

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
RAMON A. ARIAS)
Complainant)
v.) Docket No. 98-BEM-3013
WAL-MART STORES, INC.)
Respondent)

Appearances:

Darin M. Colucci, Esq., for Complainant
Chauncey D. Steele, IV, Esq., for Wal-Mart Stores, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 30, 1998, Complainant Ramon A. Arias filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Wal-Mart Stores, Inc. (hereafter: Wal-Mart) with discrimination based on his age (date of birth: January 5, 1942) in violation of Massachusetts General Laws, Chapter 151B, §4, paragraph 1B. Complainant alleged that Wal-Mart discriminated against him because of his age when it terminated him from his night receiver position on or about July 7, 1998. (Complaint, dated September 30, 1998).

Attempts to conciliate this matter were unsuccessful. On April 16, 2002, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing.

I held a public hearing in this case on May 24, 2004. On June 16, 2004, Complainant filed his written argument with the Commission.¹ On July 16, 2004, Wal-Mart filed a post-hearing memorandum with the Commission that included proposed findings of fact and conclusions of law.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable. Based on the credible evidence in the public hearing record and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law and order.

II. Findings of Fact

1. Complainant Ramon A. Arias² currently lives in Lynn, Massachusetts. Complainant was born on January 5, 1942 in Asua, Santo Domingo and has lived in the United States since April 30, 1983.

¹Complainant's submission did not include detailed findings of fact or conclusions of law.

²During the hearing, Complainant also referred to himself as "Ramon Antonio Arias Pena."

2. Complainant completed the fifth grade in elementary school. He speaks and understands Spanish. Complainant does not understand or read English except for a few words such as "thank you" and "good day."³

3. From October 10, 1997 to July 7, 1998, Complainant worked for Wal-Mart as a full-time night receiver ("overnight stocker" or "loader") in its Lynnway store located in Lynn, Massachusetts (hereafter: "Lynnway Wal-Mart"). During his employment at Lynnway Wal-Mart, Complainant's work shift was 11:00 p.m. to 7:00 a.m. and his regular weekly work schedule was 40 hours. When Complainant began working at Lynnway Wal-Mart, he earned \$8.20 per hour. (Complainant's Exhibit No. 2).

4. At Lynnway Wal-Mart, Complainant was part of a team of 30-40 night receivers who worked on the third shift. Complainant's primary duties included unloading pallets of merchandise from trucks and stocking the merchandise on shelves in various departments within Lynnway Wal-Mart. Complainant was assigned to the chemicals and paper goods department where he unloaded wooden pallets that included large boxes of paper towels, napkins and toilet paper and stocked shelves with paper supplies and cups.

5. Wal-Mart Stores, Inc., is a Delaware corporation whose headquarters are located in Bentonville, Arkansas. At all times relevant to the instant complaint, Wal-Mart operated Lynnway Wal-Mart and was an employer within the meaning of Massachusetts General Laws, Chapter 151B, §1, paragraph 5.

³At the hearing, Complainant testified through a certified Spanish-speaking interpreter.

6. During the period relevant to this complaint, Philip E. Dillinger, Frank Rocco, store manager at Lynnway Wal-Mart, and Mark A. Dubree directly supervised Complainant.⁴ Mr. Dubree was fluent in Spanish and spoke to Complainant in Spanish. Complainant testified that Mr. Rocco also spoke Spanish.

7. Susan Stewart is a district assistant for Wal-Mart and currently works at Raynham Wal-Mart. Ms. Stewart has worked for Wal-Mart since April 20, 1998. During the period relevant to this complaint, Ms. Stewart served as a personnel manager at Lynnway Wal-Mart. Ms. Stewart testified that the Lynnway Wal-Mart night shift generally had at least one support manager and one or two assistant managers.

8. Lori Moore is a support manager at Lynnway Wal-Mart and has worked for Wal-Mart for approximately eight years. During the period relevant to this complaint, Ms. Moore was a night receiver who worked on the same shift as Complainant and was a support manager in training. During this period, Mr. Dubree was Ms. Moore's immediate supervisor. Ms. Moore does not speak Spanish.

