



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**EDDIE D. ENNIS,**

Complainant,

v.

**WAL-MART STORES EAST, LP,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10197013

**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 March 4, 2021, by Edward Luban, 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.


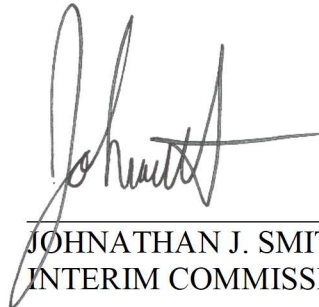
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order 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.**

DATED: **June 25, 2021**  
Bronx, New York



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JOHNATHAN J. SMITH  
INTERIM COMMISSIONER



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**EDDIE D. ENNIS,**

Complainant,

v.

**WAL-MART STORES EAST, LP,**

Respondent.

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

Case No. **10197013**

**SUMMARY**

Complainant alleged that Respondent unlawfully denied him employment because of his conviction record. Because the record does not support Complainant's allegation, the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On September 21, 2018, 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 unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on November 18, 2020.

Complainant and Respondent appeared at the hearing. The Division was represented by Catherine Ostrowski-Martin, Esq. Respondent was represented by Pamela S.C. Reynolds, Esq.

At the the hearing, the parties stipulated to the receipt in evidence of Joint Exhibits 1-5 (Tr. 6-7). In addition, Respondent acknowledged that Complainant disclosed on Respondent’s background check form that he had a felony conviction and was on the sex offender registry. Respondent also acknowledged that, contrary to a position it had taken earlier in the case, it was not asserting that Complainant failed to disclose or was otherwise dishonest in connection with his application for employment. (Tr. 7-8, 40)

### **FINDINGS OF FACT**

1. Complainant was born on April 29, 1972. (Tr. 60)
2. Respondent operates retail stores in all 50 states. (Tr. 104)
3. On March 24, 2010, Complainant was convicted after trial in Jefferson County Court, New York, of the crimes of course of sexual conduct against a child in the first and second degrees, class B and D felonies, respectively, in violation of N.Y. Penal Law §§ 130.75, 130.80. Complainant’s victim was a nine-year old girl. (Tr. 21; Joint Exh. 4, pp. 13-14)
4. Complainant was 37 years of age when he was convicted. (Tr. 60)

5. Complainant was sentenced to seven years in state prison, which he served in full. Complainant was released in March 2017 and is on parole until March 2022. (Tr. 22, 49, 62; Joint Exh. 4, pp. 13-14)

6. Complainant is designated as a sexually violent offender, risk level 2, in the New York State sex offender registry. (Joint Exh. 4, pp. 13-15)

7. Respondent requires all candidates for employment to complete a background check. Job offers are contingent upon the candidate passing the background check. (Tr. 95; Respondent's Exh. 2)

8. Respondent contracts with outside "suppliers," including General Information Services, Inc. ("GIS") to perform background checks. (Tr. 72-74, 101)

9. If the supplier determines that the candidate has passed the background check, Respondent hires the candidate. If the supplier determines that the candidate has failed, Respondent conducts a "circumstance review." (Tr. 72-74, 114-15)

10. Candidates may call a designated telephone number and leave a "circumstance message" about their conviction, rehabilitation, and things they have done since their conviction. (Tr 74, 77-78)

11. Respondent's security risk managers review the background report and circumstance message in light of the relevant statutory factors and decide whether or not to hire the candidate. (Tr. 74-75, 78-80)

12. On April 12, 2018, Complainant applied online for a full-time position as a CAP team associate 2nd at Respondent's store in Watertown, New York. (Tr. 15, 37, 61, 89; Joint Exh. 1)

13. On his application, Complainant indicated that he was available for overnight work. (Tr. 17; Joint Exh. 1)

14. CAP team associates unload trucks in the back of Respondent's stores, take merchandise to the sales floor, and load the merchandise on shelves. They are not directly supervised when they carry out such duties; they are expected to take the merchandise out to the floor and load it themselves. (Tr. 85, 124)

