

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARIO SINGH : CIVIL ACTION  
 :  
 v. :  
 :  
 WAL-MART STORES, INC. : NO. 98-1613

M E M O R A N D U M

WALDMAN, J.

June 9, 1999

I. Background

This case arises from defendant's refusal to give plaintiff a refund or exchange for a video cassette recorder (VCR) he purchased from defendant. Plaintiff alleges that defendant refused to do so because of plaintiff's national origin, Guyanese, and his race, Asian-Indian.

Plaintiff has asserted federal claims pursuant to 42 U.S.C. §§ 1981 and 1981a, and state law claims for breach of express warranty, breach of contract, fraudulent misrepresentation and for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). Plaintiff invokes supplemental jurisdiction for his state claims. Presently before the court is defendant's motion for summary judgment.

II. Legal Standard

In considering a motion for summary judgment, a court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or conclusory allegations, but rather must present evidence from which a jury could reasonably find in his favor. Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999).

### **III. Facts**

From the evidence of record, as uncontroverted or otherwise viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Defendant operates a national chain of retail stores, including one in Fairless Hills, Pennsylvania. Defendant has a merchandise return policy which permits customers with a valid receipt to return or exchange merchandise for up to 90 days from the date of purchase. While defendant will not accept goods after 90 days, it will send them out for service or repair. The return policy is posted at the courtesy desk at defendant's Fairless Hills store.

When a customer attempts to return or exchange an item, defendant requires its customer service representatives to compare the universal price codes on the customer's receipt and the package, and to compare the serial numbers on the package and on the merchandise itself in an attempt to identify items which the customer did not in fact buy from defendant within the previous 90 days. Each individual VCR has a unique serial number which is printed on the VCR and its box. All VCRs of the same make and model share the same universal price code. Even when the numbers and codes match, there is no assurance that the item is returnable. If the numbers match, it establishes that the VCR is in the box in which it was sold. If the codes match, it establishes that a VCR of that type or model was purchased on the date shown on the receipt. Thus, one could present a VCR purchased over 90 days earlier in the original box with a current

receipt for a similar VCR purchased recently and the numbers and codes would be harmonious.

Defendant requires its customer service representatives to call a manager for assistance when a customer is dissatisfied after being advised that an item he has presented is not returnable. A final decision about the return of a disputed item is made by "the store manager at the time."

Plaintiff was born in Guyana and is of Asian-Indian descent. On December 19, 1997, plaintiff went to defendant's Fairless Hills store with several friends and attempted to return a VCR. Plaintiff's father had purchased the VCR at the Fairless Hills store four months earlier for use in the family limousine. Plaintiff believed the VCR was defective because once installed in the limousine and switched on, it could not be turned off without shutting off the limousine's ignition.

Plaintiff went to the courtesy desk and spoke briefly with Linda Ely, one of defendant's customer service representatives. Ms. Ely had something else to do and Sue Bramble, the courtesy desk supervisor, assisted plaintiff. Plaintiff told Ms. Bramble that the VCR was not working properly. Ms. Bramble looked at the receipt and told plaintiff that the 90-day return or exchange period had expired but she would send the VCR for repair at no charge to plaintiff. Plaintiff agreed that more than 90 days had passed since the VCR had been purchased.

Plaintiff said that he needed a new VCR immediately and would buy a new one. Plaintiff declined to have the VCR he sought to exchange sent for repair. He purchased another identical VCR. Plaintiff acknowledges that he was not discriminated against in any way during this or at least five prior visits visit to the Fairless Hills store.

While still within earshot of the courtesy desk, Ms. Ely overheard plaintiff or his companion talk about purchasing another VCR and then returning the other. Ms. Ely informed Ms. Bramble of what she had heard and that she believed plaintiff was planning to buy a new VCR and then attempt again to return the old VCR.

