No. _____

In The
Supreme Court of the United States

VIRGINIA LAY,

Petitioner,

versus

SINGING RIVER HEALTH SYSTEM,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a jury – not a judge – decide whether to infer age discrimination when a long-term, older female employee is directed to retire and is replaced by a much younger employee, and when the chief decision-maker has made multiple statements critical of older women as employees?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Virginia Lay, Petitioner; and
2. Singing River Health System, Respondent.

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The unpublished decision of the United States Court of Appeals for the Fifth Circuit is attached as App. 1-21, and is found at 2017 WL 2643966 (5th Cir. 2017). The published Memorandum Opinion and Order Granting Motion for Summary Judgment of the United States District Court for the Northern District of Mississippi is attached as App. 22-35, and is found at 190 F.Supp.3d 599 (S.D. Miss. 2016).

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on June 19, 2017, by writ of *certiorari* under 28 U.S.C. § 1254(1).

FEDERAL STATUTE CONSTRUED

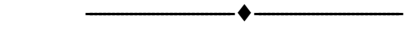
The Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), states, in relevant part:

> It shall be unlawful for an employer – . . . to discharge any individual . . . because of such individual's age. . . .

FEDERAL RULE OF CIVIL PROCEDURE CONSTRUED

Federal Rule of Civil Procedure 56(a) states, in relevant part:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.



STATEMENT OF THE CASE

Petitioner Virginia Lay was hired by Respondent Singing River Health System in 1999, as Director of Managed Care. Petitioner was terminated on June 13, 2014, at age sixty-five (65). Throughout her employment, Petitioner never received any disciplinary action and received only excellent evaluations.

Approximately nine (9) months before Petitioner lost her employment, Petitioner's Managed Care Department was merged with the Clinical Integration Department headed by Vice President Christopher Morgan. According to Morgan, who then became Petitioner's supervisor, "managed care was transferred to me because of the similarity – similarity in work. . . ."

A few months after the consolidation of the two (2) departments, in March 2014, Respondent announced that it was facing severe financial difficulties. Morgan then met with Kevin Holland, Respondent's chief executive officer, who told Morgan that "we didn't need two

senior people leading an area, and that we could probably get by with just one person. . . .” Morgan decided to resign voluntarily, leaving Petitioner as the only “senior person” in the merged department.

The next month after announcing that he was leaving voluntarily, Morgan informed Petitioner that her job was going to be eliminated. Petitioner asked Morgan, “[w]hy are you doing this to me?” and Morgan replied, “[w]e’re looking for people like you who can get the retirement and make the high salary.”

Holland testified that he, along with Morgan and Louis Bond, the financial director, made the decision to terminate Petitioner’s employment. Bond, however, denied any role in the decision.

Holland testified that during the process of deciding whether to terminate Petitioner, there were discussions about whether she was old enough to retire.

In her deposition, Petitioner denied that her job was being eliminated since the job still had to be performed. The job title, however, was changed from Director of Managed Care to Director of Cooperative Care. Petitioner testified that according to the posted job description, the Director of Cooperative Care would include ninety-nine point nine (99.9) percent of Petitioner’s previous job duties as Director of Managed Care. The new position simply had a different title.

Petitioner did not apply for the new position of Director of Cooperative Care because the job description

required a master's degree, and she had only a bachelor's degree.

Brian Argo, age thirty-one (31), an existing employee, immediately assumed Petitioner's duties. Several months later, Respondent hired Justin Rickely, age thirty-two (32), as Argo's assistant. Subsequently, Rickely became responsible for Managed Care. Although the posted job description required a master's degree – which caused Petitioner not to apply – Rickely did not have a master's degree.

Besides the fact that Petitioner's job duties were taken over by an outside applicant half her age, Petitioner's summary judgment proof also included the deposition testimony of Chief Executive Officer Holland's long-time secretary, Windy Taylor. Taylor testified about several occasions when she had heard Holland make disparaging comments about various older female employees, with these statements beginning in 2005. Taylor voluntarily left her employment in April 2014, immediately after Holland had been promoted to Chief Executive Officer because "we were all scared because of our age and our gender. . . ."

Petitioner also submitted the deposition testimony of Sandra Murray, an IT director, who testified that shortly after Holland became CEO, she was terminated and replaced by a much younger male, with less experience. Murray testified that Respondent was "using the budget shortfall as a way to get rid of a lot of older employees."

Similarly, Hattie Williams, a sixty-nine (69) year old human resource employee, testified that she and two (2) other employees, also in their sixties, were the only employees eliminated from the Human Resources Department.

The district court granted summary judgment by stating that "Singing River has articulated a legitimate, non-discriminatory reason for its decision – the elimination of the position pursuant to an overall restructuring and reduction in force." App. 26.

The Fifth Circuit Court of Appeals affirmed, stating that "[b]ecause [Petitioner's] position was not singularly eliminated, and because the elimination was part of significant restructuring during well-demonstrated financial hardship, [Respondent] presents 'a legitimate, non-discriminatory reason for the challenged employment action.'" App. 11-12.

REASON FOR GRANTING THE WRIT

This Court should review this case in order to correct the disturbing and widespread practice of lower court judges of drawing their own inferences of non-discrimination in employment discrimination cases.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 137 (2000), required this Court to "resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient

evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Reeves* held 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." *Reeves*, 530 U.S. at 148.

This Court cautioned, however, that:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability . . . [and] 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 factfinder could conclude that the action was discriminatory.

Reeves, 530 U.S. at 148.

Reeves further stated that "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors . . . [but that] [f]or purposes of this case, we need not – and could not – resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law." *Reeves*, 530 U.S. at 148-49 (citation omitted).

In her concurring opinion, Justice Ginsburg wrote that "it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories [prima facie case and evidence of discrimination] in order to survive a motion

for judgment as a matter of law." *Reeves*, 530 U.S. at 154. Further, *Reeves* noted that "the Court's opinion leaves room for . . . further elaboration in an appropriate case. . . ." *Reeves*, 530 U.S. at 155 (Ginsburg, J., concurring).

The *Reeves*' Court quoted the seemingly settled principle that in ruling on a motion for summary judgment or judgment as a matter of law:

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby*, *supra*, at 255. . . .[1]

Reeves, 530 U.S. at 150-51 (some citations omitted).

Reeves' holding that the lower courts, in ruling on a motion for summary judgment, should draw all references in favor of the non-moving party and should refrain from making "credibility determinations," or "weighing of the evidence," has either gone unheeded or has at least been construed very narrowly by the lower courts.