9. Evelyn Herasme (43 years old) is the supervisor of the Lynnway Wal-Mart accounting office and has worked for Wal-Mart since August 9, 1995. During the period relevant to this complaint, Ms. Herasme worked as an accounting associate at Lynnway Wal-Mart. Ms. Herasme completed payrolls, provided customer service and counted checks and money. Ms. Herasme's work hours were 3:00 p.m. to 11:00 p.m.

⁴Messrs. Dillinger, Rocco and Dubree did not appear at the public hearing in this case.

10. During the period relevant to this complaint, Lynnway Wal-Mart's accounting office was located in the front of the store while the night receivers worked in the rear of the store. Ms. Herasme testified that she went to the rear of the store to "punch out" at the end of her work shift and rarely saw Complainant.

11. Ms. Herasme testified that Lynnway Wal-Mart supervisors or managers sometimes asked her to attend supervision meetings with associates to serve as a witness and translate, as needed, because she is bilingual in Spanish. Ms. Herasme is unable to write in Spanish.

12. Ms. Herasme and Ms. Moore both testified that Mr. Dubree was openly gay and it was common knowledge throughout Lynnway Wal-Mart that he was gay.

13. Alicia Landrau (41 years old) is a cashier at Lynnway Wal-Mart and has worked for Wal-Mart for six years. Ms. Landrau speaks Spanish.⁵ Ms. Landrau testified that she worked in the front of the Lynnway Wal-Mart and saw Complainant once in a while. Mr. Rocco was Ms. Landrau's supervisor during the period relevant to this complaint.

Work History

14. On October 10, 1997, Complainant signed a form (written in English) that acknowledged his receipt and review of Wal-Mart's employment handbook that set forth its policies and benefits. (Complainant's Exhibit No. 1). Complainant testified that he

⁵Throughout the hearing, Ms. Landrau testified through a certified interpreter.

did not understand any items written on the form and did not recall whether the form was translated for him before he signed it. Ms. Stewart testified that a Wal-Mart employee translated policies during orientation for new Spanish-speaking employees but Wal-Mart did not provide a copy of its policies in Spanish.

15. Complainant testified that he always showed up for work on time and never called in sick.

16. On November 25, 1997, Mr. Dillinger gave Complainant a 90-day associate's evaluation covering the period from October 10, 1997 through January 1, 1998. Mr. Rocco signed Complainant's evaluation as the reviewing Wal-Mart manager or supervisor. Complainant's evaluation rated his performance as "standard" and stated, in part, that he was dependable, honest and a "good steady associate who needs very little follow-up." In Complainant's evaluation, Mr. Dillinger wrote that Complainant needed to improve his productivity by "getting more merchandise up on the counter" and "crushing" his cardboard before going home. Mr. Dillinger also wrote that Complainant had a "hard time" communicating "verbally and orally." (Complainant's Exhibit No. 3). Complainant did not receive another written evaluation during his employment at Lynnway Wal-Mart.

17. In his deposition, Complainant testified that he received a verbal warning before June 24, 1998. Complainant also testified that Mr. Dubree orally warned him about his alleged poor work performance several times between November 7, 1997 and June 24, 1998.

18. Sometime during his work shift on June 24, 1998, Complainant met with Ms. Herasme, Jennifer Demers, an assistant manager, and

Mr. Dubree for a "coaching for improvement meeting." Ms. Stewart did not attend this meeting. Ms. Herasme testified that Mr. Dubree asked her to attend this meeting because, as a Spanish-speaking associate, Complainant would be attending with Ms. Demers who did not understand Spanish. Ms. Herasme testified that she did not translate during the meeting because Mr. Dubree and Complainant talked in Spanish but she was available if Ms. Demers had a question. Ms. Herasme recalled that the meeting lasted approximately five minutes. I credit Ms. Herasme's testimony.