The next day, plaintiff returned to the Fairless Hills store with the same friends and his brother, Dion Singh. They went to the courtesy desk. Plaintiff had with him a VCR box. Plaintiff had installed the new VCR in his father's limousine, and discovered that he was also unable to turn that VCR off without shutting off the limousine's ignition. He discovered that the problem was not with the VCR but was caused by an electrical switch in the limousine being in the wrong position.<sup>1</sup>

It was the holiday season and the store was very crowded. Plaintiff and his brother waited in line for 25 to 30

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<sup>1</sup> It does not appear from the evidence of record that plaintiff related this to any of defendant's employees on December 20, 1997.

minutes behind 10 to 15 customers and ahead of about 10 customers. Of the customers waiting in line, some were white, some were black and one was Asian.<sup>2</sup> Plaintiff witnessed several customers return items in exchange for refunds which were credited to their accounts or charge cards. A white customer in front of plaintiff in line received a refund credit for a telephone which was in a "ripped-up box." A white customer immediately ahead of plaintiff received a refund credit on an item.

Plaintiff eventually came to the front of the line attended by Jennifer Bright. Ms. Bramble was nearby, recognized plaintiff and noticed that he was carrying a VCR box. Plaintiff waited about five minutes before Ms. Bright acknowledged him. During this period, Ms. Bright stepped away from the courtesy desk and used the telephone to speak with customers who had been put on hold. Plaintiff thought the delay was due to the fact that he was waiting in line with a VCR of exactly the same type as the one he had attempted to return the previous day.

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<sup>2</sup> In his brief plaintiff states that he "recalled no persons of color in line at the time he waited for and was denied his return." Plaintiff apparently refers to a portion of his deposition testimony in which he stated that he did not remember the races of the the people in line. Plaintiff, however, later unequivocally answered "Yes" to the question "Were there African-American people behind you?" Shortly thereafter, plaintiff was asked "Did you notice the races of the people who were in line with you?" He responded "African-Americans, white. There was one Oriental."

Plaintiff gave Ms. Bright the VCR he was carrying. She asked plaintiff for a receipt and his credit card. Ms. Bramble was operating the cash register next to Ms. Bright's. She approached Ms. Bright and whispered into her ear. Ms. Bright then told plaintiff that he would have to go to Ms. Bramble's register because her register was temporarily unable to process credit card transactions. A white customer behind plaintiff on Ms. Bright's line returned an item and received a refund credit.

Plaintiff went to Ms. Bramble's register and told her that he wanted to return the VCR he had bought the day before for a refund. Ms. Bramble told plaintiff that the VCR had to be inspected and she would have to verify that it was the "right" VCR. Ms. Bramble then compared the universal price codes on the receipt and the VCR box, and then the serial numbers on the box and on the VCR. Ms. Bramble said the serial numbers on the box and on the VCR did not match. Plaintiff said they did match. Ms. Bramble then said she would have to verify that the VCR worked properly. Plaintiff believed Ms. Bramble told him this because she suspected he was engaging in a "swap" or committing some type of "fraud" by returning the old VCR he had attempted to return the day before.

Ms. Bramble excused herself and found the store manager on duty, William Newman. Ms. Bramble told Mr. Newman that the serial numbers did not match. Mr. Newman advised Ms. Bramble

that store policy prevented her from giving a refund or exchange. When this was related by Ms. Bramble, plaintiff said he wanted to see the store manager.

Mr. Newman then came to the courtesy desk and "verified" that the serial numbers did not match. As plaintiff acknowledges, Ms. Bramble also told Mr. Newman that on the day before, plaintiff both bought a new VCR and attempted unsuccessfully to return an identical old VCR. She told Mr. Newman that plaintiff was attempting to make a "swap," returning a VCR for which the warranty had expired by presenting it as the new VCR. Mr. Newman told plaintiff, "you know what you did, and we know what you did." Mr. Newman told plaintiff that all he could do for him was send the VCR out for repair.

