



UNITED STATES DISTRICT COURT
District of Maine

DAVID E. MURRAY,]
Plaintiff,]
vs.]
WAL-MART STORES, INC., et al.,]
Defendants.]

VIDEOTAPED DEPOSITION OF: ALAN HEINBAUGH

Taken before Cheryl C. Pieske, Notary Public, in and for the State of Maine, on **SEPTEMBER 30, 2016**, at the offices of Johnson, Webbert & Young, LLP, 160 Capitol Street, Augusta, Maine, commencing at 9:03 a.m., pursuant to notice given.

APPEARANCES:

FOR THE PLAINTIFF: DAVID G. WEBBERT, ESQ.
MAX I. BROOKS, ESQ.
Johnson, Webbert & Young
160 Capital Street
Augusta, ME 04332-0079

FOR THE DEFENDANTS: RONALD W. SCHNEIDER, JR., ESQ.
Bernstein Shur
100 Middle Street
Portland, ME 04104-5029

Also present: Mr. David Murray

1 **A. Probably two of the three.**
 2 **Q.** And how was she bullying them?
 3 **A. E-mails; getting the previous market manager and me**
 4 **for a while, but mainly the previous market manager,**
 5 **to hold them accountable for different things. She**
 6 **was just short in her words.**
 7 **Q.** She was too demanding?
 8 **A. She was demanding. She was -- she is in a**
 9 **position -- she was in a position of influence, not**
 10 **directive.**
 11 **Q.** And do you know where her employment stands with
 12 Wal-Mart?
 13 **A. Well, she left them. She went out on LOA and never**
 14 **came back.**
 15 **Q.** Did she ever make any complaints about you?
 16 **A. No.**
 17 **Q.** Do you think your feedback played a role in her
 18 employment ending?
 19 **A. She did make a complaint with me. What that**
 20 **complaint was, I don't know. But when they started**
 21 **asking questions, actually, the store managers,**
 22 **basically, were saying, "Alan is not the problem.**
 23 **It's Ruth that's the problem." And then the**
 24 **questions started going towards her performance, not**
 25 **mine, and then she just comped out, LOA, and never**

1 **came back.**
 2 **Q.** Your understanding is that the investigation started
 3 out as a result of a complaint by her against you?
 4 **A. Correct.**
 5 **Q.** Were you told what the complaint was?
 6 **MR. SCHNEIDER:** Objection.
 7 **A. I don't recall.**
 8 **BY MR. WEBBERT:**
 9 **Q.** Was that a redbook investigation?
 10 **MR. SCHNEIDER:** Objection.
 11 **A. Could have been.**
 12 **BY MR. WEBBERT:**
 13 **Q.** Were you interviewed?
 14 **MR. SCHNEIDER:** Objection.
 15 **A. Yeah, I guess I was questioned by the regional HR.**
 16 **BY MR. WEBBERT:**
 17 **Q.** And is that how you learned that Ruth Dodge had made
 18 a complaint against you?
 19 **MR. SCHNEIDER:** Objection.
 20 **A. Uh-hmm.**
 21 **BY MR. WEBBERT:**
 22 **Q.** Yes?
 23 **A. Yes.**
 24 **Q.** Did her complaint have anything to do with her
 25 gender or sex?

1 **MR. SCHNEIDER:** Objection.
 2 **A. I don't know. I don't think so.**
 3 **BY MR. WEBBERT:**
 4 **Q.** Do you know what the nature of her complaint was?
 5 **MR. SCHNEIDER:** Objection.
 6 **A. I think that I was just too difficult to work with,**
 7 **but I really don't know specifically what the**
 8 **complaint was.**
 9 **BY MR. WEBBERT:**
 10 **Q.** And was that a redbook investigation with Janet
 11 Deans?
 12 **MR. SCHNEIDER:** Objection.
 13 **A. No.**
 14 **BY MR. WEBBERT:**
 15 **Q.** What kind of investigation was it?
 16 **MR. SCHNEIDER:** Objection.
 17 **BY MR. WEBBERT:**
 18 **Q.** I thought you said there was a complaint by her and
 19 that it was investigated, and you were found
 20 innocent. Is that right?
 21 **MR. SCHNEIDER:** Objection.
 22 **A. Yes.**
 23 **BY MR. WEBBERT:**
 24 **Q.** Was it a redbook investigation?
 25 **MR. SCHNEIDER:** Objection.

