purported safeguard against future violations. Walmart-Br.38, 49. Walmart fails to explain why incentivizing compliance with these policies would not also advance compliance with the ADA's reasonable-accommodation mandate.

CONCLUSION

For the foregoing reasons and the reasons in EEOC's opening brief, this Court should reverse the denial of injunctive relief and remand for an appropriate injunction.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Seventh Circuit Rule 28.1 because it contains 6,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on July 7, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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