Plaintiff then left the store and called the police. Anthony DeSilva, a local police officer, arrived about 20 minutes later. Officer DeSilva spoke with the manager. Plaintiff did not hear their conversation and the precise content cannot be discerned from the record presented. Officer DeSilva told plaintiff there was nothing he could do to resolve the problem and he could not force defendant to give plaintiff a credit for the VCR. Officer DeSilva advised plaintiff to consider obtaining legal advice if he was dissatisfied. At the time of his deposition in November 1998, Officer DeSilva recalled that there was a problem with some numbers not matching but was "pretty

sure," although "not a hundred percent sure," that the serial numbers matched.

On or shortly after December 23, 1997 on his way to visit a friend in New York, plaintiff stopped at defendant's New Brunswick, New Jersey store with the VCR he had attempted to return to the Fairless Hills store on December 20th. The employee at the courtesy desk offered to credit plaintiff's charge card for the amount of the purchase price. Plaintiff, however, declined the offer and left the New Brunswick store with the VCR.

When a customer enters one of defendant's stores with an item for return, a security officer places a pink sticker on the box so it is clear that the individual is not shoplifting. Plaintiff acknowledges that there should thus be two such stickers on the newer VCR box which he testified he has retained. He testified that he is in fact "not sure" if his box has two stickers.<sup>3</sup>

Plaintiff asserts that the employees at the Fairless Hills store discriminated against him on the basis of race and national origin by making him wait for five minutes when his turn came at the courtesy counter on December 20, 1997, by interrogating him "like a criminal," by "look[ing at him] with

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<sup>3</sup> Plaintiff has not submitted the box or a photograph of it.

suspicion," by inspecting the item he was attempting to return, by lying about the operation of Ms. Bright's register and by refusing to accept the VCR for credit. He claims that he has frequently lost sleep thinking about this encounter. Plaintiff also asserts that defendant violated its 90-day return policy by refusing to exchange the VCR for a refund or credit on December 20th.

#### IV. Discussion

##### A. § 1981

Individuals may not discriminate in the making and enforcement of contracts on the basis of race. See 42 U.S.C. § 1981(a); St. Francis College v. Al-Khazraji, 481 U.S. 604, 609 (1987); Runyon v. McCrary, 427 U.S. 160, 168, 174-175 (1976); Ferrill v. The Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999); Majeske v. Fraternal Order of Police, Local Lodge No. 7, 94 F.3d 307, 312 (7th Cir. 1996); Pamintuan v. Nanticoke Memorial Hospital, Inc., 1998 WL 743680, \*12 (D. Del. Oct. 15, 1998). For purposes of § 1981, race encompasses ancestry or ethnicity. See Al-Khazraji, 481 U.S. at 613.

It is not at all clear that § 1981 prohibits discrimination on the basis of national origin. See Bennun v. Rutgers State Univ., 941 F.2d 154, 172 (3d Cir. 1991) ("Section 1981 does not mention national origin"), cert. denied, 502 U.S. 1066 (1992); King v. Twp. of East Lampeter, 17 F. Supp.2d 394,

417 (E.D. Pa. 1998) (disparate treatment on basis of national origin not within scope of § 1981); Vuksta v. Bethlehem Steel Corp., 540 F. Supp. 1276, 1281 (E.D. Pa. 1982) (§ 1981 "does not concern disparity in treatment on the basis of . . . national origin"), aff'd, 707 F.2d 1405 (3d Cir.), cert. denied, 464 U.S. 835 (1983).<sup>4</sup> A plaintiff who alleges he was discriminated against because he is of Asian-Indian descent, however, may assert a § 1981 race discrimination claim. See Jatoi v. Hurst-Eules-Bedford Hospital Auth., 807 F.2d 1214, 1218 (5th Cir.) (allegation that plaintiff was East Indian sufficient to invoke protection of § 1981), modified on other grounds, 819 F.2d 545 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988); Chandoke v. Anheuser-Busch, Inc., 843 F. Supp. 16, 18 n.2 (D.N.J. 1994).

