

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

CATHORINE HARRIS,)	
Complainant,)	
-and-)	DIA No. 14ICRC012
IOWA CIVIL RIGHTS COMMISSION)	
v.)	
CASEY'S GENERAL STORES, INC.)	PROPOSED DECISION
and TINA WILLETS,)	
Respondents.)	

This case involves a complaint filed by Complainant Cathorine Harris with the Iowa Civil Rights Commission (the Commission) against Respondents Casey's General Stores, Inc. (Casey's) and Tina Willets. In her complaint, Harris alleges that she was discriminated against on the basis of age by Respondents. After an investigation, the Commission determined that probable cause existed with regard to the allegations of age discrimination based on failure to train and termination contained in the complaint. The Commission filed a Statement of Charges and transferred the matter to the Department of Inspections and Appeals for a contested case hearing. On November 25, 2014, the Commission filed an Amended Statement of Charges. On December 17, 2014, Respondents filed an Answer to the Commission's Amended Statement of Charges.

Prior to hearing, Respondents filed a Motion for Summary Judgment. The Commission resisted the motion for summary judgment. By order dated May 15, 2015, summary judgment was granted for Respondents as to the claim of failure to train and denied as to the termination claim.

Hearing on the termination claim was held on May 20, 2015 at the Wallace State Office Building in Des Moines, Iowa. Attorneys Kristin Johnson and Nicole Merrill represented the Commission. Attorney Amanda Jansen represented Respondents Casey's and Willets. Complainant Cathorine Harris appeared and testified. Respondent Tina Willets appeared and testified. In addition to Harris, the Commission called the following witnesses: Susan Craig and Cheryl Jorgensen. In addition to Willets, Respondents called Linda Boatright as a witness.

Commission Exhibits 1 through 27 were admitted as evidence. Respondents' Exhibits A through W were admitted. Prior to hearing, the parties submitted a Stipulation of Facts. The stipulation is also part of the record.

Arrangements were made at the hearing to hold the record open until June 10, 2015 for the Commission to submit a post-hearing brief; until June 24, 2015 for Respondents to submit a post-hearing brief; and until July 1, 2015 for the Commission to submit a reply brief. The Commission timely submitted a post-hearing brief and a reply brief. Respondents timely submitted a post-hearing brief.

FINDINGS OF FACT

Cathorine Harris' Hire and Training

Cathorine Harris completed an employment application to work at Casey's on May 1, 2013. Harris was 72 years old at the time she completed the application. The application did not require that Harris provide her age or birthdate, and Harris did not include this information on the application. (Stip. ¶ 1; Exh. A).

Tina Willets, who was 50 years old at the time of hearing in this matter, was the Store Manager of the Casey's in Afton, Iowa at the time that Harris submitted her application. Willets had been the store manager since January 2008. Willets interviewed Harris in person after Harris submitted her application. Willets did not ask Harris her age at the interview. Willets asked Harris whether she could count back change during the interview and asked Harris to demonstrate counting back change to a customer. Harris did not have difficulty with this skill during the interview. The interview went well and Willets wanted to hire Harris. (Stip. ¶¶ 1, 3; Willets testimony).

On July 2, 2013, Willets called the BP where Harris was working at the time she submitted her application for a reference. The individual with whom Willets spoke confirmed Harris' employment at BP. Willets thereafter offered Harris a part-time, temporary job as a cashier at the Afton Casey's location, which Harris accepted.¹ Harris believes that Willets knew generally how old she was when she offered her the job. Willets testified at hearing that she could tell from Harris' appearance that Harris was older than Willets, but she did not know her exact age. (Stip. ¶¶ 4, 5; Exh. A; Harris, Willets testimony).

Willets set up a schedule for Harris that included orientation and training. Assistant Manager Michelle Franklin conducted Harris' orientation on August 6, 2013, which lasted from 10:00 AM until 12:08 PM. During the orientation, Harris completed a document entitled Conditions of Employment in which she listed her birthdate. This document was submitted electronically to the corporate office during Harris' orientation. Willets never saw the document and was never aware of Harris' birthdate or exact age while Harris was working at Casey's. (Stip. ¶ 6; Willets testimony).

Harris' first shift after her orientation occurred on August 15, 2013, when she worked from 6:12 AM to 2:04 PM. Willets scheduled Second Assistant Manager Debra Wilkey

¹ When Harris originally submitted her application, it was to work at the Murray, Iowa Casey's location that had not yet opened.

to train Harris. Wilkey had previously trained several cashiers for Willets. Willets chose Wilkey as a trainer for Harris because of Willets' belief that Wilkey was a great employee who knew the job well. Willets felt she could depend on her to train someone the right way. Wilkey was approximately 55 years old at the time.²

Casey's uses a touch screen register with icons that represent potential purchases, such as fuel, pop, pizza, and sandwiches. The register was unlike the one that Harris was used to at BP. Casey's registers do not have a training mode. Practice that trainees receive in completing transactions on the register comes from live customer transactions with the assistance of the trainer. Harris spent this first shift standing behind Wilkey and watching her run the register. Wilkey also instructed Harris regarding how to do DVD returns. (Exh. 11; Stip. ¶ 11; Harris, Willets, Boatright testimony).

