

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**L.B. GARRISON, SHARON TITTLE, )  
BEVERLY MCCLUSKEY and )  
ROBBIE SCOGIN, )  
Plaintiffs, )  
vs. )  
WAL-MART STORES, INC., ) No. 2:05-CV-00714-WMA  
Defendant. )**

**CONSOLIDATED WITH**

**EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
Plaintiff, )  
vs. )  
WAL-MART STORES, INC., ) No. 6:05-CV-00733-WMA  
Defendant. )**

**DEFENDANT'S BRIEF IN SUPPORT OF ITS  
MOTION FOR SUMMARY JUDGMENT**

Defendant, Wal-Mart Stores East, L.P. (incorrectly referred to in the Complaint as Wal-Mart Stores, Inc.), hereby submits its Brief in Support of Its Motion for Summary Judgment.

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**I. STATEMENT OF MATERIAL FACTS**

**A. Wal-Mart Store 409**

1. Store 409 is located in Haleyville, Alabama. [Garrison p. 21 l. 8-11].
2. Within Wal-Mart, there are Supercenters and Hometown stores. [Hawkins p. 18 l. 17 – p. 19 l. 10].
3. Haleyville was a Hometown store. [Durham p. 9 l. 12-23].
4. Prior to May 2002, Store 409 was not open for business 24 hours per day. [Durham p. 147 l. 6-11].
5. Beginning on or about May 18, 2002, Store 409 became a 24 hour operation. [*Id.*].
6. Mike Hawkins was the District Manager over Store 409 (District 119) from March 2002 through February 1, 2006. [Hawkins p. 10 l. 10 – p. 11 l. 2].
7. Hawkins' date of birth is February 25, 1965. [Hawkins p. 64 l. 1-3].
8. Tim Counce transferred to Haleyville as an Assistant Manager in December 2000. [Counce p. 15 l. 20 – p. 16 l. 1].
9. Counce worked in Haleyville until he was mobilized for active military duty in February 2003, and then he returned to Haleyville in August 2003. [Counce p. 139 l. 8-16; p. 265 l. 7-9].
10. Counce was responsible for the night crew from the time he transferred to Haleyville. [Counce p. 48 l. 13 – p. 49 l. 1].
11. He then became Night Assistant Manager when the store went 24 hours.

[*Id.*; Durham p. 218 l. 13-15]

12. Mike Durham was the Manger for Store 409 from October 1994 through January 2003. [Durham p. 8 l. 8-13].

13. He has been employed by Wal-Mart for 20 years, and is currently the Manager of Store 394 in Moulton, Alabama. [Durham p. 7 l. 15-23].

14. Durham's date of birth is March 20, 1963. [Durham p.28 l.23–p.282 l.1].

15. Wal-Mart has prepared and issued to its Associates an Associate Handbook. [Jeffreys Ex. 13 p. 7].

16. The Handbook contains an Open Door Policy which “says that if you have an idea or a problem, you should go to your Supervisor to talk about it without fear of retaliation . . . . However, if the Associate feels the Supervisor is the source of the problem, or if the problem has not been addressed satisfactorily, the Associate may go to any level of management in the Company.” [Jeffreys Ex. 13 p. 7].

17. Each of the Plaintiffs received a copy of the Handbook. [Plaintiffs' Acknowledgments].

18. Although Wal-Mart has a progressive discipline system, the Handbook clearly states that there are “certain actions of misconduct that may result in immediate termination.” [Jeffreys Ex. 13 p. 23].

19. One such offense is “Theft of Company time.” [*Id.*].

20. Wal-Mart's Harassment/Inappropriate conduct policy also is discussed in the Handbook. [Jeffreys Ex. p. 24-25].

21. The Handbook directs Associate's "to report their concern to any salaried members of management." [*Id* at p. 25].

22. The policy also tells Associates that they may report their concerns to their "Regional Personnel Manager, the People Group, or the Ethics Hotline (1-800-WMETHIC)." [*Id.*].

23. Wal-Mart has adopted a Break and Meal Periods policy ("Meal Policy"). [Jeffreys Ex. 2 p. 1].

24. The policy informs Associates of the number of breaks they are entitled to based on the length of their shift. [*Id.*].

25. "Associates are not required to clock out or clock in from breaks." [*Id.*].

26. Meal Periods are provided to "Associates who work more than six (6) consecutive hours. . . ." [*Id.*].

27. Unlike breaks, Associates "must 'clock out' at the start of their meal period and 'clock in' when returning to work." [*Id.*].

28. This policy is addressed in the Handbook as well. [Jeffreys Ex 13 p. 26].

29. The Timeclock Archive Reports reflect that 126 individuals, including salaried management, worked at Store 409 during week 45, the pay period preceding Plaintiffs' termination. [Jeffreys Ex. 6].

30. Of those with known dates of birth, 60 employees were over 40 and 54 were under 40. [Associate Chart].

31. Utilizing the Timeclock Archive Reports and Associate Chart to identify which employees worked overnight with the Plaintiffs, 16 employees clocked in on night shift (Steve Boyles (DOB 11/22/53); L.B. Garrison (DOB 05/01/45); Wanda Glover (DOB 03/27/56); Curtis Karr (DOB 03/15/63); Rita Marbutt (DOB 06/11/55); Beverly McCluskey (DOB 01/09/53); Elizabeth Mize (DOB 05/01/44); Stacy Richard (DOB 03/25/71); Robbie Scogin (DOB 08/06/47); Gary Sutherland (DOB 08/29/43); Marshall Tidwell (DOB 04/01/43); Sharon Tittle (DOB 05/17/51); Crystal Tuck (DOB 09/16/81); Judy Wamsley (DOB 06/08/41); Stacy Warren (DOB 04/23/63)); and Tammie Wilkinson (DOB 05/30/58).

