IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MARVIN LEE CHAPMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. 08-4008-CV-C-SOW
	)	
	)	
WAL-MART STORES EAST, LP,	)	
	)	
Defendant.	)	

ORDER

Before the Court are defendant Wal-Mart Stores East, LP's ("Wal-Mart") Motion for Summary Judgment (Doc. #25), defendant Wal-Mart's Memorandum in Support, and plaintiff Marvin Lee Chapman's Response. For the reasons stated below, defendant's motion is granted.

I. Background

Plaintiff Marvin Lee Chapman filed this lawsuit against Wal-Mart alleging age discrimination. Plaintiff claims that Wal-Mart violated the Age Discrimination in Employment Act when it terminated his employment, harassed him about breaks, failed to investigate the reasons for his termination, denied him a pay raise, and required him to work the 7 a.m. shift. Defendant Wal-Mart seeks summary judgment on plaintiff's claims.

As an initial matter, Local Rule 56.1 pertaining to summary judgment motions states, "Suggestions in opposition to a motion for summary judgment shall begin with a section that contains a concise listing of material facts as to which the party contends a genuine issue exists." Plaintiff Chapman has not identified for the Court which material facts asserted by Wal-Mart in its Memorandum in Support are agreed upon and which material facts he disputes. Plaintiff has filed

a brief response in which he simply repeats his allegations that: 1) "for over a year, Wal-Mart compiled a paper trail at the work place on him and that a pretext reason [was] used for [his] termination;" 2) "Wal-Mart did not follow [its] own policies at the work place;" 3) he should not have been terminated without a full investigation; 4) he was treated differently than other employees; 5) he was not given an opportunity to relocate and was forced to stay at the same location to work; and 6) he was replaced by a younger worker. None of these allegations are supported by references "to those portions of the record upon which [plaintiff] relies" as required by Local Rule 56.1. Plaintiff has not identified any documents that support his allegations and has not even identified the younger worker whom he alleges replaced him following his termination.

Local Rule 56.1 provides that, "All facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party." As a result, this Court must accept the facts asserted by Wal-Mart as admitted for the purpose of evaluating the summary judgment motion because they have not been specifically controverted by plaintiff Chapman.

Therefore, the following material facts are deemed admitted for the purpose of evaluating defendant Wal-Mart's Motion for Summary Judgment. Plaintiff Marvin Chapman submitted an employment application to Wal-Mart on April 10, 1998. Plaintiff listed his availability as 6 a.m. to 6 p.m. Monday through Friday. Plaintiff was hired by defendant Wal-Mart on April 17, 1998 to work in the photo lab. On December 11, 1999, plaintiff submitted an updated availability sheet that listed his availability as 6 a.m. to 10 p.m. each day of the week.

Maria "Dulce" Arce worked in the photo lab during the time period that plaintiff worked in the photo lab. Ms. Arce is currently 25 years old and she worked from 5:30 a.m. to 9:30 a.m.

Defendant Wal-Mart concedes that there were occasional times when the photo lab was busy and plaintiff Chapman was not able to take his morning break as scheduled. Wal-Mart states that plaintiff Chapman was instructed that he was always to take a break.

According to Wal-Mart, associates may receive a "Coaching for Improvement" or "Coaching" when the associate's behavior and/or performance does not meet the expectations of Wal-Mart. Plaintiff Chapman received three written Coachings for Improvement while he was employed at Wal-Mart. The first Coaching was given on September 6, 2005 after plaintiff received a complaint for poor customer service. The second Coaching was given on March 10, 2006 after plaintiff Chapman made inappropriate comments to a female customer. The third Coaching was given on August 12, 2006 after plaintiff failed to follow company guidelines regarding transporting merchandise. Each Coaching stated that the next level of discipline could include termination.

During his employment with Wal-Mart, plaintiff received yearly evaluations. Plaintiff's last evaluation took place on March 6, 2007 and covered the time period from April 17, 2006 through April 17, 2007. Plaintiff was not given a raise during this evaluation. Plaintiff had received a raise for every evaluation prior to the March 6, 2007 evaluation. On the March 6, 2007 evaluation, however, plaintiff's performance was listed as below expectations and five areas where improvement was needed were specifically identified. Most of the areas where improvement was needed related to customer service.

