

App. 1

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-60662

ANNETTE BENJAMIN,
Plaintiff-Appellant,

v.

FELDER SERVICES, L.L.C., doing business
as Oxford Health and Rehab Center,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:16-CV-99

(Filed Nov. 20, 2018)

Before DAVIS, COSTA, and OLDHAM, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Annette Benjamin, the former Dietary Manager at a nursing home, says she was fired because of her age in violation of the Age Discrimination in Employment Act (“ADEA”). *See* 29 U.S.C. § 623(a)(1). Defendant-Appellee Felder Services, L.L.C.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

App. 2

(“Felder”), her former employer, counters it fired her due to deficient job performance, not age. Finding no evidence Felder’s legitimate rationale for firing Ms. Benjamin was pretext for discrimination, the district court granted summary judgment for Felder. Ms. Benjamin appealed. We affirm.

I.

Ms. Benjamin worked in the dietary department at Graceland Care Center of Oxford (“Graceland”), a nursing home, for approximately 32 years. As Dietary Manager, she was responsible for taking care of residents’ dietary needs, a job that included managing kitchen staff and maintaining the operation and cleanliness of the kitchen.

On June 8, 2015, when Ms. Benjamin was 59 years old, Felder took over the contract to provide dietary services at Graceland. Brenda Anderson, Felder’s Director of Dining Services, hired Ms. Benjamin to continue in her position as Dietary Manager. But conflicts quickly arose.

Graceland had been surveyed by the Center for Medicare and Medicaid Services (“CMS”) in early June 2015—prior to Felder taking over the dietary services department. Nursing homes must submit to such surveys as a requirement for participation in Medicare and Medicaid, and failure to meet regulatory requirements can lead to adverse consequences such as civil penalties or termination of participation in Medicare or Medicaid. *See* 42 U.S.C. § 1396r. During a survey,

App. 3

CMS representatives inspect all regulated aspects of the nursing home, including its kitchen and dining services, in a process that takes several days. At Graceland's June 2015 survey, CMS identified several deficiencies relating to kitchen cleanliness, expired food, and food service at Graceland. Graceland was informed of the deficiencies during its exit interview with regulators.

One such deficiency involved tray cards, which are records for each nursing home resident reflecting dietary restrictions ordered by the resident's doctor as well as the resident's food preferences. Ms. Benjamin, the Dietary Manager, was responsible for maintaining accurate tray cards. Consequently, shortly after Felder took over, the nursing home administrator instructed Ms. Benjamin to conduct a "tray card audit." This entails checking each resident's tray card against the resident's doctor's orders or the resident's chart to ensure the tray card is accurate.

Elizabeth House, the Felder District Manager responsible for overseeing Ms. Benjamin and the dietary department at Graceland, explained Ms. Benjamin failed to timely complete the tray card audit: "She basically refused to do anything with the tray card audits, so I had to do the tray card audits and then would leave her a list of things to check and then when I came back in, they weren't checked—and this was on several occasions."

CMS also identified deficiencies related to the timeliness and temperature of the food service. Ms.

App. 4

Benjamin was asked to create a resident seating chart, which is used to ensure residents seated together can be timely served together. But she failed to complete this task in a timely manner.

Felder personnel also had concerns with Ms. Benjamin's treatment of the kitchen staff and nurses. As Ms. House explained:

[T]he way she talked to the dietary staff in my opinion was rude and inappropriate. On several occasions she came into the kitchen and raised her voice to the employees. At one time in particular that sticks out in my mind, the lunch was late and . . . she just started yelling [at the staff], why—why are y'all late? Y'all have to be on time. . . . [I]t was upsetting the dietary staff.

Ms. House emphasized, “as the dietary manager, it’s [Ms. Benjamin’s] responsibility for the meal to go out on time.” Ms. House testified she was also concerned by Ms. Benjamin’s unwillingness to “cooperate with nursing staff” and her negativity towards any suggestions given by Ms. House or the nursing staff. Ms. Benjamin reacted “very negative[ly]” to any “suggestions that [were given] to her.”