Harris' second shift was on August 16, 2013. She worked from 10:57 AM until 4:22 PM. Harris also spent this shift watching Wilkey operate the register. Harris recalls that Willets told Harris she should get on the register, but testified that when she tried to do so Wilkey stopped her. According to Harris, Wilkey told Harris she was afraid Harris would mess up the cash drawer. Willets denies having told Harris to get on a register during this shift. In addition to watching Wilkey run the register, Harris also recalls stocking cups and facing candy. (Stip. ¶ 12; Harris, Willets testimony).

The schedule reflects that Harris was scheduled to train with Wilkey again on August 20, 2013. According to Harris and Casey's payroll records, Wilkey was scheduled to work that day, but did not.³ At hearing, Harris could not remember if anyone was standing next to her when she worked the register on that date. She believes Willets was working that day. While Willets does not have a specific recollection of who trained Harris, she assumes that Wilkey was scheduled to train Harris that day and for some reason was not there. This was Harris' first day working the register hands on for a significant period of time. She did not feel comfortable and was "still confused." Her shift lasted from 6:17 AM to 11:16 AM. (Exh. 7; Exh. H; Stip. ¶ 14; Harris testimony).

Harris' fourth shift was on August 21, 2013 from 9:57 AM until 4:29 PM. Wilkey was her trainer again that day and Harris operated her register with Wilkey close by. Harris was still confused about some screens that would come up on the touch screen register, but she did not inform Wilkey that she was still confused. Harris recalls bagging ice, facing candy, and checking coffee during the shift. (Exh. 7; Stip. ¶¶ 16, 17; Harris testimony).

Harris' final shift took place on August 22, 2013 from 8:05 AM until 4:04 PM. On that date, Wilkey told Willets that she did not understand how much longer she was going to need to train Harris because she felt Harris was not getting it. Although Willets had not been personally training Harris during the preceding shifts, she was able to observe the

² In an affidavit completed May 23, 2104, Wilkey attests that she is 56 years old. (Exh. C).

³ Wilkey appears as Debra Kingery in the Casey's records in evidence here. *See, e.g.*, Exh. H, J; Exh. 20.

training as she moved about the store engaged in other tasks. Willets did not feel that Harris was as outgoing and friendly on the job as she was during the interview. Willets had observed that Harris looked a little lost. (Stip ¶ 19; Willets testimony).

When Wilkey expressed the opinion that Harris was not getting it, Willets switched places with Wilkey so that she could personally observe Harris' progress on the register. At some point, Willets noticed that Harris was not counting back change to customers. Willets instructed Harris to do so, and Harris tried to do so. Willets observed that Harris' progress at the cashier role was "pretty poor." Harris did not greet people when they came in the door of the store or up to the register, she had difficulty getting the buttons to work on the touch screen register, she did not count change back on every transaction even after being instructed to do so, and she did not reliably tell customers thank you after each transaction. (Stip. ¶¶ 19, 20; Willets testimony).

Willets clocked out on August 22 at 1:08 PM. Prior to that time, Willets called Harris into the store's office to talk with her. Willets showed Harris a surveillance video that reflected that Harris had failed to ensure a customer swiped his credit card to pay for his merchandise and the customer left without paying for the merchandise. After this conversation, Willets told Harris to finish her shift and Willets left.⁴ Harris worked until approximately 4 PM. Two other female cashiers were working at the counter at that time. When Harris had questions, she asked them and they were answered. Harris was still struggling on the register. Harris had been shown how to navigate the touch screen icons; she never requested additional training on this point. (Stip. ¶¶ 21, 22, 23; Harris testimony).

Prior to the August 22 conversation, Willets had told Harris that she needed to pick up her speed, but Harris did not realize that her job was in jeopardy. Harris asserts that Willets told her during the August 22 conversation, "With your age, I don't think you're going to make it." Willets categorically denies having made any statement referencing Harris' age. (Harris, Willets testimony).

Willets recalls telling Harris during the August 22 conversation that she did not think she was getting the gist of the register work. Willets instructed Harris that she would allow her to finish her shift for the day, then Willets would visit with Wilkey and let Harris know about continuing on as an employee of Casey's. (Willets testimony).

