

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

**L. B. GARRISON, SHARON TITTLE,)
BEVERLY MCCLUSKEY and)
ROBBIE SCOGIN,)
Plaintiffs,)**

**Civil Action Number:
2:05-CV-00714-WMA**

vs.)

**WAL-MART STORES, INC.,)
Defendant.)**

CONSOLIDATED WITH

**EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
Plaintiff,)**

**Civil Action Number:
6:05-CV-00733-WMA**

vs.)

**WAL-MART STORES, INC.,)
Defendant.)**

**PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION'S BRIEF IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Equal Employment Opportunity Commission ("EEOC") submits the following
brief in opposition to Defendant's Motion for Summary Judgment.¹

Respectfully submitted,

RONALD S. COOPER
General Counsel

¹ EEOC's sole claim against the Defendant is the unlawful termination of the Plaintiffs. Facts in support of Plaintiffs' age-related failure to promote and terms and conditions claims are relevant to the unlawful termination. Therefore, these facts are relied upon in support of EEOC's unlawful termination claim.

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Table of Contents

Statement of Facts.....

- I. Response to Movant’s Statement of Material Facts
- II. Additional Undisputed Facts
- III. Additional Disputed Facts

Standard of Review.....

Argument.....

- I. Defendant is Liable for Discrimination Under the ADEA through Direct Evidence of Discriminatory Intent.
- II. Defendant is Liable Under the ADEA through Indirect or Circumstantial Evidence of Discriminatory Intent.
- III. Defendant is Liable under ADEA through Evidence That the Plaintiffs Were Victims of the “Cat’s Paw.”
- IV. Adverse Action against Employee Who is Outside of Protected Class Does Not Establish the Absence of Discrimination against Employees inside the Protected Class.

Conclusion.....

Certificate of Service.....

STATEMENT OF FACTS¹

I. Response to Movant's Statement of Material Facts

A. Walmart Store 409

10. Disputed. Tim Counce became responsible for the night crew when the Store became a 24-hour store.

B. L.B. Garrison

5. Disputed, Garrison only testified what the policy was. Garrison 23:19-23. Garrison did not view that he could speak to store management at anytime about anything, including alerting store management to Tim Counce's continued inappropriate and hostile behavior, because Garrison concluded that the Store Manager was not receptive or responsive to his concerns. He also did not believe he could complain directly to management above the store level about Tim Counce's misconduct for fear of retaliation by the Store Manager.

6. Disputed. Jeffrey's Ex. 13 does not state the proffered Statement of Fact. Plaintiff admits Garrison received the handbook.

17. Disputed. Garrison decided when the night stockers took lunch. Garrison 74:11-17;

19. Disputed. Garrison 87:3-20, 90:7-16, 98:17-99:7.

21. Disputed as written. Garrison believes Durham did treat him different because of Garrison's age. Garrison 87:3-20.

32. Disputed. The citation reads customer service "issues" not skills. Durham:159:9-23.

34. Disputed. The citation is to Durham testimony that this was the reason he did not select Garrison for the position. The citation is to Garrison's testimony that this was the reason Durham gave him for not selecting Garrison.

¹ Citations to depositions list the deponent's name followed by the page number and line reference. (i.e., Garrison 12:9-13).

36. Disputed. No citation provided by Defendant.

38. Disputed. The citation is to Durham's testimony as to why he selected Richard.

39. Disputed. The statement actually reads "less exposure to". Durham 161:15-162:9. Moreover, the citation is to Durham's testimony of why Garrison was not selected.

41. Disputed. The inclusion of the phrase "in fact" constitutes Defendant's argument.

53. Disputed, the statement reads "three." Garrison 59:10-13.

54. Disputed. Only true for the second time. Garrison 59:14-61:16.

59. Disputed. McCluskey does not remember. McCluskey 23:22-24:4

C. Beverly McCluskey

4. Disputed. Taken out of context. McCluskey 21:12-18; Dx. 4, para. 5-16. Moreover, McCluskey's statement would not be admissible under Federal Rules of Evidence 602 (personal knowledge), or 701 (opinion testimony by lay witnesses).

5. Disputed. Taken out of context. McCluskey 21:12-18; Dx. 4, para. 5-16. Moreover, McCluskey's statement would not be admissible under Federal Rules of Evidence 602 (personal knowledge), or 701 (opinion testimony by lay witnesses).

