

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHERN DIVISION**

**L. B. GARRISON, BEVERLY** )  
**MCCLUSKEY, ROBBIE SCOGIN,** )  
**SHARON TITTLE** )  
 )  
**Plaintiff,** ) **No. 2:05-CV-00714-WMA**  
 )  
 )

**CONSOLIDATED WITH**

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

**PLAINTIFFS' BRIEF IN OPPOSITION TO SUMMARY JUDGMENT**

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Note: Citations to depositions list the person’s name followed by the page number and line reference. For example, Garrison 50:19-23. Dx. refers to the exhibit to the deposition.

**DISPUTED FACTS**

L.B. Garrison

5. Disagree, only testified at to what the policy was. Garrison 23:19-23.
6. Disagree that Jeffrey's Exh. 13 says that. Admit he got a handbook.
17. Disagree, he decided when lunch breaks would be. Garrison 74:11-17.
19. Disagree, Garrison 87:3-20, 90:7-16, 98:17-99:7.
21. Disagree as written, he does believe Durham did discriminate against him on the basis of age. Garrison 87:3-20.
32. Disagree, it reads customer service "issues". Durham:159:9-23.
34. Disagree, refers to Richards not Bell. Durham 160:1-162:9.
36. Disagree, no cite given by defendant.
39. Disagree as written, reads "less exposure to". Durham 161:15-162:9.
41. Disagree with "in fact" argumentative. Garrison 92:13-19, 93:12-15.
53. Disagree, it reads "three" - he reported it 3 times. Garrison 59:10-13.
54. Disagree, only true for the second time. Garrison 59:14-61:16.
59. Disagree, McCluskey does not remember. McCluskey 23:22-24:4.

Beverly McCluskey

4. Disagree, taken out of context. McCluskey 20:12-18 & Dx.4 ¶5-16.
13. Disagree, does not remember. McCluskey 23:16-21.
14. Disagree, does not remember, not positive. McCluskey 21:3-20.

18. Disagree, only mentioned videos. McCluskey 43:12-44:10.

22. Disagree, said he terminated her because of age. McCluskey 35:12-16.

Robbie Scogin

4. Disagree, taken out of context. Scogin 22:11-13 & Dx. 3 ¶17.

10. Disagree, only theft of time. Scogin 23:23-24:1.

14. Agree, but for other reasons why *see also* Scogin 60:7-16, 73:8-13.

16. Disagree with use of the word “only”. Scogin: 30:7-15.

22. Object to use of “she claims” as argumentative, she saw. Same cite.

28. Disagree, cite does not state that. Scogin 59:L.8-18.

Sharon Tittle

4. Disagree, taken out of context. Title 19:19-20:1 & Dx. 3 ¶5-17.

8. Disagree, she does not know. Tittle: 23:8-14.

18. Disagree, asked if she asked about age as the reason. Tittle 27:16-21.

Stacey Warren

5. Disagree, was 39 yrs. 8 mo. old and was protected. *See argument infra.*

Gary Ingram

4. Disagree, determine whether “not clocking out on a consistent bases (sic).”

Jeffreys Declaration. Ex. A.

Events Leading to Plaintiffs’ Discharge from Store 409

3. Disagree. Durham Ex. 11.

4. Disagree. Durham Ex. 11.

5. Disagree, neither exhibit says Durham recognized there might a problem.

Durham Ex. 11 & 18.

11. Disagree that spreadsheet is accurate. Jeffreys 174:2-6, 176:21-177:1.

19. Disagree. Garrison 43:23-44:5.

### **STATEMENT OF MATERIAL FACTS**

1. The EEOC made a “cause” determination that each of the four plaintiffs had been discriminated against because of their age. Px. 1,2,3,4.

2. Wal-Mart’s corporate policy states employees shall have “at least 2” breaks if they work over 6 hours and it does not prohibit a third break. Px. 5, D0544.

3. Wal-Mart’s corporate policy is that associates receive compensation for breaks and are not required to clock out for breaks. *Id.*

4. Wal-Mart corporate policy states associates “generally do not receive compensation for meal periods,” it does not say they are never compensated for meal periods. *Id.*

5. The receiving crew worked however long it took to get the job done, some nights it might be in five hours and others eight hours. Tittle 45:22-46:12.

6. How long the overnight stockers work depends on when the freight is set out, everything is cleaned up and they are cleared to go home. Durham 62:2-9.

7. The only people present at Garrison’s termination meeting were Garrison,

Jeffreys and Counce. Garrison 40:20-41:1.

8. Garrison told Jeffreys that he was not guilty of stealing time. Garrison 43:15-16.

### **Clocking Out**

9. Some nights Counce would tell them not to clock out for lunch, take a fifteen minute break and go back to work. Garrison 83:23-84:11; Scogin 48:12-15; Tittle 30:5-10; Px. 6 ¶4, Warren Declaration.