1 **A. Probably. Possibly. I don't know.**
 2 **BY MR. WEBBERT:**
 3 **Q.** What are the different kinds of investigations that
 4 Wal-Mart does when there's a complaint of employment
 5 discrimination?
 6 **A. Redbook. Sometimes, depending what it is, it's**
 7 **conversational for fact-finding. Like that.**
 8 **Q.** Any other kinds?
 9 **A. Not that I'm aware of.**
 10 **Q.** So is the redbook the formal investigation?
 11 **A. Formal?**
 12 **Q.** Yes?
 13 **A. Yes.**
 14 **Q.** And if there's a concern about a financial
 15 impropriety at a store, does that result in a
 16 different kind of investigation?
 17 **A. That may be an asset protection investigation.**
 18 **Q.** Do you recall an issue with markdown issues at the
 19 Waterville store?
 20 **MR. SCHNEIDER:** Objection.
 21 **A. Yes.**
 22 **BY MR. WEBBERT:**
 23 **Q.** Did you report concerns about that?
 24 **MR. SCHNEIDER:** Objection.
 25 **A. What I had said during that investigation was that**

1 there was markdowns that weren't taken that I felt
 2 should have been taken.
 3 BY MR. WEBBERT:
 4 Q. Can you explain that a little more?
 5 A. If you have inventory that's unsellable, you are to
 6 mark it down to zero right then. You're not
 7 supposed to carry that inventory on your books into
 8 the next month, the next quarter, the next year.
 9 Q. And is this when you took over the Waterville store
 10 from David Murray?
 11 A. Yup. Yes.
 12 Q. And fairly soon after you took over, you reported
 13 this to Wal-Mart?
 14 A. That came up in their investigation about markdowns.
 15 Q. Did you initiate that investigation?
 16 A. I don't know that I --
 17 MR. SCHNEIDER: Objection.
 18 A. -- initiated it.
 19 BY MR. WEBBERT:
 20 Q. Is it possible that you initiated it?
 21 MR. SCHNEIDER: Objection.
 22 A. I don't know.
 23 BY MR. WEBBERT:
 24 Q. Did you raise a concern about David Murray's
 25 markdowns fairly soon after you took over the

1 that simple. If a TV is broken, it's cracked, if an
 2 electronic radio doesn't work, if something is out
 3 of date, something is damaged that no one would buy
 4 it, that's unsaleable.
 5 Q. Okay. Let's talk about that because I have
 6 purchased things that are damaged at discount. So
 7 I'm not sure I understand your assumption that any
 8 kind of damaged product would be unsaleable. Can
 9 you explain that further?
 10 A. Sure. If a TV screen is cracked, if a radio doesn't
 11 turn on or it crackles, or if something is out of
 12 date, you can't purchase it.
 13 Q. Sometimes customers are willing to buy something out
 14 of date, aren't they?
 15 A. Not in Wal-Mart. We don't sell anything that's out
 16 of date, knowingly sell anything out of date.
 17 Q. You know, like cars. New models come out and you --
 18 A. We don't sell cars.
 19 Q. Right. But customers will buy things that are out
 20 of date if they get a big enough discount sometimes,
 21 right?
 22 A. Cars never are out of date.
 23 Q. The year is out of date.
 24 A. Is last year's date.
 25 Q. Right. That's out of date, right?

1 Waterville store?
 2 A. I had a discussion about markdowns and deleted and
 3 clearance inventory in excess.
 4 Q. Deleted and clearance and?
 5 A. Markdowns, unsalables, nonsalable merchandise.
 6 Q. Did you report that to Paul Busby or somebody else?
 7 A. Paul Busby.
 8 Q. How soon after you took over the Waterville store
 9 did you report that?
 10 A. Months, within months.
 11 Q. And you took over in about March of 2014?
 12 A. February of -- I believe it was February.
 13 Q. And this was improprieties that you thought occurred
 14 while David Murray was the market manager?
 15 MR. SCHNEIDER: Objection.
 16 A. I expressed concerns about the amounts of that
 17 inventory.
 18 BY MR. WEBBERT:
 19 Q. And is there any discretion in the markdowns?
 20 A. Yes, there is.
 21 Q. So part of the discretion is deciding whether it's
 22 completely nonsalable?
 23 A. I would disagree with that. I mean --
 24 Q. It's a question.
 25 A. You can either sell it or you can't. It's really

1 A. No. It's just a different date.
 2 Q. Making a judgment call about whether something is
 3 out of date is discretionary, isn't it?
 4 A. No.
 5 Q. So is the latest version of Word out of date as soon
 6 as there's a new version?
 7 A. I don't know if it's out of date. It's not new.
 8 Q. Right.
 9 A. It's not the newest version.
 10 Q. It's a gray area, right?
 11 A. If a bottle of aspirin is out of date, it's out of
 12 date.
 13 Q. Is everything that cut and dry about whether it's
 14 out of date?
 15 A. Not everything, no.
 16 Q. So what did you report about your estimate of the
 17 items that should have been marked down that
 18 weren't?
 19 MR. SCHNEIDER: David, can I just -- are you
 20 asking him what he reported to Paul Busby?
 21 MR. WEBBERT: No.
 22 MR. SCHNEIDER: Okay.
 23 A. So what did I report?
 24 BY MR. WEBBERT:
 25 Q. Yup.