Since Willets left prior to Harris' shift ending, Willets spoke with Wilkey about Harris' progress during the next shift they worked together. At that time, Wilkey reported to Willets that she did not believe that Harris had improved at all and did not think it was going to do any good to keep training her. After a couple of days, it was obvious to Wilkey that Harris was overwhelmed by the job, could not multi-task, would not count

⁴ The Stipulation of Facts provides, "Ms. Willets showed Ms. Harris a surveillance video showing she failed to ensure a customer swiped his credit card to pay for his merchandise; he left without paying. Ms. Harris told Ms. Willets to finish her shift, and Ms. Willets left." (Stip. ¶ 21). In context, I presume that the last sentence was meant to read, "Ms. Willets told Ms. Harris to finish her shift, and Ms. Willets left."

change back to customers, and was struggling to run the cash register, despite the fact that Wilkey instructed her repeatedly how to complete the same functions. Additionally, Wilkey observed that Harris tended to stay behind the register and not do any of the other tasks required of a cashier. (Willetts testimony; Exh. C).

Wilkey did not observe Harris' performance improve after she noted the aforementioned deficiencies. Wilkey asked Harris repeatedly to count change back to customers, but she failed to do so. Wilkey repeatedly instructed Harris not to stand behind the register in between customers when the store was slow and instructed Harris regarding the other duties that a cashier was responsible for, including cleaning the counter and floors, making coffee and iced tea, and stocking tobacco, condiments, cups, and lids. (Exh. C).

At the end of Harris' last day of training, it took her 20 minutes to close out the cash register. It takes a typical employee five minutes or less to perform this function. Harris had been trained on this function during each of her preceding shifts, but she simply did not catch on. Wilkey did not believe that Harris had the speed necessary for the job. Harris never asked Wilkey for additional training or instruction regarding any of the cashier job duties. Wilkey had never trained another new employee on the cash register who was unable to perform the job to the same extent as Harris after five days of training. (Exh. C).

In Willetts' experience, most cashiers seem knowledgeable after the second or third day of training, even if they have never used a cash register before. With Harris, there was not simply a single issue she was having trouble with; rather, it seemed like she wasn't really getting anything. For this reason, Willetts made the decision that it did not make sense to provide further training. On the Employee Separation Form that Willetts filled out for Harris on August 28, 2013, Willetts noted that Harris was discharged for inability to perform the job. Under the "Explanation" heading, Willetts wrote, "She had 4 days of training and was just not able to keep up the pace and was not able to multi task." Harris worked a total of 34.86 hours prior to her termination. (Exh. K; Exh. 19; Willetts testimony).

On August 21 or August 22, Harris noticed that she was not scheduled for any shifts for the coming week of August 25 through August 31. She called Willetts on August 23 and asked if she was scheduled to work the following week; Willetts said no. Harris asked if that meant she was terminated and Willetts said yes. (Stip. ¶ 24).

Casey's Training Protocol

Casey's Training Guide (Checklist) covers the duties and responsibilities of an employee for each covered job description. The Training Guide serves as a guide for the trainer to follow so that all training received by new employees is thorough and consistent. For the cashier position, the Guide contemplates 35 hours of training, including orientation, spread over five shifts. (Stip. ¶ 10; Exh. 9).

While the training guide gives examples of what can be covered in a sample shift, it is simply a suggestion. The training does not have to take place in the order that the training guide sets forth. The training guide is not submitted to the Casey's corporate office. Typically, a copy is given to the trainee at the end of training as a reference. (Boatwright testimony).

Regarding training protocol, the Casey's training manual provides:

Training Evaluation\Record

The manager or a member of the management team will train every employee using the Training Guide and the Training Evaluation (Record) for each job the employee has been hired to work. The Training Evaluation is to be maintained by a member of management to insure that the employee has been properly trained in all areas. The employee must initial each area of training on the Training Evaluation verifying training for that duty was received and understood by that employee. After completing the Training Evaluation, the trainee, trainer and the area supervisor should sign and date the Training Evaluation. Send the completed Training Evaluation to the Payroll Department at the Corporate Office.

(Exh. 8).

Willetts did not make a training evaluation/record for Harris' training. The training record is a document that Willetts does not typically complete until an employee finishes training. Casey's corporate policy is that the training record is not signed until the completion of training. If an employee does not complete training, Casey's corporate office does not have an expectation that a training record will be mailed in by the store manager. It can take Willetts up to several months after training ends to get the form initialed by the employee and signed. (Willetts, Boatright testimony).

Individual Casey's store managers are responsible for evaluating whether an employee who is training is a good fit. Casey's has a spec sheet that budgets training hours for new employees. Willetts, as store manager, was responsible for the overall profitability of the store. As such, she tried stay within the training hours budgeted and to staff the store so that it ran quickly and efficiently. Willetts had the authority to terminate training if she did not believe an employee was a good fit for the job. Willetts had high expectations for all employees, regardless of age. (Boatright, Willetts, Jorgenson testimony).

