

**Rahimi v Best Buy Co. Inc.**

2010 NY Slip Op 31058(U)

April 30, 2010

Supreme Court, Suffolk County

Docket Number: 06372/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:**

Hon. Paul J. Baisley, Jr.

\_\_\_\_\_  
 WALEED RAHIMI

Plaintiff(s),

-against-

BEST BUY CO. INC.

\_\_\_\_\_  
 Defendant(s).

**ORIG. RETURN DATE:** April 1, 2008

**FINAL RETURN DATE:** May 2, 2008

**MTN. SEQ. #:** 001-CASEDISP

**PLTF'S ATTORNEY:**

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Upon the following papers numbered 1 to 8 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 4; Affirmation in Opposition and supporting papers 5 - 6; Reply Affirmation and supporting papers 7 - 8; it is

**ORDERED** that the motion (001) by the defendant for dismissal of the complaint pursuant to CPLR 3212 is granted; and it is further

**ORDERED** that the complaint is dismissed in its entirety and this action shall be marked as "Case Disposed."

This is an action brought by the plaintiff Waleed Rahimi (hereinafter Rahimi) arising out of alleged acts of discrimination against him by certain employees of the defendant Best Buy Co. Inc. (hereinafter Best Buy). The complaint contains causes of action against Best Buy for unlawful discrimination (in violation of Exec. Law §296) (first cause of action) and negligent failure to supervise, etc. with regard to two employees, Joseph Fowler (hereinafter Fowler) (second cause of action) and Joseph Cavanaugh (named in the complaint as "Joe Cavlar"; hereinafter Cavanaugh) (third cause of action). Three additional causes of action - for defamation (fourth and fifth causes of action) and intentional infliction of emotional distress (sixth cause of action) - were withdrawn pursuant to a written stipulation between the parties and, accordingly, are no longer included in this action.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851,

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487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (see *Smalls v AJI Industries, Inc.*, 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (see *Zuckerman v City of New York, supra*).

The underlying incident giving rise to this action occurred in the evening of November 22, 2005 (two days before Thanksgiving) when Rahimi (then 29 years-old) and his younger brother (then 13 years-old) went shopping at the Best Buy store in Huntington. Rahimi was interested in buying a case for his Smart Phone which he could attach to his arm while working out as well as possibly some other items. While shopping for the case, an incident occurred involving Rahimi and some Best Buy employees which led to this action being brought.

The parties provide different versions of what occurred but, nevertheless, there are two common themes arising from both versions. The first, taking Rahimi's version as true, it is clear that Best Buy's employees, Fowler, Cavanaugh and a third individual, Jonathan Varelakis (hereinafter Varelakis), acted badly in dealing with the situation involving Rahimi. Varelakis and Fowler, in particular, were rude, disrespectful, arrogant and unprofessional. Cavanaugh, whom Rahimi only dealt with subsequently by phone messages, was, at most, only guilty of failing to respond to Rahimi's messages in what Rahimi considered a timely manner.

In support of this motion, Best Buy submits, inter alia, transcripts of the depositions of Rahimi and his brother and affidavits from Varelakis, Fowler and Cavanaugh.

Rahimi, in his deposition (which is confirmed by the deposition of the younger brother), testified that he went to Best Buy to buy the case for his Smart Phone. After being directed to the section of the store with the cases, he saw one which he thought might fit and asked a Best Buy salesperson if he could open the package to see if his Smart Phone fit. The sales person was with another sales person and both expressly said that Rahimi could open the package to see if the phone fit.

Rahimi opened the package, which was not sealed, took out the case, which was not sealed within, and found the case to be a perfect fit. His intent at that time was to repack the case and buy it after finishing the rest of his shopping. While about to repack the case, he was "aggressively" approached by Varelakis (a "loss prevention specialist" whom Rahimi describes as a "security guard"). Varelakis asked Rahimi if he had opened the package. Rahimi replied that he had and explained about asking for and being given permission - pointing out the two sales people nearby. Varelakis was not interested in the explanation, did not question the sales people, and told Rahimi that he had to buy the case - which, as Rahimi explained, was his intention.

Varelakis insisted that Rahimi buy the item "now" but Rahimi said no because he wanted to continue with his shopping first. Rahimi believed that Varelakis was implying that Rahimi was possibly trying to steal the case and asked to speak to a manager in the hopes that someone with more authority would be able to resolve the matter in a reasonable manner.

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Varelakis and Rahimi then walked over to the customer service desk where a call was made to Fowler. When Fowler arrived, Rahimi explained to Fowler that he was an “avid customer” and went on to explain the situation to Fowler. Fowler, without seeking any confirmation from the sales people, then said to Rahimi, “You’re stealing the case? . . . Are you a thief.”

Rahimi, realizing that any efforts at a reasonable resolution were to no avail, then gave up and said he would pay for the case and leave. Fowler, though, took the case away from Rahimi and told him to “just leave.”

This incident, which Rahimi found embarrassing at the least, occurred in front of his younger brother and other shoppers.