13. Disputed. Does not remember. McCluskey 23:16- 21.

14. Disputed. Does not remember. Not positive. McCluskey 21:3-20.

16. Disputed.

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

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

D. Robbie Scogin

3. Disputed. This is not an appropriate statement of material fact in that it contains Defendant's legal conclusion regarding "materiality."

4. Disputed. Taken out of context. Scogin 22:11-13; Dx 3, para.17. Moreover, Scogin's statement would not be admissible under Federal Rules of Evidence 602 (personal knowledge), or 701 (opinion testimony by lay witnesses).

10. Disputed, Only theft of time. Scogin 23:23-24:1.

14. Disputed as to use of the term “apparently.” Admit for other reasons. See also Scogin 60:7-16, 73:8-13.

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

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

28. Disputed, citation does not state the proffered statement of fact. Scogin 59:8-18.

E. Sharon Tittle

4. Disputed. Taken out of context. Title 19:19-20;1; Dx 3 para. 5-17. Moreover, Tittle’s statement would not be admissible under Federal Rules of Evidence 602 (personal knowledge), or 701 (opinion testimony by lay witnesses).

8. She does not know if Jeffrey took any action because of her age. Tittle: 23:8-14.

18. Disputed, misconstrues the cited statements. The witness was asked if she asked whether age was the reason. Tittle 27:16-21.

F. Stacy Warren

5. Disputed. This is legal conclusion and not a statement of material fact.

G. Gary Ingram

4. Disputed. Determine whether “not clocking out on a consistent bases (sic). Jefferys’ Dec. Ex. A.

H. Events Leading to Plaintiffs’ Discharge from Store 409

3. Disputed. Durham Ex. 11.

4. Disputed. Durham Ex. 11.

5. Disputed. Neither exhibit says Durham recognized there might a problem. Durham Ex. 11 & 18.

17. Disputed to the degree this statement of material fact is intended to suggest that Durham authorized Jeffreys to terminate the Plaintiffs, or that Durham made the decision to terminate during this conversation. See,

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

II. **Additional Undisputed Facts**

1. The EEOC made a “cause” determination that each of the four Plaintiffs, all of whom are over the age of 40, had been discriminated against because of their age when the Defendant terminated them. 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. D0544.

3. Wal-mart’s corporate policy is that associates receive compensation for breaks and are not required to clock out for breaks. D0544.

4. Wal-mart’s corporate policy states associates “generally do not receive compensation for meal periods.” The policy does not say are “never” compensated for meal periods. D0544.

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 depo. 45:22-46:12.

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

7. Counce instructed the overnight stock workers not to clock out for lunch. McCluskey 40:19-41:1; McCluskey 41:2-6; McCluskey 36:13-18.

8. The instances when the overnight stock workers did not clock out for lunch occurred when their supervisors told them not to clock out. Garrison 83:23-84:11; Scogin 48:12-15; Tittle 30:5- Garrison 43:23-44:5 Garrison 126: 9-14; Scogin 93:21-94:2; McCluskey 38:18-23; McCluskey 38:18-39:4; Tittle 30:5-10; 32:11-14;

9. Sometimes Counce would tell the Plaintiffs not to clock out and they would finish, Counce would tell them to come back he had work back there he wanted done and Garrison would tell Counce they had not clocked out for lunch. Counce would say, “You let me worry with the time.” McCluskey dep.41:8-42:10.

10. 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.

11. On those occasions where they took a fifteen minute break as instructed instead of clocking out for lunch, Garrison would order the employees back to work after fifteen minutes. 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.

12. Counce would keep Garrison on break longer than the fifteen minutes. Garrison 148:20-149:3.

13. 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, and other matters unrelated to work. Garrison 44:23-44:5; McCluskey 65:22-67:2.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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 dep.83:10-18.

19. Mike Durham would instruct the receiving crew not to clock out for lunch. McCluskey 63:20-23; McCluskey 64:5-11.

20. Supervisors had discretion to allow the receiving crew not to clock out for lunch. Durham 70:3-8.

21. It was Counce's responsibility to make sure they took their meal breaks. Counce 43:17-20. Counce was present at each of the termination meetings. Garrison 40:20-41:1.

22. Counce 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.

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

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

25. 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.

