FILED
2006 Nov-17 PM 01:23
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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

CONSOLIDATED WITH

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

DEFENDANT'S REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO SUMMARY JUDGMENT

Defendant Wal-Mart Stores East, L.P. ("Wal-Mart") hereby responds to the arguments and evidence proffered by the individual Plaintiffs [Doc. Nos. 34-36] and the EEOC [Doc. No. 37-38]. For the reasons set forth herein, and in its

principal brief and evidence [Doc. Nos. 23-28], Wal-Mart respectfully requests that summary judgment be granted in its favor on all Plaintiffs' claims.

I. PLAINTIFFS' FACTS

158. Admitted, but irrelevant (different conduct and different decisionmaker).

159. Wal-Mart denies that Durham was either Store Manager of Store 766 [Durham p. 8 l. 14 – p. 9 l. 9] or that he was Ray's immediate supervisor. [*See* Px. 10, Manager/Supervisor Julie Processer].

160. Wal-Mart denies that Durham was either Store Manager of Store 766 [Durham p. 8 l. 14 – p. 9 l. 9] or that he was Mitchell's immediate supervisor. [*See* Px. 10, Manager/Supervisor Julie Processer].

161. Wal-Mart denies that Durham was either Store Manager of Store 766 [Durham p. 8 l. 14 – p. 9 l. 9] or that he was Wheeles' immediate supervisor. [*See* Px. 10, Manager/Supervisor Julie Processer].

Wal-Mart disputes the veracity of many of Plaintiffs' remaining allegedly undisputed facts. However, because Fed. R. Civ. P. 56 requires the court to read the evidence in the light most favorable to Plaintiffs, Wal-Mart will assume those additional facts are true solely for purposes of summary judgment because, even reading them in that light, Plaintiffs' claims are due to be dismissed.

II. ARGUMENT

A. Plaintiffs' did not timely oppose Wal-Mart's Motion for Summary Judgment

This Court's October 11, 2006 Submission Order [Doc. No. 30] directed Plaintiffs to respond to Wal-Mart's Motion for Summary Judgment "on or before **4:30 p.m.** on **October 24, 2006**." Although the Court extended the summary judgment submission dates, no change was requested nor made to the 4:30 p.m. filing deadline. However, neither the EEOC nor the individual Plaintiffs filed any brief or evidence by that deadline. [*See* Doc. No. 34 filed 11/3/06 at 7:53 p.m.; Doc. No. 35 filed 11/3/06 at 8:15 p.m.; Doc. No. 36 filed 11/3/06 at 8:22 p.m.; Doc. No. 37 filed 11/3/06 at 11:55 p.m.; and Doc. No. 38 filed 11/4/06 at 12:04 a.m.]. Having failed to timely oppose Wal-Mart's Motion for Summary Judgment, Plaintiffs' briefs and evidence should be stricken,[1] and Defendant's motion is due to be granted. See, e.g., *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned." (citation omitted)); *Lindsey v. Burlington Northern Santa Fe Railway Company*, 266 F. Supp. 2d 1338, 1343 (N.D. Ala. 2003) (holding sexual harassment claim asserted in complaint abandoned because plaintiff did not brief

[1] *See* ALND Uniform Initial Order Governing All Further Proceedings, Appendix II, p. 13, Notice.

the issue in opposition to motion for summary judgment), *aff'd*, 2004 U.S. App. Lexis 13142 (11th Cir. 2004).

B. Garrison Has Conceded His Promotion Claims

Originally, Garrison appeared to allege that he was denied two Support Manager jobs because of his age. However, Garrison concedes in footnote 2 of his brief [Doc. No. 35, p.28] that he is not making promotion claims in this action. Accordingly, they are due to be dismissed.

C. Plaintiffs' Age Was Not a Motivating Factor In Their Discharge

Plaintiffs' claims rest exclusively on the allegedly discriminatory attitude of Tim Counce. Even though the record evidence establishes that Mike Durham made the decision to discharge Plaintiffs and 39 year old Stacy Warren, Plaintiffs assert that Tim Counce manipulated the entire series of events, including the actions of Durham and Jeffreys, to get the Plaintiffs fired because of their age.[2] This manipulation, according to Plaintiffs, makes Durham and Jeffreys the cat's paw of Counce and, therefore, elevates Counce's allegedly discriminatory attitude to the level of direct evidence. Plaintiffs' theory misapplies the law and ignores the undisputed facts to the contrary.

[2] Plaintiffs offer no evidence to explain why Counce would go to such lengths to treat the Night Stocking Crew poorly because of their age while treating every other member of the overnight shift, including those older than themselves, more favorably. [*See* Doc. No. 24, A. 29-31; B. 46; D. 19-21].

