

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

721

CA 06-03704

PRESENT: GORSKI, J.P., SMITH, CENTRA, LUNN, AND FAHEY, JJ.

IN THE MATTER OF WAL-MART STORES, INC. AND
WAL-MART STORES EAST, L.P.,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, EXECUTIVE DEPARTMENT,
DIVISION OF HUMAN RIGHTS, RESPONDENT-APPELLANT.

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

THELEN REID BROWN RAYSMAN & STEINER LLP, NEW YORK CITY (JOEL L. FINGER
OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (Frank A. Sedita, Jr., J.), entered March 7, 2006. The
judgment granted the petition for a writ of prohibition.

It is hereby ORDERED that the judgment so appealed from be and
the same hereby is unanimously reversed on the law without costs and
the petition is dismissed.

Memorandum: Respondent commenced an investigation after
receiving complaints alleging that petitioners had discriminated
against three employees by discharging them because they had been
convicted of crimes. Petitioners commenced this proceeding for a writ
of prohibition, seeking to prohibit respondent from taking further
action on the complaints on the ground that the investigation was in
excess of respondent's jurisdiction. Supreme Court erred in granting
the petition. Respondent "has jurisdiction to investigate complaints
of discrimination and any error of law in the exercise of that
jurisdiction must first be challenged by administrative review before
judicial review pursuant to section 298 of the Executive Law is
available . . . The extraordinary writ of prohibition does not lie to
challenge [respondent's] initial acceptance of jurisdiction over a
complaint of discrimination" (*Randy-The Salon v New York State Div. of
Human Rights*, 201 AD2d 901, 901; see *Matter of Tessy Plastics Corp. v
State Div. of Human Rights*, 47 NY2d 789). In any event, "even where
the writ may be technically appropriate, the court must consider other
factors such as the gravity of the potential harm caused by the
threatened excess of power or whether other proceedings in law or
equity could correct the flaw" (*Matter of Town of Huntington v New
York State Div. of Human Rights*, 82 NY2d 783, 786). Here, petitioners

" 'will suffer no irreparable harm . . . by waiting to challenge [respondent's] findings, if necessary,' " following the conclusion of the administrative proceedings (*Matter of Diocese of Rochester v New York State Div. of Human Rights*, 305 AD2d 1000, 1001, quoting *Town of Huntington*, 82 NY2d at 786).

Entered: June 8, 2007

JoAnn M. Wahl
Clerk of the Court