10. Gary Sutherland heard Counce on multiple occasions tell the receiving crew that if they were not planning on working more than six hours they should not clock out for lunch and just take a fifteen minute break. Px. 7 ¶7, Sutherland Affidavit.

11. Garrison told Jeffreys that Counce would tell them not to clock out for lunch, take a fifteen-minute break and go back to work. Garrison 43:23-44:5.

12. Every day that Garrison took lunch without clocking out, Counce instructed him not to clock out. Garrison 126: 9-14.

13. The instances that Scogin would take a break and not clock out were done at the direction of her supervisor. Scogin 93:21-94:2.

14. Prior to Scogin's termination, no one from management ever asked her if she was intentionally stealing company time or if she was simply following her supervisor' instructions. Scogin 94:3-12.

15. McCluskey was told by Counce or Garrison not to clock out for lunch.

McCluskey 38:18-23.

16. McCluskey and Tittle were following instructions that they got from Counce or Garrison about not clocking out for lunch. McCluskey 38:18-39:4; Tittle 30:5-10; 32:11-14.

17. McCluskey and the others on the receiving crew did what they were told by Garrison or Counce about whether they were to clock out for lunch, it differed from night to night. McCluskey 36:13-18.

18. If they had a lot of stock, Counce would tell them there is enough work and that they would need to take a lunch and clock out. McCluskey 40:19-41:1.

19. There would be other days when Counce would tell them there would not be enough work, don't clock out for lunch. McCluskey 41:2-6.

20. Sometimes when Counce told them not to clock out and they would finish, Counce would tell them to come back, he had work he wanted done and Garrison would tell him they had not clocked out for lunch. Counce would say, "You let me worry with the time." McCluskey dep.41:8-42:10; Px. 6 ¶4-5, Warren Decl.

21. Tittle stated that on days where they were told not to clock out for lunch, when it came time to leave, Counce would not let them leave but would come up with something else for them to do. Tittle 30:11-31:9.

22. On those occasions where they took a fifteen minute break as instructed instead of clocking out for lunch, Garrison, after fifteen minutes, would tell the

employees it was time to go back to work. Counce would come in and tell them “just a minute” “I need to talk to you about something” and keep them there a while longer.

Garrison 44:10-22.

23. Counce would keep Garrison on break longer than the 15 minutes.

Garrison 148:20-149:3.

24. On some of those occasions when Counce would talk to them during the extended break, he would be talking about killing deer, about the National Guard, just everything. Garrison 44:23-44:5.

25. McCluskey stated that on a number of occasions when they took a break instead of lunch and got up after 15 minutes to go back to work that Counce would tell them, ““Wait just a minute” and then start talking about the National Guard, just whatever. Stuff that - you know, that didn’t have anything to do with us.””

McCluskey 65:22-67:2.

26. It was left to Garrison’s discretion whether the crew took a lunch or would work without taking a lunch break and be done in less than six hours based on the amount of freight and whether or not they thought they could get the freight out.

Durham 61:3-663:17-64-14; 68:13-19.

27. It had been left to Garrison’s discretion to decide if they had enough work (over six hours) to take a lunch break until the store went to 24 hours. Garrison 79:7-80:7.

28. Mike Durham had instructed Garrison to use his own discretion on whether to clock out for lunch before the store went to a 24 hour store. Garrison 126:15-127:6.

29. After the store went to 24 hours, the discretion that Garrison had did not change concerning instructing people whether or not to take lunch, based on the amount of freight. Durham 68:2-19.

30. After the store went to 24 hours when Counce was not there, Garrison would decide whether the crew would take a 30 minute lunch. Garrison 83:10-18.

31. Mike Durham had specifically instructed McClusky not to clock out for lunch. McCluskey 63:20-23.

32. Durham would ask, "Do you want - do y'all want to clock out and take a lunch or do you want to take a break and get finished and go home." McCluskey 64:5-11.

33. If the supervisor said y'all go ahead and don't clock out, we're going to work straight through tonight, that is the supervisor's call and responsibility. Durham 70:3-8.

34. It was Counce's responsibility to make sure they took their meal breaks. Counce 43:17-20.

35. Counce testified that there were occasions where the truck had under a thousand pieces and he might tell Garrison to get the crew out of here and work half

shift tonight without taking lunch. Counce 227:20-228:11.

36. Durham had evaluated Garrison on February 10, 2001 as “dependable and trustworthy.” Durham 115:22-1176:9; Px. 19 to the deposition.

37. Garrison’s evaluation on February 11, 2002 stated he was a “Honest dependable associate” which Durham signed. Durham 118:4-6; Px. 20.