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

26. Stacy 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.

27. In front of the receiving crew, Counce nicknamed Garrison "Uncle" in reference to his being the oldest member of the receiving crew. "Uncle." McCluskey 20:19-21:2; McCluskey 22:11-17; Garrison 65:9-20.

28. Counce referred to him as "Uncle" several times. Garrison 66:20-21; Garrison 70:14-19.

29. In denying Garrison a promotion, Durham told Garrison the following. "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.

30. Counce told Garrison that the true reason he did not get the Night Support Manager position was because of his age, not because the successful candidate had more experience. Garrison 92:13-93:4. Counce timed the crew with a stop watch and timed them to see if they were doing enough work. Garrison 64:12-14.

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

32. Garrison thought that his discharge was related to his age because of the way that he was treated. Garrison 110:13-18.

33. Counce would time the receiving crew's performance using a stop watch. Garrison 111:13-19; Garrison 112:13-21.

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

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

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

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

39. Counce timed the receiving crew, but did not time other employees. Scogin 42:3-14; McCluskey 92:5-12; McCluskey 49:10-23; McCluskey 50:8-14; McCluskey 27:13-28:20.

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

41. 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.

42. Counce wanted to hire his own receiving crew. Scogin 28:17-23.

43. Counce wanted to fire Garrison and the receiving crew and replace them with a younger crew. Scogin 27:10-20.

44. Young employees who were treated differently than Garrison were the counter clerks that included Crystal Tuck and Stacy Defore 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.

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

46. Crystal Tuck (DOB 9/16/91) and Stacy Richards (DOB 3/25/71) took breaks that exceeded the time allowed. McCluskey 67:7-68:8; Depo. 29 (Employee Roster); Tittle 52:13-23.

47. Tuck, Richards, and other employees exceeded their lunch hour. McCluskey 70:6-13; McCluskey 70:6-13; 76:21-79:18;;

48. Non-receiving crew employees 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.

49. Tuck would clock out for lunch, and then later clock back in and went back in the breakroom and sat down and was in there for thirty more minutes while on the clock. Scogin 34:5-13, 38:1-6.

50. Counce told Tuck 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.

51. Counce did not say anything when he walked right by the front of the service desk and saw Tuck and other non-receiving crew employees standing around the service desk looking at magazines and talking. Scogin 41:12-42:2.

52. Besides Counce's comment about getting rid of them and hiring younger workers, McCluskey thought her termination was age discrimination because he would time employees on the receiving crew and not other employees.

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

54. 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.

55. Night employees who were not on the receiving crew were allowed to take longer breaks without clocking out.

56. Robbie Scogin does not know who made the decision to discharge her. Scogin 22:11-13. Garrison was age 57 when he was discharged. Garrison 124:13-15.

57. Counce orchestrated a violation of store policy by an employee, John Dollar, who Counce wanted to get rid of. Garrison 138:3-7; Warren Declaration ¶21.

58. Counce thought the store would be in a better management position if he could terminate John Dollar

59. As part of his payroll duties, Durham discovered through review of time records what he viewed as an unusual amount of overtime among the night shift receiving crew. D 27:2-1

60. Durham also became concerned with the fact that the night shift receiving crew had worked long enough to take lunch, but had not clocked out for lunch. Durham 27:23; 28:1-3.

61. Durham discussed his concerns with Counce who admitted having taken lunch with the night shift receiving crew, affirming that they should have clocked out for lunch. Durham 27:18-23; 28:1-8.

62. Following their discussion, and Durham's production to Counce of time clock archives reports, Counce began an investigation into the discrepancies. Durham 28: 9-16; Durham 36 2-10; 41 9-23; 42 1-12.

63. After reviewing the time clock archive records, Counce created his own spread sheet detailing the time clock records of the night shift receiving crew. Counce 79:7-22.

64. Counce reviewed videotapes of the night shift receiving crew that showed them walking past the time clock toward the break room and not clocking out.

65. Counce advised Durham that his investigation disclosed that the night shift receiving crew routinely took lunch without clocking out.

66. Counce alerted Larry Jeffreys, Walmart's Loss Prevention Director, that he had evidence that the night shift receiving crew routinely took lunch without clocking out.

67. Jeffreys decided to investigate Counce's allegations.

68. Prior to the Plaintiffs being terminated, they were never warned or alerted that they were in violation of company policy regarding clocking out for lunch. Garrison 156:3-.