19. Complainant testified that, during the meeting, Mr. Dubree talked to him in Spanish. Complainant also testified that Mr. Dubree also told him that he was not satisfactorily performing his work and that he needed to increase his productivity. Ms. Herasme testified that the purpose of the meeting was to coach Complainant because Mr. Dubree believed that Complainant took eight hours to stack up paper cups when Mr. Dubree felt that it should have only taken two hours. Ms. Herasme also testified that Complainant told Mr. Dubree that it took eight hours because an (unidentified) associate hid the supply of paper cups from him. I credit Ms. Herasme's testimony.

20. During the meeting, Mr. Dubree gave a "coaching for improvement" form (written in English), dated June 24, 1998, to Complainant and asked him several times to sign it. The coaching form indicated that Complainant had to increase his productivity and that he was "not performing certain tasks when asked, putting them off and not doing them at all. . . poor performance." The coaching form described the next level of corrective action as a "decision-making day." (Complainant's Exhibit No. 4).

21. Mr. Dubree signed the coaching for improvement form as Complainant's supervisor and Ms. Demers signed it as a witness. Complainant testified that Mr. Dubree demanded that he sign the coaching for improvement form more than once but he refused to sign it because he did not understand what "it was about" and Mr. Dubree did not translate the form into Spanish. Neither Complainant nor Mr. Dubree asked Ms. Herasme to translate the coaching for improvement form, including a hand-written note that Complainant "refused to sign and decided to quit instead." (Complainant's Exhibit No. 4).

22. After Complainant refused to sign the coaching form, Mr. Dubree told Complainant to "punch out" or "clock out" and go home. Complainant then told Mr. Dubree that he was hired to work eight hours and he would not abandon his job unless Mr. Dubree directed him to leave. Complainant testified that Mr. Dubree then told him that he had the right to ask Complainant to leave. Complainant also testified that Mr. Dubree took his identification badge, took him by his arm and then escorted him to the door of the facility. Complainant denied that he told Mr. Dubree, on June 24, 1998, that he was resigning. I credit Complainant's testimony that he did not resign his position on June 24, 1998.

23. Ms. Stewart testified that it was impossible for an associate to "punch out" without an identification badge.

24. Ms. Herasme testified that Mr. Dubree acted professionally during the meeting, remained calm, kept his temper and did not raise his voice at Complainant. Ms. Herasme also testified that Complainant went "ballistic" and lost his temper after Mr. Dubree directed him to "clock out" and leave. Ms. Herasme also

testified that Complainant then called Mr. Dubree, "gay," a "faggot," and a "Cuban kiss ass" in Spanish. I credit Ms. Herasme's testimony.

25. Ms. Landrau testified that she saw Complainant "exchanging words" with Mr. Dubree on June 24, 1998 and that Complainant was very aggressive during their exchange. Ms. Landrau also testified that she heard Complainant tell Mr. Dubree to leave him alone and that he was "gay" and a "faggot" in Spanish. I credit Ms. Landrau's testimony.

26. In a statement, dated November 8, 1998, Mr. Dubree wrote that Complainant directed vulgar language at him. Mr. Dubree also wrote that he told Complainant to leave the work site because his use of vulgar language violated Wal-Mart's policy and was grounds for termination. (Complainant's Exhibit No. 9).

27. Complainant denied that he yelled or swore at Mr. Dubree or called him a "faggot" or an "ass licker" on June 24, 1998. Complainant testified that he did not know, prior to his separation, that Wal-Mart's work rules prohibited swearing by associates in the workplace although he acknowledged that the rule was "something everyone knew" and was "understood by human beings." I do not credit Complainant's testimony.

28. Complainant's coaching for improvement form did not include a reference to his swearing at Mr. Dubree or Complainant's alleged reference to Mr. Dubree's sexuality.

29. Complainant testified that he returned to work on the following day as scheduled but was told that he could not work until he talked to Mr. Rocco. Complainant testified that he

attempted to talk with Mr. Rocco at least three times before he finally met with him. Complainant also testified that Mr. Rocco told him, the first two times he returned to work, that he had not yet completed his investigation. Complainant testified that he finally met with Mr. Rocco on or about July 7, 1998, who told Complainant that he would not give him his job back because Complainant had misbehaved or behaved inappropriately with Mr. Dubree on June 24, 1998; specifically, that he swore at Mr. Dubree at the end of his coaching meeting.