38. Garrison believes that Counce made the decision to terminate him, because Counce is the one that told them to take 15 minute breaks instead of clocking out for lunch. Garrison 47:22-48:8.

### **Biased Statements**

39. Counce had told Garrison that if he had his way he would fire the whole crew and get a crew of younger people. Garrison 50:19-23.

40. Counce made that statement to Garrison at least once a week on average. Garrison 58:13-23.

41. Counce named Garrison, Tittle, McCluskey, Scogin and Warren as who he meant by the whole crew. Garrison 51:12-22.

42. Counce told Garrison the reason why he wanted to fire the whole crew was, “Younger people learn easier, and I can teach them to do what I want done better.” Garrison 52:9-11.

43. Garrison reported those statements made by Counce to Durham, Store Manager. Garrison 53:19-54:1.

44. Sutherland heard 3 or 4 times Counce state he wanted to replace the receiving crew with a new younger crew. Px. 7 ¶8.

45. Stacey Warren heard Counce say he could get younger works to replace them, because they could work faster. Px. 6 ¶16.

46. Stacey Warren told McCluskey and Garrison that Counce had told him words to the effect, "I can hire two younger guys to do your job." McCluskey 25:23-26:11; Garrison 117:10-14.

47. McCluskey heard the comment Counce made in the breakroom relating to age, nicknaming Garrison "Uncle." McCluskey 20:19-21:2.

48. Prior to that Garrison did not have any nicknames. McCluskey 21:10-12.

49. Counce asked Garrison whether he had a nickname and when he said that he did not have one Counce stated, "We will just call you Uncle, because you are the oldest." McCluskey 22:11-17; Garrison 65:9-20.

50. Counce called him "uncle" a few times. Garrison 66:20-21.

51. One night Counce called Garrison on the P A system, "Uncle L.B., will you come to the front." Garrison 70:14-19.

52. After applying for other jobs, Durham told Garrison that he was needed worse where he was and also stated, "I'm your friend, you will 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 that you have left." Garrison 87:3-20.

53. When Garrison asked Durham if he was turned down for promotion on his qualifications, Durham told him no. Garrison 94:22-95:8.

54. Durham told Garrison that he had the same qualifications as the last Support Manager that he had promoted, but said Richards was getting the job. Garrison 95:4-8.

55. After Durham told Garrison that he did not get the position that Richards received because she had more experience on the floor in dealing with customers, Counce told him, "that's just an easy way to keep from hurting your feelings. It's because of your age." Garrison 92:13-93:4.

56. Garrison felt that his discharge was due to his age, because earlier he had not gotten the promotions he sought. Garrison 128:3-20.

### **Differential Treatment**

57. Counce timed the crew with a stop watch to see if they were doing enough work. Garrison 64:12-14.

58. Though Garrison had worked in receiving a number of years, he was unaware of any production guidelines on how fast they were supposed to be working. Garrison 64:23-65:4.

59. Garrison was not discharged because of poor work quality. Garrison 101:7-10 & Ex. 1 to Garrison.

60. Garrison thought that his discharge was related to his age because of the

way that he was treated. Garrison 110:13-18.

61. Garrison and others on the crew would catch Counce hiding and watching them and Counce would also clock Garrison with a stopwatch. Garrison 111:13-19.

62. By hiding, Garrison meant that Counce would be stocking in a department, and then Counce while in another department would be peaking around the counter at Garrison with his watch. Garrison 112:13-21.

63. Counce told Garrison he was timing him, because it was a company requirement. Garrison 112:22-113:5.

64. Counce would take Garrison off by himself almost two or three times a week and tell him, "you are going to have to pick it up. You are going to have to do more than you are doing." Garrison 115:100-16.

65. Durham stated that there are not any regulations that dictate the speed in which the merchandise must be unloaded. Durham 190:14-17.

66. Durham stated it would not be appropriate to follow or stand employees around with a stopwatch. Durham 194:7-12; 195:6-10.

67. Using a stopwatch to time a stocker is not showing good respect toward the employee. Durham 195:19-22.

68. Counce timed the receiving crew, but did not time other employees. Scogin 42:3-14.

69. McCluskey also thought that she was treated differently. McCluskey

68:5:11.

70. Difference in treatment included being timed. McCluskey 92:5-12.

71. Besides Counce's comment about getting rid of them and hiring younger workers, McCluskey thought her termination was age discrimination because he would time the receiving crew and not other employees. McCluskey 27:13-28:20.

72. Crystal Tuck was treated differently than the receiving crew by not being timed. McCluskey 49:10-23.

73. McCluskey knew that Tuck had not been timed, because Tuck and the other associates had told her they were not being timed. McCluskey 50:8-14.