Employment discrimination is treated differently from other civil cases since judges frequently draw their own inferences of non-discrimination and accept

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[1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

as true the movant's evidence. *See, e.g.*, Kevin M. Clermont and Stuart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127, 131-32 (2009) (analyzing statistical data demonstrating that discrimination plaintiffs have "low chances of success," and citing a "plaintiff win rate" as "fifteen percent" dramatically lower than that of non-employment discrimination cases, which is fifty-one (51) percent); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1133 (2003) (stating that courts value efficiency over the right to a jury trial); John Bronsteen, *Against Summary Judgment*, 75 Geo. Wash. L. Rev. 522, 527 (2007) (stating that summary judgment actually costs more money than it saves); Theresa M. Beiner, *The Trouble With* Torgerson: *The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 Nev. L.J. 673, 690 (2014) (noting that some "[c]ircuits no longer invoke any type of caution in describing the standard for granting summary judgment in employment discrimination cases"); Bernice B. Donald and J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. Sch. L. Rev. 749, 752 (2013) (stating that "[t]he Federal Judicial Center has noted that '[s]ummary judgment motions by defendants are more common in [employment discrimination] cases, are more likely to

be granted, and more likely to terminate the litigation' "); Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 335 (2010) (stating that *Reeves* "leaves the field open for lower court manipulation, effectively reinstating, or at least not foreclosing, a viable pretext-plus interpretation"); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 Mo. L. Rev. 423, 425 (2010) (observing that a decade after *Reeves* there is a "tendency of courts to summarily dismiss employment discrimination claims . . . " and noting "judicial skepticism, if not outright hostility. . . ." to such claims); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001) (criticizing "the common practice of courts [isolating and finding insufficient each piece of] evidence supporting plaintiff's case in order to grant motions for summary judgment and judgment as a matter of law").

There is some academic suggestion about how to correct the tendency of the lower courts to draw their own inferences in employment discrimination cases. Bernice B. Donald and J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. Sch. L. Rev. 749, 763 (2013), proposes that lower courts should be instructed to "weed out only the rare, patently frivolous case; all others should proceed to trial."

Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. Rev. 435, 437 (2014), states lower federal courts have

"systematically undermined the powerful tool of inference drawing, which was once a hallmark of the fact-finder's evaluation of evidence, without grappling with the attendant Seventh Amendment problem." Pollis proposes a rule which would

> . . . preclude courts from resolving cases without a trial whenever state of mind is a dispositive issue. In these cases, the critical facts are typically within the exclusive domain of the party accused of wrongdoing. Therefore, the jury should be permitted to evaluate all evidence, including demeanor evidence, and to draw the dispositive inferences.

Pollis, *The Death of Inference*, 55 B.C. L. Rev. at 479.

Professor Pollis' suggestion that cases involving a determination of a decision-maker's "state of mind" should invariably present jury issues is supported by several of this Court's precedents. For example, in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), an employment discrimination case in which a judgment as a matter of law for a defendant was reversed, this Court clearly described the issue of intent being an issue of fact for the jury, stating: "There will seldom be eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact."

In *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), a case in which the issue was whether redistricting was

based upon unlawful race considerations or lawful political considerations, this Court wrote that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment in favor of the party with the burden of persuasion, . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."

In reversing a judgment as a matter of law, *Reeves* quoted from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), which wrote that: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Petitioner's case is an appropriate one for this Court to determine whether the lower courts should be corrected for systematically disregarding this Court's precedents in the liberal grant of summary judgment in employment discrimination cases. By way of example, a number of facts from this Court's opinion easily demonstrate that the Fifth Circuit did not "draw all reasonable inferences in favor of the nonmoving party, . . ." and did "make credibility determinations [and did] weigh the evidence." *Reeves*, 530 U.S. at 150.

For example, the Fifth Circuit Court of Appeals wrote that "the record demonstrates Windy Taylor, in her deposition, could recall only one [age-biased] remark, from 2005, approximately nine years before

Lay's alleged forced retirement. Taylor recalled Holland stated women above age 40 should not be in management." App. 15-16.

In fact, Taylor testified in her deposition that Holland's derogatory comments began in 2005 but continued over the years. Taylor described Holland's statements as including:

- Stating that "we can train [a young female] to be a secretary, but we can't train [her] to be young and attractive";
- Stating that a sixty (60) year old administrator needed to start planning her retirement because "you're over 40, and women over 40 should not be in the position that you're in";
- Making that statement that "once a woman turns 40, they're crazy" and "[t]hey need to be gone";
- Stating that it was okay for a man in management to be over forty (40), but "[i]t's different for a woman. . . ."; and
- Stating that he "shouldn't have hired [a female] with her age."

In discussing these discriminatory, age-based remarks (which it misinterpreted to be only a single old remark), the Fifth Circuit cited a pre-*Reeves*' Fifth Circuit case, *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), and ignored the *Reeves*' precedent to the contrary. *Reeves* specifically noted that the Fifth

Circuit had improperly "discounted [age-based comments] on the ground that they were not made in the direct context of Reeves' termination." *Reeves*, 530 U.S. at 135.

The Fifth Circuit expressly contradicted *Reeves*' teaching that "[c]redibility determinations, . . . are jury functions, not those of a judge." *Reeves*, 530 U.S. at 150-51, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, when it stated that the "veracity" of Taylor's deposition testimony was undermined because she "admitted to speaking ill of CEO Holland and mocking him on social media." App. 16.

Contrary to the *Reeves*' direction, that it is for the jury to draw inferences from the evidence, the Fifth Circuit wrote that Petitioner "provides no evidence that her superiors' discussion of her pension status was made in anything other than a helpful spirit. . . ." App. 14. This statement referred to Petitioner's evidence that Morgan had told her that Respondent was "looking for people like you who can get the retirement. . . ." App. 4. Of course, the issue of whether the statement about looking for people who can "get the retirement" was evidence of an age-based intent or was made in a "helpful spirit," required the drawing of "inferences," which, under this Court's precedents, is a matter for the fact-finder.

This Court has actually said that "[p]ension status may be a proxy for age. . . ." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993). Whether stating that a defendant was "looking for people like you who can get

the retirement" is a proxy for looking for older people is, at least, a fact question.

Another example of the Fifth Circuit's diminishment of *Reeves*' establishment of the right to have a jury decide the issue of discrimination is its overly-restrictive interpretation of *Reeves* as to the effect of a *prima facie* case. *Reeves* corrected the Fifth Circuit for "ignoring" the evidence concerning plaintiff's *prima facie* case, *Reeves*, 530 U.S. at 146, and held that the Fifth Circuit improperly "disregarded critical evidence favorable to petitioner – namely, the evidence supporting petitioner's prima facie case. . . ." *Reeves*, 530 U.S. at 152. Giving *Reeves*' teaching about a *prima facie* case an exceedingly narrow interpretation, the Fifth Circuit ruled "immaterial" Petitioner's testimony that she was "replaced" by an outside applicant "half her age, . . . " on the grounds that Petitioner lost her job as part of a large layoff and on the grounds that Respondent's witnesses had testified that the replacement had other duties. App. 15.

