STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	)	CHARGE NO.: **2014CF2283**
	)	EEOC NO.: **440-2013-05270**
Beverly Wozniak	)	ALS NO.: **15-0074**
Petitioner	)	

ORDER

This matter coming before the Commission by a panel of three, Chair Rose Mary Bombela-Tobias and Commissioners Patricia Bakalis Yadgir and Duke Alden, presiding upon Beverly Wozniak's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Illinois Department of Human Rights ("Respondent")[1] of Charge No. 2014CF2283 and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW**, WHEREFORE**, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

DISCUSSION

On April 8, 2014, the Petitioner filed a discrimination charge with the Respondent alleging that she was terminated by her employer, Wal-Mart Stores, Inc. (Wal-Mart") on January 14, 2014 on the basis of her age (65), in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act").

On December 16, 2014, the Respondent dismissed the Petitioner's charge in its entirety for lack of substantial evidence. The Petitioner filed a timely Request for Review on January 12, 2015.

The Commission concludes that the Respondent properly dismissed all counts of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. 775 ILCS 5/7A102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. *In re Request for Review of John L. Schroeder*, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

The record shows that on October 20, 1990, Petitioner was hired by Wal-Mart, and at the time in question, was a cashier. Petitioner's job duties consisted of working a cash register and providing

[1] In a request for review proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Illinois Department of Human Rights's action shall be referred to as the "Petitioner."

customer assistance. Petitioner was issued three written warnings for poor performance which led to her discharge on March 22, 2013 for violating Wal-Mart's Coaching for Improvement Policy. In particular, Petitioner was issued a first written warning on February 28, 2013 for being rude to a customer; a second written warning on March 22, 2013 for refusing a work assignment; and third written warning for refusing to implement the action plan and sign-off on the third written warning on March 22, 2013. Four other younger employees were discharge for poor performance during that time period. Further, there were 99 cashiers. 61 had been over the age of 40.

To establish a *prima facie case* for age discrimination, Petitioner must show: 1) she falls within a protected class; 2) she was performing his work satisfactorily; 3) she was subject to an adverse action; and 4) Wal-Mart treated a similarly situated employee outside of Petitioner's protected class more favorably under similar circumstances. *See Anderson v. Chief Legal Counsel*, 334 Ill.App. 3d 630, 634, 778 N.E.2d 258, 268 Ill.Dec. 272 (3d Dist., 2002); *Marinelli v. HRC*, 262 ILL.App.3d 247, 634 N.E.2d 463 (2d Dist. 1994).

In further analyzing discrimination cases under the Human Rights Act, assuming arguendo that Petitioner proved by a preponderance of the evidence a *prima facie* case of discrimination treatment, Wal-Mart then has the burden of stating a legitimate nondiscriminatory reason for its employment decision, which has the effect of successfully rebutting the presumption of unlawful discrimination. The burden then shifts to Petitioner to prove by a preponderance of the evidence that the legitimate reason offered by the employer was not the true reason underlying its decision, but, instead, merely a pretext for discrimination. The ultimate burden of proving that the employer engaged in intentional discrimination remains at all times with the employee. *Burdine*, 450 U.S. at 252-53, 101 S.Ct. at 1093, 67 L.Ed2d at 215; *Acorn Corrugated Box Co.,* 181 Ill.App.3d at 136–37, 129 Ill.Dec. at 891, 536 N.E.2d at 941; *Kenall Manufacturing Co.,* 152 Ill.App.3d at 701, 105 Ill.Dec. at 524, 504 N.E.2d at 809.

In the instant case, Petitioner fails to satisfy the second and fourth prongs of her *prima facie case*. As to prong two, Petitioner's discharge was due to poor performance in violation of its Coaching for Improvement policy. There is no nexus between the Petitioner's termination and her age. Regarding the fourth prong, there is no proof that Petitioner was treated less favorably than others because of her age as other younger employees were also terminated for poor performance.

Further, Wal-Mart articulated a legitimate and non-discriminatory reason for Petitioner's discharge, namely for violations of its Coaching for Improvement policy. Further, there is no evidence that Wal-Mart's articulated reason for discharging Petitioner was pretext for unlawful discrimination. In the absence of any evidence that the business consideration relied upon by Wal-Mart is a pretext for discrimination, it is improper to substitute judgment for the business judgment of the employer. *See Berry and State of IL, Dept. of Mental Health and Developmental Disabilities*, IHRC, ALS no. S1946, Charge No. 1994SA0240 (December 10, 1997). Additionally, Wal-Mart is entitled to make employment decisions based upon its reasonable belief of facts surrounding the situation. The correctness of the reason is not important as long as there was a good faith belief by the [employer] in its decisions." *Carlin*

v. Edsai Mfg. Co., Charge No. 1992CN3428, ALS No. 7321 (May 6, 1996), *citing Homes and Bd. of County Comm'rs, Morgan County*, 26 Ill. HRC Rep. 63 (1986). *See also Shah v. IHRC*, 192 Ill. App. 3d 263, 273-74, 548 N.E.2d 695, 701 (1st Dist. 1989) ("A good faith belief for an employment decision is sufficient to rebut an intentional discrimination charge."). All in all, there is no substantial evidence that Petitioner was discharged because of her age, 65.

In her Request for Review, there is no additional evidence provided by Petitioner that would warrant a reversal of Respondent's original determination. It appears that Petitioner for the first time raises the issue of harassment, however. Respondent lacks jurisdiction to consider new allegations or charges of discrimination [raise for the first time during request for review proceedings]. *See* 775 ILCS 5/8-103.

Accordingly, the Petitioner has not presented substantial evidence to show that the Respondent's dismissal of the charge was not in accordance with the Act.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The dismissal of the Petitioner's charge is hereby **SUSTAINED.**

2. This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Wal-Mart Stores, Inc. as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS)
) **Entered this 17th day of December 2018.**
HUMAN RIGHTS COMMISSION)

Chair Rose Mary Bombela-Tobias

Commissioner Patricia Bakalis Yadgir

Commissioner Duke Alden