Other Employees at the Casey's Afton Location

Jenna Crabb, another Casey's cashier, did not understand how to count back change and had several register shortages after being trained. In her case, Willetts provided additional training regarding counting back change with a different trainer than Crabb trained with initially. Crabb understood the register generally and knew how to stay

busy and greet the customers; her only issue was with counting back change correctly so that her register did not come up short. (Willetts testimony).

Crabb was a part-time employee who worked at Casey's from April 13, 2010 through June 9, 2010. Crabb submitted a resignation to Casey's on June 25, 2010. The Employee Separation Form that Willetts completed on the same date indicates that Crabb was discharged for inability to perform the job. Under the heading "Explanation," Willetts wrote, "[W]anted me to work around her second job, I said no. She was retrained on reg after not seeming to get it, so no loss." Crabb was 16 years old at the time she was employed by Casey's. She worked approximately 69 hours prior to her discharge. (Exh. 10, 22).

Donald Dean was a cook in the pizza kitchen. Pizza cooks are more difficult to find than cashiers. Dean received more training than Harris because of the nature of the job. Willetts always brings in pizza cooks during the day to have them learn how to make pizzas because pizza sales are much different during the day. At night, a cook must make a higher volume of pizzas and training is more difficult. (Willetts testimony).

Dean was a part-time employee who worked at Casey's from September 21, 2010 through October 22, 2010. The Employee Separation Form that Willetts completed on October 25, 2010 indicates that Dean was discharged for inability to perform the job. Under the heading "Explanation," Willetts wrote, "He just couldn[']t seem to be able to do the kitchen after 2 wks training. Bad at truck delivery also, couldn't remember things[.]" Dean was 18 years old at the time he was employed by Casey's. He worked approximately 67 hours prior to his discharge. (Exh. 11, 23).

Beth Herzberg, a cashier, had several cash shortages and she and Willetts came to a mutual agreement that she would no longer work at Casey's. After Willetts talked to her, Herzberg agreed that the job was more demanding than she thought and she knew she could not perform to the standards required. While Herzberg's employment did not ultimately work out, she did understand how to use the register, greeted customers appropriately, and did not seem confused. Ultimately, Willetts simply felt that she was not catching it when she was handing back too much money to customers. (Willetts testimony).

Herzberg was a part-time employee who worked at Casey's from August 15, 2011 through September 9, 2011. The Employee Separation Form that Willetts completed on September 12, 2011 indicates that Herzberg was terminated for inability to perform her job. Under the heading "Explanation," Willetts wrote, "3 cash shortages of \$20 at least each time, no speed, mutual that she would be let go and or step down, no rehire to[o] slow[.]" Herzberg was 50 years old at the time she was employed by Casey's. She worked approximately 61 hours prior to her discharge. (Exh. 12, 24).

There were other older employees who worked for Willetts at the Afton store: Jean Cross, in her 60s, worked full-time doughnuts five days per week; Marilyn Flynn, in her 60s, also worked doughnuts; and Cindy Driscoll, in her 60s, who started the same year

as Willets. Willets characterizes each of those employees as being good at their jobs; they all caught on to the jobs with a “normal” amount of training. (Willets testimony).

Susan Craig, a Casey’s employee who has worked as a cashier since July 2013, was also hired by Willets and trained on the register by Wilkey. Craig had worked a cash register for years prior to her employment at Casey’s and she had previous experience with touch screen registers. For the first few hours of her training, Craig simply watched Wilkey operate the register. Craig does not recall whether she used the register herself on her first day. Wilkey stood next to her when Craig first started using the register on her own. In total, Craig was scheduled to train with Wilkey for three shifts for a total of 20.75 hours. (Craig testimony; Exh. W).

Cheryl Jorgensen also started as a cashier at the Afton Casey’s store in July 2013 and was hired by Willets. She has since been promoted to assistant manager. Jorgensen was trained by another employee, Sarah Hendricks. Jorgensen initially watched Hendricks on the register and Hendricks showed Jorgensen how to toggle through the touch screens. Jorgensen came to Casey’s from Pizza Hut, where she had utilized a similar touch screen register. Jorgensen was able to “play around with” the register on her first day of training. (Jorgensen testimony).

Jorgensen trained around the same time as Harris on different registers. It was Jorgensen’s impression that Harris was struggling with the register and overwhelmed by the cashier job. Since she became employed at Casey’s, Jorgensen has trained more than five new cashiers. It is Jorgensen’s opinion that Harris was not catching on as quickly as most cashiers. Jorgensen believes it would have taken a lot more training to bring Harris up to speed; she believes Harris would never have had the speed to keep up with the traffic over the lunch hour. (Jorgensen testimony).

