No. 18-1089

In The
Supreme Court of the United States

ANNETTE BENJAMIN,

Petitioner,

versus

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

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Felder Services, L.L.C. states that Felder Services, L.L.C. is a privately held non-profit corporation. There is no parent corporation of this Respondent and no publicly-held company that owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The unpublished Decision of the United States Court of Appeals for the Fifth Circuit is found at 2018 U.S. App. LEXIS 32854 (5th Cir. 2018), and is attached to the Petition as App. 1-14. The unreported Opinion of the United States District Court for the Northern District of Mississippi granting summary judgment is found at 2017 U.S. Dist. LEXIS 144019 (N.D. Miss. Sept. 6, 2017), and is attached to the Petition as App. 15-22. The unreported Order of the United States District Court is attached to the Petition as App. 23.

STATEMENT OF THE CASE

Felder Services, L.L.C. (hereinafter "Felder" or "Respondent") contracted with Graceland Care Center of Oxford ("Graceland"), a nursing home, to provide dietary and laundry services. The contract was effective June 8, 2015. Annette Benjamin (hereinafter "Petitioner") was employed by Graceland for 32 years. When Felder contracted with Graceland, it hired Petitioner and others who were already employed in the dietary service department. Petitioner was hired as Dietary Manager, the same position she held with Graceland. Petitioner was 59 years old in June 2015.

Thereafter, Petitioner failed to complete tasks in a timely manner and, among other things, her overall job performance was poor. Continued poor job performance led to termination of Petitioner's employment by Felder on July 8, 2015.

Felder replaced Petitioner with a person 42 years of age. Petitioner filed suit alleging that her employment was terminated due to her age in violation of 29 U.S.C. §623(a)(1). Upon close of discovery, Respondent moved for summary judgment which was granted by the district court. *Benjamin v. Felder Services, L.L.C.*, 2017 U.S. Dist. LEXIS 144019 (N.D. Miss. Sept. 6, 2017).[1] Pet. App. 15-22. The district court, in accordance with long established law, held that Felder was entitled to summary judgment as Plaintiff failed to successfully rebut the defendant's legitimate, non-discriminatory reason for terminating her employment. *Id.* Aggrieved with this decision, Petitioner appealed to the Fifth Circuit which affirmed that Felder was entitled to judgment as a matter of law. *Benjamin v. Felder Services, L.L.C.*, 2018 U.S. App. LEXIS 32854 (5th Cir. 2018), Pet. App. 1-14.

As the Fifth Circuit properly held, the ADEA makes it unlawful to fire an employee who is "at least 40 years of age" because of her age. Pet. App. 5 *citing* 29 U.S.C. §§623(a)(1), 631. "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." *Id. citing Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010).

Because there was no direct proof of discrimination presented by Petitioner, the Fifth Circuit found that under the *McDonnell Douglas* framework, she is

[1] References will be made to Petitioner's appendix for the lower Court opinions.

required to establish a *prima facie* case of age discrimination. *Id. citing McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). The court found that Petitioner met that burden because (1) her employment was terminated; (2) she was qualified for the position; (3) she was within the protected class; and (4) she was replaced by someone younger. *Id. citing Berquist v. Wash. Mut. Bank*, 500 F.3d 349 (5th Cir. 2007). Therefore, the Fifth Circuit determined that the case "turns on the second and third factors in the *McDonnell Douglas* burden-shifting framework: (A) whether 'the employer [can] articulate some legitimate, non-discriminatory reason for' its decision, and (B) whether that articulated reason 'was in fact pretext'" *Id.* pp. 5-6 *citing McDonnell Douglas*, 411 U.S. at 802, 804.

Respondent presented evidence that it terminated Petitioner's employment for several reasons, one of which was her failure to complete projects in a timely manner. Specifically, she failed to conduct a "tray card audit." Tray cards are records for each nursing home resident that ensure the resident is receiving the proper diet. Petitioner failed to conduct the audit and her supervisor was required to complete it for her. Petitioner also failed to create a resident seating chart to ensure residents were served their meals in a timely manner.

Petitioner was instructed to carry out these tasks as a result of a survey conducted by the Center for Medicare and Medicaid Services ("CMS") which identified deficiencies in the Graceland kitchen and dining services. As Dietary Manager, Petitioner was responsible

for the kitchen staff and the operation and cleanliness of the kitchen.