69. The store's payroll staff should have alert Counce each week, through meal exception reports, if time weekly time disclosed that his employees were working over six-hours took lunch without clocking out. Counce 321:13-23; 322 1-23; 323 1-23; 324 1-23; 335 1-23; 326 1-23, 327 1-23, 328 1-23.

70. Counce, after being advised by payroll staff of discrepancies or exceptions in a meal exception report, was required to either approve or object to the discrepancy. *Id.*

71. Despite the existence of the notice policy, and records indicating the night shift receiving crew were working over six hours without clocking out for lunch, Counce denies receiving notice prior to Durham's alert to him. *Id.*; 328 1-23; 329 1-23; 330 1-23; 331 1-23; 332 1-23.

72. Jeffreys arrived on the morning of December 19th, 2002, the morning the Plaintiffs were terminated, to conduct his investigation, including interviewing the Plaintiffs.

73. Durham talked to Jeffreys on the morning of December 19th, before Jeffreys started his interviews, and told him that if there was no dispute of management's claims a decision would be made to terminate the employees. Durham 125:13-126:2.

74. Jeffreys reviewed the records, spreadsheet and video evidence provided by Counce the same morning that he interviewed the plaintiffs. Jeffreys' depo. 36:8-12.

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

76. Counce provided Jeffreys the times the plaintiffs should have been going on breaks. Jeffreys' depo. 26:7-14.

77. Jeffreys relied upon verbal guidance that Counce gave him to conclude that the video evidence showed that the night shift receiving crew were going to the break room for a 15 minute break as opposed to their half hour lunch break. Jeffreys' depo. 72:15-73:1.

78. Jeffreys did not review all the store's time clock records that were produced but, instead, simply compared checked relevant portions of the record to confirm the spreadsheet evidence detailing the activities of the night shift receiving crew. Jeffreys' depo. 136:16-18.

79. Counce's pre-interview meeting with Jeffreys was brief. Counce 82:23-83:6; Counce 94:6-9.

80. Counce gave to Jeffreys a substantial number of documents to review when he arrived the morning on the interviews. Counce 205:17-22; Counce 373:2-11.

81. Jeffreys did not review the tapes in Counce's presence. Counce 102:20-23.

82. When Counce met with Jeffreys there was not a lot of time before the interviews with the plaintiffs. Counce dep.86:19-87:23.

83. The interviews with the plaintiffs began at the end of the meeting with Jeffreys. Counce 89:2-5.

84. Jeffreys was supposed to do an independent investigation. Durham 87:1-4.

85. According to Jeffreys, additional investigation, rather than termination, should have occurred if the he received information that the Plaintiffs' supervisors told them not to clock out during lunch breaks.

86. Jeffreys denied that any employee told him, during the interview, gave him an explanation of why they did not clock out for lunch. Jeffreys 52: 11-23; 53: 1-13.

87. Counce recalled that all the Plaintiffs, except Garrison, told Jeffreys that Garrison told them not to clock out for lunch, Counce 115:8-23; 116:1-23; 117 1-23; 118 2-17; 123: 6-16. and that Jeffreys challenged the reasonableness of their following their supervisor's instruction.

Id.

88. During the interview, the Plaintiffs told Jeffreys that their supervisors told them not to clock out during lunch breaks. *Id.*

89. The Plaintiffs assert that they told Jeffreys, during their interviews, that their supervisor(s) told them not to clock out for lunch.

89. Durham was not in the employee interviews on December 19th. Durham 102:21-103:5; 106:2-4.

91. Durham was not in the store when the Plaintiffs were terminated.

92. Durham did not make the decision to terminate the Plaintiffs prior to the conclusion of the interview.

93. Durham and Jeffrey agreed that a decision on whether to terminate the Plaintiffs should be made after the conclusion of the interviews. Jeffreys 45: 20-23; 46:1-16.

94. Jeffreys did not have authority to terminate the Plaintiffs. Jeffreys 13:9-12.

95. Each Plaintiff was terminated at the conclusion of his or her interview.

96. Counce and Jeffreys were present at each of the Plaintiffs' interviews.

97. Counce had authority to terminate the Plaintiffs. Counce 160:16-18; 163: 6-23; 164: 1-6; 282: 11-23; 283:1-15.

98. Counce prepared each of the Plaintiffs' exit (termination) sheets. Counce 184:14-23; 183: 18-23; 184: 1-23; 185: 1-16; 350: 4-23; 351: 1-17.