Felder fired Ms. Benjamin on July 8, 2015. Felder hired Ricky Diggs, age 42, to replace her.

II.

“We review the grant of a motion for summary judgment *de novo*, applying the same standard as the

App. 5

district court.” *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010). Summary judgment should be granted where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). All facts are viewed in the light most favorable to the non-moving party, who must offer more than conclusory allegations to defeat summary judgment. *See Moss*, 610 F.3d at 922.

The ADEA makes it unlawful to fire an employee who is “at least 40 years of age” because of her age. 29 U.S.C. §§ 623(a)(1), 631. The “plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the but-for’ cause of the challenged employer decision.” *Moss*, 610 F.3d at 922 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009)).

Where, as here, the plaintiff’s case is premised on circumstantial evidence, we apply the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Moss*, 610 F.3d at 922. Under the *McDonnel* [sic] *Douglas* framework, a plaintiff alleging unlawful termination must put forward a *prima facie* case that: (1) she was fired; (2) she was qualified for the position; (3) she was within the protected class; and (4) she was either (a) “replaced by someone outside the protected class,” (b) “replaced by someone younger,” or (c) “otherwise discharged because of [her] age.” *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007). If the ADEA plaintiff makes a *prima facie* case, “the burden shifts to the

App. 6

employer to provide a legitimate, non-discriminatory reason for the employment decision.” *Id.* “If the employer articulates a legitimate, non-discriminatory reason for the employment decision, the plaintiff must then be afforded an opportunity to rebut the employer’s purported explanation, to show that the reason given is merely pretextual.” *Moss*, 610 F.3d at 922.

III.

In this case, it is undisputed Ms. Benjamin made out a *prima facie* case under the ADEA: she was fired; she was qualified for the position; she was over 40 years old; and she was replaced by a younger employee. *See Berquist*, 500 F.3d at 349. This case therefore turns on the second and third factors in the *McDonnell Douglas* burden-shifting framework: (A) whether “the employer [can] articulate some legitimate, nondiscriminatory reason for” its decision, and (B) whether that articulated reason “was in fact pretext.” *McDonnell Douglas*, 411 U.S. at 802, 804.

A.

As discussed above, Felder presented evidence it fired Ms. Benjamin because she failed to timely complete assignments—specifically, the tray card audit and the resident seating chart—and because her overall work performance was poor. We have repeatedly recognized that poor job performance is a legitimate, nondiscriminatory reason for firing an employee. *See, e.g., Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 345

App. 7

(5th Cir. 2005); *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 403 (5th Cir. 2001). Indeed, “even an incorrect belief that an employee’s performance is inadequate constitutes a legitimate, non-discriminatory reason.” *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991); *see also Reynolds v. Sovran Acquisitions, L.P.*, 650 F. App’x 178, 184 (5th Cir. 2016) (per curiam).

Felder therefore carried its burden of production.

B.

Once the employer satisfies its burden of production, the plaintiff must show the proffered non-discriminatory reason is merely pretext for age discrimination. *See Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013). “[A] plaintiff relying upon evidence of pretext to create a fact issue on discriminatory intent falters if [s]he fails to produce evidence rebutting all of a defendant’s proffered nondiscriminatory reasons.” *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 351 (5th Cir. 2005); *see also Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003).

A plaintiff may show “pretext either through evidence of disparate treatment or by showing that the employer’s proffered explanation is false or unworthy of credence.” *Laxton*, 333 F.3d at 578 (internal quotation marks omitted). Ms. Benjamin does not point to any other employee who was treated differently, so she must establish pretext by showing Felder’s explanation is “false or unworthy of credence.” *Id.* She attempts to do so in five ways. Each is unavailing.

App. 8

1.