The fundamental discrepancy between *Reeves* and the Fifth Circuit's view of Petitioner's case is the Fifth Circuit's statement that Petitioner's evidence of age-based comments is " 'insignificant in comparison to the evidence of' [Respondent]'s legitimate reasons for [Petitioner's RIF retirement]. . . ." App. 17. This is precisely the opposite of the *Reeves*' holding, which was that "[i]n concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was

fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 153.

In *Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 1867-68 (2014), this Court found that the Fifth Circuit had

> credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while "this Court is not equipped to correct every perceived error coming from the lower federal courts," . . . we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents.

(Citation omitted).

Tolan was decided in the context of qualified immunity. Petitioner's case arises in the context of employment discrimination, an area in which academic commentators have actually documented the tendency of the federal courts to grant summary judgment in favor of defendants at an alarming rate.

Andrew S. Pollis has convincingly explained the unfortunate tendency of federal judges to draw their own inferences in employment discrimination cases, stating:

> The derogation of the jury's inference-drawing function in civil cases has serious

> consequences. In 1874, the Supreme Court explained in *Sioux City & Pacific Railroad Co. v. Stout*[2] that "twelve [citizens] know more of the common affairs of life than does one" and "that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." The sheer size of a civil jury ensures greater diversity. Beyond the numbers, jurors historically have come "from the various classes and occupations of society," in part to ensure that federal judges, "blissfully unaware" of the plight of the average person, would not decide cases based on their own life experiences. . . .
>
> It stands to reason that members of an elite class will draw inferences differently from other segments of society.

Pollis, *The Death of Inference*, 55 B.C. L. Rev. at 472-73 (footnotes omitted).

[2] *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. 657 (1873).

CONCLUSION

Petitioner's case is an appropriate one in which to correct the disturbing trend of the federal courts to diminish the right to trial by jury in employment discrimination cases.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60431

VIRGINIA LAY,

Plaintiff-Appellant,

v.

SINGING RIVER HEALTH SYSTEM,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:15-CV-130

(Filed Jun. 19, 2017)

Before BARKSDALE, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Virginia Lay challenges the summary judgment granted Singing River Health System against this action, which claims age discrimination in her termination in conjunction with a reduction-in-force. She fails to show a genuine dispute of material fact for whether

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* 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.

Singing River's reason for termination was pretext for such claimed discrimination. AFFIRMED.

I.

Singing River is a non-profit healthcare provider in Jackson County, Mississippi. Lay began working for Singing River as director of managed care in 1999, at age 50. In that position, according to her deposition, she was responsible for, *inter alia*: "[m]anaged care contracting, reviewing, working with insurance companies to become in network with" them, and running the physician hospital organization at Singing River, Premier Health.

In 2013, Singing River moved Lay's managed-care department within the clinical-integration department, as discussed *infra*. In doing so, Lay went from reporting directly to the chief financial officer (CFO), Louis Lee Bond, to reporting to the vice president of clinical integration, Chris Morgan, then age 50. As Morgan explained in his deposition, "managed care was transferred to [clinical integration] because of the . . . similarity in work" between the two departments. He further stated: "the purpose of clinical integration is to sell services. So is managed care[; its purpose] is to sell services".

Through an audit in early 2014, Singing River discovered an $88 million shortfall caused by overstatements of accounts receivable. According to the deposition of Singing River's chief executive officer (CEO), Kevin Holland, the audit forced the hospital

"into a position of having to evaluate everything that we were doing and evaluate every position in the organization. And we determined where we were effective, where we were not effective".

On the verge of bankruptcy, Singing River hired an outside consultant, The Godbey Group, to evaluate, *inter alia*, the performance of the managed-care department. Godbey found Singing River's "historical approach to financial services . . . [i]ncluding the managed care" contracts "woefully inadequate". According to CEO Holland, on Godbey's recommendation, Singing River "went back and renegotiated all of [its] managed care contracts, and [it] had a tremendous amount of success with that".

During the restructuring in April 2014, Morgan, CEO Holland, and chief human resources officer (CHRO), Craig Summerlin, discussed possible changes to Morgan and Lay's department. As Morgan stated in his deposition, he, CEO Holland, and CHRO Summerlin "decided that [they] would eliminate [Lay]'s position, that [they] would restructure, . . . and that [they] could probably get by with one person; and then merge managed care with clinical integration to provide more support for whatever parts of clinical integration and managed care would continue".

Singing River's decisionmakers combined portions of Lay's and Morgan's jobs into a new director-of-collaborative-care-network position. Morgan decided to leave Singing River within a month of formulating

the restructuring plan, knowing the restructuring would adversely affect his job as well.

Before leaving, Morgan met with Lay and CHRO Summerlin on 22 April 2014 to discuss the restructuring of the managed-care department. Lay stated in her deposition that Morgan told her she had to retire, but did not mention that her position was being eliminated. Rather, she stated, Morgan said: "We're looking for people like you who can get the retirement and make the high salary". The parties agree Lay was able to work through June 2014 to maximize her retirement benefits.

When deposed, Morgan could not recall whether Lay expressly accepted the retirement plan, but he construed as her acceptance her assistance in drafting her farewell email. Morgan sent that email to the Singing River staff on 25 April 2014. In response, Lay's 7 May 2014 email to Morgan stated she had "a number of productive years left and therefore [she was] not willing to retire" because doing so would cause "considerable financial hardship".

Soon thereafter, Lay met again with Morgan and CHRO Summerlin to discuss her retirement. In her deposition, Lay stated: she was first informed her position was being "eliminated" at this second meeting; and she was advised she could apply for other positions within Singing River. Before her position ended, Lay was again encouraged to monitor the Singing River website for job postings of interest to her.

According to Lay, she was forced to retire. In that regard, Lay decided not to apply for any positions at Singing River, and stated in her deposition she did not apply for the position she contends replaced her own because the job description included requiring a master's degree, which she did not have. In her deposition, she stated no one dissuaded her from applying for the position; she understood her position was to be combined with her supervisor's to create a new position; and she admitted her assertion – later made plain in her opening brief here – that the new position's responsibilities overlapped with her former responsibilities by "99.9%" was conjecture, based on her cursory review of the new job posting online and the remarks of two employees.

Lay made few attempts to seek comparable employment; and her search for comparable positions concluded after a single conversation with a professional at another local hospital, in which she was told that hospital was not looking to fill a comparable position. At the end of her work for Singing River in June 2014, Lay earned $160,000 annually. Her job search concluded when she took a full-time job, earning $3,000 monthly.