1 **MR. SCHNEIDER:** Well --

2 **MR. WEBBERT:** You can say "objection" every

3 time.

4 **MR. SCHNEIDER:** No, no, no, because I need to

5 know whether I -- who -- reporting to who.

6 **MR. WEBBERT:** You can object.

7 **MR. SCHNEIDER:** No. I need -- I may have to

8 do more than just object.

9 **MR. WEBBERT:** Could you read the -- can we

10 have the question read back?

11 **MR. SCHNEIDER:** Yeah.

12 **MR. WEBBERT:** It might help.

13 **MR. SCHNEIDER:** I'm just trying to tailor it

14 so that I understand what you're asking.

15 (Question read as follows by reporter: So what

16 did you report about the estimate of the items that

17 should have been marked down that weren't?)

18 **A. I don't recall an estimate, dollar value.**

19 **BY MR. WEBBERT:**

20 **Q.** You testified I thought that the size of the

21 markdowns was one of your major concerns, right?

22 **A. Not -- not the amount that was taken, the amount**

23 **that should have been accounted for.**

24 **Q.** Right. That's the number I'm asking about.

25 **A. I don't recall having a number.**

1 **Q.** Right, but a range. Was it under \$5?

2 **A. I don't recall how much it was. \$5 is not much,**

3 **so...**

4 **Q.** It was more than that, right?

5 **A. Sure.**

6 **Q.** So for it to be of worthy of your attention, it had

7 to be above \$5, right?

8 **A. It was thousands of dollars.**

9 **Q.** Above 10,000?

10 **A. I don't recall.**

11 **Q.** Is it likely it was above 10,000 in your view?

12 **A. Likely.**

13 **Q.** Is it likely it was above 50,000?

14 **A. I don't recall. I would say well over ten, but I**

15 **don't know how much.**

16 **Q.** And who was responsible for doing the marking down

17 at the Waterville store?

18 **A. The store manager followed up by market manager.**

19 **Q.** And the store manager was whom?

20 **A. McCafferty.**

21 **Q.** Did he get in trouble for the markdown?

22 **MR. SCHNEIDER:** Objection.

23 **A. There were discussions with me about what his**

24 **obligation was on dealing with markdowns.**

25 **BY MR. WEBBERT:**

1 **Q.** Was he primarily responsible for the markdown

2 decisions that you were questioning?

3 **A. He's the manager of the store, so, yes.**

4 **Q.** And now he's currently serving as a store manager?

5 **A. He is.**

6 **Q.** Which store?

7 **A. He just went to Auburn, Maine.**

8 **Q.** And that has larger sales than Waterville?

9 **A. Yup. It does.**

10 **Q.** Is that the store in Maine with the most sales?

11 **A. I believe it still carries that title.**

12 **Q.** Is it fair to say that you wouldn't send him to the

13 store with the most sales if you didn't think he was

14 one of the better store managers?

15 **A. Well, I didn't send him there.**

16 **Q.** I'm sorry. Wal-Mart wouldn't have him as the store

17 manager for Auburn unless they thought he was one of

18 the better store managers in Maine, right?

19 **A. Correct. At the time he was in Waterville, he was**

20 **not one of the better store managers.**

21 **Q.** And you reported your concerns to Paul Busby you

22 said, right?

23 **A. Uh-hmm.**

24 **Q.** Did you have any further involvement in that issue?

25 **MR. SCHNEIDER:** Objection.

1 **A. There was an investigation.**

2 **BY MR. WEBBERT:**

3 **Q.** Were you interviewed in the investigation?

4 **A. Yup.**

5 **Q.** Do you remember about when that interview was?

6 **A. Middle of that year.**

7 **Q.** So middle of 2014?

8 **A. Probably.**

9 **Q.** Were you ever told --

10 **A. Well, first quarter, second quarter.**

11 **Q.** Were you ever told what the conclusions of the

12 investigation were?

13 **MR. SCHNEIDER:** Objection.

14 **A. No.**

15 **BY MR. WEBBERT:**

16 **Q.** Do you have any sense of what the result of the

17 investigation was?