When Rahimi got home, he called Best Buy customer service in Minnesota and spoke to a person he believes is named Kevin Murphy who listened to Rahimi’s retelling of events and “couldn’t believe” that Best Buy personnel would act in such a manner, apologized on behalf of Best Buy and said he would contact the Huntington store’s general manager, Joseph Cavanaugh, to get back to Rahimi. Mr. Murphy also said he would email contact information for Cavanaugh to Rahimi.

Rahimi, that same evening, called Cavanaugh’s cell phone, got his voice mail, described the incident and left his contact numbers for Cavanaugh.

Rahimi did not hear back from Cavanaugh that evening and emailed Mr. Murphy the next morning about the lack of a response thus far. As Wednesday came to a close with no response, Rahimi emailed Mr. Murphy again and tried calling Cavanaugh again. After Friday passed with no response (that Friday being known as “Black Friday” among retailers; the busiest shopping day of the year), Rahimi concluded that Best Buy had no interest in resolving the matter, that they did not care and, subsequently, brought this action against Best Buy.

Rahimi believes that the reprehensible conduct on the part of Best Buy was motivated by a discriminatory intent based upon his appearance, to wit: hair in a bun atop his head, beard, olive skin, appearance of a person of middle Eastern origin. In fact, Rahimi, a Harvard graduate, born in this country of Afghani parents, spoke Farsi as his first language, spoke English with an accent and was of the Muslim faith. Rahimi, in trying to rationalize the egregious conduct of the Best Buy employees, concluded that they would not have treated him in the manner they did if he were a white male and the only logical conclusion was that their actions were discriminatory and based upon his appearance as someone of a middle Eastern national origin and/or his giving the appearance of a follower of the Muslim faith.

Rahimi concedes that no slurs of any kind were used by the Best Buy employees. Indeed, there is no indication that Cavanaugh - with whom there was no in-person contact - even knew what Rahimi looked like.

Varelakis states in his affidavit that he saw Rahimi remove the case from its packaging, approached Rahimi and asked if he planned to purchase it. According to Varelakis, Rahimi became irate and Varelakis

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asked Rahimi to leave the store. Varelakis states that he would have acted the same way with any customer in such circumstances.

Fowler states that he told Rahimi that since he opened the package, he had to purchase it. Rahimi refused and Fowler asked him to leave the store. Fowler, like Varelakis, says he would have treated any customer the same way under similar circumstances.

Cavanaugh acknowledges that he received a call requesting that he call Rahimi as well as a voice mail from Rahimi - both on the evening of the occurrence. Cavanaugh states that he never heard from Rahimi again. Nor does Cavanaugh deny that he never called Rahimi back. Nevertheless, Cavanaugh looked into the matter and was satisfied, after talking to Varelakis and Fowler, that Rahimi "was treated with respect."

In order to make out an action for discrimination under Executive Law §296, a plaintiff must show that he is the member of a protected class, that there was an intent to discriminate on the basis of the plaintiff being a member of a protected class and that the act or acts of discrimination concerned one or more of the activities delineated in the statute which provides, in part, that "It shall be an unlawful discriminatory practice for any person, being the . . . manager . . . or employee of any place of public accommodation . . . to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . (Exec. Law §296[2][a]; see *Mahmud v Kaufman*, 454 F Supp 2d 150, 157-158 [SDNY 2006]).

With regard to intent, the plaintiff must show that the defendant's actions were "purposefully discriminatory" and motivated by such (see *Rivera v Hertz Corp.*, 990 F Supp 234, 236-237 [SDNY 1977]). Moreover, properly supported facts must be shown from which an inference of discrimination can be drawn and "mere conclusory allegations" are insufficient (see *Chapman v Best Buy, Inc.*, 2007 WL 3532696 [NDNY 2007][not reported in F Supp 2d]).

In this case, Rahimi's allegations and his deposition testimony show that he is a Muslim of Afghani heritage who, at worst, had a very bad retail experience. That, however, is not enough to support a claim of discrimination (*Id.* at \*2 [regarding an African-American]).

Accordingly, the defendant Best Buy has made a prima facie showing of entitlement to summary judgment on the cause of action sounding in discrimination.

As to the causes of action sounding in negligent supervision based upon the alleged discriminatory conduct, Rahimi must show that Fowler and Cavanaugh engaged in such discriminatory misconduct, that Best Buy knew or should have known of the propensities of Fowler and Cavanaugh toward such misconduct and that the plaintiff was injured thereby (see *Manno v Mione*, 249 AD2d 372, 373, 670 NYS2d 368 [2d Dept 1998]). Here, in view of the prima facie showing of no discrimination under the provisions of Exec. Law §296, there is no discriminatory misconduct on the part of the Best Buy employees - Fowler and Cavanaugh - which would provide the basis for a finding of misconduct. In

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addition, Fowler and Cavanaugh, in their affidavits, state that there are no prior complaints against them of such conduct in the past.

Indeed, the key element that the employer knew or should have known of an employee's propensity for such conduct is missing here (*see Brown v State*, 45 AD3d 15, 27, 841 NYS2d 698 [3d Dept 2007], *lv denied* 9 NY3d 815, 848 NYS2d 26 [2007]; *Manno v Mione*, 249 AD2d 372, 373, 670 NYS2d 368 [2d Dept 1998]).