Failure to meet the CMS regulatory requirements can lead to adverse consequences such as civil penalties or termination of participation in the Medicare or Medicaid programs. *See* 42 U.S.C. §1396r. Pet. App. p. 2. The survey was conducted in June of 2015, just prior to the effective date of Respondent's contract with Graceland. The deficiencies were identified by the surveyors to the Graceland staff during the exit interview and Respondent was responsible for implementing the plan to correct the deficiencies, which included the tasks assigned to Petitioner.

Respondent also presented evidence that Petitioner's supervisor was troubled because she witnessed Petitioner raising her voice and being rude to coworkers. Her supervisor testified that Petitioner was negative and uncooperative with her and other staff members. Petitioner does not deny the specific incidents of raising her voice to kitchen staff or reacting negatively to suggestions from her supervisor or other staff.

Based upon these facts, Respondent made the decision to terminate Petitioner's employment. The Fifth Circuit found that poor job performance has been "repeatedly recognized" as a legitimate non-discriminatory reason for firing an employee. *Id.* pp. 6-7 *citing Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 345 (5th Cir. 2005) (other citations omitted). As the court held, "even an incorrect belief that an employee's

performance is inadequate constitutes a legitimate, non-discriminatory reason." *Id.* p. 7 *quoting Little v. Republic Ref. Co.*, 924 F.2d 93 (5th Cir. 1991); *see also Reynolds v. Sovran Acquisitions, L.P.*, 650 F. App'x 178, 184 (5th Cir. 2016) (per curiam).

The Court, having determined that Felder carried its burden of production and applying the *McDonnell Douglas* burden shifting framework, considered whether Petitioner "established pretext" by showing Felder's explanation is "false or unworthy of credence." *Id.* p. 7 *citing Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003). Once the employer satisfies its burden of production, a Plaintiff must show the proffered non-discriminatory reason is merely a pretext for age discrimination. *Id. citing 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 non-discriminatory reasons." *Id. citing Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 (5th Cir. 2005); *Laxton*, 333 F.3d at 578.

As the Fifth Circuit determined, Petitioner attempted to show that Respondent's explanation was "false or unworthy of credence" in five ways. *Id.* p. 7. The court discussed Petitioner's evidence in detail and held, *per curium*, that Petitioner failed to present sufficient evidence that Felder's non-discriminatory reason for its decision was a pretext and affirmed the district court's grant of summary judgment.

Petitioner argues that the Fifth Circuit failed to follow the law and argues that the court failed to properly consider what she describes as substantial evidence. *Petition*, pp. 3-5.

In general, Petitioner argues that the Fifth Circuit did not mention "much of Petitioner's evidence" without identifying what evidence was not mentioned. With respect to Respondent's explanation that Petitioner failed to timely complete tasks, Petitioner admitted she did not do so but argues that she could not perform the tasks because Respondent required her to perform other assigned tasks. She provided excuses for not completing the tasks. As the court held, even if Respondent's expectations were unreasonably high, such evidence does not support discriminatory intent explaining that "[P]ointing to Ms. Benjamin's failure to complete tasks is not pretext for age discrimination." *Id.* p. 9 *citing*, *e.g.*, *Morris v. Tri-State Truck Ctr., Inc.*, 681 F. App'x 303, 305 (5th Cir. 2017) (per curium) (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).

As to Respondent's evidence of poor overall job performance, Petitioner argues that she had positive performance reviews from Graceland approximately one year before Felder contracted with Graceland. However, the court found that Petitioner contended that she had new and different responsibilities under Felder and that positive reviews from a prior employer does not make Felder's explanation pretextual. *Id.* Pet. App. pp. 9-10.

Petitioner argues that any decision based upon the deficiencies cited by CMS in the survey cannot support Respondent's decision because her supervisor did not see the formal written findings of the survey until after Petitioner was terminated. However, Respondent was made aware of the deficiencies by the surveyors prior to receiving the formal document.[2]

Petitioner argues that she submitted evidence from coworkers who stated that they had not witnessed Petitioner being rude, inappropriate or uncooperative. However, Petitioner did not deny raising her voice to the staff or reacting negatively to her supervisor or nurses. As the Fifth Circuit held, the proffered evidence by Petitioner does not show that Petitioner's supervisor's concerns regarding these incidents were baseless. Pet. App. p. 10.