Since the 1991 amendments, § 1981 encompasses the "performance, modification and termination of contracts." See 42 U.S.C. § 1981(b); Rivers v. Roadway Express, Inc., 511 U.S. 298, 300 (1994); Spriggs v. Diamond Auto Glass, 165 F.3d 1015, 1017-18 (4th Cir. 1999). Section 1981 claims typically involve allegations of discrimination in the context of employment contracts. Claims involving retail transactions are less

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<sup>4</sup> The Supreme Court has recently granted certiorari with respect to the question. See United Brotherhood of Carpenters & Joiners of America, Inc. v. Anderson, 119 S. Ct. 1495 (1999). In any event, there is no evidence of record that Ms. Bramble or Mr. Newman were aware that plaintiff was a native or national of Guyana.

frequent but do arise. See Morris v. Office Max, Inc. 89 F.3d 411, 413 (7th Cir. 1996); Wesley v. Don Stein Buick, Inc., --- F. Supp.2d ---, 1999 WL 232676, \*6 n.8 (D. Kan. Mar. 10, 1999); Bobbitt by Bobbitt v. Rage, Inc., 19 F. Supp.2d 512, 516 (W.D.N.C. 1998); Hampton v. Dillard Dep't Stores, Inc., 985 F. Supp. 1055, 1059 (D. Kan. 1997). They are, however, not unheard of. See Hickerson v. Macy's Department Store at Esplanade Mall, 1999 WL 144461 (E.D. La. Mar. 16, 1999); Wells v. Burger King Corp., --- F. Supp.2d ---, 1998 WL 1031798 (N.D. Fla. Dec. 14, 1998); Stevens v. Steak N Shake, Inc., 35 F. Supp.2d 882 (M.D. Fla. 1998); McCaleb v. Pizza Hut of America, Inc., 28 F. Supp.2d 1043 (N.D. Ill. 1998); Ackaa v. Tommy Hilfiger Co., 1998 WL 136522 (E.D. Pa. Mar. 24, 1998); Sterling v. Kazmierczak, 983 F. Supp. 1186 (N.D. Ill. 1997); Harrison v. Denny's Restaurant, Inc., 1997 WL 227963 (N.D. Cal. Apr. 24, 1997); Lewis v. J.C. Penney Co., Inc., 948 F. Supp. 367 (D. Del. 1996).

To sustain his § 1981 claim, plaintiff must show that he was intentionally discriminated against because of his race in the enforcement or performance of the 90-day consumer return/exchange agreement. See Odom v. Columbia University, 906 F. Supp. 188, 194 (S.D.N.Y. 1995). Section 1981 claims are governed by the burden-shifting framework set out in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See

Stewart v. Rutgers, The State University, 120 F.3d 426, 431-32 (3d Cir. 1997).

Defendant argues that plaintiff has failed to establish a prima facie case of racial discrimination and that even if he had, he has failed to produce evidence which would permit a reasonable factfinder to conclude that defendant's nondiscriminatory explanation of a suspected swap is pretextual.

To the extent that plaintiff's § 1981 claim is predicated on defendant's employees making him wait for five minutes at the courtesy counter, interrogating him "like a criminal," looking at him "with suspicion," inspecting the VCR and telling him the register was not processing credit-card transactions, it is not sustainable. See Morris, 89 F.3d at 414 (§ 1981 plaintiff must point to specific fact of denial of contract right to survive summary judgment -- that store employee summoned police to "check out" black patrons because of race insufficient); Bobbitt, 19 F. Supp.2d at 517-18 (allegations of poor service, even with discriminatory animus, manifested by 10 minute wait before being seated in restaurant, discourteous treatment by waitress and 15 minute wait to receive menus insufficient to state prima facie § 1981 claim); Hampton, 985 F. Supp. at 1059-60 (harassment by store security guard because of race insufficient to state prima facie § 1981 claim). See also Lewis, 948 F. Supp. at 371-72 (rejecting argument that § 1981

provides remedy for breach of unstated contract that all who enter a commercial establishment will be treated equally as "such a theory would come close to nullifying the contract requirement of § 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts").