As to any injuries as a result of the alleged misconduct, other than embarrassment and shame, there is no support for any real damages. Indeed, Rahimi only speculates, at best, that the incident may have contributed to a temporary lag in the family's restaurant business (also in Huntington) following the incident.

Accordingly, the defendant Best Buy has made a prima facie entitlement to summary judgment on the remaining causes of action in the complaint which sound in negligent supervision.

The burden now shifts to the plaintiff to come forward with evidence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980])2d at 401, 565 NYS2d at 427).

In opposition, the plaintiff Rahimi submits, inter alia, his personal affidavit and a copy of Best Buy's "Conduct Guidelines for Managers."

In his affidavit, Rahimi goes over the same facts as he testified to at his deposition. Taking these statements as true, there is credible support for finding that the conduct of Fowler and Varelakis (Varelakis' conduct is not included in the causes of action herein) was offensive, insulting, arrogant and reflected poor judgment but not that it was discriminatory. Indeed, the statements attributed to Fowler and Varelakis by Rahimi all evidence a legitimate motivation for their actions and statements, to wit: that Rahimi's conduct was consistent with trying to take the item in question without paying for it. While the facts as stated by Rahimi support that he was totally innocent of such improper conduct, there is no factual basis for a finding of discrimination under Executive Law §296 other than the coincidence that the person observed and suspected of attempting to steal an item had the appearance of someone of a middle Eastern heritage and possibly a Muslim (*cf. Chapman v Best Buy, Inc., supra* at \*2).

The plaintiff also argues that acts of discrimination may occur in the absence of specific references to the plaintiff's national origin or color and cites *Hudson Transit Lines, Inc. v New York State Human Rights Appeal Board* (65 AD2d 277, 411 NYS2d 374 [2d Dept 1978]) as authority for this argument. But in *Hudson Transit Lines, Inc.*, a bus driver's actions were found to be discriminatory because in handling a ticket dispute, his actions were inconsistent with company policies. In the Rahimi case, where an attempted theft was suspected, in requiring Rahimi to either buy the item and leave the store or, subsequently, to just leave, there was no indication of any deviation from company policies with respect to such circumstances.

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Indeed, once Best Buy shows there was a legitimate reason for the actions and conduct of its employees, it becomes incumbent upon the plaintiff to show that the stated legitimate reason was merely a pretext for the actual discrimination (*see e.g. Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 [1981]). Here, Best Buy has come forward with a legitimate, nondiscriminatory basis for the actions of its employees and, in opposition, Rahimi only offers speculative, conclusory statements. This is not enough to raise a triable issue of material fact (*see Johnson v Lord & Taylor*, 25 AD3d 435, 807 NYS2d 367 [1<sup>st</sup> Dept 2006]).

As to the causes of action sounding in negligent supervision, the plaintiff refers to Best Buy's "Conduct Guidelines for Managers." This document includes general guidelines reflecting a policy of "non-discrimination pursuant to federal, state and local laws" which applies to "all personnel actions" and is applicable to the treatment of customers.

With regard to Fowler, as stated above, even taking the statements made by Rahimi as true, there is insufficient support for the claim of discrimination. Fowler's actions and statements fall woefully short of the standard that one would expect of reasonable people in such a situation but there is no support for a finding of discrimination as the basis for such conduct. Indeed, the shame of all of this is that neither Fowler nor Varelakis ever took the simple step of calling over or walking the short distance to the sales people who could have confirmed Rahimi's version of the facts. In any event, in the absence of a showing of discrimination, there can be no negligent supervision claims based upon Fowler having been culpable of same.

As to Cavanaugh, the evidence is even less compelling because the only contact between Rahimi and Cavanaugh was by phone messages; there was no visual contact and, thus, no attributing to Cavanaugh of what Rahimi looked like. While Rahimi's name and voice may have been an indication of a different national origin or religion, such speculation provides less of a basis for a finding of discrimination than the circumstances surrounding Rahimi's interaction with Fowler.

Accordingly, with regard to the negligent supervision claims, the plaintiff has failed in his burden to show issues of fact requiring a trial.

The plaintiff also argues that this motion for summary judgment is premature because he has not had the opportunity to depose the defendant's witnesses; particularly, those submitting affidavits in support of this motion. In reply to this argument, the defendant notes that the plaintiff and his brother have already been deposed and that the plaintiff has had ample opportunities to depose the defendant's witnesses but has not done so. In any event, taking the plaintiff's version as true, he still does not make a case for discrimination.

In conclusion, the conduct of the Best Buy employees, which, if true, in a civilized society certainly calls out for corrective measures by Best Buy and, at the very least, an apology, does not, however,

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support a finding of discrimination. Accordingly, the complaint and its remaining causes of action - all of which are based upon the discrimination allegations - must be dismissed pursuant to CPLR 3212.

This constitutes the decision and order of the court.

Dated:

*April 30, 2010*

**HON. PAUL J. BAISLEY, JR.**

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**HON. PAUL J. BAISLEY, JR., J.S.C.**