In affirming the lower court decision, the Fifth Circuit held that Petitioner failed to meet her burden to show Respondent's explanation was a pretext. *Id*. p. 7.

Petitioner has now filed her Petition for Writ of Certiorari arguing that the district court and the Fifth Circuit failed to "cite" the holding in *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000) and that the writ should be granted because a "large number" of Courts of Appeals' opinions either disregard *Reeves* or don't apply the holding consistent with Petitioner's

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[2] Petitioner attempts to minimize the importance of these deficiencies by describing them as causing "only" minimal or potential harm. *Petition*, p. 4. Certainly any harm to a nursing home resident is an important matter.

interpretation of *Reeves*. As set forth below, the court's opinion is not contrary to *Reeves* and Petitioner fails to show that there is real conflict of opinion or authority between the Courts of Appeals on this issue. Accordingly, the petition should be denied.

THERE IS NO COMPELLING REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Petitioner argues that the Writ should be granted to "cure the confusion in the Courts of Appeals about when summary judgment should be granted in an employment discrimination case and to make clear that direct evidence is not required." *Petition*, p. 6. Petitioner argues that the Fifth Circuit failed to apply *Reeves* but on the other hand argues that the *Reeves* opinion is ambiguous and has caused confusion because it doesn't precisely define the "circumstances" under which granting summary judgment in an employment discrimination case is proper. *Reeves* is not ambiguous and properly acknowledges that each case must be decided upon its particular facts.[3]

[3] Petitioner begins her argument by quoting a law review article for the proposition that all "savvy employers" purposely make discriminating decisions and instruct their decision makers to cover up evidence of the wrongful decision. Petitioner's attempt to paint Respondent with this biased and broad indictment is without foundation, similar to her cause of action. Without quoting a law review article or implicating Petitioner, it is certainly common knowledge that "savvy employees" and their "savvy attorneys" create a cause of action against innocent employers where none exists.

Petitioner argues that courts of appeals either disregard *Reeves* or give it such a narrow construction that it is impossible to prove discrimination without an admission by the employer. *Petition*, p. 6. Petitioner presents a mischaracterization of the law and the basis for the Petition. What Petitioner is actually requesting is that this Court accept certiorari and eventually hold that any evidence, no matter how "weak" presented by an employee to rebut the employer's non-discriminatory reason for its decision is sufficient to defeat a motion for summary judgment. That is not the law and is not what this Court held or even implied in its holding in *Reeves*.

In *Reeves*, the Supreme Court reversed the Fifth Circuit on the basis that the appellate panel failed to take into account the Plaintiff's evidence supporting his *prima facie* case when considering the overall sufficiency of the evidence to support his age discrimination claim. The Fifth Circuit determined that while *Reeves* "may very well" have offered sufficient evidence for a reasonable jury to conclude that the employer's explanation for its decision was pretextual, it was necessary for *Reeves* to present additional sufficient evidence that his age motivated the employer's decision. The court concluded that the evidence of actual discrimination was not sufficient and the jury's verdict in favor of *Reeves* was reversed as a matter of law. *Id.* at pp. 139-40. This Court granted certiorari to resolve a conflict among the courts of appeals as to whether a plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable fact-finder to

reject the employer's non-discriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. *Id.* at 140.

As this Court held, "[w]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration." *Reeves*, 530 U.S. at 147 *quoting Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Thus, *Reeves* holds that "a Plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*

The *Reeves* opinion goes on to state as follows:

> This is not to say that such a showing by the Plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the Plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the Defendant's explanation, no rational fact finder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the Plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and

> uncontroverted independent evidence that no discrimination had occurred.

Id. at 147 (citations omitted). *Reeves* further stated that "to hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Id.* (citations omitted).

It is this portion of the holding that Petitioner argues creates ambiguity and needs to be clarified. Petitioner cites numerous law review articles in support of this proposition. The fallacy in Petitioner's argument is that she fails to show that the Fifth Circuit in the case at hand either misinterpreted or failed to apply the holding in *Reeves*.

The Fifth Circuit did not require "direct evidence" to be presented by Petitioner nor did it require an admission on the part of Respondent. The Court properly required Petitioner to present sufficient evidence to support her position that Respondent's non-discriminatory purpose for her termination was "false or unworthy of credence." There is no implication in the Fifth Circuit opinion that the panel required Petitioner to present anything other than sufficient evidence for a reasonable fact-finder to reject the employer's non-discriminatory explanation for its decision. Petitioner failed to do so and the court found that Respondent's explanation was conclusive on the issue.