30. Ms. Demers completed and signed an exit interview form (written in English) that described Complainant's separation as a voluntary termination and listed Complainant's last day of work as June 25, 1998. Mr. Dubree witnessed Ms. Demer's signature on the form. The exit interview form also noted that Complainant refused sign the form and decided to quit. It also noted that Complainant swore at managers and associates and "caused a big scene/insubordination." The exit interview form was undated and did not specifically describe Complainant's alleged pejorative statements about homosexuals, "gays" or "faggots." (Complainant's Exhibit No. 5).

31. Complainant testified that he refused to sign his exit interview form because he could not read it.

32. The back of Complainant's exit interview form included a written notation purportedly made by Mr. Dubree regarding an oral warning he gave to Complainant, on March 23, 1998, about "milking the clock" and not following instructions on several occasions. Ms. Stewart testified that Mr. Dubree's notation was photocopied onto the back of the exit interview form in lieu of the standard explanatory information that described Wal-

Mart's disciplinary process. (Complainant's Exhibit No. 5).

33. Ms. Stewart testified that Wal-Mart's policy in 1998 established three levels of employee coaching: verbal communication, formal coaching and "decision day." Ms. Stewart testified that verbal communication usually occurs with an associate after they've violated a general rule or have a lack of productivity and that there is no designated Wal-Mart form for issuing a "verbal communication." Ms. Stewart also testified that, at the "decision day" stage, associates have one day to decide whether they want to continue to work at Wal-Mart.

34. Under Wal-Mart's 1998 coaching for improvement policy, a supervisor is required to take the following actions if an associate refuses to sign the coaching for improvement form: restate the problem and expectations; ask the associate to confirm and restate his understanding; listen to the associate's response and explanation; allow the associate to write any comments on the form, including that he or she does not agree; ask the associate to initial the form; have another management associate present to witness the discussion and sign the completed form; if the associate refuses to sign the coaching for improvement form, the next level of supervision is required to sign the completed form. (Complainant's Exhibit Nos. 7 and 8).

35. No Wal-Mart second-level supervisor signed Complainant's coaching for improvement form, dated June 24, 1998. (Complainant's Exhibit No. 4).

36. Wal-Mart's general rules for associates provided that "profanity has no place at work, wherever [your] work location

or whatever the circumstance. It will not be tolerated." The written policy also provided that a violation might result in disciplinary action, up to and including termination. (Respondent's Exhibit No. 5).

37. Ms. Stewart testified that, in her experience, Wal-Mart associates are immediately terminated if they swear at a supervisor and that she knew of specific instances where associates were terminated for swearing. Ms. Stewart also testified that she knew of Wal-Mart associates who swore but were not terminated.⁶

38. Ms. Landrau testified that she never saw a Wal-Mart associate curse during her employment at Wal-Mart other than Complainant on June 24, 1998.

39. Complainant testified that Mr. Dubree treated him "very bad" and continually harassed him based on his age as follows: (a) Mr. Dubree told Complainant that he had "pity" on him and that he did not fire Complainant because he was an "old person;" (b) Mr. Dubree never called Complainant by his first name but called him "an old person" who "soiled" himself or an "old shit" over one hundred times; (c) Mr. Dubree often sent him home before his work shift ended and would not give him sufficient help when he needed; (d) Mr. Dubree took Complainant's hat, laughed and showed it to other employees, roller skated away and caused Complainant to follow him throughout the store to retrieve it. During these incidents, Complainant testified that Mr. Dubree told him "to hurry up, old man, hurry up." Complainant also

⁶Ms. Stewart was not asked nor did she provide the ages of Wal-Mart associates she knew were terminated for swearing at their supervisors prior to June 1998. She also did not provide the ages of the Wal-Mart associates she knew swore but were not terminated prior to 1998.

testified that Mr. Dubree threw his hat into high places throughout the facility forcing him to get a ladder to retrieve it. Based on Complainant's demeanor and manner of testifying, I do not credit his testimony about Mr. Dubree's alleged harassment.