Around the time the restructuring plan was created – April 2014, before Lay left Singing River – CFO Bond hired Brian Argo as executive director of finance. After Lay's alleged forced retirement, Argo temporarily took over her responsibilities running the managed-care department.

Argo was 30 and had a master's degree. He had previously served as vice president and chief revenue officer for the Children's Hospital Medical Center in Omaha, Nebraska. Initially, he oversaw some of managed care, Lay's former work. At the same time, Argo continued to oversee the finance department. He stated in his deposition that Lay's previous duties, which he assumed, did not consume the majority of his day.

Argo continued handling managed care until January 2015, when he hired Jason Rickley, then 32, to fill the new director-of-collaborative-care-network position – which, as previously noted, effectively combined Morgan's clinical-integration and Lay's managed-care positions. The position streamlined collaborative-care and managed-care elements, along with analytical elements and population-health initiatives. Collaborative care involved providing credentialing for providers. As CFO Bond stated in his deposition, the new job included duties distinct from those for which Lay had experience.

The director-of-collaborative-care-network job description was posted in November 2014. After being hired in January 2015, Rickley did not work strictly on managed care, as Lay had. In addition to managed-care contracting, Rickley performed reimbursement contract modeling and analysis, and monitored Singing River's population-health initiative – managing patients' health and hospital experience from start to finish. His annual salary was $110,000. When hired,

he was enrolled in a master's-degree program in healthcare administration.

Lay filed this action in April 2015, claiming she was terminated because of her age. Singing River moved for summary judgment approximately a year later. The motion was granted in June 2016. *Lay v. Singing River Health Sys.*, 190 F. Supp. 3d 599, 601 (S.D. Miss. 2016).

In granting summary judgment, the court concluded Lay failed to demonstrate a genuine dispute of material fact "regarding whether age was a factor in Singing River's decision to terminate her employment". *Id.* Contrary to discrimination, the court highlighted: "Morgan in fact delayed termination of Lay's position until she was eligible for retirement benefits". *Id.* at 603. Concluding "Lay was clearly terminated as part of a reduction-in-force", and applying the "slightly different *prima facie* elements for a reduction-in-force case", the court ruled there were no genuine disputes of material fact to rebut Singing River's proffered "legitimate, non-discriminatory reason" for eliminating Lay's position. *Id.* at 602-03.

II.

The summary-judgment record consists of depositions of Lay; CHRO Summerlin; CEO Holland; former vice president of clinical integration, Morgan; CFO Bond; director of revenue integrity, Mark LaFontaine; executive director of finance, Argo; director of collaborative-care network, Rickley; executive assistant to

CEO Holland, Windy Taylor; Epic implementation director, Sandra Murray; and benefits specialist, Hattie Williams. Also in the record are Singing River's job descriptions for revenue-cycle project director (a position similar to managed-care director), director of collaborative-care network, and vice president of clinical integration; declarations by CHRO Summerlin and CFO Bond; Lay's work evaluations for 2010, 2011, and 2013; EEOC charges filed by Lay and Murray; news publications reporting on the financial shortfall; emails and other correspondence; the list of individuals terminated by Singing River in conjunction with the reduction-in-force; Lay's second amended complaint; and Singing River's discovery responses.

It goes without saying that a summary judgment is reviewed *de novo*, applying the same standard as the district court. *E.g., Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (citing *Threadgill v. Prudential Sec. Grp., Inc.*, 145 F.3d 286, 292 (5th Cir. 1998)). "The court shall grant summary judgment if the movant shows that 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). Along that line, the evidence in the summary-judgment record is viewed in the light most favorable to the non-movant. *E.g., Davidson v. City of Stafford, Tex.*, 848 F.3d 384, 390 (5th Cir. 2017). In other words, summary judgment is improper if a reasonable factfinder could find in favor of the non-movant. *E.g.*, *id.* at 394 (reversing summary judgment because factual disputes resolved favorably for the non-movant constituted a

colorable claim). In that regard, mere conclusory allegations will not defeat a summary-judgment motion because they do not constitute competent summary-judgment evidence. *E.g., Moss*, 610 F.3d at 922.

The Age Discrimination in Employment Act (ADEA) proscribes an employer's "discharg[ing] any individual" because of his or her age. 29 U.S.C. § 623(a)(1). Under the ADEA, Lay must demonstrate she would not have been terminated but for the alleged discrimination. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

Toward that end, the more than well-known burden-shifting analysis is employed. A plaintiff who establishes a *prima facie* case of age discrimination "raises an inference of unlawful discrimination". *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996). As a result,

> [t]he burden of production then shifts to the defendant to proffer a legitimate, non-discriminatory reason for the challenged employment action. The defendant may meet this burden by presenting evidence that "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action."

Id. (internal citation omitted) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993)). If defendant meets that burden, "the presumption of discrimination created by the plaintiff's prima facie case disappears and the plaintiff must meet [her] ultimate

burden of persuasion on the issue of intentional discrimination". *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005).

A.

The parties agree Lay was terminated during a reduction-in-force (RIF). For such RIF circumstances, the elements for the requisite *prima facie* case are:

> In a reduction-in-force case, a plaintiff makes out a *prima facie* case by showing (1) that [s]he is within the protected age group; (2) that [s]he has been adversely affected by the employer's decision; (3) that [s]he was qualified to assume another position at the time of the discharge; and (4) "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."

Nichols, 81 F.3d at 41 (quoting *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812 (5th Cir. 1991)).

In granting summary judgment, the district court assumed *arguendo* a *prima facie* case was established. *Lay*, 190 F. Supp. 3d at 602 ("the Court will assume without deciding that Lay has cleared the relatively low hurdle of establishing a *prima facie* case"). Although the *prima facie vel non* issue was inadequately briefed here, we will likewise assume *arguendo* that a *prima facie* case is established. (To that

end, appellant's brief should include citations to the record in the argument section and not merely in the earlier recitation of facts.)

Accordingly, at issue are: whether Singing River proffers "a legitimate, non-discriminatory reason for the challenged employment action", *Nichols*, 81 F.3d at 41; and, if so, whether Lay "meet[s her] ultimate burden of persuasion on the issue of intentional discrimination", *Machinchick*, 398 F.3d at 350.

B.

For its claimed non-discriminatory reason, Singing River contends: it restructured multiple departments during large-scale financial hardship; and Lay's was one of many positions eliminated. Eliminating positions amidst department restructuring is legitimate and non-discriminatory. *Berquist v. Wash. Mut. Bank*, 500 F.3d 344, 356-57 (5th Cir. 2007).