The first nondiscriminatory reason proffered by Felder is Ms. Benjamin's failure to complete projects in a timely manner. Ms. Benjamin does not dispute her failure to timely complete her projects but argues this reason must be pretextual because she had good excuses. First, she says the tray card audit was delayed because she had many other responsibilities and because her computer was not compatible with Felder's system for tray cards. Second, she implies the tray card audit and seating chart update were unnecessary because she had updated both a week before Felder took over the facility. Finally, she suggests her failure to complete the tray card audit and seating chart should be excused because she customarily relied on subordinates to complete parts of these tasks.

Ms. Benjamin's explanations and criticisms come down to one underlying complaint: Felder's expectations for the Graceland Dietary Manager's job performance were unreasonably high. That may have been so, but unreasonable expectations are not evidence of discriminatory intent. "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated." *Moss*, 610 F.3d at 926 (quoting *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988)). Even if Ms. Benjamin believed the tray card audit and seating chart updates were unimportant, she does not dispute her failure to complete these assigned tasks. She likewise does not dispute that these projects related to deficiencies identified by CMS, undermining

App. 9

her theory they were unimportant.¹ Moreover, there is no evidence Ms. Benjamin had delegated these particular tasks to her subordinates—and even if she had, she agrees that as Dietary Manager she was ultimately responsible for everything in her department. Pointing to Ms. Benjamin’s failure to complete tasks is not pretext for age discrimination. *See, e.g., Morris v. Tri-State Truck Ctr., Inc.*, 681 F. App’x 303, 305 (5th Cir. 2017) (per curiam) (no evidence of age discrimination where employee “presented no evidence that she did not, in fact” take the actions cited by the employer as its basis for firing her).

2.

As to Felder’s other stated reason for the termination—overall poor performance—Ms. Benjamin argues she had always received positive performance reviews from Graceland, so Felder’s concerns about performance are not credible. But it is evident Felder had different expectations for the Dietary Manager. As noted above, Ms. Benjamin herself contends she had new and different responsibilities under Felder. So, evidence of positive reviews from a former employer does not make Felder’s explanation pretextual.

¹ Ms. Benjamin argues the CMS survey could not have been part of Felder’s legitimate rationale because the report was received over a month after she was fired. Though CMS’s final report was not issued until late July 2015, CMS personnel conducted an “exit interview” on the final day of the survey, at which point they made Felder aware of the deficiencies they had identified. Thus, Felder began working to correct the identified deficiencies even before CMS issued its final report. Ms. Benjamin’s argument is unavailing.

App. 10

As to the treatment of the kitchen staff and nurses that troubled Ms. House, Ms. Benjamin put forward testimony from former co-workers who stated they had not witnessed Ms. Benjamin being rude, inappropriate, or uncooperative during their time working together.² A plaintiff can prove pretext by showing the employer's proffered reason is false. *See Laxton*, 333 F.3d at 578. But Ms. Benjamin does not dispute that the troubling incidents occurred. She does not deny raising her voice to the kitchen staff or reacting negatively to suggestions from Ms. House or the nurses. In short, the proffered evidence does not show that Ms. House's concerns regarding specific incidents were baseless.

Moreover, “[e]ven an incorrect belief that an employee’s performance is inadequate constitutes a legitimate, nondiscriminatory reason. We do not try in court the validity of good faith beliefs as to an employee’s competence.” *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995); *see also Clark v. Boyd Tunica, Inc.*, 665 F. App’x 367, 371 (5th Cir. 2016) (per curiam); *Cervantez v. KNIGP Servs. Co. Inc.*, 349 F. App’x 4, 9 (5th Cir. 2009) (per curiam) (citing *Mayberry*, 55 F.3d at 1091); *Waggoner v. City of Garland*,

² Ms. Benjamin argues the district court improperly weighed the credibility of these witnesses. To the extent the district court suggested this testimony carries little weight because, for example, one former co-worker had also been fired and another had worked with Ms. Benjamin only one day a week, it erred. Courts may not assess credibility at summary judgment. *See Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016). But even taking this testimony for all it is worth, it does not provide the necessary evidence of pretext.

App. 11

Tex., 987 F.2d 1160, 1165–66 (5th Cir. 1993). Ms. Benjamin would have to show Ms. House’s concern over her treatment of kitchen and nursing staff was not based on good faith concerns about her competence, and she has not done so.