40. Complainant testified that he never complained to any managers or supervisors at the Lynnway store about Mr. Dubree's actions or failure to give him sufficient help because he was afraid that he would be fired. I do not credit Complainant's testimony.

41. Ms. Herasme and Ms. Moore testified that they never saw Mr. Dubree harass associates in any way, call them names or touch them inappropriately. Ms. Moore recalled one instance in which she saw Complainant make faces at Mr. Dubree behind his back and say something in Spanish that she did not understand. Ms. Moore testified that a Spanish-speaking associate told her that Complainant's statement was about "gays."

42. Ms. Moore denied that Mr. Dubree gave Complainant more work than other associates. She testified that Mr. Dubree sometimes gave Complainant a "little less" work than other associates. Ms. Moore testified that she felt that paper goods was the easiest department to work in, besides soft lines, because the pallets held large boxes, were very light and could be unloaded and stocked on shelves in two or three hours. Ms. Moore also testified that Complainant often failed to complete his assigned work, refused to unload certain pallets, refused to work more quickly and took bathroom breaks for more than one-half hour. I credit Ms. Moore's testimony.

43. On November 5, 1998, Ms. Moore signed a hand-written document in which she stated that she had "never experienced or seen any indication of age discrimination, or any other discrimination" during her employment at Wal-Mart. (Respondent's Exhibit No. 3).

44. Ms. Herasme testified that she has never seen a Wal-Mart manager or supervisor, including Mr. Dubree, treat associates differently because of their age. I credit Ms. Herasme's testimony.

45. Ms. Stewart testified that Wal-Mart had an "open-door" policy in 1998. Under the policy, an associate could complain at any level of supervision without fear of retaliation. (Respondent's Exhibit No. 4).

46. Ms. Stewart testified that, in July 1998, 85 of 263 employees (32%) in Lynnway Wal-Mart were 40 years or older. Ms. Stewart also testified that 8 of 33 night receivers (24%) were 40 years or older as of July 1998.

47. After Complainant separated from Wal-Mart, he testified that he diligently searched for work and began to work again as a cleaner in New York City beginning in 2001. Complainant testified that his pay rate in 2001 was approximately \$250 or \$300 each week.

48. Complainant filed a claim for unemployment insurance (UI) benefits with the Massachusetts Division of Employment and Training (DET) on July 8, 1998. In its initial determination, dated August 16, 1998, the DET disqualified Complainant because it found that he voluntarily quit without good cause rather than

accept a warning for violating Wal-Mart's rule, which disqualification was affirmed by a DET hearing officer. (Respondent's Exhibit No. 1). On November 4, 1998, the DET's board of review affirmed the hearing officer's decision. (Respondent's Exhibit No. 2). On May 2000, a DET review examiner overturned Complainant's initial determination after a fact-finding hearing and ruled that Complainant was eligible for UI benefits.⁷ (Complainant's Exhibit No. 6).

III. CONCLUSIONS OF LAW

Massachusetts General Laws, Chapter 151B, §4(1B), makes it unlawful to discriminate in employment on the basis of an individual's age. Chapter 151B protects individuals who are forty years or older when the alleged discrimination occurred. G.L. c. 151B, §1(8)⁸. In this case, Complainant alleges that Wal-Mart terminated him on or about July 7, 1998 because of his age.

To establish a prima facie case of age discrimination, Complainant must show by credible evidence that (1) he is a member of a protected class based on his age, i.e., that he was 40 years or older during the time period that he worked at Lynnway Wal-Mart; (2) he was capably performing his duties and responsibilities as a night receiver when Wal-Mart terminated him; (3) he was replaced by someone who was substantially younger, i.e., by someone at least five years younger, or

⁷ Although the review examiner found that Complainant swore at Mr. Dubree, she concluded that he did not commit deliberate misconduct because Wal-Mart had not uniformly applied its rule against profanity. Complainant received \$4,326.00 in UI benefits covering the benefit weeks from July 18, 1998 through January 23, 1999.