The summary-judgment record documents the weight of Singing River's financial burden, with an audit's confirming $30 million in losses in 2013 and 2014 each. Obviously, questioning how an entity handled a financial crisis – even proving its decisions ill-advised – does not amount, without more, to pretext for discrimination. "Our anti-discrimination laws do not require an employer to make proper decisions, only non-retaliatory ones." *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007). Because Lay's position was not singularly eliminated, and because the elimination was part of significant restructuring

during well-demonstrated financial hardship, Singing River presents "a legitimate, non-discriminatory reason for the challenged employment action". *Nichols*, 81 F.3d at 41.

C.

Therefore, the "ultimate burden" rests with Lay. *Machinchick*, 398 F.3d at 350. Relying on *Rachid v. Jack in the Box, Inc.*, Lay asserts a reasonable factfinder could find age discrimination was the more likely reason for her termination than the reasons offered by Singing River. 376 F.3d 305 (5th Cir. 2004).

Among the evidence cited for purportedly establishing a reasonable factfinder could determine age discrimination was Singing River's more likely motivation, Lay notes Rickley, whom she views as her replacement, is half her age. She further contends she was forced to retire because of her age and pension status. Finally, Lay contends, through depositions: a Singing River human-resources employee, Sandra Murray, told Lay that she saw age discrimination in firing "all the time"; and Windy Taylor, the former assistant to Singing River's CEO Holland, stated Holland made a disparaging remark about older female employees in 2005.

1.

While Lay claims her position was replaced by a higher-paid position of essentially identical function,

CFO Bond stated in his deposition that the new position consolidated not only Lay's prior responsibilities but those of her supervisor, Morgan, such that a one-to-one comparison is inappropriate. Morgan stated in his deposition that he understood his job "was going to be eliminated and/or merged", and he took part in developing that strategy.

Lay asserts: the new position "entailed 99.9% of [her] previous job duties under a different title"; and Singing River did not save money in eliminating her position because the new employee whose responsibilities included hers was paid a higher salary. The "99.9%" assertion in Lay's brief appears to derive from her deposition, when, as discussed *supra*, she stated she estimated the calculation from the job profile she read online. Lay further stated she did "[n]ot specifically" know the full responsibilities required for the new position. A reasonable factfinder would not be persuaded by pure conjecture; there is no genuine dispute of material fact on this point. *Berquist*, 500 F.3d at 356.

Again, to the question of cost via an allegedly higher-paid position, Lay neither challenges the record's confirming $30 million losses in 2013 and 2014, nor overcomes our court's not critiquing business decisions, to the extent they do not evidence discrimination. *LeMaire*, 480 F.3d at 391. Accordingly, to the extent Lay contends she was "replaced" by someone half her age, replacement is an inaccurate characterization; therefore, the new employee's age is immaterial. As to being "replaced" by anyone, Lay "fails to raise a genuine [dispute] of material fact regarding the

evidence presented to support [Singing River]'s legitimate, non-discriminatory reason for [her] termination". *Berquist*, 500 F.3d at 356.

2.

Next, Lay contends she was forced to retire because of her age and pension status. "We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993).

The summary-judgment record, however, demonstrates Lay was not forced to retire, as though a younger person replaced her precise position: her position was eliminated, among other positions, amidst financially-driven restructuring. The summary-judgment record demonstrates discussions of Lay's retirement status were held subsequent to acknowledgement that her position would be eliminated. Lay points to nothing in the summary-judgment record demonstrating her age was expressly discussed during conversations about her termination.

Because Lay provides no evidence that her superiors' discussion of her pension status was made in anything other than a helpful spirit, Lay does not create a genuine dispute of material fact concerning whether Singing River "target[ed] employees with a particular pension status". *Id.* Therefore, as to whether Lay was forced to retire, she "fails to raise a genuine [dispute]

of material fact regarding the evidence presented to support [Singing River]'s legitimate, non-discriminatory reason for [her] termination". *Berquist*, 500 F.3d at 356.

3.

Finally, Lay relies on the two above-described sets of hearsay as evidence of age discrimination. She contends, relying on the deposition of Windy Taylor, former executive assistant to Singing River's CEO Holland, that Holland made age-related derogatory comments about employees; and Lay stated in her deposition that Elaine Hiers, program specialist for payroll and retirement, from whom the summary-judgment record contains no evidence, remarked she saw age-based discrimination "all the time" within Singing River. (Another former employee, Sandra Murray, was deposed. At her deposition, she discussed her own age-discrimination EEOC claim, though she admitted to never personally hearing any age-related discriminatory comments around Singing River regarding her or Lay. In other words, this is an instance in which a former employee, who alleged age discrimination, cannot recall a single concrete, age-related comment.)

a.

As for the alleged remarks by CEO Holland, the record demonstrates Windy Taylor, in her deposition,

could recall only one remark, from 2005, approximately nine years before Lay's alleged forced retirement. Taylor recalled Holland stated women above age 40 should not be in management. Undermining the statement's veracity, Taylor admitted to speaking ill of CEO Holland and mocking him on social media. Given the ambiguity, the alleged age-related comment lacks the requisite genuine dispute of material fact.

But, even if accurate, the remark fails our court's test for workplace comments indirectly evidencing age discrimination:

> Where a plaintiff offers remarks as circumstantial evidence alongside other alleged discriminatory conduct, . . . a plaintiff need only show (1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.

Reed v. Neopost USA, Inc., 701 F.3d 434, 441 (5th Cir. 2012). In the light of *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000), *Reed* distinguished that workplace remarks offered as *direct* evidence of discrimination are still held to the *CSC Logic* test: "Remarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue". *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996).

Here, while CEO Holland surely held leverage over any relevant decisionmakers who chose to consolidate Lay's position, the one remark his former assistant recalled was not discriminatory animus. *Reed*, 701 F.3d at 441. The alleged 2005 remark's absence of implication that "senior managers were to be fired to make room for younger trainees" weighs against such animus. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "Moreover, even if [the comment was] direct evidence of discrimination, this evidence is 'insignificant in comparison to the evidence of' [Singing River]'s legitimate reasons for [Lay's RIF retirement], and 'thus is insufficient, on its own, to establish discrimination' ". *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016) (quoting *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (*Rodriguez* was appealed after summary judgment rather than after trial.)) And, obviously, the alleged comment is far from being "proximate in time" to Lay's retirement.

b.

The second point of hearsay was the alleged comment by Elaine Hiers, a payroll and retirement specialist in Singing River's human-resources department. Lay stated in her deposition that Hiers, learning of Lay's severance, recounted to Lay seeing age discrimination at Singing River "all the time". As noted, the summary-judgment record contains no deposition of, or other evidence from, Hiers; there is only an email

from Lay to Hiers requesting a meeting after Morgan's email announcing Lay's retirement.

