

**COMMONWEALTH OF MASSACHUSETTS**  
**MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION**

**MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION**

**and**

**EARNEST BROMES,**

**Complainant**

**v.**

**Docket No. 98240448**

**FAMOUS FOOTWEAR**

**Respondent**

**Appearances:** For the Complainant: Hugh Heisler, Esq.

For the Respondent: Carole Sakowski Lynch, Esq.

**DECISION OF THE HEARING OFFICER**

**I. PROCEDURAL HISTORY**

On May 7, 1998, the Complainant, Earnest Bromes, filed a Complaint with this Commission alleging discrimination in public accommodation on the basis of his race and color in violation of M.G.L. 272 Section 98 and/or M.G.L. c. 151 B Section 4. Specifically the Complaint alleged that the Respondent, Famous Footwear, imposed a condition precedent to purchase by requiring the Complainant to produce identification in addition to his credit card that it did not impose on customers not within the Complainant's protected category. The

Investigating Commissioner found probable cause and certified the matter for public hearing on April 10, 2003.

A public hearing was held before me on May 7, 2003. I have carefully considered all the evidence adduced at the hearing, as well as the arguments of counsel for both parties. To the extent that testimony of the witnesses is not in accord with the findings set out below, it is not credited. Factual issues raised at the hearing but not discussed below are found either to be unsupported by credible evidence, or not pertinent to the resolution of the issue before me.

## II. FINDINGS OF FACT

1. The Complainant is an adult African-American male. The Complainant's wife, Ms. Bromes, is a woman of Puerto Rican heritage. She has multiple piercings in her ears. (Stipulations of Fact; Testimony of Complainant; Ms. B.)

2. The Respondent, Famous Footwear, is a chain of retail stores specializing in discounted brand name shoes. The store in which the incident at issue occurred is located in the Searstown Mall in Leominster, Ma. (Stipulations of Fact; Bucha)

3. On November 18, 1997, two women reported thefts of their credit cards while at the Searstown Mall. The credit cards were subsequently used by unauthorized people at nearby retail establishments. (C-1)

4. On November 19, 1997, Searstown Mall Security officers visited the Famous Footwear store. The officers alerted store personnel that there had been a credit card theft. They requested that

the Respondent require a second form of identification from any individual(s) paying with a credit card who met the physical description of the thieves. The description given by mall security was of a black male and a black female with a lot of ear piercings. (C-2; R-1; R-2)

5. Melissa Fountain was the assistant manager on duty at the Respondent on November 19, 1997. She is no longer an employee of the Respondent. Ms. Fountain submitted an affidavit in lieu of testimony at the hearing in which she stated:

... I do recall that mall security came into Famous Footwear and requested that we check the identification of customers paying with a credit card if they fit the description of the individuals who had stolen the credit card. In response, I told mall security that we would request a second form of identification from all customers as I did not think it was fair to single out individuals based on their physical description...

Following the visit from mall security, I held a meeting with my staff and advised them of the theft in the mall. I requested that they check the identification of all customers paying with a credit card that day...

I also recall placing a piece of paper at the register which contained information about the theft.

(R-1)

I credit Ms. Fountain's recitation of these events as the affidavit is consistent with her earlier statements, with the affidavit of Ms. Ezyk, the sales clerk, and with the Respondent's employment training materials. (Bucha; R-1,1; R-2; C-2; R-4,5,6)

6. In the evening of November 19, 1997, the Complainant entered the Respondent's Searstown Mall store accompanied by his wife and grandson. The Complainant testified that there were no other customers in the store and that he was not followed or observed while selecting his purchase. He chose a pair of penny loafers, brought them to the register and presented a VISA credit card to the sales clerk. The Complainant testified that the register did not open when the credit card was first run through. He stated that the sales clerk apologized, said it was her first day on the job, and kept looking down at something written next to the register. She then asked the Complainant for a second form of identification. The Complainant asked why she needed one. She responded that there had been a theft in the mall. The Complainant said "and?". She responded that some credit cards had been stolen. The Complainant asked if his name matched the name on the stolen credit card. The sales clerk responded "no." The Complainant then asked if she was requiring identification only from people of color. The sales clerk responded "yes." The Complainant told her that practice was inappropriate. The sales clerk then left and the manager appeared. The Complainant repeated his statement that requiring identification from people of color was inappropriate. The manager apologized, said it was not the practice of the store and completed the purchase. (Testimony of Complainant)