⁸The term "age' unless a different meaning clearly appears from the context, includes any duration of time since an individual's birth of greater than forty years." Added by St. 1984, c. 266, §4.

presented credible evidence that his termination occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. See e.g., Knight v. Avon Products, 433 Mass. 413, 420-21 (2003), quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311-312 (1996); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Stephan and Massachusetts Commission Against Discrimination v. SPS New England, Inc., ____ MDLR ____ (2004).

As a preliminary matter, I reject Complainant's contention that I should give preclusive effect pursuant to the collateral estoppel doctrine to DET's findings and conclusions of law in Complainant's claim for unemployment insurance benefits.⁹ In addition, I have neither adopted nor considered the review examiner's findings and conclusions of law for purposes of reaching my conclusions on whether Wal-Mart discriminated against Complainant under the provisions of G.L. c. 151B. See Alba v. Raytheon Company, 441 Mass. 836 (2004)(to apply the collateral estoppel doctrine, a [factfinder] must answer affirmatively four questions: "(1) was there a final judgment on the merits in the prior adjudication; (2) was the party against whom estoppel is asserted, a party (or in privity with a party) to the prior adjudication; (3) was the issue decided in the prior adjudication identical with the one presented in the action in question; (4) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication?"; Hunter v. Cayer, 61 Mass. App. Ct. 725 (2004); Daniels v. Washington, 25 MDLR 97 (2003), affirmed by Full Commission, 26 MDLR 41 (2004).

⁹I note that DET information and records are confidential and are not admissible except in certain civil and criminal matters that are not applicable to this complaint. See Chapter 151A, §46.

Complainant has shown, by credible evidence, that he is a member of a protected class based on his age because he was 56 years old (date of birth: January 5, 1942) when Wal-Mart fired him from his night receiver position at Lynnway Wal-Mart. Lee v. President & Fellows of Harvard College, 60 Mass. App. Ct. 836 (2004). However, Complainant has not shown that he was meeting Wal-Mart's legitimate and reasonable work expectations when Wal-Mart discharged him, i.e., that he was adequately performing his night receiver duties on July 7, 1998. See Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003).

While there is a dispute about whether Complainant was performing his job at an acceptable level, I credit Wal-Mart's evidence that Mr. Dubree held a coaching for improvement meeting with Complainant on June 24, 1998 because of his poor work performance, i.e., his lack of productivity, and issued a written warning with corrective action steps. (Complainant's Exhibit No. 4). I also find that Complainant's poor productivity was ongoing from his initial associate's evaluation and had not improved by June 24, 1998 despite several prior verbal warnings and Mr. Dillinger's negative commentary in Complainant's evaluation. (Complainant's Exhibit No. 3). I also note that Wal-Mart's verbal and written warnings are also entirely consistent with Ms. Moore's testimony and observations, which I found credible, about Complainant's poor work performance including his repeated lack of productivity.

I credit the testimony of Ms. Herasme and Ms. Landrau that Complainant described Mr. Dubree, an openly gay man, with derogatory and highly insulting words such as "faggot" and "Cuban kiss ass" after Mr. Dubree told him to leave after he

failed to sign his coaching improvement form. While I conclude that Mr. Dubree was not authorized under Wal-Mart policy to direct Complainant to leave Lynnway Wal-Mart for failing to sign his coaching for improvement form, I do not find that Mr. Dubree fired Complainant or that he had resigned immediately prior to his derogatory statements.¹⁰ Accordingly, Complainant made his inappropriate and insubordinate statements that revealed an anti-gay and anti-Cuban animus while he remained a Wal-Mart employee; thereby, subjecting himself to Wal-Mart's disciplinary process.