1. The proper application of the cat's paw doctrine refutes the application of a direct evidence analysis

Wal-Mart acknowledges that the Eleventh Circuit has recognized the "cat's paw" theory in disparate treatment and harassment cases. *See, e.g., Llampallas v. Mini-Circuits, Lab. Inc.*, 163 F.3d 1236, 1249 – 50 (1998) and *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 – 32 (1999). In both *Llampallas* and *Stimpson*, however, the court's analysis focused on whether the actual decisionmaker relied upon the biased recommendation of someone else. *See Llampallas*, 163 F.3d at 1249 ("if the plaintiff shows that the harasser employed the decisionmaker as her 'cat's paw' - - i.e., the decisionmaker acted in accordance with the harasser's decision without herself evaluating the employee's situation . . . ."); *Stimpson*, 186 F.3d at 1331 (the cat's paw "theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is using the decisionmaker as a mere conduit, or 'cat's paw' to give effect to the recommender's discriminatory animus."). In *Llampallas* for example, the Eleventh Circuit held that the cat's paw theory did not apply because there was no evidence that the alleged harasser made a recommendation that was relied upon by the actual decisionmaker. "Blanch communicated no adverse employment decision regarding Llampallas to Kaylie for his review; nor did she recommend that Kaylie take action against Llampallas." 163 F.3d at 1249. Here,

there is no evidence that Counce made a recommendation to Durham or Jeffreys concerning the penalty, if any, to be imposed against Garrison, McCluskey, Scoggin, Tittle, or Warren.

Obviously recognizing this defect in their theory, Plaintiffs attempt to mask this problem by focusing on Counce's role in gathering the videotapes and time archive reports relied upon by Durham and Jeffreys in deciding that the Night Stocking Crew had intentionally violated Company policy, and then seeking to downplay Durham's and Jeffrey's reliance on those records. To accomplish this feat, Plaintiffs' essentially argue that Counce forced the Plaintiffs to violate Wal-Mart's break and meal policy, then patiently waited for Durham to discover their violation, so he (Counce) could then manipulate the investigation to orchestrate their discharge because Counce believed they were too old. The facts do not support Plaintiffs' myth.

Durham discovered their failure to clock out for lunch because it resulted in unexpected overtime, an issue for which Durham had to account to his supervisor. [Durham p. 26 l. 10 – p. 29 l. 8; p. 31 l. 7 – p. 32 l. 16]. Durham was the Company representative who identified their conduct as a potential problem under Company policy. [*Id.*]. Wal-Mart's time archive reports unequivocally show that all 5 members of the Night Stocking Crew regularly worked more than 6 hours without clocking out for lunch (i.e., those reports show that the Plaintiffs engaged in the

conduct for which they were discharged). [Jeffreys Ex. 11]. Most importantly, the record evidence establishes that Durham and Jeffreys each reviewed the archive reports and videotapes. Even assuming they mistakenly interpreted those times, their actions refute Plaintiffs' argument that they were acting at the behest of Counce. Because the "cat's paw" theory is the basis for Plaintiffs' direct evidence arguments, and because the record evidence demonstrates that the 'cat's paw" theory is inapplicable in this case, Plaintiffs claims are subject to the circumstantial model of proof. As discussed below, however, Wal-Mart's motion for summary judgment is due to be granted under that theory as well.

D. Plaintiffs' Age Was Not a Motivating Factor In Their Discharge

Much like their cat's paw/direct evidence argument, Plaintiffs' circumstantial evidence argument is based on the allegedly discriminatory comments of Tim Counce. Ignoring for the moment that Counce denies making any ageist remarks [Counce p. 172 l. 10 – p. 173 l.4], Counce's alleged favorable treatment of every other night shift employee as compared to his treatment of the Night Stocking Crew undercuts age being the motivation for his actions. That is especially true where, as here, Plaintiffs admit that Counce treated older employees more favorably than themselves.

Plaintiff's allegations concerning Counce, however, do not address the sole legal issue before the court – did Mike Durham discharge Garrison, McCluskey,

Scoggin, and Tittle because of their age? The record evidence proves that he did not.

First, Plaintiffs do not dispute that they engaged in the conduct for which they were discharged. Instead, they claim that they followed Counce's instructions and then were punished for doing so. Even assuming that is true, the record evidence does not show that Durham knew of any such instructions by Counce at the time he made the discharge decision, much less that these instructions, if true, were motivated by Counce's age bias.

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]. Because Plaintiffs must prove that the decisionmaker was motivated by their age, the Plaintiffs' own testimony conclusively refutes theirs and the EEOC's claims on their behalf.

III. 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

Fern H. Singer
Charles A. Powell IV
Attorneys for Defendant, Wal-Mart Stores, Inc.

OF COUNSEL:
BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ
420 20th Street North, Suite 1600
Birmingham, Alabama 35203

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 November 17, 2006.

Rocco Calamusa, Jr., Esquire
Wiggins Childs Quinn & Pantazis
301 19th Street North
Birmingham, Alabama 35203-3204

Ermea J. Russell
Equal Employment Opportunity Commission
1130 22nd Street South, Suite 2000
Birmingham, AL 35205

s/Charles A. Powell IV
OF COUNSEL