CONCLUSIONS OF LAW

Under the Iowa Civil Rights Act of 1965 (“ICRA”),

1. It shall be an unfair or discriminatory practice for any:
 - a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.⁵

In this case, the Commission asserts that Respondents terminated Harris because of her age. A claim of intentional discrimination can be established through either direct or indirect evidence. Direct evidence may include remarks by a decisionmaker that show a specific link between a discriminatory bias and the adverse employment action,

⁵ Iowa Code § 216.6(1) (2015).

sufficient to support a finding that the bias motivated the action.⁶ The Commission argues that the statement Harris alleges Willets made – that “with [her] age,” Harris could not make it as a Casey’s cashier – constitutes direct evidence of discrimination. Alternatively, the Commission argues that: 1) even if the statement is not found to be direct evidence of discrimination, the statement, along with other evidence in the record, is enough to establish an inference of discrimination; or 2) if the statement is not found to be credible, the other evidence in the record is sufficient to establish an inference of discrimination under the *McDonnell Douglas* burden shifting paradigm.

Direct Evidence

As an initial matter, there is a factual dispute regarding the piece of direct evidence upon which the Commission relies. While Harris testified at hearing that Willets told her on August 22 that “with my age she didn’t think I could make it,” Willets categorically denies having made any statement regarding Harris’ age during the August 22 conversation, or at any other time. The existence of direct evidence of discrimination in this case hinges on a determination of witness credibility.

There are a number of factors a fact-finder may consider when determining credibility of witness testimony. Some of the most common factors include:

1. Whether the testimony is reasonable and consistent with other evidence you believe
2. Whether a witness has made inconsistent statements
3. The witness’s appearance, conduct, age, intelligence, memory and knowledge of the facts.
4. The witness’s interest in the trial, their motive, candor, bias and prejudice.⁷

For a variety of reasons, I credit Willets’ testimony that she did not make any reference to Harris’ age during the August 22 conversation regarding Harris’ performance or at any other time. After careful review of the complaint and investigative materials, deposition transcripts, and hearing testimony, Harris has made several materially inconsistent statements during these proceedings. These inconsistencies are outlined below:

- At her deposition, Harris testified that Willets told her during her interview that as a cashier she would have to count back change to customers. (Exh. S, p. 20). At hearing, Harris testified that she did not remember Willets telling her during her interview that if she was hired as a cashier she would be required to count back change to customers. (Hearing tr., pp. 45-46).
- In a sworn statement in her complaint, Harris certified that Respondents’ policy was to provide 40 hours of training. (Exh. D, ICRC035). At hearing, Harris

⁶ *Doucette v. Morrison County, Minn.*, 763 F.3d 978, 985-86 (8th Cir. 2014).

⁷ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

testified that no one at Casey's promised her any certain amount of training. (Hearing tr., p. 49).

- In an interview with the Commission's investigator, Harris testified that she got on the register herself for about two minutes on August 16. (Exh. F). At her deposition, Harris testified that she did not even get on the register for a couple minutes on August 16. (Exh. S, pp. 30-31). At hearing, Harris testified that her first opportunity to work on the register was on August 20. (Hearing tr., p. 37).
- In an affidavit submitted in conjunction with Respondents' summary judgment motion, Harris affirmed that she did not recall who was supposed to help train her on August 20 and that she tried to run the register on her own. Harris' affidavit states, "When I had questions, I asked for help from the employee running the other cash register at the time." (Harris SJ Aff., ¶ 8). At her deposition, Harris testified that she believed Willets was her trainer on August 20. In response to a question regarding whether Willets or whoever trained her was "standing there with you to make sure everything was going okay," Harris responded affirmatively. (Exh. S, p. 32). At hearing, Harris could not recall whether there was anybody actually standing beside her on August 20. Additionally, she testified that she did not remember whether Willets helped her with questions she had on that date. (Hearing tr., p. 37).
- In her summary judgment affidavit, Harris affirmed that she had difficulty with the register on August 21 because no one had shown her "how the system of screen levels worked." (Harris SJ Aff., ¶ 9). At her deposition, Harris testified that Wilkey showed her how to get through the different levels on the touch screen register. (Exh. S, p. 51). At hearing, Harris acknowledged that she had been shown how to get through the touch screen levels. (Hearing tr., p. 56).

Additionally, Harris did not reference the alleged statement Willets made regarding her age when she filed her complaint on September 4, 2013. Harris filled out the Commission's complaint form and indicated she believed she was discriminated against based on her age. On the last page of the form, there is space for the complainant to provide a summary of her allegations. The instructions state:

BRIEF SUMMARY OF ALLEGATIONS. Please describe what happened to you. How were you discriminated/harassed/retaliated against. Please be sure to address each action you identified. Insure that your summary reflects the basis you previously identified. ***Please read the instruction before writing your brief summary if you have questions.***

In response to this question, Harris wrote,

I was not properly trained [shadowing by manager],⁸ my schedule was 2 days one week and three the following week. Respondent gave me less training than other workers. I received 32 and Respondents['] policy was to provide 40 hours[.]

I was terminated for being slow and younger person was not fast either. This younger person (appx. 40) was hired one month before me and was given an opportunity to pick up her speed. I was terminated after 32 hours.