18 **MR. SCHNEIDER:** Objection.

19 **A. No.**

20 **BY MR. WEBBERT:**

21 **Q.** So if they had found improper markdowns, what would

22 the next procedure normally be?

23 **A. Accountability.**

24 **Q.** What --

25 **A. Yeah, accountability.**

1 Q. What kind of accountability?

2 A. **I don't know.**

3 Q. Well, you're a market manager responsible for

4 markdowns indirectly through your store managers,

5 right?

6 A. **Uh-hmm.**

7 Q. What do you understand to be the accountability if

8 you were to intentionally not mark items down?

9 A. **It could be getting written up.**

10 Q. Any criminal liability?

11 A. **I don't think so.**

12 Q. And what do you think -- given the scale of the

13 issue that you saw in Waterville, what do you think,

14 if it was intentionally done, what would be the

15 appropriate consequences?

16 A. **Accountability.**

17 Q. A coaching?

18 A. **Yup.**

19 Q. Termination?

20 A. **It depends. Maybe. Maybe not.**

21 Q. And given what you know, do you think the store

22 manager was primarily responsible for the markdown

23 issues that you saw?

24 A. **The store manager was insistent that it was**

25 **following the market direction.**

1 Q. 80 pallets of?

2 A. **Clearance deleted.**

3 Q. What is clearance deleted?

4 A. **Things that are out of season. Like right now,**

5 **summer is out of season. We're going into winter.**

6 **It should be clearanced and sold, or if you have**

7 **Easter or Valentine's or 4th of July, it's out of**

8 **season now. That would be both clearance and**

9 **deleted because it goes deleted, and then it's**

10 **clearanced. Deleted means it's nonreorderable at**

11 **the time. And the same with side counter stock,**

12 **things become deleted, taken out of a modular, and**

13 **then they go clearance after they're deleted.**

14 Q. Did you report concerns about the lack of markdowns

15 in Skowhegan?

16 A. **Oh, yeah.**

17 Q. Was that investigated, too?

18 A. **I don't know.**

19 Q. Were you interviewed about it?

20 A. **I don't remember Skowhegan.**

21 Q. And what were the 80 pallets?

22 A. **It's stuff that should have been gone: Out of**

23 **season stuff, old merchandise, things that didn't**

24 **have a home.**

25 Q. So they should have been sold before they got

1 Q. What does that mean, the market direction?

2 A. **Murray's direction.**

3 Q. The market manager?

4 A. **Uh-hmm.**

5 Q. Did you believe him?

6 A. **I didn't have a reason not to.**

7 Q. Did the store manager think that it was legitimate

8 the way he had handled the markdowns?

9 A. **Yup, he did.**

10 Q. And can you give any examples of things that weren't

11 marked down that you thought obviously should have

12 been?

13 A. **TVs, electronics, out of dates. Well, I picked**

14 **up -- I picked up two stores. I couldn't tell you**

15 **specifically how much Waterville had, but Skowhegan**

16 **had over 80 pallets of clearance deleted packed up,**

17 **wrapped up in their steel and plus what was on the**

18 **floor, which is a lot.**

19 Q. So besides Waterville, what was the other store?

20 A. **Skowhegan.**

21 Q. Okay. And you're saying you observed in Skowhegan a

22 problem with markdowns, too?

23 A. **Not -- yeah. Not taking markdowns, yes.**

24 Q. And the evidence was? You said there was?

25 A. **Over 80 pallets plus what was on the floor.**

1 wrapped up?

2 A. **Typically.**

3 Q. Do they have any value when the season comes back?

4 A. **Yup. Sometimes it does, yup.**

5 Q. Is it possible you get more money if you wait until

6 the next season when it's appropriate?

7 A. **If it's still a viable product, yup.**

8 Q. Is that a legitimate strategy?

9 A. **Sure, it's legitimate.**

10 Q. Was clearance/deleted ownership an overall issue in

11 2013 in the region you worked in?

12 A. **Yup.**

13 Q. Tell me about that. What was the discussion about

14 it being an issue generally?

15 A. **That corporately we were holding onto too much**

16 **clearance/deleted. We had exit strategies to get**

17 **through that. You know, value price to put it on**

18 **end caps, put it in a clearance/deleted aisle.**

19 **There was a PowerPoint that came out on how to**

20 **display it, take progressive markdowns.**

21 Q. So this was recognized as an across-the-board

22 problem?