74. Counce started timing the receiving crew about 2 months before they were terminated. Scogin 60:7-16.

75. Counce timing Scogin made her nervous. Scogin 73:8-13.

76. Garrison was 57 when he was discharged. Garrison 124:13-15.

77. Garrison had heard Counce say that if we could get rid of John Dollar, we will be in a better position in management. Garrison 138:3-7.

78. Garrison thinks that Durham should have given them a warning if he thought they were doing something wrong. Garrison 156:3-10.

79. The receiving crew was treated differently than the counter clerks. Garrison 166:14-21.

80. Young employees who were treated differently than Garrison. They were

the counter clerks that included Crystal Tuck and Stacy Defoor (DOB 6/16/82) who got to pick which department they wanted to work, while the receiving crew was assigned where they were to work. Garrison 163:22-165:2; Docket Entry 29 #1.

81. McCluskey had also observed Crystal Tuck (DOB 9/16/81) and Stacy Richards (DOB 3/25/71) take breaks that exceeded the time allowed. McCluskey 67:7-68:8; Docket Entry No. 29 #2 (Employee Roster).

82. McCluskey had also observed Tuck, Richards, and other employees staying longer than an hour for lunch. McCluskey 70:6-13.

83. McCluskey had timed the lunch, because it occurred more and more. McCluskey 70:6-13; 76:21-79:18.

84. They would stay at lunch for an hour, clock back in and then would go back to the breakroom and stay 10 or 15 minutes. McCluskey 72:13-73:2.

85. Scogin had observed Tuck clock out for lunch, and then later clock back in, go back in the breakroom and sit down, and she was in there for 30 more minutes while on the clock. Scogin 34:5-13, 38:1-6.

86. Scogin was treated differently by being told by Counce to stock some departments, while Tuck was standing around the service desk looking at magazines, talking to others and laughing, and Counce never said anything to those employees about what they did. Scogin 33:23-35:1.

87. Scogin never saw or heard Counce say a word when he walked right by

the front of the service desk and saw Tuck and other employees standing around the service desk looking at magazines and talking. Scogin 41:12-42:2.

88. Counce would get the counter clerks together and take them out in the front of the store. Garrison 167:9-19.

89. Garrison had seen the counter clerks stay out there in the front of the store for an hour. Garrison 167:19-20.

90. The counter clerks taking breaks of that length is what was strange to Garrison. Garrison 170:14-19.

91. McCluskey asked Counce about an Inventory Control Specialist position and he just sort of blew her off and walked away. McCluskey 18:16-6.

92. Tuck was treated differently than the receiving crew by her being assigned to stock department one, food, and then Counce would come and tell the people working on the receiving crew that they would have to stock that department and Tuck would be up at the front standing around at the front desk. Tittle 42:2-17.

93. Tuck was also treated differently by taking longer breaks and lunch breaks. Tittle 42:18-23.

94. Stacy Richards was another employee who was treated differently because when Tittle and the receiving crew went to take a break, she was already in the break area and still there when the receiving crew's break ended. Tittle 52:13-23.

### **Other Facts**

95. Plaintiffs were replaced by persons outside the protected age group, Billy Pelphrey (DOB 3-17-81), Wesley Watts (DOB 7-13-81), Mary Cason (DOB 11-3-75) and Bobby Davis (DOB 1-3-75). Px. 8, Def.'s Position Stat. to EEOC, pg. 4.

96. McCluskey states she was treated differently by being replaced by younger people. McCluskey 58:14-22.

97. Scogin does not know who made the decision to fire discharge her. Scogin 22:11-13.

98. Scogin just signed the termination paper, but did not read it. Scogin 23:17-24:1.

99. Scogin had no idea why she had been called to the office and was in shock at the meeting. Scogin 25:13-23.

100. Crystal Tuck told Scogin that Counce had told Tuck that he wanted to hire his own receiving crew. Scogin 28:17-23.

101. Scogin had also been told by Garrison that Counce had told Garrison that he wanted to fire them and get a younger receiving crew. Scogin 27:10-20.

102. Scogin was not told that she was discharged for poor work performance. Scogin 88:11-14.

103. Christy Hyde, a department manager, told Scogin that after Scogin was fired that Counce called a meeting up front the morning of their terminations and stated, "I just fired five people." Scogin 94:15-96:19.

104. Hyde told Scogin that Hawkins or Durham and Jeffreys were present at the meeting where Counce stated, "I just fired five people." Scogin 98:5-12.

105. At the time of his termination, Stacey Warren was 39 years and 8 months old. Docket Entry 29 #2 (Employee Roster and termination form).

106. Garrison, Scogins, McCluskey and Tittle were all qualified to perform their jobs. Durham 26:4-9.

107. Prior to December 2002, Durham would describe the four plaintiffs as good employees. Durham 113:6-16.

108. Durham stated that one of the things that he had to explain to his boss was the meal exception of employees not taking lunch when they work beyond 6 hours and "have we discussed this with the individuals or that sort of thing there." Durham 32:17-21.