A claim that a store refused because of race to accept an item for return or exchange to which a customer was contractually entitled, however, clearly involves the performance of a contract. See Hickerson, 1999 WL 144461, \*2.

To establish a prima facie § 1981 case the plaintiff must show that he is a member of a protected class; that he attempted to make, enforce or secure the performance of a contract; that he was denied the right to do so; and, that the opportunity to make, enforce or secure the performance of a contract for like goods or services remained available to similarly situated persons outside the protected class. See Wells, 1998 WL 1031798, at \*2; White v. Denny's, Inc., 918 F. Supp. 1418, 1424 (D. Colo. 1996). If plaintiff succeeds in doing so, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the challenged action.

The plaintiff may then avert summary judgment by presenting evidence from which one could reasonably find that the proffered reason is unworthy of belief or that unlawful

discrimination was more likely than not a determinative factor in the challenged decision. See Wells, 1998 WL 1031798, at \*2-3; White, 918 F. Supp. at 1425-26. See also Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F. 3d 639, 644 n.5 (3d Cir. 1998). A plaintiff, however, cannot discredit a proffered reason merely by showing that it was "wrong or mistaken" as the issue is whether "discriminatory animus motivated" the decisionmaker and not whether he or she was "wise, shrewd, prudent or competent." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). See also Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa.) (that a decision is ill-informed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995); Doyle v. Sentry Ins., 877 F. Supp. 1002, 1009 n.5 (E.D. Va. 1995) (it is the perception of the decisionmaker that is relevant).

The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times upon the plaintiff. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

"Similarly situated" means similar "in all relevant respects." Kline v. Kansas City, Mo., Fire Dept., --- F.3d ---, 1999 WL 270013, \* 9 (8th Cir. May 5, 1999). See also Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998)

(plaintiff must show he was "similar in all of the relevant aspects" to persons allegedly receiving preferential treatment); Holifield v. Reno, 115 F.3d 1555, 1563 (11th Cir. 1997)("in all aspects"); Shumway v. United Parcel Service, 118 F.3d 60, 64 (2d Cir. 1997) ("similarly situated in all material respects"); Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989) ("in all relevant aspects"); Dill v. Runyon, 1997 WL 164275, \*4 (E.D. Pa. Apr. 3, 1997) (plaintiff must demonstrate preferential treatment of persons "similarly situated in all material respects" to plaintiff).

Plaintiff seeks to compare himself simply to other customers at the Fairless Hills store who were attempting to return or exchange merchandise on December 20, 1997. Defendant argues with force, however, that there is no evidence any other customer had attempted to return an out-of-warranty appliance, purchased another identical appliance and then again attempted to make a return the next day at the same store in the presence of an employee who witnessed the events of the prior day and had been alerted to a conversation in which the customer or his companion discussed replicating the purchase and using the new receipt to do a swap. Plaintiff has not identified another customer of any race or ethnicity who was similarly situated in "all relevant respects."

Moreover, one cannot reasonably conclude that defendant's proffered reason is unbelievable or that defendant more likely than not refused to give plaintiff a refund on December 20th because of his race. The version of events on December 19th as described by Ms. Bramble and Ms. Ely is uncontroverted. Plaintiff himself perceived that Ms. Bramble suspected he was engaging in a "swap" or "fraud."<sup>5</sup> Plaintiff acknowledges that he was not discriminated against by Ms. Bramble or anyone else at the Fairless Hills store during his visit on December 19th or during at least five prior visits.

That plaintiff was offered a refund at another Wal-Mart store shortly thereafter does not reasonably support an inference that the Fairless Hills store employees discriminated against him on the basis of race or ethnicity. To the contrary, the only logical inference is that defendant does not racially discriminate in making refunds and would have given plaintiff one at any of its stores where he had not aroused suspicion. It underscores that plaintiff was denied a refund at the Fairless Hills store because it was there that one day before he attempted to return an out-of-warranty VCR, declined to have it repaired, announced he would simply buy a new VCR and then the next day

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<sup>5</sup> Even accepting that Ms. Bramble and Mr. Newman were wrong about the serial numbers, a match would show only that an item was in the box in which it was sold. Given the knowledge that plaintiff had recently purchased two identical boxed VCRs, this would not perforce obviate defendant's employees' suspicion.

sought to return a VCR of the identical model in the presence of an employee who knew he had attempted to return the out-of-warranty VCR the day before and had been alerted to a conversation suggesting a swap.