15. CAP team associates are commonly used as "floaters" and backup to fill other positions in Respondent's stores. Even if they are hired for an overnight position, they may be transferred to different shifts, for months at a time, and assigned to do whatever jobs are needed, including pushing carts and running cash registers. (Tr. 85, 89-90)

16. Respondent offered Complainant a full-time position as a CAP team associate 2nd at its Watertown store, subject to successful completion of a drug screen and background check. (Tr. 19, 37; Joint Exh. 2)

17. On May 30, 2018, Complainant accepted Respondent's conditional job offer. (Joint Exh. 2)

18. The same day, Complainant submitted a completed background check form online to Respondent. Complainant indicated that he had a 2010 felony conviction for "course of conduct" and that he was registered in the New York sex offender registry. (Tr. 19-21, 38; Joint Exh. 3)

19. On June 1, 2018, in response to a request from GIS, Complainant provided additional information about his convictions. (Joint Exh. 4, p. 11)

20. On June 6, 2028, GIS sent Complainant a copy of his background report, which included details about his convictions and sex offender status; a form to dispute any information in the report that Complainant believed was "inaccurate, incomplete, or outdated;" and a summary of rights under the federal Fair Credit Reporting Act. (Tr. 38-39; Joint Exh. 4)

21. GIS informed Complainant that he had five days to contact Respondent at a designated telephone number to provide additional information about his convictions, including “the circumstances surrounding [his] convictions,” his “rehabilitation or treatment efforts,” any classes he had taken, and whether had had received a certificate of good conduct. (Joint Exh. 4)

22. Complainant did not dispute the background report because it was accurate. (Tr. 44, 58-59, 63)

23. Complainant did call the number provided, and he left a voicemail about the circumstances of his criminal case “in general.” When he testified at the public hearing, Complainant could not recall exactly what he said in his voicemail. (Tr. 44, 58-59)

24. Marcos Nuno has been employed by Respondent for almost 14 years. Since December 2019, Nuno has worked in cyber security. (Tr. 70-71, 98, 117)

25. Prior to his current position, Nuno was a security risk manager for Respondent. His responsibilities included vetting job applicants and conducting circumstance reviews. (Tr. 71, 74-75, 80)

26. Nuno conducted thousands of circumstance reviews, including more than one hundred from New York State. (Tr. 82, 84)

27. As a security risk manager, Nuno was familiar with the factors Respondent had to consider under N.Y. Correction Law related to the employment of persons with criminal convictions. Nuno considered New York a “very strict state” and New York’s eight-factor test the “gold standard.” (Tr. 107, 121)

28. When Nuno transferred to his current position, he lost his access to records of cases he reviewed as a security risk manager. He was unable to review any such records in preparation for

the hearing, and, when he testified, he did not specifically recall reviewing Complainant's background report or the content of his circumstance message. (Tr. 86-87, 110, 116, 120-21)

29. Nuno did recall attending a conference in connection with the Division's investigation of Complainant's complaint when he was still a security risk manager and had access to information about his review of Complainant's background report. The conference stood out in Nuno's mind as "very, very brutal . . . it was aggressive, the investigator was very thorough." (Tr. 88, 116-18, 127)

30. Nuno's awareness that he conducted Complainant's circumstance review is based on his participation in the Division conference. At the time he attended the conference, Nuno remembered conducting Complainant's circumstance review. (Tr. 117, 121)

31. Nuno testified credibly to his practice in the circumstance reviews he conducted. In all his reviews, Nuno reviewed the background report to get a "baseline understanding" of the case; listened to any circumstance message left by the candidate, sometimes multiple times; and considered the required statutory factors. (Tr. 79-81, 103, 115-16)