109. The assistant manager was responsible to make sure that breaks and meal periods are taken and he is "in charge of assigning when that's going to take place." Durham 35:7-10.

110. Warren heard Counce say that he had set John Dollar up to be terminated by the roof hatch being left open. Px. 6, Warren Declaration ¶21.

111. Counce volunteered to go back and double-check the videotape. Durham 35:12-18.

112. Durham depended on Counce to be candid in the presentation of the

facts to him. Durham 295:5-8.

113. Durham was provided videotape excerpts by Counce which he looked at. Durham 295:15-18.

114. Counce is the person who reviewed the videotapes. Durham 70:18-71:8.

115. Jeffreys did his review and met the plaintiffs on the same day. Jeffreys' 36:8-12.

116. Counce gave the videotapes, notes and spreadsheet to Jeffreys. Counce 79:2-6.

117. Counce explained to Jeffreys how the spreadsheet he had prepared, the time clock archives and videotapes all tied in together. Durham 325:9-327:15

118. Counce gave Jeffreys the times the plaintiffs should have been going on breaks. Jeffreys 26:7-14.

119. The meeting with Jeffreys was brief. Counce 82:23-83:6.

120. It was a brief discussion. Counce 94:6-9.

121. The time archive reports that Counce gave to Jeffreys was a mountain of paperwork. Counce 205:17-22.

122. The stack of paper was probably about 8 inches thick. Counce 373:2-11.

123. Jeffreys relied upon information that Counce's gave him that when the employees were not going to the break room for a 15 minute break as opposed to their half hour lunch break. Jeffreys 72:15-73:1.

124. Jeffrey's said that he checked every one of the dates on the spreadsheet. Jeffrey's 136:16-18.

125. Counce pulled the videotapes for Jeffrey's to view. Durham 89:23-90:1.

126. Jeffrey's did not review the tapes in his presence. Counce 102:20-23.

127. When Counce met with Jeffrey's there was not a lot of time before the interviews with the plaintiffs. Counce dep.86:19-87:23.

128. The exit interviews with the plaintiffs began at the end of the meeting with Jeffrey's. Counce 89:2-5.

129. Larry Jeffrey's was supposed to do an independent investigation. Durham 87:1-4.

130. Counce advanced the videotapes close to the time in question. Counce 369:13-19; 378:4-8.

131. Durham did not independently go and look at the videotapes to see if the employees had taken a prior break period and were now coming back for a lunch period. Durham 73:14-22.

132. Durham relied on Counce to see if the employees had taken a prior break period and were now coming back for a lunch period. Durham 73:23-74:1.

133. Durham did not tell Counce to ask the 5 employees why there had been nights when they did not clock out for lunch. Durham 74:23-75:4, 10-12.

134. He did not ask the 5 employees why there had been nights when they did

not clock out for lunch. Durham 75:13-14.

135. Durham was not in the employee interviews on December 19<sup>th</sup>. Durham 102:21-103:5; 106:2-4.

136. In considering whether there was theft of time, whether the employees intended to be taking time, it was a misunderstanding, someone did not inform them of the policy, or some other explanation comes into play. Durham 47:13-20.

137. The only way to know whether the violation is intentional or based on a misunderstanding is to ask the person who has violated the policy. Durham 50:5-13.

138. In instances where people were taking longer breaks, Durham does not remember anyone being terminated for it. Durham 56:18-22.

139. Counce stated he observed the plaintiffs not clocking out for lunch, but did not say anything to them. Counce 69:7-18.

140. Counce did not remind them to clock out. Counce 70:2-5.

141. Prior to Jeffreys coming, Durham and Jeffreys had already discussed that the decision was going to be made to terminate. Durham 125:60-12.

142. Durham talked to Jeffreys on the morning of December 19<sup>th</sup> before Jeffreys started his interviews that if there was not going to be anything to dispute what they already had, then the decision was to terminate. Durham 125:13-126:2.

143. The decision had been made to terminate the employees, unless information came back from the employees Durham did not know. Durham 95:20-96:7.

144. If there was anything that was going to come out in the individual interviews that was going to dispute the facts for some reason, then the decision was still open. Durham 97:11-98:6.

145. If there was anything that was said like I was told to do this, I was instructed to do that or that sort of thing, that would have warranted further investigation. Durham 98:8-99:6.

146. Durham stated that if the employees had been told by Counce not to clock out, if “he knowingly told them to break the law, then no, they should not be terminated.” Durham 101:14-102:2.

147. If review of the new information had revealed that they were told not to clock out, the decision to terminate would not have been made. Durham 102:14-20.