99. Counce signed each of the Plaintiffs' exit (termination) sheets. Counce 178:12-23; 181: 1-23; 182: 1-13.

100. Jeffreys did not confer with Durham at the conclusion of the interviews to determine what he wanted to take place. Jeffreys 47:4-23; 48:1-23; 49: 1-23; 50 10-21.

101. If there was anything that was going to come out in the individual interviews to dispute management's facts, then the decision was still open. Durham 97:11-98:6.

102. If anything was said to suggest that the employees were instructed not to clock out for lunch, further investigation would have been warranted. Durham 98:8-99:6.

103. If the employees had been told by Counce not to clock out, they should not have been terminated. Durham 101:14-102:2.

104. If review of 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.

105. Durham relied upon Jeffrey's interviews to make the final call on whether to terminate the employees. Durham 137:1-2.

106. Durham depended on Counce to be candid in the presentation of the facts to him. Durham 295:5-8.

107. Durham did not independently review the video tapes to see if the employees had taken a prior break period and were now coming back for a lunch period. Durham 73:14-22.

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

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

110. Counce was involved in the process that led to the termination of the plaintiffs. Durham 144:4-145:7.

111. 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. *, Def.'s Position Statement to EEOC, pg. 4.

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

113. Durham discussed the incident involving the night crew with Walmart's Regional Human Resources Director and Senior Managers not assigned to Store 490.

114. Durham had evaluated Garrison on February 10, 2001 as "dependable and trustworthy." Durham 115:22-1176:9; Px. 19.

115. Garrison's evaluation on February 11, 2002 stated he was a "Honest dependable associate" which Durham signed. Durham 118:4-6; Px. 20.

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

117. Garrison was a Receiving Manager which was equal level as Richard's position as Department Manager prior to her selection as Night Support Manager. Durham 156:23 - 157:23.

118. Counce fired the Plaintiffs. Scogin dep.94:15-96:19.

119. At the time of his termination, Stacy Warren was 39 years and 8 months old. (Employee Roster and termination form).

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

121. The four plaintiffs were good employees. Durham 113:6-16.

122. 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.

123. The Plaintiffs should not have been terminated if the interviews disclosed allegations that their supervisors instructed or directed them to not to clock out during lunch breaks.

124. Counce prepared the Plaintiffs' termination papers and signed them.

125. Counce had authority to terminate the receiving crew and other employees under his supervision.

126. In considering whether theft of time occurred, management should have considered whether there was a misunderstanding about the policy, or another explanation that suggested that no theft was intended. Durham 47:13-20.

127. 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.

128. In instances where other employees were taking longer breaks, Durham does not remember anyone being terminated. Durham 56:18-22.

129. Counce observed the Plaintiffs not clocking out for lunch, but did not say anything to them. Counce 69:7-18.

130. Counce did not remind the Plaintiffs to clock out. Counce 70:2-5.

131. Durham told the District Manager the day before the Plaintiffs were terminated 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.

132. 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.

133. Durham lined the temporary associates to work the night of December 19th and asked them not to say anything about it. Durham 129:2-5.169.

134. Tiffany Rose Ray (DOB 10/30/84) who worked where Durham was store manager received a verbal coaching for “repeat meal exceptions. She regularly works beyond 6 hours without a meal.” D6034, D5952.

135. Mitchell Ashley (DOB 3/7/83) who worked where Durham was store manager received a verbal coaching “repeat meal exceptions. She repeatedly works past 6 hours without a meal.” D 6079, D5956.

136. Martin Wheels (DOB 8/13/94) who worked where Durham was store manager received a verbal coaching “repeat meal exceptions. He repeatedly works 6 hours without a meal. D6110, D 5964.

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

138. When Garrison was the receiving crew’s sole supervisor, and prior to the store going to 24-hours, the night shift receiving crew routinely clocked out for lunch. Counce 225: 11-23, 226: 1-8.

139. Counce gave Jeffreys all the records and information he created and compiled to review as part of the investigation. Counce 251: 1-13. Counce also gave Jeffreys' his personal account of what he believed the Plaintiffs had done wrong. Counce 251: 14-23.