Needless to say, Lay's recollection of Hiers' statement is inadmissible hearsay. Lay contends the statement is an admission by a party opponent, which, subject to Federal Rule of Evidence 801(d)(2)(D), is not hearsay. Hiers, however, was not a party opponent for the purpose of employment-discrimination proceedings.

To qualify for that exception, "the declarant must be involved in the decision making process affecting the employment action involved". *Kelly ex rel. All Heirs at Law of Kelly v. Labouisse*, No. 3:07-cv-631, 2009 WL 427103, at *3 (S.D. Miss. 19 Feb. 2009), *aff'd sub nom. Kelly v. Labouisse*, 364 F. App'x 895 (5th Cir. 2010); *see also Ramirez v. Gonzales*, 225 F. App'x 203, 210 (5th Cir. 2007). Lay does not contend Hiers was involved in any of the RIF retirement-or-hiring decisions at issue in this action, rendering the alleged statement inadmissible for summary-judgment consideration.

But, even assuming *arguendo* the alleged statement is an admission by a party opponent, the remark fails the *Reed* standard for workplace remarks constituting circumstantial evidence of age discrimination: Hiers was neither "primarily responsible for the challenged employment action" nor "a person with influence or leverage over the relevant decisionmaker". *Reed*, 701 F.3d at 441.

Finally, Lay emphasizes *Reeves*, in which the Supreme Court overturned our court's reversal of a jury

verdict for age discrimination because our court "failed to draw all reasonable inferences in favor of [plaintiff]", *inter alia* relying on non-dispositive evidence for defendant's proffered non-discriminatory firing rationale, and discounting age-related comments "not made in the direct context of [plaintiff's] termination". 530 U.S. at 152-53. *Reeves*, however, is distinguishable.

In *Reeves*, but not in the present action: plaintiff was fired outright and not encouraged to apply for other positions in the company; plaintiff directly rebutted claims of poor performance through records demonstrating satisfactory performance; plaintiff testified defendant made disparaging, age-related comments directly to, and about, plaintiff; defendant offered no contention of eliminating plaintiff's position out of financial necessity; and a jury found for plaintiff prior to appeal. *Id.* at 144-45 (plaintiff fired, rebutted poor performance, no dispositive evidence supporting defendant's explanation); 151-52 (age-disparaging comments); 139 (jury verdict for plaintiff). Most notably, *Reeves* did not involve a RIF, which is evaluated by the earlier-described separate *prima facie* standard. *See generally id.*; *Nichols*, 81 F.3d at 41.

Lay offers nothing but conjecture about the manner in which her position was consolidated or her estimation that the new position was "99.9%" the same as her former position, based on her single review of a job posting. Lay's further conjecture that other cost-saving methods were available to Singing River is inappropriate for us to consider. *LeMaire*, 480 F.3d at 391. Lay does not contend any of the age-related comments she

presents were made directly about, or to, her. The attenuation is far more pronounced than in *Reeves*.

Regarding age-related disparaging remarks made by any of Singing River's personnel, Lay fails to create "a genuine [dispute] of material fact regarding the evidence presented to support [Singing River]'s legitimate, non-discriminatory reason for [her] termination". *Berquist*, 500 F.3d at 356.

D.

Lay makes additional points which we need not engage in-depth. While Lay contends a majority of the released employees were older than age 40, as reflected in the Singing River layoff-list in the summary-judgment record, she provides no evidence regarding the overall age makeup of Singing River's employees, or the overall age makeup of new employees: we cannot determine whether her assertion is statistically significant. And, to the extent Lay contends a supervisor expressed to another eliminated employee that Singing River wished he could stay, without making similar representations to Lay, the expression is insignificant, as that employee's position was still eliminated.

In sum, like the plaintiff in *Berquist*, Lay "fails to raise a genuine [dispute] of material fact regarding the evidence presented to support [Singing River]'s legitimate, non-discriminatory reason for [her RIF retirement]". 500 F.3d at 356 (also assuming *arguendo* a *prima facie* case). Restated, a reasonable factfinder would not return judgment for Lay regarding her

claimed wrongful termination for age discrimination, whether considering her contentions that her same position was duplicated, that she was forced to retire, or that Singing River's decisionmakers made age-related discriminatory comments.

III.

For the foregoing reasons, the judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

VIRGINIA LAY **PLAINTIFF**

v. **CAUSE NO. 1:15CV130-LG-RHW**

SINGING RIVER HEALTH SYSTEM **DEFENDANT.**

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 2, 2016)

BEFORE THE COURT is the Motion [51] for Summary Judgment filed by Defendant Singing River Health System in this Age Discrimination in Employment Act case. The issues have been fully briefed. After due consideration of the parties' submissions and the relevant law, it is the Court's opinion that Plaintiff Lay has failed to show there is a question of material fact regarding whether age was a factor in Singing River's decision to terminate her employment. Accordingly, the Motion will be granted and this case dismissed.

BACKGROUND

Lay was hired in 1999, when she was fifty years old, as Singing River's Director of Managed Care. (Lay Dep. 7, 17, ECF No. 57-1). In 2014, news of Singing River's serious financial difficulties was widely publicized on the Mississippi Gulf Coast. Singing River

undertook a "plan to restructure the entire leadership team" in which "employees were laid off, positions were eliminated, and departments were restructured." (Summerlin Aff. 1, ECF No. 54-1).

At the time, Lay reported to Chris Morgan, the Vice President of Clinical Integration. Morgan was informed by CEO Kevin Holland that Morgan's department would have to be restructured. (Morgan Dep. 15, ECF No. 51-4). The decision to terminate Lay's employment was made by Morgan, with assistance from human resources officer Craig Summerlin, (Summerlin Dep. 16, ECF No. 51-5), and approval from Holland. (Morgan Dep. 17-19; Holland Dep. 13, ECF No. 57-7). Lay met with Morgan and Summerlin on April 22, 2014, when Morgan told her she was "going to have to retire." (Lay Dep. 27). Summerlin explained to her that it would be "a good deal for me to wait until June to retire for the better payout or better benefits." (*Id.* at 28-29). At the end of the meeting, she asked Morgan, "'Why are you doing this to me?' and he said 'We're looking for people like you who can get the retirement and make the high salary.'" (*Id.* at 28). Lay asserts that she did not understand that her position was going to be terminated when Morgan told her she was going to have to retire. A few days later, Morgan sent an email to the rest of the department announcing Lay's retirement. (Pl. Resp. Ex. 13, ECF No. 57-13). Lay sent Morgan a memo almost two weeks later, stating that she was not willing to retire. (Pl. Resp. Ex. 14, ECF No. 57-14). Lay does not remember having any discussions

with Morgan or Summerlin about the memo, (Lay Dep. 43), and her retirement was effective on June 13, 2014.