23 A. **Uh-hmm.**

24 Q. Had you gotten ahead of that in all of your stores?

25 A. **I had. I had the lowest clearance/deleted in the**

1 **division.**
 2 **Q.** So you were more successful than all the other
 3 market managers in getting ahead of this issue; is
 4 that right?
 5 **A.** I was.
 6 **Q.** But you understood that this issue was not limited
 7 to David Murray's market, right?
 8 **A.** No. There was a lot of clearance/deleted that
 9 wasn't dealt with the way we were showed to.
 10 **Q.** The new standards?
 11 **A.** Standards, yup.
 12 **Q.** And they had changed in 2013; is that right?
 13 **A.** I don't know that they had changed. They had -- it
 14 was just another way of getting through that
 15 merchandise.
 16 **Q.** Fair to say that there was a push throughout the
 17 entire region to change how deleted ownership was
 18 handled?
 19 **A.** Fair.
 20 **Q.** And you're saying in 2013 it was recognized that
 21 many stores were holding onto too much merchandise
 22 that had become less saleable and, perhaps, even not
 23 saleable at all; is that right?
 24 **A.** Correct.
 25 **Q.** And was the region still working on that in 2014?

1 **A.** I don't know when Julie had sent out the PowerPoint.
 2 '12, '13, '14, I don't know. It had been sent out a
 3 couple different times a couple of different ways,
 4 so...
 5 **Q.** So your recollection is the first one wasn't enough.
 6 They had to follow up on it and keep working on it?
 7 **A.** Yup. Sure.
 8 **Q.** So it took over a year to get on top of that
 9 problem?
 10 **A.** Yup.
 11 **Q.** Do you remember a Brad Rosenberry?
 12 **A.** I do.
 13 **Q.** Was he an employee that worked with you?
 14 **A.** Yup. He was a store manager in Brewer.
 15 **Q.** Did you have issues with his performance?
 16 **A.** I did.
 17 **Q.** Did he lose his job?
 18 **A.** He resigned. He quit. I had coached him, put him
 19 on a PIP. He had quit. He came back two weeks
 20 later. Paul reinstated him. I gave him a week back
 21 in the store. I came back in, talked to him, put
 22 him back on his performance improvement plan; and I
 23 think he quit like within three days of that again.
 24 **MR. SCHNEIDER:** I'm going to object. David,
 25 one thing I realized yesterday that we did not do,

1 we did not designate the deposition as confidential.
 2 **MR. WEBBERT:** I think the confidentiality
 3 issue gives you some time to do that.
 4 **MR. SCHNEIDER:** Right. So we have to do -- I
 5 just thought we should be put that on the record for
 6 today, too, right now, because I just thought about
 7 it. You're, obviously, talking about other third
 8 parties, so...
 9 **MR. WEBBERT:** Right. We have a confidential
 10 order that allows --
 11 **MR. SCHNEIDER:** No. I understand.
 12 **MR. WEBBERT:** -- 15 days after the transcript
 13 is issued. So I agree.
 14 **MR. SCHNEIDER:** Okay.
 15 **BY MR. WEBBERT:**
 16 **Q.** Approximately when did Brad Rosenberry quit?
 17 **A.** 2009 maybe.
 18 **Q.** Did he make any complaints about you?
 19 **MR. SCHNEIDER:** Objection.
 20 **A.** I don't think he liked me. But did he make a formal
 21 complaint? I don't recall a formal complaint.
 22 **BY MR. WEBBERT:**
 23 **Q.** Did he make an informal complaint about you to
 24 anyone else?
 25 **MR. SCHNEIDER:** Objection.

1 **A.** To Ruth.
 2 **BY MR. WEBBERT:**
 3 **Q.** Do you recall the nature of his complaint?
 4 **A.** No.
 5 **Q.** Did she talk to you about it?
 6 **A.** What's that?
 7 **Q.** Did Ruth talk to you about his complaint?
 8 **A.** No.
 9 **Q.** How did you find out about it?
 10 **A.** I guess it was Busby. It was a long time ago.
 11 **Q.** Did any Wal-Mart employees ever file legal claims
 12 against Wal-Mart based on adverse actions that you
 13 contributed to?
 14 **MR. SCHNEIDER:** Objection.
 15 **A.** Not to my knowledge.
 16 **BY MR. WEBBERT:**
 17 **Q.** So did Brad Rosenberry file any complaints about the
 18 end of his employment?
 19 **MR. SCHNEIDER:** Objection.
 20 **A.** Not to my knowledge.
 21 **BY MR. WEBBERT:**
 22 **Q.** Have you received training from Wal-Mart on the laws
 23 prohibiting sexual harassment?
 24 **A.** Yeah.
 25 **Q.** Tell me about that training.