(Exh. D, ICRC035).

In answer to a question on a Commission questionnaire that she submitted several weeks after her complaint, Harris wrote that she did not feel that the lack of appropriate training “had anything to do with my age until Aug. 23 when Tina told me that she didn’t think I could keep up with the fast pace.” In the same set of questionnaires, Harris responded to a question regarding what reason(s) were given for her termination, “That I was an older employee, that the ‘fast pace’ of the store I would not be able to keep up.” (Exh. E, ICRC042-43).

The Commission argues that too much should not be read into Harris’ omission of the alleged statement by Willets in a section of the complaint requesting only a “brief summary” of Harris’ allegations. It is striking, though, that Harris did not reference Willets’ alleged comment anywhere in her complaint. One would think that a supervisor making a statement directly linking Harris’ termination to her age would have been significant enough that she would have included it somewhere in her complaint if it in fact had occurred.

In contrast, Willets’ testimony regarding Harris’ termination and the reasons for it has been consistent over time. In the employee separation form that Willets completed at the time of Harris’ termination, she states that after four days of training, Harris was not able to keep up the pace and was not able to multi-task. The Commission argues that at hearing Willets added new reasons for termination, such as that Harris could not count back change, was not friendly or outgoing in her cashier role, and had problems activating the touch screen buttons on the register. While Willets’ assertion that Harris was not friendly or outgoing was not specifically listed on the employee separation form, both of the other issues – counting back change and difficulty in activating the touch screen buttons – directly relate to Harris’ ability to keep up with the pace of the cashier job. A cashier who is unable to activate the touch screen buttons or count back change is going to lag behind in pace. The fact that Willets expanded at hearing on the reasons for terminating Harris in a manner consistent with the brief notes she wrote on the employee separation form does not undermine her credibility.

Finally, it is noteworthy in making the credibility determination that Willets herself was the person who conducted the interview with Harris and made the decision to hire her.

⁸ The words in parentheses, “shadowing by manager,” appear in the summary that Harris wrote above the sentence in which they appear here with an arrow pointing to them.

If Willets had a belief that an employee of Harris' age would not be able to perform adequately as a cashier, it is difficult to understand why she would have hired Harris. Harris originally applied to work at the Murray store, not the Afton store, and if Willets truly harbored age-based animus against older workers it would have been easy enough for Willets to make the decision not to hire Harris based on the fact that she would only have been a short-term employee until the Murray store opened.

Willets' testimony that she did not reference Harris' age in the August 22 conversation with her or at any other time is more credible than Harris' contrary testimony. There is no direct evidence of discrimination.

Indirect Evidence

The Commission argues in the alternative that, even if Harris' testimony regarding the August 22 conversation in which Willets allegedly referenced her age in discussing poor performance is not found credible, the Commission can still establish that Respondents violated the ICRA using indirect evidence under the *McDonnell Douglas* framework. Respondents argue, relying on *Landals v. George A. Rolfes Co.*,⁹ that the *McDonnell Douglas* framework cannot be applied where a plaintiff presents direct evidence of discrimination. In *Landals*, the employer challenged the sufficiency of the evidence to support a prima facie case of age discrimination and argued that the plaintiff failed to establish that the employer's reason for discharge was a pretext.¹⁰ While *Landals* did not involve direct evidence of age discrimination, the Court discussed the issue:

Under the *McDonnell Douglas* framework, the burden of proving the ultimate question remains on the plaintiff. The *McDonnell Douglas* framework cannot be applied where the plaintiff uses the direct method of proof of discrimination. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523, 533 (1985). Where direct evidence is presented and the employer suggests other factors influenced the decision, the employer has the burden of proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the improper factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1995, 104 L.Ed.2d 268, 293 (1989).¹¹

In the case cited by *Landals* for the proposition that the *McDonnell Douglas* framework cannot be applied where the plaintiff presents direct evidence of discrimination, the direct evidence of discrimination was an employer policy that was discriminatory on its face. The direct evidence the plaintiff presented in that case was not disputed by the employer.¹² In this case, Respondents have disputed the direct evidence presented by the Commission and, as discussed in detail above, the direct evidence is found not to be

⁹ 454 N.W.2d 891, 893-94 (Iowa 1990).

¹⁰ *Id.* at 892.

¹¹ *Id.* at 893-94.

¹² *Trans World Airlines*, 469 U.S. at 121.

credible. Under these circumstances, the Commission may argue an alternative theory of discrimination since the direct evidence it presented was not credited.