B. § 1981a

There is no cause of action under § 1981a. Section 1981a merely provides additional remedies to plaintiffs pursuing employment discrimination claims under Title VII or the Americans with Disabilities Act. See Varner v. Illinois State Univ., 150 F.3d 706, 718 (7th Cir. 1998); Huckabay v. Moore, 142 F.3d 233, 241 (5th Cir. 1998) (by its plain language § 1981a merely provides additional remedies for unlawful intentional employment discrimination); Perry v. Dallas Independent School Dist., 1998 WL 614668, \*1 n.1 (N.D. Tex. Sept. 23, 1998) ("[t]here is no such thing" as a "§ 1981a claim"); Powers v. Pinkerton, Inc., 28 F. Supp.2d 463, 472 (N.D. Ohio 1997), aff'd, 168 F.3d 490 (6th Cir. 1998); Presutti v. Felton Brush, Inc., 927 F. Supp. 545, 550 (D.N.H. 1995); Swartzbaugh v. State Farm Ins. Co., 924 F. Supp. 932, 934 (E.D. Mo. 1995); West v. Boeing Co., 851 F. Supp. 395, 398-401 & n.7 (D. Kan. 1994); McCormack v. Bennigan's, 1993 WL 293895, \*2-\*3 (E.D. Pa. July 30, 1993). Plaintiff is not pursuing a cause of action for employment discrimination and has no legally cognizable "§ 1981a claim."

C. Plaintiff's State Law Claims

Where all federal claims have been disposed of before trial, any supplemental state law claims are generally dismissed. See Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d cir. 1995); Lovell Mfg. v. Export-Import Bank of the U.S., 843 F.2d 724, 734 (3d Cir. 1988); Burke v. Mahanoy City, 40 F. Supp.2d 274, ---, 1999 WL 116291, \*14 (E.D. Pa. Mar. 3, 1999); Johnson v. Cullen, 925 F. Supp. 244, 242 (D. Del. 1996); Litz v. City of Allentown, 896 F. Supp. 1401, 1414 (E.D. Pa. 1995); Renz v. Shreiber, 832 F. Supp. 766, 782 (D.N.J. 1993); 13B Charles Alan Wright et al., Federal Practice and Procedure § 3567.2 (1984).

When, however, the appropriate disposition of supplemental claims involving settled questions of state law is straightforward and can be determined without further court proceedings, judicial economy is disserved by a dismissal without prejudice which would require a state court to duplicate the efforts of the federal court to reach the same result. See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993); Moore v. Nutrasweet Co., 836 F. Supp. 1387, 1404 (N.D. Ill. 1993). See also Borough of W. Mifflin, 45 F.3d at 788 (although claim over which court has original jurisdiction is dismissed before trial, court may decide pendent state claims where "considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so").

Plaintiff's defense of his state law claims consists of six conclusory sentences. From the summary judgment record it is clear that plaintiff has not sustained these claims. No useful purpose would be served by forcing the parties to proceed in state court and requiring a state judge to replicate the time expended to review the parties' submissions regarding those claims. The court will exercise its discretion and dispose of them herein.

Plaintiff acknowledges he was offered a full refund at defendant's New Brunswick store. Other than in contracts in which time is of the essence, a brief delay in performance does not constitute an actionable breach of contract. See, e.g., Gorzelsky v. Leckey, 586 A.2d 952, 956 (Pa. Super.), appeal denied, 598 A.2d 284 (Pa. 1991). Moreover, even if defendant's refusal to perform on December 20, 1997 constituted a breach, plaintiff has submitted no evidence that he sustained any damages from the brief delay in defendant's offer to perform at its New Brunswick store.