148. Durham relied upon Jeffreys’ interviews to make the final call on whether to terminate the employees. Durham 137:1-2.

149. Durham relied on Jeffreys to make the final determination based on the facts and the interview. Durham 137:14-20.

150. Durham relied on Jeffreys’ investigation which as far as he knew consisted of reviewing the documents that Counce had gotten, the time clock archives, the spreadsheet Counce prepared and the videotapes Counce put together. Durham 141:2-9.

151. Counce was involved in the process that led to the termination of the

plaintiffs. Durham 144:4-145:7.

152. Counce was involved in the investigation. Counce 29:17-22.

153. Durham talked to the District Manager the day before the plaintiffs were terminated and told him that he planned on pulling people from his temporary pool of associates to offer them the plaintiffs positions provided the information was correct. Durham 127:9-128:4.

154. Durham and/or Lou Garrison spoke with the temporary associates to find out if they would be interested in helping overnight, but Durham could not offer them a job until after the plaintiffs were terminated. Durham 128:7-19.

155. Durham lined up the temporary associates to work the night of December 19<sup>th</sup> and asked them not to say anything about it. Durham 129:2-5.

156. Durham was not told by anybody involved in any of the meetings that the overnight stockers stated that they were told not to clock out each time they did not clock out for lunch. Durham 354:22-355:4.

157. Durham had questioned Counce why the receiving employees were not clocking out for lunches. Counce 32:23-33:3.

158. Jason Dill (DOB 10/19/82) who worked where Durham was store manager, was given by Counce verbal coaching (01/2/01), written coaching (4/3/01) and a Decision Making Day (4/13/01) for excessive breaks before termination by Counce on May 10, 2001. Px. 9.

159. Tiffany Rose Ray (DOB 10/30/84), who worked where Durham was store manager, received a verbal coaching and was not terminated for “repeat meal exceptions. She regularly works beyond 6 hours without a meal.” Px. 10.

160. Ashley Mitchell (DOB 3/7/83), who worked where Durham was store manager, received a verbal coaching and was not terminated for “repeat meal exceptions. She repeatedly works past 6 hours without a meal.” Px. 11.

161. Martin Wheelles (DOB 8/13/84), who worked where Durham was store manager, received a verbal coaching and was not terminated for “repeat meal exceptions. He repeatedly works 6 hours without a meal. Px. 12.

162. None of the plaintiffs received a verbal coaching for repeat meal exceptions prior to their termination. Garrison Dx. 4 ¶21; Scogin Dx. 2 ¶15; McCluskey Dx.4 ¶14; Tittle Dx. 3 ¶15.

### ARGUMENT

Age discrimination may be proven through direct evidence or circumstantial evidence. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990); *see also Eskra v. Provident Life & Acc. Ins. Co.*, 125 F.3d 1406, 1411 (11th Cir.1997) (holding that when proving discriminatory treatment, the same analysis applies to ADEA cases as to Title VII cases). “Evidence is direct when it is sufficient to prove discrimination without inference or presumption.” *Clark v. Coats & Clark Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir.1993); *Bell v. Birmingham Linen*

*Service*, 715 F.2d 1552, 1557 (11th Cir. 1983); *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5<sup>th</sup> Cir. Unit B 1981) (Scrap of paper saying “Too old-lay off” constituted direct evidence because was made in the context of the decision at issue).

At least once a week on average Counce had told Garrison that if he had his way he would fire the whole crew (Garrison, Tittle, McCluskey, Scogin and Warren) and get a crew of younger people. Garrison 50:19-23, 51:12-22, 58:13-23. Counce’s reason why he wanted to fire the whole crew was, “Younger people learn easier, and I can teach them to do what I want done better.” Garrison 52:9-11. When the issue about the plaintiffs’ clocking out for lunch arose, Counce volunteered to go back and double-check the videotape. Durham 35:12-18. Durham was provided videotape excerpts by Counce. Durham 295:15-18. Durham did not independently go and look at the videotapes to see if the employees had taken a prior break period. Durham 73:14-22. He relied on Counce to see if the employees had taken a prior break period. Durham 73:23-74:1. Durham depended on Counce to be candid in the presentation of the facts to him. Durham 295:5-8. Counce gave Jeffreys the times the plaintiffs should have been going on breaks. Jeffreys’ 26:7-14. Counce was involved in the investigation. Counce 29:17-22.

