

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

ISMAEL WALKER,

Complainant,

v.

WAL-MART STORES EAST, L.P.,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10111967

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on December 28, 2007, by Christine Marbach Kellett, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENT:**

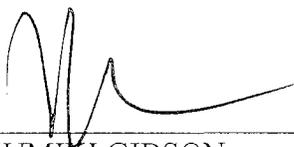
- The award for back wages shall be made in full with no withholdings or deductions.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York

10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED**, this 22nd day of January, 2008.



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KUMIKI GIBSON  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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HUMAN RIGHTS**

on the Complaint of

**ISMAEL WALKER,**

Complainant,

v.

**WAL-MART STORES EAST, L.P.,**

Respondent.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. 10111967

**SUMMARY**

Complainant charged Respondent with unlawful discrimination based upon conviction record when it failed to offer him a job as unloader. Respondent produced no explanation for its decision. The documentation produced at the public hearing established Respondent did not hire Complainant because of Complainant's conviction record. Complainant was the victim of discrimination in employment in violation of the Human Rights Law and is entitled to damages.

**PROCEEDINGS IN THE CASE**

On May 25, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. The public hearing was held on October 26, 2007.

Complainant and Respondent appeared at the public hearing. The Division was represented by Anton Antomattei, Senior Attorney. Respondent was represented by Steven K. Weiss, Esq.

Counsel received permission to file post-hearing submissions. Respondent timely filed its proposed findings of fact.

#### **FINDINGS OF FACT**

1. Complainant charged Respondent with unlawful discrimination in violation of the Human Rights Law after Respondent failed to hire Complainant as an unloader. (ALJ’s Exh. 1)
2. Respondent admitted in its answer that it failed to hire Complainant, and denied unlawful discrimination. (ALJ’s Exh. 3)
3. In April 2006, Complainant applied for the position of unloader with Respondent at an hourly rate of \$8.20. (Tr. 80-82, 89-90)
4. During the application process, in answer to questions from Respondent, Complainant disclosed that he had prior felony convictions. (Respondent’s Exh. 1, 2; Tr. 97, 100, 101-102)
5. Complainant’s convictions were for assault in 1993 and for possession of a controlled substance in 1998, for which he served five years in prison. (Division’s Exh. 2; Tr. 97, 100 )
6. Complainant subsequently had personal interviews with two different Respondent managers, one on April 12, 2006, and one on April 18, 2006. (Respondent’s Exhs. 1, 2; Tr. 90-94, 101-102)

7. At Respondent's request, its agent General Information Services, Inc. ("GIS") conducted a background investigation, including an Investigative Consumer Report. (Division's Exh. 1, 2)

8. On April 18, 2006, GIS sent Complainant a copy of its Investigative Consumer Report, a report which flagged Complainant as non-competitive in two areas: the background report and the grading results. (Division's Exh. 2)

9. Both of these areas referenced Complainant's criminal conviction. (Division's Exh. 2)

10. By letter dated April 25, 2006, GIS, as Respondent's agent, notified Complainant that he would not be hired. (Division's Exh. 1)

11. Respondent chose to offer no testimony at the public hearing. (Tr. 140)

12. As a result of Respondent's decision not to provide testimony or produce any explanation of its decision, there was no information as to the factors in Respondent's decision not to hire Complainant other than the noted non-competitive flags. (Division's Exhs. 1, 2; Tr. 140)

13. The rejection letter was a big shock to Complainant, especially in light of the two interviews. (Tr. 90-4, 101-02)

14. Complainant was angry, stressed, and very worried. (Tr. 102, 104)

15. In his distress, Complainant would go to his step-father, Robert Tillman ("Tillman") and seek advice and counsel. (Tr. 47-48, 133-135)

16. Tillman described Complainant as devastated, a description Complainant himself repeated. (Tr. 25-6, 131-32)

17. Tillman described Complainant's conduct as fretful and obsessive, as Complainant would come over to Tillman's house several times a day to speak about Respondent's conduct. (Tr. 47-48, 70-71, 126-127)

18. Although Tillman understood how important being employed was to Complainant, even he began to feel burdened by Complainant's depressed state and Complainant's obsession with Respondent's rejection. (Tr. 65, 71, 121-123 )

19. On June 1, 1996, Complainant obtained employment earning \$9.00 an hour at Mohawk Beverage. (Division's Exh. 3; Tr. 108, 113)

20. Between April 25, 2006, when he was notified he was not hired by Respondent, and June 1, 2006 when he commenced working for Mohawk Beverage, there are five weeks. Had Complainant been employed by Respondent, during those five weeks he would have earned \$1537.50, calculated as \$8.20 an hour times 37.50 hours a week times 5 weeks ( $8.20 \times 37.5 \times 5 = 1537.50$ ). (Tr. 82-83, 110-113)

21. Complainant did not seek professional counseling and took no medications in connection with Respondent's conduct. (Tr. 130-131)

22. Complainant did receive advice and informal counseling from Tillman. (Tr. 133-135)

23. Complainant continues to experience stress as a result of Respondent's actions. (Tr. 132)

### **OPINION AND DECISION**

Human Rights Law §296.15 provides that it is an unlawful discriminatory practice for a private employer ("employer") to deny employment to an individual "by reason of his having been convicted of one or more criminal offense..." when such denial is in violation of Article 23-A of the Correction Law of the State of New York. Human Rights Law § 296.15.