32. Although he was not required to clock in or clock out as a salaried member of management, Tim Counce (DOB 08/19/73) also worked overnight. [Counce p. 48 l. 13 – p. 49 l. 1].

**B. L.B. Garrison**

1. Garrison was hired by Wal-Mart in store 409 (Haleyville, AL) on March 11, 1991. [Garrison p. 21 l. 3-11].

2. His date of birth is May 1, 1945. [Garrison p. 31 l. 10-11].

3. At the time Garrison was hired, the Personnel Manager in Store 409 conducted orientation [Garrison p. 22 l. 12-15].

4. The Personnel Manager reviewed with Garrison Wal-Mart's Open Door Policy. [Garrison p. 23 l. 12-23].

5. Garrison understood that he was free under the Open Door Policy to

speak to store management at any time about anything. [Garrison p. 23 l. 19-23].

6. In addition to orientation, Garrison also received Wal-Mart's Employee Handbook [Garrison p.25 l.11-20; p.133 l.4-20 and Ex. 2; Jeffreys Ex. 13], and online computer based training while employed in Store 409. [Garrison p.25 l. 21–p.26 l.14].

7. Mike Durham replaced Don Getz as the Manager of Store 409 in October 1994 [Garrison p. 27 l. 15-16; Durham p. 8 l. 8-13], and remained Garrison's Store Manager for the remainder of Garrison's employment with Wal-Mart. [Garrison p. 27 l. 17-20].

8. Garrison was hired to work in the Receiving Department. [Garrison p. 21 l. 15 – p. 22 l. 1].

9. At that time, Garrison unloaded trucks. [Garrison p. 28 l. 20–p. 29 l. 6].

10. Subsequently, the receiving crew's job duties were changed to include not only unloading trucks, but stocking shelves. [Garrison p. 29 l. 7-22].

11. Garrison's immediate supervisor on the receiving crew first was William Hilton and then Shelly Lovette. [Garrison p. 29 l. 23 – p. 31 l. 4].

12. According to Garrison, both Hilton and Lovett were younger than him. [Garrison p. 31 l. 5-9].

13. In or about 1995, however, Mike Durham promoted Garrison to Receiving Manager. [Garrison p. 31 l. 12-21].

14. Sharon Tittle, Beverly McCluskey, Stacy Warren, Marshall Tidwell, Gary Sutherland, and Robbie Scogin worked on Garrison's receiving crew at the time

Store 409 went to a 24 hour operation. [Garrison p. 34 l. 13 – p. 35 l. 10].

15. After the store went 24 hours, Sutherland and Tidwell became unloaders. [Garrison p. 46 l. 12 -19; p. 81 l. 17 – p. 82 l.10].

16. The other five (Garrison, McCluskey, Tittle, Scogin, and Warren) were the stocking crew. [Garrison p. 82 l. 6 - 10].

17. After the store went 24 hours, Counce decided when the night stockers took lunch. [Garrison p. 74 l. 11 -17].

18. However, on nights when Support Manager Stacy Richards worked, Garrison would decide when his crew would take lunch.[Garrison p.74 l.18–p.75 l.5].

19. According to Garrison no one at Wal-Mart treated him differently because of his age before Store 409 went to 24 hours. [Garrison p. 37 l. 6-15].

20. He alleges unequivocally that Assistant Manager Tim Counce treated him differently because of his age. [Garrison p. 38 l. 14-20].

21. Garrison is not certain, but thinks Mike Durham might have also treated him differently because of his age. [Garrison p. 38 l. 21 – p. 39 l. 9].

22. Other than Counce and Durham, Garrison is not aware of any Wal-Mart associate who treated him differently because of his age. [Garrison p. 39 l. 10-14].

23. In addition to his discharge (discussed in detail below), Garrison claims to have sought but not been selected for a job as Support Manager on night and a job as either Support Manager on days or inventory control in the stockroom. [Garrison p. 87 l. 3 – p. 90 l. 6].

24. Durham recalls Garrison expressing an interest in the two Support Manager positions (day and night shifts) created by Store 409 going 24 hours. [Durham p. 145 l. 9 – p. 149 l. 3].

25. According to Garrison, he interviewed for these jobs either before or around the time Store 409 went 24 hours. [Garrison p.90 l. 7-16; p. 98 l. 17–p.99 l. 7].

26. Garrison was interviewed by Durham for both jobs. [Garrison p. 90 l. 21 – p. 91 l. 9; p. 98 l. 17-23].

27. Garrison knows the day shift job went to “[a] Bell boy. I can’t think of his first name.” [Garrison p. 99 l. 8-15].

28. Garrison has no idea why Bell was selected [Garrison p. 99 l. 16-18], but alleges that Durham told him that he would “be better off where you are at. And, besides you don’t have a lot of good years left. You would be better off where you are at for the years you have left.” [Garrison p. 87 l. 3-20; p. 99 l. 16 – p. 100 l. 8].

29. Even though Garrison did not ask Durham what he meant by these remarks, Durham told Garrison that he needed him in the receiving job “because of the maturity and confidence that he had in me.” [Garrison p. 100 l. 9-23].