The Complainant testified that he completed the purchase so he could have a record of being in the store for the purpose of filing a complaint. He stated that he did subsequently send a written complaint to the Respondent's corporate headquarters somewhere in New York, but never got a response. The Complainant testified that he was upset and angry about this incident for several days. It brought up deep feelings about other incidents of racial discrimination he had experienced earlier in life. (R-7)

7. Genevieve Ezyk was the sales clerk on duty in the evening of November 19, 1997. She had been employed by the Respondent for approximately one week at that time. She left the employ of the Respondent in mid-December, 1997. She submitted an affidavit in lieu of testimony at the hearing. Ms. Ezyk recalled that the Respondent was accompanied to the register by a female with light brown skin wearing several pierced earrings in her ears. When the Complainant presented a credit card:

“...I asked him for a second form of identification based on the request of the mall security guard and especially because the female accompanying him was wearing several pierced earrings. I specifically recall thinking that this woman fit the description of the individual mentioned by the security guard as one of the thieves... [The Complainant] got very angry and asked me why I was requesting the identification. I tried to explain to him that we had been asked by the mall security guard to request a second form of identification of customers paying with a credit card because of a theft in the mall. I never told [the Complainant] that I was only asking for a second form of identification from people of color. [The Complainant] started yelling at me and accusing me of discriminating against him. As I recall, I was very upset and started to cry. Some of the other customers tried to intercede by telling me it was okay and it was not my fault. [The Complainant] started asking me if his name was the same name as the name on the credit card. I did not know the name of the individual whose credit card was stolen. However, at the time I was very upset and embarrassed by the way that [the Complainant] was treating me and was trying to get away from him. When he asked me this question, I either responded no or

that I did not know. I immediately left to get the manager. I then stayed in the back of the store to try to regain my composure.

(R-2; See also C-2)

I credit the statements in Ms. Ezyk's affidavit as they are consistent with her earlier unsworn written recollection (R-2 and C-2), the affidavit of Ms. Fountain, and with the results of the Respondent's investigation.

8. The Complainant did not observe any sales transactions at the Respondent's store other than his own. There is no evidence in the record of any credit card sales transactions at the Respondent's store on November 19, 1997, or thereafter, other than the one at issue here.

9. Timothy Bucha, the Respondent's Human Resources Manager for the past six years, testified that he was responsible for training and development, employee supervision, recruiting, worker compensation and customer complaints for the Region which included the Searstown Mall in 1997. Any complaints concerning that store in 1997 and 1998 would have been directed to him. Mr. Bucha testified that he first learned of the incident involving the Complainant when he received a copy of the Complaint filed with the Massachusetts Commission Against Discrimination. He and the district manager then interviewed the employees involved, obtained written statements, and prepared the formal response to the Complaint. No other investigation summary was prepared. Mr. Bucha testified that Ms. Fountain told him that after speaking to mall security on November 19, 1997, she told all store employees to ask for a second form of identification for all credit card purchases, regardless of the appearance or identity of the

customer. Mr. Bucha also testified that Ms. Ezyk told him that she had been instructed by Ms. Fountain to request a second form of identification from all credit card purchases due to a theft. (Bucha)

### III. CONCLUSIONS OF LAW

After careful consideration of the facts and arguments of both parties, I conclude that the Complainant has not proven that the Respondent engaged in unlawful discrimination on the basis of race and color when it requested a second form of identification from the Complainant during his credit card purchase on November 19, 1997.

M.G.L. c. 172 § 98 prohibits any distinction, discrimination or restriction of any person in a place of public accommodation based on race or color. The phrase “place of public accommodation” is defined in M.G.L. c. 272 § 92A as “any place which is open to and accepts or solicits patronage of the general public...[such as] (4) a retail store or establishment.” The Commission is authorized to enforce the public accommodation statute pursuant to M.G.L. c. 151B § 5. *Ekhator v. Stop & Shop Supermarket Co.* 24 MDLR 147 (2002). To determine whether there is a violation of the public accommodation statute, the Commission analyzes the evidence in accordance with the disparate treatment standard set forth in *Wheelock v. Massachusetts Commission Against Discrimination*, 371 Mass. 130 (1976); *Lipchitz v. Raytheon Company*, 434 Mass. 493 (2001); *Reese v. May Dept. Store*, 24 MDLR 395 (2002). To establish a *prima facie* case of discrimination in a place of public accommodation the Complainant must demonstrate that he was 1) a member of a protected class, 2) denied access to, restricted, or treated differently from others not in his protected class, and 3) in a place of public accommodation. *Rome v. PVTA*, 19 MDLR 159 (1997). Based on the credible evidence in the