Plaintiff was terminated for misconduct on July 16, 2007 when plaintiff was responsible for misplacing four rolls of a customer's undeveloped film that contained wedding photographs. Wal-Mart states that age was not a factor in plaintiff's termination and that plaintiff would have been terminated regardless of his age.

II. Standard

A motion for summary judgment should be granted if, after viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Rafos v. Outboard Marine Corp., 1 F.3d 707, 708 (8th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact for trial and that the movant is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party opposing a properly supported motion for summary judgment may not rest upon the allegations contained in the pleadings, "but must set forth specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In reviewing a motion for summary judgment, this Court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving any doubts as to the facts or existence of any material fact against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 (1970).

III. Discussion

Defendant Wal-Mart argues that plaintiff Chapman has no direct evidence of age discrimination. In addition, Wal-Mart asserts that plaintiff Chapman was terminated due to the fact that he had multiple customer service issues and was not performing his job at a level that met Wal-Mart's expectations when he was terminated.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*. ("ADEA") makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623. A plaintiff may establish a claim of intentional age discrimination through either direct or indirect evidence. Ward v. Int'l Paper Co., 509 F.3d 457, 460 (8th Cir. 2007).

In this case, plaintiff has not presented any direct evidence of discrimination. Even if plaintiff could identify any direct evidence of discrimination, Wal-Mart has stated that it would have taken the adverse employment action even without taking plaintiff's age into account. *See* Bedwell v. Jefferson Smurfit Corp., 947 F. Supp. 1322 (E.D. Mo. 1996). Plaintiff Chapman was terminated for misconduct related to customer service issues. During an approximately eleven-month time span, from September of 2005 through August of 2006, plaintiff received three Coachings and two of those were related to customer service issues. Each Coaching document specifically stated that if the behavior continued, the next level of action to be taken could include termination. Then, in March of 2007, plaintiff's yearly evaluation identified five areas where improvement was needed, mainly in the area of customer service. Plaintiff was terminated a few months later, in July of 2007, after losing four rolls of a customer's film containing wedding photographs.

There is no indication that plaintiff's age was a factor in his termination. Plaintiff was terminated for poor customer service.

In the absence of direct evidence of discrimination, a plaintiff may proceed with a discrimination case based upon circumstantial, or indirect, evidence. Calder v. TCI Cablevision of Missouri, Inc., 298 F.3d 723 (8th Cir. 2002). To establish a prima facie case of age discrimination using indirect evidence and to survive a motion for summary judgment, the plaintiff is required to show: 1) he is a member of a protected age group; 2) he was performing his job at a level that met

his employer's legitimate expectations; 3) he was discharged; and 4) the employer replaced him with a younger person. Ziegler v. Beverly Enter.-Minnesota, Inc., 133 F.3d 671, 675 (8th Cir. 1998); Riley v. Lance, Inc., 518 F.3d 996, 1000 (8th Cir. 2008).

Plaintiff Chapman cannot make a prima facie case of age discrimination. Plaintiff cannot show that he was performing his job at the level that met Wal-Mart's expectations. Plaintiff had multiple issues with customer service as reflected in the Coachings as well as his annual review in March of 2007. Finally, plaintiff was terminated over a customer service issue. Plaintiff's age discrimination case fails as a matter of law.

None of plaintiff's other allegations are sufficient to state a claim for discrimination. Plaintiff has failed to demonstrate that we was treated less favorably than similarly-situated employees under 40 years of age.

IV. Conclusion

For the reasons stated above, it is hereby

ORDERED that defendant Wal-Mart Stores East, LP's Motion for Summary Judgment (Doc. #25) is granted and the Clerk of the Court shall enter judgment in favor of defendant Wal-Mart. It is further

ORDERED that this case is removed from the Court's September 14, 2009 Trial Docket.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

DATED: June 23, 2009