Morgan's position was also slated for elimination, and he began working for another employer shortly before Lay's last day in June. (Morgan Dep. 7-8, 10, 33). Holland gave Morgan and Lay's job functions to Chief Financial Officer Lee Bond, who "divvied up some of the role" to Brian Argo, Executive Director of Finance, and a number of employees who were previously in Lay's department. (Holland Dep. 19-10; Bond Dep. 31, 33-34, ECF No. 57-8). Bond also incorporated some of Lay's job functions into a new "Director of Collaborative Care Network" position. (Bond Dep. 28). Lay did not apply for the position because of the requirement for a master's degree, although she believed it entailed "99.9 percent of my job duties." (Lay Dep. 45). The person hired was thirty-two year old Justin Rickley, who is about two-thirds completed with his master's degree coursework. (Summerlin Aff. 2, ECF No. 54-1; Rickley Dep. 13, ECF No. 57-17). Rickley's job duties entail more than managed care functions formerly performed by Lay. (Argo Dep. 13-15, ECF No. 57-16). Rickley does "a pretty significant amount of contract modeling [] and analyzing. . . . those are some of the major things that he does." (*Id.* at 14).

Lay filed a charge of age discrimination with the Equal Employment Opportunity Commission and received a Notice of Right to Sue. (Compl. Ex. A, B, ECF Nos. 1-1, 1-2). This lawsuit followed.

DISCUSSION

Under the ADEA, an employer cannot "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1); *see also Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 308-09 (5th Cir. 2004). Singing River moves for summary judgment under Fed. R. Civ. P. 56, which in employment discrimination cases requires application of a burden-shifting analysis.

A party that establishes a *prima facie* case of age discrimination "raises an inference of unlawful discrimination." *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996). "The burden of production then shifts to the defendant to proffer a legitimate, non-discriminatory reason for the challenged employment action. The defendant may meet this burden by presenting evidence that 'if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.'" *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993)). "If the defendant meets its burden, the presumption of discrimination created by the plaintiff's prima facie case disappears and the plaintiff must meet its ultimate burden of persuasion on the issue of intentional discrimination." *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005).

1. Lay's *Prima Facie* Case

The parties set out and argue the *prima facie* elements for a standard ADEA discrimination claim involving termination. However, Lay was clearly terminated as part of a reduction-in-force, and therefore the Court applies the Fifth Circuit's slightly different *prima facie* elements for a reduction-in-force case. This requires a party to make out a *prima facie* case of age discrimination by showing "(1) that he is within the protected age group; (2) that he has been adversely affected by the employer's decision; (3) that he was qualified to assume another position at the time of the discharge; and (4) 'evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.'" *Nichols*, 81 F.3d at 41 (quoting *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812 (5th Cir. 1991)).

A *prima facie* case "is fairly easily made out." *Amburgey*, 936 F.2d at 812. Given that the parties have argued different *prima facie* elements – concentrating on whether Lay was replaced by a younger worker – the Court will assume without deciding that Lay has cleared the relatively low hurdle of establishing a *prima facie* case.

2. Singing River's Reasons For Its Decision And Pretext

Singing River has articulated a legitimate, nondiscriminatory reason for its decision – the elimination

of the position pursuant to an overall restructuring and reduction in force. *See EEOC v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (noting that a reduction in force is a legitimate, non-discriminatory reason for discharge). Thus, the question is pretext. To establish pretext, Lay must show both that the employer's reason was false, and that discrimination was the real reason for her termination. *Flanner v. Chase Inv. Servs. Corp.*, 600 F. App'x 914, 918 (5th Cir. 2015).

In an effort to demonstrate that the reduction in force was a pretext for age discrimination, Lay points first to the fact that her termination was in the form of a forced retirement, arguing that "telling a person that they must retire is evidence of age discrimination." (Pl. Mem. 17, ECF No. 56). However, the Fifth Circuit has stated that "[t]he word 'retire,' does not, by its very use," establish that age was a motivating factor in termination. *Martin v. Bayland, Inc.*, 181 F. App'x 422, 426 (5th Cir. 2006). *See also Hilde v. City of Eveleth*, 777 F.3d 998, 1006 (8th Cir. 2015) ("'[R]etire' and 'age' are not synonyms."). Morgan and Summerlin both testified they determined that Lay's position would be terminated, and they discussed retirement because Lay was very close to being eligible for Singing River retirement benefits. Morgan in fact delayed termination of Lay's position until she was eligible for retirement benefits. Telling Lay she must retire does not tend to show that age discrimination, rather than the restructuring and reduction in force, was the true reason Singing River terminated her. *See Kilgore v. Brookeland Ind. Sch. Dist.*, 538 F. App'x 473, 477 (5th Cir.

2013) (comment concerning retirement eligibility did not establish pretext).

Next, Lay argues that she was an excellent employee. In the context of a reduction in force, the fact that an employee is qualified for his job is less relevant, as some employees may have to be let go despite competent performance. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1992); *see also Chavez v. URS Fed. Tech. Servs., Inc.*, 504 F. App'x 819, 821 (11th Cir. 2013) ("During a reduction-in-force, competent employees who in more prosperous times would continue and flourish at a company may nevertheless have to be fired."). However, the Court "can infer pretext if the plaintiff was 'clearly better qualified than the employee[]' who was not laid off." *Baumeister v. AIG Glob. Inv. Corp.*, 420 F. App'x 351, 355 (5th Cir. 2011). Lay argues that her duties were initially taken over by thirty-one-year-old Argo, who was later assisted by a thirty-two-year-old new hire. Lay does not argue that she was clearly better qualified than these two persons. She argues that her salary was less than Argo's, making it unlikely that assigning her duties to him saved Singing River money. In regard to the new hire, she argues that he, like her, lacked a master's degree. Neither argument establishes pretext because neither shows that Lay was the clearly better qualified employee. *Daniel v. Universal ENSCO, Inc.*, 507 F. App'x 434, 439 (5th Cir. 2013); *Baumeister*, 420 F. App'x at 355.

Lay also asserts that Singing River did not save money by eliminating her position, and there were

other options it could have taken, "such as eliminating younger directors whose departments were losing money . . . or an across the board pay cut. . . ." (Pl. Mem. 19, ECF No. 56). Lay can not raise an issue of pretext by questioning Singing River's business judgment about the best way to manage its financial crisis. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007); *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, 696 F.3d 128, 140 (1st Cir. 2012). The Fifth Circuit has instructed:

> The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions nor was it intended to transform the courts into personnel managers. The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.