3.

Ms. Benjamin also argues that personnel changes made after Felder took over the Graceland dietary department are evidence of pretext or discriminatory intent. In 2017 (during discovery in this case), the Graceland dietary department had fewer employees over 40 years old than it had on June 8, 2015 (the day Felder took over). And of the three employees in the dietary department who had their hourly pay decreased under Felder, two were over 40 years of age. From this, Ms. Benjamin would have us infer pretext.

We cannot. While the Graceland dietary department experienced some turnover between 2015 and 2017, the record does not support an inference of pretext. The record shows the dietary department decreased in size from 21 employees in 2015 to 17 employees in 2017. One cook who was 70 years old in 2015 testified she retired voluntarily. Three of the Graceland employees who remained in 2017 were over 50 years old. Indeed, Felder hired a new 55-year-old employee sometime between 2015 and 2017. As to pay changes, though two older employees saw their pay decrease under Felder’s management, several older employees received a pay increase.

App. 12

Even if events that took place long after Ms. Benjamin was fired are pertinent, these personnel changes do not evidence discriminatory animus. Marginal changes in the age makeup of such a small staff do not raise an inference of age discrimination. That is especially true here because one of the older employees retired voluntarily and Felder treated other older employees favorably. *Cf. Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 152 (5th Cir. 1995) (noting retention of other employees within the protected class undermines plaintiffs theory of age discrimination).

4.

Ms. Benjamin also points to her verified complaint, in which she states, “prior to [her] termination, [Felder] had conducted interviews with all dietary employees except Plaintiff, generally outlining its expectations and any change in job descriptions.” The complaint does not say exactly when these interviews occurred, but it appears they were conducted after all the dietary employees had been re-hired by Felder on June 8, 2015.³ When Ms. Benjamin asked why she “was not being interviewed,” Felder assured her it was “nothing to worry about.” Ms. Benjamin contends her

³ It is Ms. Benjamin’s burden to show pretext, and she has not pointed us to record evidence clarifying precisely when these interviews occurred. If they occurred before June 8, 2015, then this is no evidence of pretext because Ms. Benjamin *was hired*. Felder’s decision to hire Ms. Benjamin without an interview would not suggest pretext regarding her later performance issues.

App. 13

lack of an interview is evidence Felder did not intend to retain her.

Even assuming the lack of an interview indicates Ms. Benjamin’s supervisors did not expect to retain her, she has not shown they made that decision because of her age. Indeed, Ms. Benjamin worked for Felder for just four weeks, and Felder’s concerns appear to have arisen quickly. Ms. House discussed Ms. Benjamin’s behavior with her own supervisor, Ms. Anderson, at least a week before Ms. Benjamin was fired. In the absence of any evidence of discriminatory intent, the suggestion that Felder was planning to fire Ms. Benjamin all along is no evidence of pretext. *See, e.g., McDaniel v. Nat'l R.R. Passenger Corp.*, 705 F. App'x 240, 250 (5th Cir. 2017) (per curiam) (explaining that even “intentionally” leaving plaintiff “off the interview list” is no evidence of pretext where “[plaintiff] provides no reason to believe that it was for discriminatory purposes”). That Felder supervisors did not interview Ms. Benjamin regarding her responsibilities does not show its stated reasons for firing her are false or otherwise suggest discriminatory intent.

5.

Finally, Ms. Benjamin argues that an “Employee Information Sheet” she filled out on the day Felder hired her—which included a request for her date of birth—is evidence of discriminatory animus. She says “[t]here is no legitimate, non-discriminatory explanation in the record explaining why Defendant wanted to

App. 14

know the age of an applicant,” so Felder must have harbored animus towards older workers. Ms. Benjamin did not cite this document as evidence of pretext to the district court, and the district court did not consider it. We will not consider it for the first time on appeal. *See Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 846 (5th Cir. 2010).