With regard to age discrimination claims under the federal Age Discrimination in Employment Act (ADEA), the United States Supreme Court held in *Gross v. FBL Financial Services, Inc.* that the burden-shifting framework articulated in *Price Waterhouse v. Hopkins*¹³ and used in mixed-motives cases under Title VII of the Civil Rights Act does not apply. Under *Gross*, to establish disparate treatment under the ADEA, the plaintiff must prove that age is the “but-for” cause of the employer’s adverse decision; a conclusion that age is simply a contributing factor does not result in liability for the employer.¹⁴

In *DeBoom v. Raining Rose, Inc.*, the Iowa Supreme Court found that a jury instruction in a sex discrimination case under the ICRA that instructed jurors that the plaintiff’s sex must have been “the reason which tip[ped] the scales decisively one way or the other” in order to establish a violation was incorrect and established a heavier burden than the statute or case law required.¹⁵ The court held:

[I]n discrimination cases, the plaintiff need only demonstrate ‘termination occurred under circumstances giving rise to an inference of discrimination’ and his or her status as a member of a protected class was a determining factor in the decision to terminate employment.¹⁶

(Emphasis in original). The court went on to note that it would be easier to use the word “motivating” rather than “determining” in discrimination cases, as that change would eliminate the confusion between differing burdens of proof and clarify that the protected status need not be *the* determining factor.¹⁷ Under the ICRA, then, the Commission need only show that Harris’ age played a part, or was a motivating factor, in Respondents’ termination decision.¹⁸

Where the Commission presents indirect evidence of discrimination, the claim is analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.¹⁹ Under that framework, the Commission has the initial burden to establish a prima facie case of discrimination. Once it has done so, the burden of production shifts to the Respondents to articulate a legitimate non-discriminatory reason for the employment action. If they do so, the burden shifts back to the Commission to

13 490 U.S. 228 (1989).

14 557 U.S. 167, 173-74 (2009).

15 772 N.W.2d 1 (Iowa 2009).

16 *Id.* at 13 (citing *Smidt v. Porter*, 695 N.W.2d 9, 14-16 (Iowa 2005); *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 639 (Iowa 1998); *Vaughn v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996)).

17 *Id.* at 13-14.

18 See *Newberry v. Burlington Basket Co.*, 622 F.3d 979, 982 (8th Cir. 2010).

19 *Tusing v. Des Moines Independent Community School Dist.*, 639 F.3d 507, 515 (8th Cir. 2011).

demonstrate by a preponderance of the evidence that the stated non-discriminatory reason was merely a pretext for discrimination.²⁰

In order to establish a prima facie case of age discrimination, the Commission must prove that: 1) Harris was in the protected class; 2) she was qualified to perform the job; 3) she suffered an adverse employment action; and 4) the circumstances under which the adverse action occurred permit an inference of discrimination.²¹

The ICRA protects individuals 18 and over from age discrimination.²² There is no dispute that Harris is a member of the protected class. There is likewise no dispute that Harris was subject to an adverse employment action; she was terminated.

With regard to whether Harris was qualified for the cashier position, the Eighth Circuit has acknowledged conflicting case law within the circuit regarding this element of the prima facie case. In a relatively recent case, a panel of the Eighth Circuit concluded that under the more sound line of cases a complainant must show only that she possesses the basic skills necessary for performance of the job, not that she was performing it satisfactorily. Under this reasoning, a complainant is not “tasked with anticipating and disproving his employer’s reasons for termination during the prima facie case.”²³ The undisputed facts here establish that Harris had been employed as a cashier at another gas station convenience store immediately prior to her hire by Casey’s. She was interviewed by Willets and found to possess the basic skills required of a Casey’s cashier. Under these circumstances, Harris was qualified for the position for purposes of establishing a prima facie case.

The Commission argues that, even without Willets’ alleged statement referencing Harris’ age in relation to her job performance, there is sufficient evidence to permit an inference of discrimination. Specifically, the Commission argues that Wilkey did not take time to properly train Harris in accordance with Casey’s training procedures and Willets did not consider the quality of Harris’ training in making the determination to terminate her. Additionally, the Commission argues that younger employees received additional training, while Harris was not permitted additional training.

The credible evidence in the case does not permit an inference that Harris’ age was a factor in her termination. As an initial matter, Willets both hired and fired Harris. She hired Harris after an in-person interview knowing her approximate age and then terminated her after five days of training. In *Lowe v. J.B. Hunt Transport, Inc.*, the same company officials who hired the plaintiff to be a trucking terminal manager at age 51 later fired the plaintiff at age 53, allegedly for falsifying a petty cash report.²⁴ The court held that, in light of the plaintiff’s “weak” attacks on the defendant’s asserted

²⁰ *Id.*

²¹ *Jones v. University of Iowa*, 836 N.W.2d 127, 147-48 (Iowa 2013); *DeBoom*, 772 N.W.2d at 6-7 (Iowa 2009).

²² Iowa Code § 216.6(3) (2015).

²³ *Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 469-70 (8th Cir. 2014).