From these facts, the jury could reasonably conclude that both Durham and Jeffreys were merely a “cat’s paw” conduit for Counce’s bias. The “cat's paw” theory of liability occurs when a person with discriminatory animus manipulates the

decisionmaker. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998). Here, Counce reviewed the videotapes, Durham did not independently go back and review them. Durham relied on Counce to see if they had taken a prior break period and were then coming back for a lunch period. Jeffreys relied on Counce for the times the plaintiffs should have been going on break. The time sequence between when Counce gave Jeffreys the materials and the interviews make it impossible for Jeffreys to truly do an independent investigation to review the tapes, time records and each spreadsheet entry for accuracy. Counce had stated he wanted to fire them and get a younger crew. *See facts 115-128 supra*. Here, Counce was involved in the decision making process, because he provided the information used to make it. In *Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 11219-20 (S.D. Fla. 2002), the court found that where a supervisor played a role in the promotion decision, and the decisionmaker was a mere cat's paw, direct evidence could come from the biased individual who was the defacto decisionmaker. Where the evidence shows that the employee possessed leverage, exerted influence over the decisionmaker, or played a role in the adverse employment action, direct evidence may be supplied by them. *Id.* Likewise, in *Lewis v. Y.M.C.A.*, 52 F.Supp.2d 1253, 1260 (N.D. Ala. 1999), where a recommendation was received by an a biased employee, that employee's statement (cannot hire you, because prior lawsuit cost them too much money) was direct evidence. Here, Counce's statements that if he had his way he would fire the whole crew and replace them with younger

people was direct evidence. Credibility of such direct evidence is not an issue at the summary judgment stage of the case. “Where the non-movant presents direct evidence that, if believed by the jury, would be sufficient to win at trial, summary judgment is not appropriate even where the movant presents conflicting evidence.” *Merritt v. Dillard Paper Company*, 120 F.3d 1181, 1189 (quoting *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir.1996)). There also is evidence that Counce set John Dollar up to be terminated by the roof being left open. Px. 6 ¶21. It shows he was capable of manipulating situations to get employees terminated. The evidence shows that Counce, who had discriminatory motive toward the plaintiffs, supplied and withheld information both with Durham and Jeffreys. Importantly, he never told them he had directed the plaintiffs not to clock out. He told them when the plaintiffs should have taken lunch, gave cued up portions of the videotapes to Durham and Jeffreys, and prepared an erroneous spreadsheet (Jeffreys 174: 2-6; 176:21-177:1) from time archive records and what he claimed the videos showed. Immediately after terminating them, Counce told employees he had just fired five employees. Direct evidence from Counce using the cat’s paw was established.

Assuming *arguendo* that the issue of would the same decision be reached anyway is due to be reached at this stage of the case, *Lewis v. Y.M.C.A.*, 208 F.3d 1303 (11<sup>th</sup> Cir. 2000), summary judgment is due to be denied. At summary judgment all inferences must be construed in the light most favorable to the non-moving party.

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152 (2000). Here, plaintiffs testified that the only time they did not clock out for lunch was when they were told to do so by Counce, Durham, or by Garrison, who had been delegated the authority to do so. Garrison 43:23-44:5, 83:23-84:11, 126:9-14, McCluskey 36:13-18, 38:18-39:4, 63:20-23, 64:5-11; Scogin 48:12-15, 93:21-94:2; Tittle 30:5-10, 32:11-14. Durham stated that if the employees had been told by Counce not to clock out, “they should not be terminated.” Durham 101:14-102:2. *See also* Durham 102:14-20. Summary judgment “on the same decision” issue is therefore due to be denied.

Alternatively, assuming *arguendo* that Counce’s statements are not direct evidence, using the circumstantial evidence approach still yields that summary judgment is due to be denied. Under the *McDonnell Douglas* approach a prima facie case was established by each plaintiff showing (i) at the time he was fired, he was a member of the class protected by the ADEA<sup>1</sup> (ii) he was otherwise qualified for the position (Durham 26:4-9, 113:6-16), (iii) he was discharged, and (iv) defendant hired persons outside the protected class (Def. Br. at 27; Px. 8). *Reeves* at 142. Each of those was established. Next is consideration of defendant’s reason for their termination, theft of time, and showing it is pretext. *Id.* at 143.

As already stated above, in each instance where the plaintiffs did not clock out, it was due to instructions by Counce, Durham, or Garrison. Durham admitted that if

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<sup>1</sup> It is undisputed that all of the plaintiffs were in the protected category.

they were following instructions, they would not have been terminated. Durham 101:14-102:2, 102:14-20. Garrison testified he told Jeffreys that Counce would tell them not to clock out for lunch, take a 15 minute break and go back to work. Garrison 43:23-44:5. In *Delgado v. Lockheed-Georgia Company*, 815 F.2d 641, 645 (11<sup>th</sup> Cir. 1987), the court held that the division manager's testimony that employees would not have been terminated if they were following instructions concerning mischarging time raised a genuine issue of fact. Here, Durham's testimony that if the plaintiffs were following instructions they would not have been terminated likewise raised a genuine issue of fact.