* * *

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

ANNETTE BENJAMIN PLAINTIFF
VS. CIVIL CAUSE NO: 3:16-CV-099-NBB-RP
FELDER SERVICES, LLC d/b/a
OXFORD HEALTH AND REHAB
CENTER DEFENDANT

MEMORANDUM OPINION

(Filed Sep. 6, 2017)

Presently before the court is the defendant's motion for summary judgment. Upon due consideration of the motion, response, exhibits, and supporting and opposing authority, the court is ready to rule.

Factual and Procedural Background

The plaintiff, Annette Benjamin, brings this action against her former employer, defendant Felder Services, LLC ("Felder"), an Alabama company doing business as Oxford Health and Rehab Center, asserting that the defendant terminated her employment in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. The plaintiff was a long-term employee of thirty-two years for the defendant's predecessor, Lafayette LTC, Inc. At the time of the plaintiff's discharge, she was fifty-nine years old and employed as a "dietary manager."

App. 16

On June 8, 2015, the defendant purchased the contract regarding dietary, laundry, and housekeeping at the facility. The plaintiff worked for the defendant for only approximately thirty days before her employment was terminated. The plaintiff claims that prior to her termination, the defendant conducted interviews with all dietary employees except the plaintiff, generally outlining the company's expectations and any change in job descriptions. The plaintiff's supervisor, Brenda Anderson, allegedly told the plaintiff that the failure to interview her was "nothing to worry about," that she did not understand how the plaintiff could do all the work she was doing, and that she was doing an excellent job.

The plaintiff also claims that the defendant placed a large number of additional requirements upon her and that it was impossible for her to fulfill all of these duties immediately. The plaintiff claims that on the day she was fired a younger black male who appeared to be in his forties was on site. Subsequently, this man was hired as her replacement. He was forty-two at the time he was hired.

When the plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC"), the defendant indicated that the plaintiff was fired because she failed to prepare tray cards and complete a seating chart in a timely manner. The plaintiff claims that she was unable to complete the tray cards in a timely fashion because the defendant had assigned so many job duties to her and that she was working on both assignments at the time of her termination. The

App. 17

plaintiff claims that the defendant's proffered legitimate, non-discriminatory reason of the plaintiff's poor job performance was a pretext for discharging her because of her advanced age. After the EEOC issued her right to sue letter, the plaintiff filed her ADEA complaint in this court on May 23, 2016. The defendant subsequently filed this motion for summary judgment.

Standard of Review

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the movant makes such a showing, the burden then shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celote [sic] Corp.*, 477 U.S. at 324 (quoting Fed. R., Civ. P. 56(c), (e)). Before finding that no genuine issue for trial exists, the court must first be satisfied that no rational trier of fact could find for the non-movant. *Matsuhita [sic] Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Analysis

The ADEA provides that “[i]t shall be unlawful for an employer to . . . discharge 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)(1). “To establish an ADEA claim, a plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the ‘but-for’ cause of the challenged employer decision.” *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (quoting *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2351 (2009)).

The plaintiff has produced no direct evidence of age discrimination and must therefore establish a prima facie case through circumstantial evidence. In the absence of direct evidence of discrimination, the court must use the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of age discrimination, the plaintiff must show “that she: (1) is a member of a protected class; (2) was qualified for her position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that others similarly situated were treated more favorably.” *Okoye v. Univ. of Texas Houston Health Science Center*, 245 F.3d 507, 512-13 (5th Cir. 2001).