140. Counce recalled discussing with Jeffreys, during the interviews, the Plaintiffs claims that Garrison told them not to clock out for lunch. Counce 121: 14-23; 122 1-4;

STANDARD OF REVIEW

A party moving for summary judgment must show that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987); American Viking Contractors, Inc. v. Scribner Equipment Co., 745 F.2d 1365, 1369 (11th Cir. 1984); Warrior Tombigbee Transportation Co., Inc. v. M/V Nan Fung, 695 F.2d 1294 (11th Cir. 1983).

A plaintiff, to survive a motion for summary judgment, must "come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact." Pace v. Southern Railroad System, 701 F.2d 1383, 1391 (11th Cir. 1983). The issue at the summary judgment level is whether there are genuine issues of material fact in dispute, which, if taken in the light most favorable to the non-movant, a reasonable fact-finder could find that the employer's proffered reason for the adverse employment action was not the true reason for the employment decision. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 921 (11th Cir. 1993). "[S]ummary judgment is not a proper vehicle for resolving claims of employment discrimination which ... turn on an employer's motivation and intent." Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919-920 (11th Cir. 1993); Delgado v. Lockheed-Georgia Co., 815 F.2d 641, 644 (11th Cir. 1987).

The trial court should grant summary judgment if there can be only one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). The court "must consider all the evidence in the light most favorable to the non-moving party." Rollins, 833 F.2d at 1528. It must resolve all reasonable doubts in favor of

the non-moving party. Barnes v. Southwest Forest Industries, Inc., 814 F.2d 607, 609 (11th Cir. 1987).

ARGUMENT

I. PLAINTIFF WILL ESTABLISH LIABILITY THROUGH DIRECT EVIDENCE OF DISCRIMINATORY INTENT

The Plaintiff in an age discrimination case under the ADEA bears the burden of proving that age was the motivating factor in the employer's decision to terminate. Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 143 (2000). The Plaintiff must convince the jury that employer's proffered reason for its conduct is not worth of belief. Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 1193 (10th Cir. 2006)

A case of age discrimination may be established through direct evidence of a discriminatory intent. Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1558 (11th Cir. 1988). To prevail in an ADEA action, a plaintiff is not required to provide direct evidence of disparate treatment. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983). However, when it exists, a plaintiff may use direct evidence to prove a violation of the ADEA. Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 (11th Cir. 1990); EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1070-72 (11th Cir. 1990); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923-24 (11th Cir. 1990).

Direct evidence is evidence that relates to actions or statements of an employer that reflect a discriminatory attitude which correlates to the discrimination complained of by the plaintiff. Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990). In an earlier decision, the Eleventh Circuit stated that such evidence, if believed, proves the existence of a fact in issue without inference or presumption. Castle, *supra* at 1558 n. 13.

Where the plaintiff presents direct evidence of discriminatory motive, the analytical framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973), is inapplicable. EEOC v. Beverage Canners, Inc., 897 F.2d at 1070-71.

In direct evidence cases, a link between the evidence of motive and the challenged employment action can be shown if the biased statements were made by the decision maker or one who was involved in the decision, at or around the time that the decision was made. EEOC v. Alton Packaging Corp., 901 F.2d at 924.

In Burns v. Gadsden State Community College, 908 F.2d 1512 (11th Cir. 1990), the Court stated that direct evidence of the decisionmaker's discriminatory motive regarding one employment decision may be used as evidence of that decisionmaker's discriminatory motive in making a similar employment decision. Burns, 908 F.2d at 1518-19 & n.9, citing EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990). Moreover, the Eleventh Circuit has found direct evidence with respect to statements made both prior and subsequent to the employment decision. In Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1530 (11th Cir. 1985), the plaintiff, who left the company in 1980, presented direct evidence consisting of statements made by the decisionmaker in 1978 that he was surprised at the longevity of staff members, the hospital needed "new blood" and he intended to recruit younger staff persons. The same individual also stated in 1980, just prior to the termination at issue, that the plaintiff's "advanced age" caused her stress. The Court held that the district court erred in directing a verdict for defendant as there was substantial direct evidence from which a jury could conclude that defendant acted with discriminatory intent.