record, I find that Complainant has established two elements of his *prima facie* case of unlawful discrimination in a place of public accommodation based on his race and color. Complainant has shown that he is a member of a protected class based on his race and color—African-American. In addition, there is no dispute that Famous Footwear is a place of public accommodation as described in G.L. c. 272 § 92A (4). See e.g., *Cummings v. Safeguard Security and Galleria Mall*, 24 MDLR 174 (2002). However, the Complainant has failed to show that he was treated differently from non-African-Americans when he purchased shoes at the Respondent's Searstown Mall store on November 19, 1997. Thus, the Complainant has not met his initial burden of establishing a *prima facie* case of racial discrimination.

In reaching this conclusion I note that there is no evidence in this record that could tell me whether other customers were asked for additional identification verification when making a credit card purchase at the Respondent's store as the Complainant was. Thus, there is no observational or anecdotal evidence of disparate treatment. To support his claim that he was treated differently because of his race the Complainant relies solely on his version of an admittedly tense exchange with a nervous sales clerk. Based on his demeanor, the multiple impeachments of his hearing testimony, and the existence of employee statements to the contrary which remain consistent over time, I do not credit the Complainant's version of his exchange with the Respondent's sales clerk. On the other hand I do credit the statements of the store's assistant manager, Ms. Fountain, that she instructed the sales clerk that all credit card purchases were to be supported by additional identification. There is no evidence that this instruction was not carried out in any instance. There is only evidence that it was. With no direct evidence of discriminatory treatment the Complainant has not established a *prima facie* case.

Assuming *arguendo* that the Complainant had shown elements necessary to establish a *prima facie* case, I would turn to the Respondent to offer a legitimate, non-discriminatory reason for its action. Here, the Respondent has stated unequivocally that the mall's security alert was the reason the Complainant was asked for supporting identification during a credit card transaction. The reason articulated by the Respondent is both legitimately business-related and non-discriminatory on its face. I note also that while I credit the Respondent's evidence that it required additional identification from all credit card purchasers as a result of the security alert, it is undisputed that the Complainant and his wife met the general physical description of the unauthorized credit card users supplied to the Respondent by the mall security officers. Because I am persuaded that the Respondent imposed universal supporting identity requirements on November 19, 1997, I do not reach the issue of whether adhering to a facially reasonable "law enforcement" request which would necessarily result in disparate treatment of customers based on their appearance would constitute a legitimate, business-related reason for otherwise odious and unlawful discrimination.

The burden would then shift to the Complainant to prove by a preponderance of the evidence that the reason advanced by the Respondent for its action was a pretext for illegal discrimination. The Complainant has not made such a showing here. The existence of the mall's security alert, and the basis for it, is unrebutted. The Respondent's subsequent refinement of the security officers' request to demand additional identification from a certain category of credit card purchasers to include all credit card purchasers is also unrebutted. There is no evidence that the Respondent failed to consistently request additional identification from all its credit card customers without regard to their race or appearance on or after November 19, 1997. Therefore, I am persuaded that the Respondent's proffered reason for requesting a secondary form of

identification from the Complainant when he presented a credit card on November 19, 1997, that it was a universally applied fraud precaution implemented at the request of the mall security, was not a pretext for unlawful racial discrimination.

#### IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and pursuant to the authority granted to the Commission under M.G.L. c 151B § 5, I find that the Respondent did not engage in illegal discrimination against the Complainant in violation of M.G.L. c. 272 § 98. I hereby order that the complaint be dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal to the Full Commission. To do so, a party must file a Notice of Appeal with the Clerk of the Commission within ten (10) days of receipt of this Order and a Petition for Review to the Full Commission within thirty (30) days of receipt of this Order. M.G.L. c. 151B Section 3 (6); 804 CMR 1.16 (1).

**SO ORDERED this 6<sup>th</sup> day of June, 2003**

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LINDSAY BYRNE  
Hearing Officer