There was additional evidence of age bias. Counce was the defacto decisionmaker utilizing as the cat's paw Durham and Jeffreys. *See supra* 24-25. The evidence of bias includes not simply Counce's statement to Garrison that he would like to fire the whole crew and get a crew of younger people, Garrison 50:19-23, but also his statement to Warren that he could get younger workers to replace them, because they could work faster. Px. 6 ¶16. Additionally, he told Garrison he would call him "Uncle," because he was the oldest, called him that a few times, including one night on the P A system 65:9-20, 66:20-21, 70:14-19. *Reeves* held it was error not to draw all reasonable inferences in nonmovant's favor from the age-related comments, and also error to discount them because they "were not made in the direct context of Reeves' termination." *Reeves*, 530 U.S. at 152. Additionally, in *Reeves* the supervisor

had conducted an efficiency study and then recommended the plaintiff be put on probation following the study. Here, there is the evidence that Counce timed the receiving crew with a stopwatch. Durham testified timing employees using a stopwatch did not show respect toward the employee. Durham 195:19-22. There is no evidence that Counce timed any of the younger employees. Counce treated younger employees differently, allowing them longer breaks and lunches; talking to them outside the store; did not time them with a stopwatch; and while on the clock allowed them to read magazines and talk by the service desk after assigning the receiving crew to stock their areas. Viewed in the most favorable light, all of the evidence shows that Counce had bias, illegal motivation and used the cat's paw to terminate the plaintiffs.

There also is evidence that Durham himself had instructed the plaintiffs not to clock out, but take a break. This too established pretext. McCluskey 63:20-23. 64:5-11. Durham knew how lunch was handled. That some plaintiffs may not have known or believed before Durham was deposed that he acted discriminatorily does not prove anything. Durham's statements to Garrison that he did not have a lot of good years left and would be better off where he was at "for the years that you have left" shows age bias. 87:3-20.<sup>2</sup> These show pretextual motive in plaintiffs' terminations.

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<sup>2</sup> Defendant argues that the promotion claims are time barred. Their utility in this case is not in making a claim for those promotions, but rather to illuminate current practices. *Allen v. County of Montgomery, Alabama*, 788 F.2d 1485, 1488 (11th Cir. 1986); *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1214 (5th Cir. 1980).

There also is evidence that younger employees who worked in a store managed by Durham that did not clock out for lunch were given verbal coaching and not terminated. The plaintiffs received no such coaching and were terminated. This supports a finding of disparate treatment. *Jones v. Gerwins*, 874 F.2d 1534, 1540 (11<sup>th</sup> Cir. 1989). The good evaluations of Garrison and lack of discipline belie he engaged in misconduct. *Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290, 1294 (11<sup>th</sup> Cir. 1989); see also *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1509 (4<sup>th</sup> Cir. 1988)(lack of write-ups refuted poor performance).

Defendant argues that because Warren was outside of the protected age, the showing of a difference in treatment cannot be made. That argument fails for two reasons. First, Warren was four months from the protected category. The fact that he was not in the protected category did not mean that age bias did not affect how he was perceived. Second, the evidence shows that Warren was eliminated for the very reasons that the others were, that Counce was going to replace the crew with younger people who would be faster. In *Allen v. American Home Foods, Inc.*, 644 F.Supp. 15523, 1560 (N.D. Ind. 1986), the court held that if a person's position who was not in the protected age group was being eliminated, because all of the persons in the protected category were eliminated, they had standing to sue. *Accord, Spector v. Runyon*, 1992 WL 1370661 (E.E.O.C.). Defendant argues that because it terminated Gary Ingram, a young employee, it shows plaintiffs termination was not due to age.

However, the exit interview form does not show Ingram was terminated due to not clocking out at lunch, but reads "clock out at 4:40 pm." Docket Entry 29, #4 at D0477. Jeffreys' statement claiming it was related to not clocking out for lunch is dated after the plaintiff's termination. *Id.* at D0474. It therefore is due to be rejected as trustworthy when it contradicts the Exit Interview. Also, there is no evidence that Ingram was instructed by his supervisor not to clock out for lunch factually distinguishing him from the plaintiffs. Finally, there is no evidence that the store manager at that store had made biased statements like Durham had made.

### **CONCLUSION**

The evidence shows the plaintiffs followed instructions when told not to clock out. Durham admitted in such a situation, they should not have been terminated. The evidence shows age bias of both Counce and Durham. Counce directed the plaintiffs not to clock out and did not inform Durham he had done so. He was substantially involved in the investigation and shaped the evidence. This is a classic "cat's paw" situation. Additionally, there is the bias of Durham, shown by his statement to Garrison, who himself had instructed the plaintiffs not to clock out and knew that this had frequently been done in an attempt to save money by reducing the number of hours worked. Summary judgement is due to be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that I have filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This the 3rd day of November, 2006.

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