Complainant charged Respondent with discrimination based upon prior criminal conviction in violation of Human Rights Law §296.15. The documentary evidence produced at the public hearing established Respondent categorized Complainant as non-competitive in two areas, both of which referenced his criminal conviction. Respondent offered no explanation for its decision not to hire Complainant. Complainant met his burden of proof and established he was the victim of unlawful discrimination. He is entitled to damages.

Under the provisions of Article 23-A of the Correction Law, an employer may not refuse to hire an individual by reason of his prior criminal convictions unless it is shown that there is a direct relationship between the criminal offenses and the employment sought, or there would be an unreasonable risk to property or the safety and welfare of specific individuals, or the general public. Correction Law §752.

A prospective employer may take into account several factors or balancing calculations, in connection with the revelation of a criminal conviction background. These factors include the specific duties or responsibilities of the position; the bearing if any of the offense to the fitness or ability of the individual to perform the duties of the position; the time lapsed since the occurrence of the criminal act; the age of the individual at the time of the criminal offense; the seriousness of the offense(s); any information regarding rehabilitation and good conduct; and the legitimate interests of the employer in protecting property and public safety. Correction Law §753. Although Respondent's agent identified Complainant as noncompetitive in the two areas referencing his criminal convictions, Respondent produced no evidence that either it or its agent performed these balancing calculations.

While an employer is under no duty to give a person with a criminal conviction record employment, it is the intent of the Correction Law Article 23-A, to remove the unfair and

counterproductive prejudice that exists against individuals with criminal conviction records. *See, Pisano v. McKenna*, 120 Misc. 2d 536, 466 N.Y.S.2d 231 (Sup. Ct. Oneida Co. 1983).

Consequently, an employer must consider the factors outlined in Correction Law Article 23-A to determine if an offer of employment should be made. *See: Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 528 N.Y.S.2d 519 (1998).

Respondent failed to produce any evidence that it or its agent had engaged in such considerations.

Complainant established he was a victim of unlawful discriminatory conduct.

Complainant is entitled to compensatory damages arising as a result of Respondent's unlawful discriminatory conduct. Complainant mitigated those damages by finding employment within five weeks from the unlawful conduct. He was out of work between April 25, 2006, when he was notified he would not be hired, and May 31, 2006. On June 1, 2006, Complainant commenced work at a higher rate of pay. Had Respondent hired Complainant, Complainant would have earned \$307.50 a week (37.50 times \$8.20), for five weeks or \$ 1537.50.

Complainant is entitled to an award of back wages in the amount of \$1537.50.

The Commissioner is authorized to award interest on back wages. *Aurrecchione v NYSDHR*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Under the circumstances in this case, Complainant is entitled to interest at the statutory rate of nine per cent per annum calculated from a reasonable intermediary date of May 13, 2006, the midway date between April 26, 2006 and May 31, 2006.

The Commissioner is also authorized to award compensatory damages for emotional pain and suffering. Although Complainant did not seek professional counseling or require medication to deal with his reaction to Respondent's action, Complainant did seek the advice and

counsel of his step-father. Complainant was distressed, angry and frustrated. Complainant would obsess over the Respondent's actions to his stepfather. Complainant continues to be angry and stressed as a result of Respondent's actions. Compensatory damages in the amount of \$10,000 for the mental anguish and suffering described by Complainant are consistent with the goals and objectives of the Division and prior awards of the Commissioner. *Peterman v. Kelly Services Inc.*, DHR Case No. 4704621 (May 24, 2006).

### ORDER

Based on the foregoing, and pursuant to the provisions of the Human Rights Law and the Rules of Practice of the Division, it is hereby

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within sixty days of receipt of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$1537.50 minus all mandated withholdings, and deductions for federal, state and local income taxes, as damages for lost wages for the period of April 25, 2006 to May 31, 2006. Interest shall accrue on the award at the rate of nine percent per annum from the reasonable intermediate date of May 13, 2006 until the date of this Order. Interest shall continue to accrue on these damages, including the accrued interest at a rate of nine percent per annum from the date of this Order until paid.

2. Within sixty days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$10,000.00 without any withholding or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of the

Respondent's unlawful discrimination against him. Interest shall accrue on the award at the rate of nine per cent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

3. The aforesaid payments shall be made by Respondent in the form of certified checks made payable to the order of Complainant, Ismael Walker, and delivered by certified mail, return receipt requested to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.

4. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of the General Counsel, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

5. Respondent shall cooperate with the representatives of the Division during any subsequent investigation into compliance with the directives contained within this Order.

DATED: December 24, 2007  
Bronx, New York



Christine Marbach Kellett  
Administrative Law Judge