32. Nuno reviewed Complainant's background check report and circumstance message, and he considered the eight factors under N.Y. Correction Law. (Tr. 103, 111, 122-26)

33. In his review, Nuno noted that children are present in Respondent's stores at all hours of the day and night; that Complainant could be stocking merchandise, unmanaged, during any shift; and that he could be transferred to different shifts or different positions as a "floater." Nuno also noted that Complainant's convictions were for "pretty serious" sex crimes, that only "pretty minimal" time had elapsed since Complainant's convictions, that Complainant had not been out of prison long enough to determine the risk of his re-offending, that Complainant was "mid to older" when he was convicted, and that Complainant had completed a rehabilitation program.



Nuno concluded that because Complainant could be working anywhere in the store at any time, unsupervised, his employment would pose too great a risk. (Tr. 89-92, 123-26, 129-30)

34. On June 18, 2018, GIS notified Complainant that Respondent would not offer him employment. (Tr. 24; Joint Exhibit 5)

### **OPINION AND DECISION**

It is an unlawful discriminatory practice for an employer to deny employment to any individual because he has been convicted of a criminal offense, when such denial is in violation of N.Y. Correction Law Article 23-A (“Article 23-A”). N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.15. Article 23-A prohibits an employer from denying employment to an individual because of a criminal conviction, unless there is a direct relationship between the offense and the specific employment sought, or granting the employment “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.” N.Y. Correction Law § 752. In making this determination, the employer must consider each of the following factors:

- (a) The public policy of this state . . . to encourage the . . . employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the . . . employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the . . . employer in protecting property, and the safety and welfare of specific individuals or the general public.

N.Y. Correction Law § 753(1). *See also Matter of Acosta v. New York City Dept. of Educ.*, 16 N.Y.3d 309, 316, 921 N.Y.S.2d 633, 635 (2011) (A failure to consider each of the factors “results in a failure to comply with the Correction Law’s mandatory directive”).

Respondent is not required “to point to any contemporaneously created record that demonstrates that it considered each of the eight factors in reviewing [Complainant’s] application.” *Matter of Dempsey v. New York City Dept. of Educ.*, 25 N.Y.3d 291, 300, 11 N.Y.S.3d 529, 535 (2015), quoting *Acosta*, 16 N.Y. 3d at 319, 921 N.Y.S.2d at 637.

When Complainant submitted his background check form, he disclosed that he had a felony conviction and was on the sex offender registry. Respondent did not deny Complainant’s application for employment upon these disclosures. Rather, GIS proceeded with the background check, notified Complainant of the results, gave him an opportunity to dispute the information, and gave him an opportunity to leave a telephone message with additional information about his convictions, including “the circumstances surrounding [his] conviction,” his “rehabilitation or treatment efforts,” any classes he had taken, and whether had had received a certificate of good conduct. Complainant did not dispute the background report because it was accurate, but he did call the number provided and left a voicemail about his case.

Nuno reviewed Complainant’s background report, listened to his voicemail, and considered all the factors set forth in Correction Law § 753(1). Nuno noted that children are present in Respondent’s stores at all hours of the day and night; that Complainant could be stocking merchandise, unmanaged, during any shift; and that he could be transferred to different shifts or different positions as a “floater.” Nuno also noted that Complainant’s convictions were for “pretty serious” sex crimes, that only “pretty minimal” time had elapsed since Complainant’s convictions, that Complainant had not been out of prison long enough to determine the risk of his

re-offending, that Complainant was “mid to older” when he was convicted, and that Complainant had completed a rehabilitation program. Nuno concluded that because Complainant could be working anywhere in the store at any time, unsupervised, his employment would pose too great a risk.

Because Respondent properly considered the required factors, it did not unlawfully discriminate against Complainant when it decided not to hire him. Accordingly, the complaint must be dismissed.

**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division’s Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same hereby is, dismissed.

DATED: March 4, 2021  
Syracuse, New York



Edward Luban  
Administrative Law Judge