Moss v. BMC Software, Inc., 610 F.3d 917, 926 (5th Cir. 2010) (quoting *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988)).

Lay next states that she told Elaine Hiers, the retirement specialist in the human resources department, that she was being let go because of her age. Hiers responded that she sees that all the time. Lay contends this is an admission of a party opponent and therefore admissible evidence of pretext. Lay does not contend that Hiers was involved in the decision to terminate her employment.

The applicable rule excludes from the definition of hearsay a statement "offered against an opposing party . . . made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2). Where alleged statements concern an employee's termination, the declarant must have been involved in the decision to terminate the employee. *See Ramirez v. Gonzales*, 225 F. App'x 203, 210 (5th Cir. 2007) ("Longoria's comments to Walker do not fall within the party opponent exception because they concerned matters outside the scope of her employment, since Longoria was not involved in the decision to terminate Ramirez."). Moreover, Hier's comments amount to no more than stray workplace remarks and are not evidence of discrimination. *See Krystek v. Univ. of So. Miss.* 164 F.3d 251 (5th Cir. 1999).

Next, Lay asserts that "of the ninety-seven (97) employees let go, almost two-thirds was over the age of forty (40)." (Pl. Mem. 19, ECF No. 56). The Fifth Circuit has explained that such statistical evidence usually cannot rebut the employer's articulated nondiscriminatory reasons.

> [G]ross statistical disparities resulting from a reduction in force or similar evidence may be probative of discriminatory intent, motive or purpose. Such statistics might in an unusual case provide adequate circumstantial evidence that an individual employee was discharged as part of a larger pattern of layoffs targeting older employees. *This is not to say*

> *that such statistics are enough to rebut a valid, nondiscriminatory reason for discharging a particular employee. Generally, they are not. . . . [P]roof of pretext, hence of discriminatory intent, by statistics alone would be a challenging endeavor.*

Tex. Instruments Inc., 100 F.3d at 1184-85 (emphasis in original) (quoting *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992)). "The probative value of statistical evidence ultimately depends on all the surrounding facts, circumstances, and other evidence of discrimination." *Id.* at 1185 (citing *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)).

Lay simply attaches a list of the ninety-seven terminated employees with associated identifiers such as job title, age, race, sex and years of service. (Pl. Resp. Ex. 20, ECF No. 57-20). However, there is no similar information about the population from which this list was generated. Without some indication that there is a "gross statistical disparity" between the entirety of the pool of Singing River employees and the employees selected for the reduction in force, the list does not provide evidence of pretext.

Lay next attempts to show a culture or pattern of discriminating against older workers through evidence of two other employees. The first is fifty-year-old Sandra Murray, who was the interim IT director for two years, but not selected for the permanent IT director position. Murray complains that the decision maker, Larry Shoemaker, promoted a younger male into the position instead. (Murray Dep. 20, ECF No. 57-21). The

second is sixty-nine-year-old Hattie Williams, who worked part time as a benefits specialist in the human resources department. Her supervisor, Craig Summerlin, eliminated her position in the reduction in force. (Williams Dep. 9, ECF No. 57-23).

In the Fifth Circuit, attempting to show pretext through an employer's treatment of employees in the same protected group requires that the comparators be similarly situated.

> Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff. This court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge.

Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 302 (5th Cir. 2000) (citation omitted). It is apparent that neither Murray nor Williams is similarly situated with Lay. There is no commonality between departments or supervisors, and Murray was not terminated. Evidence regarding their experiences is not evidence of pretext.

Finally, Lay attempts to show pretext through certain age- and gender-based comments purportedly made by Holland. Lay presented deposition testimony

from Windy Taylor, in which Taylor related comments Holland made sometime in 2005,[1] that older women did not belong in management because, among other things, they went "cuckoo for cocoa puffs" after menopause. (Taylor Dep. 17-18, 94-95, ECF No. 57-19). Taylor never heard Holland make derogatory remarks, including age-related remarks, about Lay specifically. (*Id.* at 28, 60).

Assuming Holland, as CEO, was a decision-maker regarding Lay's termination, his remarks can be probative of discriminatory conduct if there is other evidence of pretext. *See Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 577 (5th Cir. 2003) ("After *Reeves*, . . . so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent."); *see also Reed v. Neopost USA, Inc.*, 701 F.3d 434, 441 (5th Cir. 2012) ("Where a plaintiff offers remarks as circumstantial evidence *alongside other alleged discriminatory conduct*, . . . we apply a more flexible two-part test.") (emphasis added) (citations omitted); *Cervantez v. KMGP Servs. Co. Inc.*, 349 F. App'x 4, 10-11 (5th Cir. 2009) ("[A] comment is not evidence of discrimination if it is the sole proof of pretext."); *Bugos v. Ricoh Corp.*, No. 07-20757, 2008 WL 3876548, at *6 (5th Cir. Aug. 21, 2008) ("Because Brown's workplace comments are

[1] Ms. Taylor worked as an administrative assistant for Holland from 2005 until 2014. Although she references several instances during that period when he commented negatively about women over 40, she generally did not testify about the dates the comments were made.

the only circumstantial evidence of pretext, and, standing alone, they are not probative, we affirm the district court's grant of summary judgment.").

Without other evidence of pretext, the Court cannot consider Holland's comments, almost ten years past, to be evidence of discrimination. *See Bugos*, 2008 WL 3876548, at *5 (where the supervisor's comments that "women work harder than men," "women are better employees than men," and "women are better received by the customer than men" were the only evidence of pretext, those comments were not probative). Lay has failed to present any evidence of pretext other than age-related comments, and she cannot defeat summary judgment on her ADEA claim by relying on this evidence alone.

CONCLUSION

Lay has failed to provide competent summary judgment evidence supporting her allegations that Singing River Health System terminated her employment because of age. Because Singing River has shown there is no question of material fact for the jury, summary judgment should be granted and this case dismissed.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion [51] for Summary Judgment filed by Singing River Health System is **GRANTED**. Plaintiff's claims are **DISMISSED**.

SO ORDERED AND ADJUDGED this the 2nd day of June, 2016.

s/ Louis Guirola, Jr.

LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

VIRGINIA LAY **PLAINTIFF**

v. **CAUSE NO. 1:15CV130-LG-RHW**

SINGING RIVER HEALTH SYSTEM **DEFENDANT.**

JUDGMENT

(Filed Jun. 2, 2016)

In accordance with the Court's Memorandum Opinion and Order entered herewith,

IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the Defendant. Plaintiff's claims against the Defendant are **DISMISSED**.

SO ORDERED AND ADJUDGED this the 2nd day of June, 2016.

s/ Louis Guirola, Jr.

LOUIS GUIROLA, JR.
CHIEF U.S. DISTRICT JUDGE