If the plaintiff can establish a prima facie case, the employer is afforded the “opportunity to articulate a

legitimate, non-discriminatory reason for the adverse employment action.” *Willis v. Coca Cola Enterprises, Inc.*, 445 F.3d 413, 420 (5th Cir. 2006). “Once the employer offers evidence of such a legitimate reason, the burden shifts back to the plaintiff-employee to raise a genuine issue of material fact that this nondiscriminatory reason is merely pretextual.” *Id.* At this point, “the factual inquiry proceeds to a new level of specificity.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

The defendant admits that the plaintiff has established a prima facie case because her employment was terminated; she was qualified for the position; she was approximately fifty-nine years old at the time of discharge; and she was replaced by a forty-two year old man. The burden therefore now shifts to the defendant to articulate a legitimate, non-discriminatory reason for the plaintiff’s discharge. The defendant’s reason for the discharge was that the plaintiff did not complete her assigned tasks in a timely fashion and her overall work performance was poor. The plaintiff’s immediate supervisor testified that “she was not willing to cooperate with nursing staff on working with them to try to solve some of the issues that they were having.” In addition, the plaintiff’s supervisor testified that the plaintiff raised her voice in an inappropriate manner to the staff. The supervisor also testified that the plaintiff failed to complete her tray card audits in a timely fashion and that she herself had to complete the tray card audits. The supervisor also testified that the plaintiff failed to complete a seating chart. Further,

App. 20

during an early June 2015 survey by the Department of Health and Human Services, Centers for Medicare and Medicaid Services, the facility was cited for numerous violations. These violations included that the facility served cold meals, failed to store and serve foods in a sanitary manner, and ran a dirty kitchen.

Given that these reasons are legitimate and non-discriminatory, the burden shifts back to the plaintiff to show a genuine issue of material fact that the given reason is merely pretextual. *Willis*, 445 F.3d at 420. The plaintiff cites five different co-workers who testified that they had never witnessed the plaintiff being rude or disrespectful to a co-worker or resident during her employment at the facility. The record reveals, however, that one of these co-workers was fired by the defendant, one did not work directly for the defendant, one worked with the plaintiff only one day a week, and another did not work with the plaintiff at the time of her termination. The plaintiff also cites that the two oldest employees had their pay cut when the defendant took over the kitchen, laundry, and housekeeping operations at the facility. The record shows, however, that several kitchen employees of varying ages had their pay cut when the defendant took over.

The plaintiff states that she was unable to perform the tray card audits in a timely fashion because the defendant added many new job duties. Because she allegedly did not have the time to perform the tray card audits immediately, her supervisor performed the audits before the plaintiff allegedly had the chance. The plaintiff also states that she was never given a

deadline and that she was working on the tray cards and the seating chart when she was fired.

The court finds that the proffered legitimate, non-discriminatory reason is not pretextual because an employee not performing job duties in a timely manner is a valid reason for termination. The plaintiff also raises the issue that she was replaced by a much younger male and that he allegedly told a third-party that he was hired two weeks before the plaintiff was fired and was waiting for her to be let go. The court must disregard this alleged statement as inadmissible hearsay. Further, while the plaintiff's replacement was younger, he was ultimately treated the same by the defendant when his performance did not rise above the plaintiff's, and he was fired as well.

While the plaintiff has satisfied her *prima facie* burden, she cannot successfully rebut the defendant's legitimate, non-discriminatory reason for terminating her employment. The plaintiff's own testimony regarding the tray card audit and her supervisor's testimony reflecting her attempts at trying to get the plaintiff to do her job show the plaintiff's poor work performance and failure to complete assignments. The court finds that these reasons, taken together with the surveys from the Department of Health and Human Services, are more than valid to warrant the plaintiff's termination. The court therefore finds that the defendant's motion for summary judgment should be granted.

App. 22

Conclusion

For the foregoing reasons, the court finds that there are no genuine issues of material fact, and the defendant is entitled to judgment as a matter of law. The motion for summary judgment shall be granted. A separate order in accord with this opinion shall issue this day.

This, the 6th day of September, 2017.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

ANNETTE BENJAMIN PLAINTIFF
VS. CIVIL CAUSE NO: 3:16-CV-099-NBB-RP
FELDER SERVICES, LLC d/b/a
OXFORD HEALTH AND REHAB
CENTER DEFENDANT

ORDER

In accord with the memorandum opinion issued this day, it is **ORDERED AND ADJUDGED** that the defendant's motion for summary judgment is **GRANTED**, and this case is dismissed with prejudice and closed.

This, the 6th day of September, 2017.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE
