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BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

PAULA M. HALEY,
EXECUTIVE DIRECTOR, *ex rel.*
MARCELLIN BROOKS,

Complainant,

v.

WAL-MART STORES, INC.,

Respondent.

ASCHR No. J-08-0069
OAH No. 11-0206-HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's Recommended Decision of November 29, 2011 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint of Marcellin Brooks v. Wal-Mart Stores, Inc. alleging discrimination based on race in violation of AS 18.80.230 is DISMISSED.

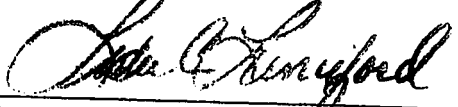
IT IS SO ORDERED.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

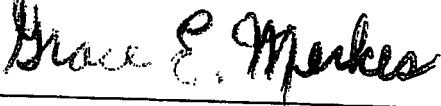
DATED: February 24, 2012


Mark S. Fish, Commissioner

DATED: February 24, 2012


Lester C. Lunceford, Commissioner

DATED: February 24, 2012


Grace Merkes, Commissioner

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CERTIFICATE OF SERVICE

I certify that on February 24, 2012, a true and correct copy of this Final Order was mailed or delivered to the following parties:

Lauri Owen, Human Rights Attorney (hand-delivery)
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and:

Administrative Law Judge Jeffrey A. Friedman
Office of Administrative Hearings
State of Alaska
550 W. 7th Avenue, Suite 1600
Anchorage, AK 99501

By: *Margaret A. Taylor*
Margaret A. Taylor
Commission Secretary

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
APPOINTMENT BY THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS**

Paula M. Haley, Executive Director, Alaska)
State Commission for Human Rights *ex rel.*)
MARCELLIN BROOKS,)
)
Complainant,)
)
v.)
)
WAL-MART STORES, INC.)
)
Respondent.)

OAH No. 11-0206-HRC
ASCHR No. J-08-0069

RECOMMENDED DECISION

I. INTRODUCTION

Executive Director Paula Haley, acting on behalf of Marcellin Brooks, filed an Accusation against Wal-Mart Stores, Inc. The Accusation alleges that Wal-Mart discriminated against Mr. Brooks in a place of public accommodation on account of his race when it denied him the advantages and privileges available to other individuals. Specifically, that Wal-Mart refused to allow Mr. Brooks to return a product for store credit under circumstances that, according to the Accusation, Wal-Mart's policies allowed the return.

Because the Executive Director has not met her burden of proof, the Commission should enter an order dismissing the Accusation.

II. FACTS

Mr. Brooks is an African American male.¹ He worked for Wal-Mart from August 1996 through March 2002, and became familiar with Wal-Mart's policies during that time. He also shops at Wal-Mart often, and has returned items without any problems on numerous occasions.

In February 2009, Mr. Brooks purchased a Seal-A-Meal² at Wal-Mart's Dimond store. The purchase price was \$68.28.³ On March 6, 2009, Mr. Brooks attempted to return this item to Wal-Mart's Benson Boulevard store. He did not have the receipt with him at the time. Mrs.

¹ Unless otherwise noted the factual findings are based on Mr. Brooks' testimony.

² Mr. Brooks explained that a Seal-A-Meal uses a vacuum process to seal food in a plastic bag.

³ Exhibit 7.

Brooks was outside in the car during this incident. Mr. Brooks spoke first with a customer service assistant who scanned the item and then called a Customer Service Manager (CSM) for assistance. The CSM did not allow Mr. Brooks to return the product for store credit.⁴ The precise reasons for this decision are disputed and are discussed in more detail below. Mr. Brooks acknowledged that neither the assistant nor the CSM at the Benson store made any negative racial comments during the transaction. However, Mr. Brooks felt that he was treated rudely and was disrespected.

After being refused at the Benson store, Mr. and Mrs. Brooks drove to the Dimond Boulevard store. This time Mrs. Brooks, who is an Alaska Native, went inside to return the Seal-A-Meal and was able to do so without any problem.⁵

Wal-Mart allows most items to be returned for a refund within 90 days of purchase with a receipt.⁶ When the value of the item being returned without a receipt is more than \$50, a CSM or other manager must authorize the return. The CSM has the option of allowing store credit on a gift card or may deny the return.⁷

III. DISCUSSION

A. Legal Framework

Alaska has a broad policy against discrimination based on a variety of protected classifications.⁸ In places of public accommodation, it is unlawful

To refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin[.⁹]

Under this statute, it would be illegal for Wal-Mart to refuse to allow Mr. Brooks to return the Seal-A-Meal for store credit because of his race.

The parties agree that the *McDonnell Douglas*¹⁰ burden shifting framework should be followed in this case. This framework uses a three part analysis. The complainant has the initial burden of establishing a *prima facie* case of discrimination. The burden then shifts to the

⁴ He would have been allowed to exchange his Seal-A-Meal for a different Seal-A-Meal, but Mr. Brooks did not wish to do that; he wanted store credit in the form of a gift card.

⁵ Both Mr. and Mrs. Brooks testified in support of this finding.

⁶ Testimony of Wal-Mart employees Shar Barrington, Sonya Hobson, & Shauna Mayberry.

⁷ *Id.*

⁸ AS 18.80.200.

⁹ As 18.80.230(a)(1).

¹⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

respondent to provide a legitimate, non-discriminatory reason for its actions. If that burden is met, the complainant has the burden of producing evidence to show that the offered reason is pretextual.

B. *Prima Facie* Case

Both parties agree that the case of *Callwood v. Dave & Busters, Inc.*¹¹ sets out the elements of a *prima facie* case.¹² In a public accommodation case such as this one, complainants must prove

(1) they are members of a protected class; (2) they made themselves available to receive and pay for services ordinarily provided by the defendant to all members of the public in the manner in which they are ordinarily provided; and (3) they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that (a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.¹³

There is no dispute that Mr. Brooks is a member of a protected class. There is evidence that he made himself available to receive a refund or store credit for returning an item previously purchased under circumstances where that refund or credit would ordinarily be given.¹⁴ The central dispute in this case revolves around the third element of the *Callwood* test.

As discussed above, Mr. Brooks was not allowed to return the Seal-A-Meal and obtain a refund or store credit when he attempted to return the item. Mrs. Brooks, who is a member of a different protected class, was allowed to return the item and obtain store credit. A person could rationally infer from this that the different treatment was due to unlawful discrimination. That the attempted return and successful return occurred at different stores and involved different Wal-Mart employees suggests there may be other rational inferences that could be drawn, but does not obviate the fact that one rational inference is that the difference was due to illegal discrimination.

¹¹ 98 F.Supp.2d 694 (D. MD 2000).

¹² Complainant's Prehearing brief, page 6; Wal-Mart's Prehearing brief, pages 9 – 10.

¹³ *Callwood*, 98 F.Supp.at 707 (D. MD 2000). Some courts have disapproved of this test in situations where there is adequate evidence of how similarly situated persons not of the protected class have received services. See *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d. 193, 203 – 204 (Ct.App. Iowa 2006) (discussing cases that have and have not followed the *Callwood* test). The *Callwood* test is used here at the suggestion of both parties. No ruling is made as to whether this test would be the appropriate test in other cases.

¹⁴ Mr. Brooks testified that he was familiar with Wal-Mart policies and that under the circumstances he described, he should have been given store credit. This evidence is sufficient to support a *prima facie* case.

The Executive Director has established a *prima facie* case.

C. Legitimate, Non-Discriminatory Reason

The next question is whether Wal-Mart has established a legitimate, non-discriminatory reason for its decision to deny store credit to Mr. Brooks.

Fatu Solomona was the customer service assistant who Mr. Brooks approached to return the Seal-A-Meal.¹⁵ She testified that because the value of the item was more than \$50 and Mr. Brooks did not have a receipt, she needed a manager's approval to accept the return. The manager who came to assist with this transaction was Kalie Kaimimoku.¹⁶ Ms. Kaimimoku only worked for Wal-Mart for about six months. She testified that her understanding of the Wal-Mart policy was that she could not authorize a refund if the customer did not have a receipt. Without a receipt she could approve an exchange, but she could not take the merchandise back and issue store credit or a cash refund.

Ms. Kaimimoku testified that she followed this policy stringently. Nine out of ten times, if the customer did not have a receipt, she would not authorize a refund. She testified that refunds were only allowed within 90 days of purchase on most items, and if there is no receipt, and no record of the purchase in the store computer, there is no way to determine if the customer was returning the item within the 90 day time limit. She does not believe she treated Mr. Brooks any differently than other customers. Her normal procedure was to tell customers that without a receipt they could exchange the product, call the manufacturer, or find the receipt. She believes she would have followed her normal practice with Mr. Brooks.