It is well settled that a management official need not have the ultimate decisionmaking authority to have direct ties to the decisional process. See Miles v. M.N.C. Corp., 750 F.2d 867, 874-76 (11th Cir. 1985); Williams v. Valentec Kisco, Inc., 964 F. 2d 723, 726-28 (8th Cir.), cert. denied, 113 S. Ct. 635 (1992); Shager v. Upjohn Co., 913 F. 2d 398, 405 (7th Cir. 1990); Conway v. Electro Switch Corp., 825 F.2d 593, 598 (1st Cir. 1987); ; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (plaintiff's evidence was sufficient to shift the burden of proof to the employer even though the majority of the discriminatory comments were made by individuals who did not have decision making authority). Moreover, key decisionmakers will almost always deny that they harbor discriminatory attitudes. Such denials appear less credible

when there is discriminatory bias on the part of other company officials. See generally Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 54 (3d Cir. 1989)

If the plaintiff presents direct evidence that the employer acted with discriminatory motive and the trier of fact believes it, the employer can avoid liability only if it satisfies the trier of fact by a preponderance of the evidence that the same employment decision would have been reached in the absence of the discriminatory motive. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1795 (1991) (plurality opinion); EEOC v. Alton Packaging Corp., 901 F.2d at 923-24; EEOC v. Beverage Canners, Inc., 897 F.2d at 1071-72.

Direct evidence exists in this case in the form of Tim Counce's enunciated desire to terminate the receiving crew and replace them with younger workers, is his enunciated preference for younger workers, his demeaning public references to Garrison's age, and in the preferential manner in which he treated younger employees. Notably, Counce was directly responsible for the decision to terminate the Plaintiffs in that he (i) lured the Plaintiffs into activity upon which Walmart relied to terminate the Plaintiffs, (ii) led and conducted an investigation focused on the Plaintiffs' activity, (iii) compiled and created information and documents upon which Walmart relied to terminate the Plaintiffs, (iv) presented derogatory information to the lead investigator and the store manager who, absent any other meaningful source of information, relied on Counce's representations, and (v) ultimately participated in the decision to terminate (as evidenced by his being the only terminating authority present in final act of the process and actively participating in it).

Finally, there is ample evidence that the Defendant would not have terminated the Plaintiffs' had Counce not intentionally directed the Plaintiffs to their demise, or admitted the Plaintiffs were acting under supervisory direction. At a minimum, Plaintiff has shown that there are genuine issues of material fact which preclude summary judgment.

II. PLAINTIFF WILL ESTABLISH LIABILITY THROUGH INDIRECT OR CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATORY INTENT

Intent to discriminate in violation of the ADEA can be established inferentially, through circumstantial evidence. The initial step in proving intent through circumstantial evidence is to establish a prima facie case of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). A prima facie case of age discrimination can be established by showing that: 1) the aggrieved individual is a member of the protected group; 2) he was qualified for the position; 3) he suffered an adverse employment action; and 4) he was replaced.² Mitchell v. Worldwide Underwriters Ins. Co., 967 F.2d 565, 566 (11th Cir. 1992); Baker v. Sears, Roebuck & Co., 903 F.2d 1515, 1519 (11th Cir. 1990); Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989); Ramsay v. Chrysler First, Inc., 861 F.2d 1541, 1543 (11th Cir. 1988); Pace v. Southern Railway System, 701 F.2d 1383, 1386 (11th Cir. 1983), reh'g denied, 464 U.S. 1018, 104 S.Ct. 549 (1983). Evidence establishing the third prong of this formula has included a showing that: 1) younger persons were retained in similar positions from which older qualified employees were terminated; or 2) the aggrieved individual can show that he was qualified for another available job with the employer. Early v. Champion Intern. Corp., 907 F.2d 1077 (11th Cir. 1990); Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 644 (5th Cir. 1985); Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988).

Here, it is clear that Plaintiff has established a prima facie case of age discrimination. Individual Plaintiffs are in the protected age group since when they were terminated each one was over 40 years old; they were qualified for the positions they held; and they suffered an adverse employment decision when they were fired. Durham 26:4-9; 113:6-16.

² The Supreme Court held in O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307, 1309-1310 (1996), that the replacement in an ADEA case need not be a person outside the protected category. The fact that the replacement is substantially younger than the employee is a more reliable indicator of age discrimination than the fact that the replacement was someone outside the protected age group. Id. In the Eleventh Circuit, the replacement does not have to be outside the protected age group. A prima facie case is established where the aggrieved individual is replaced by someone who is younger, but not necessarily under the age of 40. Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990); Carter v. City of Miami, 870 F.2d 578, 583 (11th Cir. 1989); Stanfield v. Answering Service, Inc., 867 F.2d 1290, 1294 (11th Cir. 1989); Goldstein v. Manhattan Industries, 758 F.2d 1435, 1442-43 (11th Cir. 1985).