A plaintiff may not recover damages for emotional disturbance in a breach of contract action unless he sustained bodily injury as a result of the breach or the breach is of a kind for which serious emotional disturbance was a particularly likely result. See Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F. Supp.2d 688, 694 (E.D. Pa. 1998); Rodgers v.

Nationwide Mut. Ins. Co., 496 A.2d 811, 815-16 (Pa. Super. 1985).

Even assuming that loss of sleep evinces serious emotional disturbance, there is no evidence or allegation that plaintiff sustained bodily injury and the breach of an agreement to accept a consumer appliance for a refund is hardly the kind of conduct particularly likely to result in serious emotional disturbance. Plaintiff has not presented evidence of any other consequential damages.

Plaintiff's breach of warranty claim fails for the same reasons. Defendant offered plaintiff a full refund at its New Brunswick store and plaintiff suffered no damages as a result of the brief delay.

A claim for fraudulent misrepresentation may not be based on a promise to take action in the future. See Timberline Tractor & Marine, Inc. v. Xenotechnix, Inc., 1999 WL 248644, \*2 (E.D. Pa. Apr. 27, 1999); Redick v. Kraft, Inc., 745 F. Supp. 296, 301 n.2 (E.D. Pa. 1990). A plaintiff must show that a statement of present intention was false when uttered. See Timberline Tractor & Marine, 1999 WL 248644, at \*2; Redick, 745 F. Supp. at 301 n.2; Brentwater Homes, Inc. v. Weibley, 369 A.2d at 1172, 1175 (Pa. 1977). From the evidence of record, one cannot reasonably find by clear and convincing evidence that when defendant sold plaintiff a VCR on December 20, 1997, it did not intend to honor its warranty or refund policy for that VCR.

Moreover, there is no evidence of an injury proximately caused by the alleged fraud. Plaintiff was offered a full refund for the VCR by defendant shortly thereafter at its New Brunswick store.

The purpose of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) is to eradicate "unfair or deceptive business practices" and prevent fraud. See Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 719 (Pa. Super.), appeal denied, 683 A.2d 883 (Pa. 1991). Among the "unfair or deceptive business practices" barred by the UTPCPL is the "fail[ure] to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made." See 73 P.S. 201-2(4)(xiv); Kaplan, 617 A.2d at 721. A person who purchases goods primarily for personal, family or household purposes and thereby suffers an ascertainable economic loss as a result of the use of an unfair trade practice may sue under the UTPCPL to recover the greater of his actual damages or \$100 plus, in the court's discretion, treble damages, attorney fees and costs. See 73 P.S. 201-9.2. An "ascertainable loss of money or property" is a prerequisite to a cognizable UTPCPL claim. See Basile v. H & R Block Eastern Tax Svcs., Inc., --- A.2d ---, 1999 WL 105042, \*9 (Pa. Super. Mar. 3, 1999).

Defendant offered to give plaintiff a full refund for the VCR at its New Brunswick store. Plaintiff has not suffered an ascertainable economic loss.

#### **V. Conclusion**

The court assumes and accepts that plaintiff was the victim of mistaken suspicion. Plaintiff, however, has failed to present evidence sufficient to sustain a claim of intentional racial discrimination. Shortly after the encounter at Fairless Hills, defendant offered to give plaintiff a full refund. Even assuming that defendant nevertheless misrepresented and on December 20th breached its sales agreement and warranty, there is no evidence that plaintiff sustained cognizable damages as a proximate result. Plaintiff has failed to sustain his state-law claims as well.

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT  
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 WAL-MART STORES, INC. : NO. 98-1613

O R D E R

AND NOW, this                    day of June, 1999, upon  
consideration of defendant's Motion for Summary Judgment (Doc.  
#14) and plaintiff's response thereto, consistent with the  
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is  
**GRANTED** and accordingly **JUDGMENT IS ENTERED** in the above-  
captioned action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.