Other Wal-Mart managers testified that Ms. Kaimimoku held an overly strict interpretation of Wal-Mart's return policy. Shauna Mayberry worked for Walmart from 2001 through December of 2009.¹⁷ She held various positions including that of CSM. She testified that a CSM did have the discretion to accept a return for an item valued over \$50 even without a receipt. She stated that she would refuse to accept a return in those circumstances about 20% of the time. She also testified, however, that when she first started in the CSM position, she applied the policy strictly, and denied most returns for products worth over \$50 if the customer did not have a receipt. As she saw managers above her overruling her decision not to accept a return, she started approving more of them because she understood Wal-Mart was more concerned with

¹⁵ Testimony of Ms. Solomona & Mr. Brooks.

¹⁶ Testimony of Ms. Solomona & Ms. Kaimimoku.

¹⁷ Testimony of Ms. Mayberry.

keeping the customer happy than strictly applying the return policy. On some occasions she would accept a return and the customer would inform her that the Benson store had refused to accept the return. She formed the impression that employees at the Benson store were stricter in following the return policy than she was.

Shar Barrington is the Assistant Manager at the Benson Wal-Mart store, and had previously been a CSM. She has been with Wal-Mart for 11 years, and at the Benson store four years.¹⁸ She also testified that newer, less experienced CSMs tend not to accept returns without a receipt because they are afraid they will be reprimanded. Over time, they become more willing to use their discretion to accept returns without a receipt. She testified that this happened to her when she was becoming familiar with being a CSM.

Sonia Hobson is a shift manager at the Benson Wal-Mart store. She has worked for Wal-Mart for 15 years, and has been at the Benson store since 2004.¹⁹ She testified that a CSM has permission to allow a refund without a receipt, but that it is discretionary. She said that new CSMs tend to refuse to allow a refund, and as they gain experience they become more likely to allow a refund when the customer does not have a receipt.

The evidence shows that Wal-Mart has established a policy against accepting refunds without a receipt but that CSM's and other managers have discretion to override that policy on a case by case basis. Ms. Kaimimoku and Ms. Solomona testified that they were applying this policy when Mr. Brooks asked to return the Seal-A-Meal.²⁰ Wal-Mart has established a legitimate, non-discriminatory reason for refusing to accept the return.

D. Evidence of Pretext

Because Wal-Mart has shown a non-discriminatory reason for its actions, the burden shifts back to the Executive Director to show that this reason was not the real reason for declining the return. As noted above, there were no statements by any Wal-Mart employees that suggested racial animus. The evidence that Wal-Mart's decision not to accept the refund was discriminatory came from Mr. Brooks. He testified that Ms. Solomona should have promptly requested a manager to review the return request, but instead Ms. Solomona simply told him he

¹⁸ Testimony of Ms. Barrington.

¹⁹ Testimony of Ms. Hobson.

²⁰ Ms. Kaimimoku may have misunderstood this policy and not have known that she had some discretion to accept the return. That an employee applied a legitimate policy incorrectly is not illegal discrimination, however, unless it is shown that the misapplication was because of the victim's protected class or for some other illegal reason.


could not return the item. Mr. Brooks had to request that she call a manager.²¹ According to Mr. Brooks, when Ms. Kaimimoku arrived, she told him rudely that she would not allow the return. Mr. Brooks also noted that even after Ms. Solomona told him he could not return the Seal-A-Meal, she looked through the box. Mr. Brooks felt that if the store was not going to accept the return, there was no reason to look through the box. Mr. Brooks felt he may have been suspected of stealing the item and that is why Ms. Solomona looked through the box. Mr. Brooks testified that he felt hatred from Ms. Solomona and Ms. Kaimimoku based on their body language and the way in which they handled his return.

This is a case that turns on the burden of proof. Mr. Brooks' perceptions may be accurate, but the Executive Director is required to prove they are accurate. It must be proven that it is more likely true than not true that Wal-Mart's decision was due to Mr. Brooks' race rather than a non-discriminatory application of Wal-Mart's return policy. The evidence in this case does not establish that it is more likely true than not true that Wal-Mart's decision was because of his race.

IV. CONCLUSION

The Executive Director has not met her burden of proof in this matter. Accordingly, the Accusation should be DISMISSED.

DATED this 29th day of November, 2011.

By: 

Jeffrey A. Friedman
Administrative Law Judge

²¹ Ms. Solomona did not agree with Mr. Brooks' testimony.