Even if Complainant had established that he was adequately performing his job duties when Wal-Mart terminated him, which he did not, he failed to show that Wal-Mart replaced him with a less qualified younger person or treated him differently than other similarly situated younger night receivers when it terminated him for his derogatory statements directed at Mr. Dubree. In addition, Complainant did not produce any comparative evidence to establish that Wal-Mart failed to take disciplinary actions, including termination, against younger associates who swore at or directed derogatory comments toward their supervisors. See Massachusetts Commission Against Discrimination & Kampion v. Cisco Systems, Inc., 25 MDLR 464 (2003)(the complainant failed to show that her employer treated her differently from similarly situated younger male employees), affirmed by Full Commission, 26 MDLR 43 (March 4, 2004). For the above reasons, I conclude that Complainant did not establish a prima facie case of age discrimination in violation of Massachusetts General Laws, Chapter 151B, §4(1B) when Wal-Mart discharged him on July 7, 1998.

¹⁰I rejected Wal-Mart's contention that Complainant resigned on June 24, 1998, or that he abandoned his position when he failed to show up for his next scheduled shift.

Assuming arguendo that Complainant has established a prima facie case of age discrimination, the burden shifts to Wal-Mart to produce and articulate credible evidence of legitimate non-discriminatory reasons for its actions. See Abramian, 432 Mass. at 116-117; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665 (2000). If Wal-Mart meets its burden of production, Complainant must show by a preponderance of the evidence that Wal-Mart "acted with a discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by [Wal-Mart] for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Complainant retains the ultimate burden of proving that Wal-Mart's adverse employment action, i.e., his termination, was the result of a discriminatory animus based on Complainant's age. Id.; Abramian, 432 Mass. 117.

I conclude that Wal-Mart has met its burden of producing a legitimate, nondiscriminatory reason for terminating Complainant on July 7, 1998. Complainant's insubordinate conduct on June 24, 1998 when he swore at and called Mr. Dubree derogatory names based on his sexual orientation and national origin certainly constitutes a legitimate, nondiscriminatory reason for his termination. Massachusetts Commission Against Discrimination & Molloy v. Cook & Co., 24 MDLR 325 (2002)(age discrimination claim fails because Complainant's insubordinate conduct was a legitimate, nondiscriminatory reason for her termination). The fact that Mr. Dubree did not have explicit authority to order Complainant to leave the Lynnway Wal-Mart store after he refused to sign a coaching for improvement form does not mitigate nor justify his disrespectful and insubordinate statements. I also

find that Complainant engaged in his improper conduct knowing that it violated Wal-Mart's workplace policy.

Finally, I conclude that Complainant failed to produce any credible evidence that Wal-Mart was motivated by an age-based animus when it terminated him. First, I do not believe Complainant's testimony that Mr. Dubree continually harassed him because of his age. In addition, I find no evidence in the record to support Complainant's assertion that he was afraid to complain to Wal-Mart supervisors or managers about Mr. Dubree's alleged harassment because of his unsubstantiated concerns that he would be fired. I am persuaded that Complainant raised Mr. Dubree's alleged harassment in an attempt to rebut Wal-Mart's legitimate concerns about his work performance and use of derogatory language. Second, none of the witnesses corroborated any part of Complainant's testimony regarding Mr. Dubree's alleged age-based harassment even though Ms. Moore and Ms. Herasme were certainly in a position to observe Complainant's workplace interaction with Ms. Dubree. Finally, the workforce profile for Lynnway Wal-Mart during the relevant time period undercuts Complainant's assertion that Wal-Mart acted with an age-based discriminatory intent. The evidence showed that Wal-Mart employed or retained a number of night receivers who were also in Complainant's protected class: 85 of 263 (33%) associates at the Lynnway Wal-Mart were 40 years or older, including 8 of 33 (24%) night receivers. Stephan and Massachusetts Commission Against Discrimination, supra. (evidence showed that employer retained or hired other employees who were older than Complainant).

For the reasons discussed above, Complainant has not persuaded me that Wal-Mart's reasons for terminating him were a

pretext for unlawful age discrimination. Therefore, I conclude that Wal-Mart did not engage in unlawful discrimination based on his age and I hereby order that this matter be dismissed.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the complaint is hereby dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 3rd day of November, 2004.

Kenneth B. Grooms
Hearing Officer