²⁴ 963 F.2d 173, 174 (8th Cir. 1992).

justification for termination, the short time that the plaintiff worked for the defendant, his age when hired, and the fact that the same officials hired and fired him were fatal to his discrimination claim. No rational inference of discrimination was possible.²⁵

With regard to training provided to other employees, the Commission presented insufficient evidence to conclude that the other employees referenced were similarly situated to Complainant.²⁶ Dean was a pizza cook; Willets provided credible testimony that pizza cooks are more difficult to find and that the training for the job is more difficult. Dean worked only 67 hours prior to his discharge; there is no breakdown in the record regarding how many hours were spent in training. Crabb and Herzberg, the other employees referenced as comparators by the Commission, were employed as cashiers, but the evidence does not support the conclusion that their performance issues were as severe from the outset as those of Harris. Crabb had issues counting back change which resulted in her register coming up short, but she was able to stay busy and greet customers in the manner expected. While Herzberg had several cash shortages and performed slowly, she nevertheless understood the register and did not seem confused. It is also significant that, while Herzberg worked slightly longer than Harris, she was ultimately terminated based on her performance. The evidence reflects that Willets held her employees to high standards, regardless of age.

Willets and Jorgenson both provided credible testimony that Harris had extreme difficulty with the most basic tasks that Casey's required its cashiers to complete. She was unable to properly activate the touch screen register and could not competently navigate through the various levels of the touch screen. Wilkey, Harris' trainer, expressed the view that no matter how much additional training Harris was provided she did not feel she would be able to catch on to the register. Willets credibly testified that there was no single issue that Harris was having trouble with; rather, she was not catching on to any of the tasks required. In Willets' experience, most cashiers appear knowledgeable after the second or third day of training, even if they have never used a cash register before. This was not the case with Harris, and Willets made the decision that further training was not advisable.

While the Commission argues that the training that Wilkey provided was lacking, there is no evidence that the training Harris received was substantively different or less comprehensive than training received by other cashiers. Wilkey also trained Craig, a

²⁵ *Id.* at 175 ("It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.").

²⁶ The Commission's failure to train claim was dismissed at the summary judgment stage. The ultimate question before the undersigned administrative law judge is not whether Respondents provided Harris with adequate training; rather, the question is whether Respondents terminated Harris based upon her age. The Commission argues that the difference in training between Harris and other younger employees is evidence that Respondents treated Harris differently because of her age and contributes to an inference of discrimination on the ultimate question of termination. The training evidence is discussed in this context.

cashier who was hired shortly before Harris. Craig trained for a total of 20.75 hours, all under Wilkey. She is still employed by Casey's as a cashier.

The Commission also argues, in support of an inference of discrimination, that Willets failed to follow Casey's training policies in the training of Harris. It is undisputed that Harris received approximately 35 hours of training, including orientation. This is the precise amount contemplated by the Casey's Training Guide. While no Training Evaluation form was ever completed for Harris, there is credible evidence in the record that it was not unusual for Willets to take up to several months after training before she would sign the form and get it initialed by the employee. Harris' employment ended before the time frame when Willets would typically have completed this form.

In looking at the credible evidence as a whole, the most reasonable conclusion to be drawn is that Harris simply did not meet Willets' performance expectations for her store and, on that basis, she was terminated. While the Commission stresses the speed with which Willets came to the conclusion that Harris did not measure up, the fact that Willets made a quick decision regarding Harris' performance does not mean that her decision was based on Harris' age. There is simply no support for this in the record.

Harris herself acknowledged at hearing that she was slow on the register during the training period, as she had never seen a register like the one used at Casey's. While Harris believes she should have been trained in a different fashion, including having hands-on practice on the register prior to the time at which Wilkey allowed this, it is within Respondents' business judgment to determine how much training to provide an employee before deciding to cut their losses if they believe an employee does not have the requisite skills to perform the job.

While I do not find that the Commission established a prima facie case of age discrimination, even if the evidence had supported a prima facie case, Respondents presented credible evidence that Harris' termination was a result of poor performance. As discussed above, the Commission has not proven that this proffered reason was a pretext for discrimination.

ORDER

The Commission has not proven that Respondent Casey's General Stores, Inc. or Respondent Tina Willets committed an unfair or discriminatory practice in employment. All further proceedings are dismissed.

Dated this 25th day of September, 2015.



Laura E. Lockard
Administrative Law Judge

cc: Nicole Merrill, ICRC (Electronic Mail)
Catharine Harris (First Class Mail)
Amanda Jansen (Electronic and First Class Mail)
Casey's General Stores, Inc. (First Class Mail)
Tina Willets (First Class Mail)

NOTICE

Any adversely affected party may appeal this proposed decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.²⁷ The appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. In addition, the appeal shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.²⁸

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.²⁹

²⁷ 161 Iowa Administrative Code (IAC) 4.23(1).

²⁸ 161 IAC 4.23(3).

²⁹ 161 IAC 4.23(2).