Petitioner cites a 2014 law review article that concluded that several circuits have "expressed reluctance" to grant summary judgment in employment discrimination cases, some "appear" to apply a tougher standard to a Plaintiff trying to overcome a motion for summary judgment, and others are "simply confused as to the standard." *Petition*, pp. 11-12. The author concluded that even in circuits that exercised caution, Defendants frequently win summary judgment motions. Petitioner is requesting that this Court exercise its judicial powers because a law review article suggests that Defendants frequently win summary judgment motions. This argument falls short of what this Court has required when granting certiorari. *NLRB v. Pittsburg S.S., Co.*, 340 U.S. 498 (1951) ("Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals."). The Court will only grant a petition for compelling reasons. Supreme Court Rule 10.

Petitioner quotes a 2017 law review article that discusses a 2005 survey of the circuits and concludes that the survey was only able to show "more or less" the tendencies of the circuits and that the applicable standard depends on the "panel members, the facts, and the type of case." *Petition*, p. 11. This could be said of any type of case or any applicable standard. The law requires the courts to consider discrimination claims on a case-by-case basis. *Reeves*, 530 U.S. at 148, 149.

Petitioner is asking the court to remove all discriminatory power and hold that any evidence presented by a Plaintiff, no matter how "weak," is sufficient to rebut an employer's non-discriminatory explanation for adverse employment actions. That is not the law and *Reeves* in no way supports such an argument. In fact, it held just the opposite. *Id.* at 147.

The only specific opinion Petitioner cites in support of her argument that the Fifth Circuit refuses to apply *Reeves* is *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113. However, *Vadie* specifically considered *Reeves* and found that the facts in *Vadie* were clearly distinguishable from *Reeves*. The Court found that the case fell within the exception noted in *Reeves* because, just as the case herein, the Plaintiff failed to make an adequate showing. *Vadie*, 218 F.3d 365, 374 n.23.

Petitioner also argues that the Fifth Circuit refused to apply *Reeves* and should have accepted as true Petitioner's evidence of good performance. The Fifth Circuit discussed the fact that Petitioner did not dispute incidents which occurred during her brief employment which caused her supervisor concerns. Further, the Fifth Circuit cited long standing law holding that even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, nondiscriminatory reason and that the Courts do not try the validity of good faith beliefs as to an employee's competence. Pet. App. p. 10 *citing 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 curium); *Cervantez v. KMGP Servs. Co. Inc*., 349 F. App'x 4, 9 (5th Cir. 2009) (per curium) (additional citations omitted).

Petitioner argues that the Fifth Circuit improperly considered Respondent's state of mind when finding Petitioner failed to rebut Respondent's "good faith" belief that Petitioner was incompetent. Petitioner has the burden to come forward with "sufficient" evidence to show the Respondent's explanation is false. *Reeves*, 530 U.S. at 143. Petitioner failed to rebut that Respondent had a good faith belief as to its reasons for her termination. The question is not one of Respondent's "state of mind" but the evidence that must be produced by Petitioner to show that Respondent's belief was unreasonable. *Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 (5th Cir. 1993); *Cervantez*, 349 F. App'x at 10.

Petitioner argues that the Fifth Circuit improperly made a credibility determination with respect to the coworkers who testified on Petitioner's behalf, in violation of the holding in *Reeves*. Contrary to this argument, the Fifth Circuit specifically addressed that issue and held that "even taking this testimony for all it is worth, it does not provide the necessary evidence of pretext." The Court specifically did not assess the credibility of these employees. Pet. App. p. 10, n.2.

The Fifth Circuit and the district court properly applied the well established law, including the *Reeves* opinion, in finding in favor of the Respondent. The

facts do not support Petitioner's claim of age discrimination.

CONCLUSION

There is no "compelling reason" to grant certiorari in this case. Petitioner's argument that there is a need to clarify the holding in *Reeves* is misplaced. The law that governs this case is well settled and there is no "real and embarrassing conflict of opinion and authority" between the courts of appeals that must be addressed. To avoid summary judgment under the *McDonnell Douglas* framework, Petitioner was required to provide sufficient evidence from which a jury could reasonable infer that Respondent's proffered reasons for termination were merely pretextual. Petitioner failed to do so and the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

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