30. Garrison says that Mr. Crow was his District Manager at the time of Bell’s selection [Garrison p. 101 l. 17-21].

31. Garrison made no effort to talk to Crow about his not being selected for this job. [Garrison p. 102 l. 10-13].

32. According to Durham, Bell was selected for this job because of his

ability to manage, to get along with people, good customer service skills, and his good feel for the overall operation of the store. [Durham p. 159 l. 9-23].

33. In addition, Bell was a college graduate. [*Id.*].

34. Garrison was not selected because he had less customer service experience, and he lacked knowledge with respect to the front end operation. [Durham p. 161 l. 15 – p. 162 l. 9; Garrison p. 82 l. 19 - 23].

35. Garrison also sought the Night Support Manager job that went to Stacy Richard. [Garrison p. 90 l. 7 – p. 91 l. 9].

36. **Richard** was a Department Manager when she applied for this job.

37. Receiving Manager and Department Manager were equal level, hourly jobs. [Durham p. 156 l. 23 – p. 157 l. 23].

38. Durham selected her because “she had done well in the area that she managed, overall appearance of her area was good, out of stocks were limited, she had good evals from history there, and [he] felt as though she was deserving of the promotion based on that.” [Durham p. 160 l. 1-10].

39. Garrison was not selected because of his lack of customer service experience, and lack of knowledge of front-end operations. [Durham p. 161 l. 15 – p. 162 l. 9].

40. Durham made no references to Garrison’s age during this interview. [Garrison p. 93 l. 16-20].

41. In fact, Durham told Garrison that Richards was selected over him

because she had more experience on the floor dealing with customers. [Garrison p. 92 l. 13-19; p. 93 l. 12-15].

42. Even though Durham did not make any references to Garrison's age during this interview [Garrison p. 93 l. 16-20], Garrison claims that he discussed Richards' selection with Counce who allegedly told Garrison "[t]hat's just an easy way to keep from hurting your feelings. It's because of your age." [Garrison p. 92 l. 13 – p. 93 l. 4].

43. Counce, however, was not present for Garrison's interview. [Garrison p. 93 l. 5-7].

44. Furthermore, even though Garrison made the effort to ask Durham if he had been turned down for the job because of his qualifications, Garrison did not tell Durham what Counce allegedly had said, nor did he ask if what Counce had said was true. [Garrison p. 94 l. 15 – p. 96 l. 10].

45. Counce denies telling Garrison that he was not selected for a Support Manager job because he was too old. [Counce p. 171 l. 13 – p. 172 l. 9].

46. With respect to Counce, Garrison alleges that Counce treated everyone on Garrison's crew differently than all other overnight employees in Store 409. [Garrison p. 105 l. 12 – p. 106 l.21].

47. Garrison thinks Counce did so because of his crew's age [Garrison p. 107 l. 3 – 7], and claims that Counce told him on several occasions that "[i]f I had my

way, I would fire the whole crew and get me a new crew of younger people.” [Garrison p. 49 l. 20 – p. 50 l. 14].

48. The first time Counce allegedly made this remark was “not over two or three days after we went on twenty-four hours a day.” [Garrison p. 50 l. 10 - 18].

49. Counce made it clear that his comment was directed to Garrison, Tittle, McCluskey, Scogin, and Warren. [Garrison p. 51 l. 12 - 22].

50. Counce did not make this statement about the unloaders or any of the other employees who worked in the front of the store. [Garrison p. 51 l. 23–p.52 l. 5].

51. Garrison claims to have reported Counce’s comment to Durham “[t]wo or three days, maybe a week later,” [Garrison p. 52 l. 12 – p. 54 l. 6], but he made no effort to report Counce’s remark to Hawkins at that time. [Garrison p. 57 l. 17 - 20].

52. Garrison also alleges that Counce made this statement “[a]t least once or twice a week, on average,” from May through December 2002. [Garrison p. 58 l. 20 – p. 59 l. 6].

53. He did not report every remark by Counce to Durham [Garrison p.59 l.7-9], but contends that he did so on at least two other occasions.[Garrison p.59 l.10-13].

54. Garrison is not sure when he talked to Durham, and no one else was present for his conversations with Durham. [Garrison p. 59 l. 14 – p. 61 l. 16].

55. Counce denies ever having made this statement. [Counce p. 172 l. 10 – p. 173 l. 4].

56. Durham denies that Garrison ever told him that Counce had threatened

to fire his crew or that Counce made ageist remarks. [Durham p. 221 l. 5 – 14].

57. Garrison also claims that he reported Counce's comment to District Manager Hawkins. [Garrison p. 61 l. 17 – p. 64 l. 17].

58. Hawkins denies that Garrison or any other Associate ever told him that Counce made any age related remarks. [Hawkins p. 56 l. 19 – p. 57 l. 4].

59. Not one of the other Plaintiff's heard Counce make this remark. [Tittle p. 77 l. 2 – 17; McCluskey p. 23 l. 22 – p. 24 l. 11; Scogin p. 27; l. 21 – p. 28 l. 1].

60. The only other age related comment Garrison claims he heard Counce make was to nickname him Uncle during lunch one night. [Garrison p. 66 l. 9 – p. 67 l. 14].

61. All five members of the night stocking crew were present for this conversation. [Garrison p. 67 l. 15 – p. 68 l. 7].

62. Garrison is not sure when this occurred, but believes it was after Store 409 went 24 hours. [Garrison p. 68 l. 8 – 16].

63. Garrison has no recollection of having reported this to Durham or Hawkins. [Garrison p. 68 l. 22 – p. 69 l. 6].

### **C. Beverly McCluskey**

1. McCluskey's date of birth is January 9, 1953. [McCluskey p. 17 l. 5-8].

2. She was hired by Wal-Mart in Jasper in March 1999 and later transferred to Haleyville. [McCluskey p. 17 l. 9-20].

3. Mike Durham was the Store Manager when she transferred to Haleyville

[McCluskey p. 17 l. 21-23], but Store 409 was not yet a 24 hour operation. [McCluskey p. 18 l. 1-3].

4. McCluskey does not believe that Durham ever treated her differently because of her age. [McCluskey p. 46 l. 1-4].

5. She does not believe that any employee of Wal-Mart, other than Tim Counce, treated her differently because of her age. [McCluskey p. 45 l. 19-23].

6. Her discharge is the only action taken against her at Wal-Mart that she alleges was because of her age. [McCluskey p. 20 l. 12-18].

7. McCluskey never heard Durham make any age related comments. [McCluskey p. 27 l. 9-12].

8. However, she claims to have been present in the break room when Tim Counce told Garrison “[w] will just call you Uncle, because you are the oldest.” [McCluskey p. 21 l. 21 – p. 22 l. 17].

9. On this occasion, McCluskey was in the break room at Store 409 with Counce, Garrison, Warren, Tittle, and Scogin. [*Id.*].

10. Warren said he had trouble remembering names and nicknamed Tittle “Hester,” and McCluskey “Hester Jr.” [*Id.*].

11. McCluskey says that Counce asked if anyone else had a nickname to which Garrison responded no. [*Id.*].

12. At this point, she claims Counce nicknamed Garrison Uncle. [*Id.*].

13. This is the only time she ever heard Counce refer to Garrison as Uncle

[McCluskey p. 22 l. 18-21], and there is no other instance where she heard Counce make any reference to any employee's age. [McCluskey p. 23 l. 16-21].

14. McCluskey does not know when this conversation took place or whether it occurred before or after the store went 24 hours. [McCluskey p. 21 l. 3-20].

15. McCluskey made no effort to report Counce's comment to her Store Manager or District Manager. [McCluskey p. 24 l. 12-19].

16. According to McCluskey, she was discharged by Larry Jeffreys. [McCluskey p. 32 l. 20 – p. 33 l. 1].

17. She met with Jeffreys on December 19, 2002, at which time Jeffreys informed McCluskey that she was being discharged because she was not clocking out for lunch. [McCluskey p. 35 l. 17 – p. 36 l. 12; p. 45 l. 1-14 and Ex. 1].

18. McCluskey does not know what Jeffreys relied upon to decide to discharge her, but recalls him mentioning videotapes and Time Archive Reports during her exit interview. [McCluskey p. 43 l. 12 – p. 44 l. 10].

19. McCluskey admits that there were days she did not clock out for lunch, but claims that on each such occasion she was instructed not to clock out by either Counce or Garrison. [McCluskey p. 38 l. 18 – p. 39 l. 4].

20. Tim Counce and Shelly Lovette were present for this meeting, but neither said a word. [McCluskey p. 36 l. 21 – p. 37 l. 18].

21. Jeffreys made no reference to her age during this meeting, nor did he say she was being discharged because of her age. [McCluskey p. 37 l. 19 – p. 38 l. 5].

22. Furthermore, McCluskey does not know if Jeffreys did anything to her because of her age. [McCluskey p. 35 l. 12-16].

23. Prior to her discharge meeting with Jeffreys on December 19, 2002, the only other occasion on which she recalls talking to Jeffreys occurred a few nights earlier when Jeffreys was in Store 409 with District Manager Mike Hawkins. [McCluskey p. 33 l. 2-13; p. 35 l. 5-11].

24. Although she spoke with Jeffreys and Hawkins, she made no effort to report any of Counce's alleged comments to either of them. [McCluskey p. 33 l. 21 – p. 35 l. 4].

**D. Robbie Scogin**

1. Scogin's date of birth is August 6, 1947. [Scogin p. 36 l. 8-9].
2. She was hired by Wal-Mart in February 1994 and worked in Store 409 throughout her tenure with the Company. [Scogin p. 18 l. 4-15].
3. At all times material to the Complaint, Mike Durham was the Store Manager. [Scogin p. 18 l. 22 – p. 19 l. 11].
4. Scogin does not believe that Durham took any action against her because of her age. [Scogin p. 20 l. 22 – p. 21 l. 4].
5. Scogin was initially hired as a part-time stocker, but was offered a job as a full-time receiving crew member a month or two later. [Scogin p. 19 l. 12-22].
6. Shelly Lovette was Scogin's supervisor when she joined the receiving crew. [Scogin p. 20 l. 4-9].

7. Subsequently, Garrison replaced Lovette and he remained receiving supervisor for the remainder of Scogin's tenure with Wal-Mart.[Scogin p.20 l.10-21].

8. Scogin first met Larry Jeffreys on December 19, 2002. [Scogin p. 21 l. 5-12].

9. She never heard Jeffreys make any comments about hers or any other employee's age. [Scogin p. 24 l. 11-19].

10. On December 19, 2002, Scogin met with Jeffreys and Counce [Scogin p. 22 l. 19-22] at which time Jeffreys told her she was being discharged for "theft of company time – not clocking out for lunches." [Scogin p. 22 l. 7-10; p. 23 l. 3 – p. 24 l. 1 and Ex. 1].

11. No one during this meeting mentioned Scogin's age, nor did they make any age related comments. [Scogin p. 24 l. 2-10].

12. No one told her she was being discharged because of her age. [Scogin p. 25 l. 8-12].

13. Even though Scogin admits that she does not know who made the decision to discharge her, she believes that Jeffreys and Counce did so because of her age. [Scogin p. 22 l. 11-18].

14. Apparently, Scogin believes her age was the reason for her discharge because Garrison told her that Counce had said that "he [Counce] wanted to fire us [the receiving crew] and get a younger receiving crew." [Scogin p. 27 l. 10-20].

15. Scogin, however, never heard Counce make this remark [Scogin p. 27 l. 21 – p. 28 l. 1], never heard Counce say he wanted to fire her or any member of the receiving crew [Scogin p. 29 l. 22 – p. 30 l. 2], and never heard him make any reference to her age. [Scogin p. 30 l. 3-6].

16. The only age reference she claims to have actually heard from Counce was “I’m not sure what it was – something about LB being too old.” [Scogin p. 30 l. 7-15].

17. She does not know when this occurred [*Id.*], and she admits that she is not exactly sure what Counce said about Garrison’s age. [Scogin p.30 l. 23–p.31 l. 4].

18. Whatever she heard, she did not report the remark to Mike Durham or her District Manager. [Scogin p. 31 l. 5-18].

19. Although Scogin does not claim to have had any difficulties working with Counce prior to her discharge [Scogin p. 32 l. 3-7], she does believe Counce treated other employees differently than the receiving crew because of age. [Scogin p. 32 l. 8-12].

20. The employees that Scogin claims Counce treated differently were Wanda Glover, Betty Mize (DOB 05/01/44), Jan Marbutt (DOB 06/11/55), Crystal Tuck (DOB 09/16/81), and Tammy Wilkerson (DOB 05/30/58). [Scogin p. 32 l. 13 – p. 33 l. 12, and Associate Chart].

21. As described by Scogin, Counce treated these five employees differently than the receiving crew [Scogin p. 33 l. 8-17], and Counce treated Scogin exactly the

same as every other member of the receiving crew, including Warren. [Scogin p. 33 l. 18-22].

22. Of this group, Scogin claims to have seen Mize and Tuck leave the break room, clock in, and then return to the break room for approximately 30 minutes. [Scogin p. 33 l. 23 – p. 34 l. 13; p. 37 l. 6 – p. 38 l. 16].

23. Mize is older than Scogin, while Tuck is substantially younger. [Compare Scogin p. 36 l. 8-9 (DOB 08/06/47), with Associate Chart (Mize DOB05/01/44; Tuck DOB 09/16/81)].

24. Scogin did not report the actions of Mize and Tuck to Counce or any other member of management. [Scogin p. 38 l. 17 – p. 39 l. 13].

25. Furthermore, while she claims to have mentioned this incident to Jeffreys during her discharge meeting, Jeffreys “asked me who were they, and I didn’t tell him. I did not tell him who they were.” [Scogin p. 39 l. 14 – p. 40 l. 15].

26. Scogin has no knowledge that anyone in management knew about Mize’s and Tuck’s actions. [Scogin p. 40 l. 20 – p. 41 l. 1].

27. Scogin also testified that Counce timed the receiving/stocking, but not the unloaders, cashiers, or other full-time employees working the front of the store. [Scogin p. 42 l. 3 – p. 43 l. 8].

28. Scogin does not know why Counce was timing the stocking crew and did not ask for an explanation. [Scogin p 58 l. 8-18].

29. Counce told Scogin he wanted to see how many boxes they got out per minute. [Scogin p. 59 l. 19-22].

30. Neither Counce or anyone else in management told Scogin her work was too slow. [Scogin p. 60 l. 21 – p. 61 l. 7].

31. Wal-Mart never disciplined her for being too slow.[Scogin p.54 l.11-13].

32. Scogin did identify one instance after the store went 24 hours where Mike Durham told the receiving crew they were “going to have to start getting the merchandise on the shelves faster.” [Scogin p. 54 l. 14 – p. 55 l. 21].

33. On this occasion, Durham told the receiving crew, including Warren, that they needed to get everything out of receiving and on the shelves because “some men that were higher up over him that were coming to the store the next day or two.” [Scogin p. 57 l. 2 – p. 58 l. 3].

34. Scogin claims that Stacy Warren (DOB 04/23/63) told her that Counce told him that “he could hire younger people to do twice as much work than we could.” [Scogin p. 69 l. 13-22].

35. Scogin never heard Counce say anything like that. [Scogin p.70 l. 7-10].

36. This reported comment did not prevent Scogin from doing her job. [Scogin p. 73 l. 16 – p. 74 l. 10].

37. Scogin did not complain to Mike Durham about how Counce was treating her at work. [Scogin p. 72 l. 13-17].

38. Likewise, she made no effort to report any concerns about Counce to her District Manager. [Scogin p. 72 l. 18-22].

**E. Sharon Tittle**

1. Tittle's date of birth is May 17, 1951. [Tittle p. 15 l. 9-10].
2. She was hired by Mike Durham to work in Store 409 in 1997. [Tittle p. 14 l. 12 – p. 15 l. 13].
3. Tittle never heard Durham make any comments or remarks about any associate's age. [Tittle p. 18 l. 12-16].
4. Tittle does not believe that Durham took any action against her because of her age. [Tittle p. 18 l. 17-21].
5. At the time Tittle was hired, Garrison was receiving supervisor, and Scogin, Sutherland, Tidwell, and Warren were working on the receiving or stocking crew. [Tittle p. 15 l. 14-21; p. 16 l. 2-21].
6. McCluksey was hired onto the crew later. [Tittle p. 15 l. 22 – p. 16 l. 1].
7. Tittle met with Jeffreys, Counce, and Lovette on December 19, 2002. [Tittle p. 21 l. 2 – p. 22 l. 14 and Ex. 1; p. 22 l. 23 – p. 23 l. 7].
8. Tittle does not believe that she had ever met Jeffreys before this meeting [Tittle p. 22 l. 15-18], and she does not know if she believes if Jeffreys took any action against her because of her age. [Tittle p. 23 l. 8-14].
9. No one during this meeting mentioned Tittle's age. [Tittle p.22 l. 19-22].

10. The reasons Tittle believes she was discharged because of her age are (1) Counce timed the receiving crew, and (2) because Counce made a comment about Garrison being old. [Tittle p. 23 l. 15 – p. 24 l. 17].

11. The comment Tittle is referring to is Counce's allegedly nicknaming Garrison "Uncle" because of Garrison's age. [Tittle p. 24 l. 18 – p. 25 l. 7].

12. This is the only remark Tittle ever heard Counce make about any associate's age. [Tittle p. 25 l. 13].

13. Counce never made any comments about Tittle's age. [Tittle p.25 l. 14-16].

14. Tittle made no effort to report Counce's alleged comment to Mike Durham or Mike Hawkins. [Tittle p. 26 l. 14 – p. 27 l. 4].

15. Tittle went back to work and finished her shift after this discussion. [Tittle p. 25 l. 23 – p. 26 l. 8].

16. The only other basis for Tittle's belief that she was discharged because of her age is Counce's timing of the receiving crew putting up stock. [Tittle p.27 l.5-15].

17. Tittle acknowledges that Counce was timing all of the stockers, including Warren. [Tittle p. 27 l. 22 – p. 28 l. 11].

18. She did not ask and Counce did not explain why he was doing so. [Tittle p. 27 l. 16-21].

19. Neither Counce or any other member of management said that the stockers were being timed because of their age. [Tittle p. 28 l. 12-22].

20. Tittle acknowledges that there were days where she did not clock out for lunch, but says she only did so when instructed not to by Garrison or Counce. [Tittle p. 29 l. 16 – p. 30 l. 10].

21. She also says there were instances where Counce would keep them on break for longer than 15 minutes talking about non-work related activities. [Tittle p. 32 l. 15 – p. 33 l. 3].

22. Tittle made no effort to report these instances to Durham or her District Manager. [Tittle p. 33 l. 11-19].

#### **F. Stacy Warren**

1. Warren's date of birth is April 23, 1963. [Associate Chart].
2. Warren worked on the stocking crew in Store 409 with Garrison. [Garrison p. 34 l. 22 – p. 35 l. 4], McCluskey [McCluskey p. 28 l. 17 – p. 29 l. 1], Scogin [Scogin p. 33 l. 18 - 22], and Tittle [Tittle p. 16 l. 2 - 9].
3. The Plaintiffs admit that Warren was treated the same as themselves. [Garrison p. 105 l. 12–p.107 l. 7; McCluskey p.88 l. 2–p. 89 l. 1; Scogin p.33 l. 8-22].
4. Like the individual Plaintiffs, Warren was discharged on December 19, 2002 for “theft of company time – not clocking out for lunches.” [Warren Exit Interview].
5. At the time of his discharge, Warren was 39 years old and, therefore, outside of the protected class. *See* 29 U.S.C. § 631(a).

**G. Gary Ingram**

1. Ingram worked for Wal-Mart in Store 766 in Florence, Alabama. [Jeffreys Dec. ¶ 2 and Ex. A].
2. Ingram's date of birth is January 1, 1982 [*Id.*].
3. Jeffreys was contacted by the Co-Manager in Store 766 who reported that Ingram was "taking lunch hours and not clocking out for them." [*Id.*].
4. Jeffreys requested that Store 766's Loss Prevention review the Time Archive Reports to determine whether Ingram was clocking out for lunch. [*Id.*].
5. On December 9, 2002, Jeffreys interviewed Ingram as part of his investigation. [*Id.*].
6. Jeffreys communicated his investigative findings to Co-Manager Stephens, and Ingram was discharged for theft of time. [*Id.*].
7. At the time of Ingram's discharge, he was 20 years old.

**H. Events Leading to Plaintiffs' Discharge from Store 409**

1. On December 7, 2002, Durham went to Store 409 on a Saturday to finalize payroll. [Durham p. 26 l. 19 – p. 29 l. 8].
2. Durham was required to report overtime to his District Manager and Durham noticed that the receiving crew not only had overtime, but it also appeared that they were not taking lunch breaks. [*Id.*; p. 31 l. 7-18].
3. Specifically, Durham was reviewing the Timeclock Archive Report dated November 30 – December 13, 2002. [Durham Ex. 11].

4. Durham made a note to discuss this issue with Counce on Counce's next scheduled shift. [*Id.*].

5. When Counce told Durham that the receiving crew had taken lunch because he was with them when they took lunch, Durham recognized there might be a problem. [*Id.*; *see also* Durham Ex. 18].

6. Because Counce would not normally review Payroll Archive Reports in the normal course of his job duties [Durham p. 34 l. 12 - 23], Durham made the Timeclock Archive Reports available to Counce [Durham p. 36 l. 21 – p. 37 l. 7]; and Counce already had access to Store 409's security videotapes. [*Id.*].

7. Durham delegated to Counce the responsibility of checking the Timeclock Archive Reports and videotapes. [Durham p. 41 l. 9 – p. 42 l. 6].

8. After his discussion with Counce, Durham called District Manager Hawkins and notified Hawkins of the ongoing investigation. [Durham p. 43 l. 9 – p. 45 l. 22; Hawkins p. 14 l. 22 – p. 17 l. 22].

9. Hawkins indicated to Durham that if the investigation confirmed a number of occasions where members of the receiving crew were taking lunch without clocking out, that would be grounds for termination. [Hawkins p. 17 l. 1-22; Durham p. 45 l. 2 – p. 46 l. 11; p. 50 l. 21 – p. 52 l. 13].

10. Following Durham's discussion with Hawkins, Counce "was gathering information and reviewing videotapes and going back beyond the week that

[Durham] had a question about to see exactly how deep-rooted this may or may not be.” [Durham p. 57 l. 4-18].

11. Durham Ex. 18 is Counce’s summary of his review of Timeclock Archive Reports and security videotapes. Jeffreys Ex. 4 is a spreadsheet prepared by Counce reflecting information gathered from Wal-Mart’s Timeclock Archive Reports. [Counce p. 79 l. 7 – p. 80 l. 7; p. 185 l. 18 – p. 186 l. 1].

12. Once Counce completed his review of Timeclock Archive Reports and videotapes, he made all of his investigative materials available to Larry Jeffreys. [Counce p. 191 l. 2-23].

13. Jeffreys went to Store 409 the morning of December 19, 2002. [Jeffreys p. 13 l. 22 – p. 15 l. 21; p. 119 l. 9-12].

14. He arrived at Store 409 between 6:00-6:30 a.m. [Jeffreys p. 119 l. 23 – p. 120 l. 4].

15. Jeffreys was provided and reviewed Timeclock Archive Reports, videotapes, and Counce’s spreadsheet. [Jeffreys p. 21 l. 23–p. 22 l. 18; p. 120 l. 3-12].

16. He also met with Durham to discuss what the penalty would be for the night stocking crew. [Jeffreys p. 41 l. 17 – p. 43 l. 8].

17. During this discussion, Durham told Jeffreys that the night stocking crew should be discharged unless his interviews with the employees produced a satisfactory explanation for their failure to clock out for lunch. [Jeffreys p. 45 l. 20 – p. 50 l. 21].

18. Jeffreys then interviewed each member of the night stocking crew. [Jeffreys p. 15 l. 10-21; p. 196 l. 9-12].

19. At no point during these interviews did any member of the night stocking crew tell Jeffreys that they had been advised not to clock out for lunch [Jeffreys p. 196 l. 13-17], nor did any tell him that they believed they were being treated differently because of their age. [Jeffreys p. 196 l. 18-22].

20. At the conclusion of these interviews, all five members of the night stocking crew were discharged. [Garrison Ex. 1; McCluskey Ex. 1; Scogin Ex. 1; Tittle Ex. 1; Warren Exit Interview].

### **III. ARGUMENT**

#### **A. Garrison's Support Manager Claims Are Due To Be Dismissed**

A plaintiff must file an ADEA discrimination charge with the EEOC within 180 days of the alleged violation. *See* 29 U.S.C. § 626(d)(1). While the requirement that an EEOC charge be timely filed is not jurisdictional in nature, *see Zipes v. Trans WorldAirlines*, 455 U.S. 385, 393 (1982), the requirement is a condition precedent to the maintenance of an action and the plaintiff bears the burden of demonstrating that the condition has been satisfied. *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1010 (11th Cir. 1982). Thus, failure to file before the 180-day period elapses requires the court to dismiss a subsequent lawsuit as untimely. *Quillen v. American Tobacco Co.*, 874 F. Supp. 1285, 1292 (M.D. Ala. 1995). Therefore, for Garrison's promotion claims to be timely, he must allege conduct that occurred within 180 days of his

Charge filing on April 25, 2003 (*i.e.*, events on or after September 8, 2002). Here, Garrison claims that he sought promotions to two hourly, Support Manager jobs around the time Store 409 went 24 hours. [Garrison p. 90 l. 7 – 16; p. 98 l. 17 – p. 99 l. 7]. Ignoring for the moment that these allegations are contradicted both by Garrison’s admission that no one treated him differently because of his age before Store 409 went 24 hours [Garrison p. 37 l. 6-15] and his testimony that he is not certain that Durham took any action against him because of his age [Garrison p. 38 l. 21 – p. 39 l. 14], these events allegedly occurred in May 2002, roughly 11 months before Garrison filed his EEOC Charge. Accordingly, Garrison’s allegations concerning these jobs are time barred.

Even assuming they were not time barred, Durham has articulated legitimate, non-discriminatory reasons for selecting **Richards** [p. 160 l. 1 – 10] and Bell [Durham p. 159 l. 9 – 23]. Given that Garrison admits that he lacked experience running the cash registers [Garrison p. 82 l. 19 – 23], and acknowledges that Richards “had more experience on the floor dealing with customers,” [Garrison p. 92 l. 13 – 19], Durham’s decisions were not a pretext for age discrimination and Wal-Mart is entitled to summary judgment on his disparate treatment claims.