Once a prima facie case of discrimination is established, the employer has the burden of producing evidence tending to show that the employment decision was for a legitimate, non-discriminatory reason. Defendant has the burden of producing sufficient evidence to raise “a genuine issue of fact as to whether it discriminated against the Plaintiff.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1083, 1093-95 (1981); Tamimi v. Howard Johnson Co., Inc., 807 F.2d 1550, 1555 (11th Cir. 1987).

After the Defendant has articulated a legitimate reason for the employment decision, it becomes the Plaintiff’s burden to prove by a preponderance of the evidence that discrimination was a reason for the termination. If the defendant articulates a legitimate, nondiscriminatory reason for the termination, the plaintiff can prevail by demonstrating that the defendant’s articulated reason was not the true reason for the termination. The Plaintiff can prove this either directly by persuading the factfinder that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1824-25 (1973); Burdine, 450 U.S. at 256, 101 S.Ct. at 1093-95; Horn v. Bibb County Commission, 713 F.2d 689, 691 (11th Cir. 1983).

Plaintiffs’ can establish by a preponderance of evidence that Walmart’s articulated reason for the termination, Plaintiffs taking lunch without clocking out, is pretextual. First, Plaintiff can show that Wal-Mart replaced each of the Plaintiffs with individuals who were in their twenties. Plaintiff can show that Counce instructed the Plaintiffs not to clock out for lunch and then used that as a reason to legitimize his discriminatory intent. Plaintiffs can show that others not in the protected age group did not clock out for lunch but were not terminated. Plaintiffs can show that for the Plaintiffs were targeted for termination by Counce. Plaintiffs can show that Mr. Counce manipulated the investigation and influenced the decision making process to accomplish his discriminatory intent. Plaintiffs can show that Counce was actively involved in the final decision to terminate the Plaintiffs.

Wal-Mart's may assert, but without merit in this case, that it could not have discriminated against the Plaintiffs because it hired them when they were in the protected age group. Mr. Counce did not hire the Plaintiffs. But, Mr. Counce, the newly appointed night manager was the one calling the shots in the termination of the Plaintiffs. Even if the comments by Counce that Mr. Garrison would be called "uncle" because he was old, and he would like to fire the entire stocking crew so that he could hire a younger crew, and timing their stocking are not considered direct evidence, they certainly are strong evidence of pretext. Similarly, the comment by Mr. Counce that he had "set up" another employee in the protected age group so that he would get terminated and the fact that others outside the protected age group were not terminated are also strong evidence of pretext.

For the foregoing reasons, Plaintiff can show that Wal-Mart's reason for the termination of the Plaintiffs' is pretextual. Plaintiff can show through circumstantial evidence that the Plaintiffs were terminated because of their age. At a minimum, Plaintiff has shown that there are genuine issues of material fact which preclude summary judgment.

III. PLAINTIFFS WILL ESTABLISH THAT THE PLAINTIFFS' WERE VICTIMS OF THE "CAT'S PAW."

Alternatively, the Plaintiffs can establish liability under the theory of the "cats paw." The cat's paw" theory of liability occurs when a person with discriminatory animus manipulates the decisionmaker. *EEOC v. BCI Coca Cola Bottling Company of Los Angeles*, U.S. Ct. Appeals, App. No. 04-2220 (10th Cir. 2006); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir.1998). Here, Counce (i) lured the Plaintiffs into activity upon which Walmart relied to terminate the Plaintiffs, (ii) led and conducted an investigation focused on the Plaintiffs' activity, (iii) compiled and created information and documents upon which Walmart relied to terminate the Plaintiffs, and (iv) presented derogatory information to the lead investigator and the store manager who, absent any other meaningful source of information, relied on Counce's representations.

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 of discrimination may be attributed to them. 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)).

For the foregoing reasons, Plaintiff respectfully requests that Wal-Mart's Motion for Summary Judgment be denied. Plaintiffs' have presented direct and circumstantial evidence of age discrimination regarding the termination of the individual Plaintiffs. Plaintiffs have shown that there are genuine issues of material fact which preclude summary judgment in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2006, I electronically 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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