#### **B. Plaintiffs’ Age Was Not a Motivating Factor In Their Discharge**

In a discriminatory discipline or discharge case, a plaintiff must show that he is a member of a protected class and that he “engaged -- either (a) disputedly or (b) admittedly — in misconduct similar to persons outside the protected class; and [] that

similarly situated, non[-]minority employees (that is, persons outside the protected class) received more favorable treatment.” *Jones v. Bessemer Carraway Hosp.*, 137 F.3d 1306, 1311 n.6 (11th Cir. 1998) (citing *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989)).

In this case, Wal-Mart acknowledges that the night stocking crew was replaced by younger individuals. While the Company expects the Plaintiffs to rely on that fact in an effort to create an inference of age discrimination, that fact is insufficient to do so in this case.

First, everyone believed by Durham to have taken lunch without clocking out was discharged. [Durham p. 329 l. 18-23]. Because that group included 39 year old Stacy Warren, the record evidence establishes that employees within and outside the protected class were treated the same. Given Durham’s reliance on Jeffreys’ during the Exit Interviews, this fact is underscored by Jeffreys’ involvement in the discharge of a 20 year old in another store on December 9, 2002, for exactly the same reason. [Ingram Notes and Exit Interview].

Second, three of the individual plaintiffs (Tittle, Scogin, and McCluskey) admit that Durham took no action against them because of their age [McCluskey p. 45 l. 19 – 23; Scogin p. 20 l. 22 - p. 21 l. 4; Tittle p. 18 l. 17 - 21], and Garrison does not know whether Durham did so. [Garrison p. 38 l. 21 – p. 39 l. 9]. Given that Durham selected the night shift replacements [Durham p. 127 l. 3 – p. 136 l. 5], this testimony

by Plaintiffs eliminates any logical connection between age, either Plaintiffs or their replacements, and jobs on the night stocking crew.

Even assuming the Plaintiffs are credited with a *prima facie* case, Wal-Mart has clearly articulated a legitimate, non-discriminatory reason for Plaintiffs' discharge - - theft of Company time by Plaintiffs failure to clock out for lunch. [Garrison Ex. 1; McCluskey Ex. 1; Scogin Ex. 1; Tittle Ex. 1; Warren Exit Interview]. Wal-Mart's Meal and Break Policy requires Associates who work more than six consecutive hours to take an unpaid lunch. [Jeffreys Ex. 2]. It is clear from the Timeclock Archive Reports that Plaintiffs and Warren regularly worked more than six hours without clocking out for lunch. [Jeffreys Ex. 6]. Wal-Mart's Associate Handbook states that theft of Company time may result in discharge for the first offense. [Jeffreys Ex. 13 p. 23]. Here, Durham concluded that the five (5) members of the night stocking crew (Garrison, McCluskey, Scogin, Tittle, and Warren) engaged in a pattern of taking lunches without clocking out in violation of Company policy. He discussed this decision with Larry Jeffreys and made it clear to Jeffreys that discharge was appropriate unless the members of the night stocking crew offered evidence during their interviews with Jeffreys which contradicted Durham's understanding of their conduct. Jeffreys did not report any such information to Durham and discharged each member of the night stocking crew for theft of time.

Having met its burden, Wal-Mart is entitled to summary judgment in its favor unless each Plaintiff can create a genuine issue of material fact concerning whether

the Company's reason for their discharge is a pretext for age discrimination. Here, the Plaintiffs cannot satisfy their burden of proof.

As noted previously, three of the Plaintiffs deny that Durham took any action against them because of their age and the fourth, Garrison, is not certain. The fact that the Plaintiffs do not accuse Durham of taking any action against them because of their age refutes any pretext argument.

Not only do the Plaintiffs concede that Durham took no action against them because of their age, Stacy Warren was discharged along with his fellow night stocking crew members. [Warren Exit Interview]. At the time of his discharge, Warren was 39 years old. If that does not demonstrate that Plaintiffs were treated the same as individuals outside of the protected class, the Plaintiffs claim that all five members of the night stocking crew were treated differently than every other night Associate in Store 409. Because the majority of that group was over 40, including four employees older than all of the Plaintiffs, the evidence does not create a genuine issue of material fact that their age was a motivating factor in their discharge. In fact, any assertion that Garrison's age was a factor in his discharge is undercut by the fact that Durham promoted Garrison to Receiving Manager. "[T]hese facts may give rise to a permissible inference that no discriminatory animus motivated [Brinker's] actions." *Williams v. Vitro Services Corporation*, 144 F.3d 1438, 1443 (11th Cir. 1998), citing *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995); *Grossman v. Dillard Department Stores, Inc.*, 109 F.3d 457, 459 (8th Cir. 1997).

Wal-Mart anticipates that the Plaintiffs will attempt to confuse the issue by directing the court's attention to Counce's alleged statements and his role in gathering the Timeclock Archive Reports and security videotapes relied upon by Durham. Those reports, however, show that the Plaintiffs' regularly worked more than six (6) hours without clocking out for lunch as required by Company policy [Jeffreys Ex. 6], and the undisputed evidence establishes that theft of time, not clocking out for lunch, is why the four Plaintiffs and Stacy Warren were discharged.

Accordingly, the record evidence demonstrates that the Plaintiffs were discharged for a legitimate, non-discriminatory reason and Wal-Mart is entitled to summary judgment on their claims.

#### **IV. CONCLUSION**

In light of the foregoing, defendant Wal-Mart Stores East, L.P., respectfully requests that all Plaintiffs' complaints be dismissed and that summary judgment be granted in its favor on all of their claims.

s/Charles A. Powell IV

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of the foregoing pleading has been served upon the following counsel for parties in interest herein by electronic mail or by mailing same to offices of said counsel, on October 10, 2006.

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