No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case brought under the Age Discrimination in Employment Act, where a long-term, older employee is displaced by a younger employee, may a court properly grant summary judgment by accepting as true the employer's disputed claim that the plaintiff was a poor performer, and that the alleged poor performance, not age, was the reason for the firing?

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. Annette Benjamin, Petitioner; and
2. Felder Services, L.L.C., doing business as Oxford Health and Rehab Center, Respondent.

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OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fifth Circuit is found at 2018 WL 6119903 (5th Cir. 2018), and is attached as App. 1-14.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 WL 3896676 (N.D. Miss. 2017), and is attached as App. 15-22. The unreported Order of the United States District Court is attached as App. 23.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on November 20, 2018, 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 CONSTRUED

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

> A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. 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

Fifty-nine (59) year-old Annette Benjamin (hereinafter "Petitioner") was employed by Respondent Felder Services, L.L.C.'s (hereinafter "Respondent") predecessor, Lafayette LTC, Inc., d/b/a Graceland Care Center of Oxford (a nursing home), for thirty-two (32) years as the dietary manager.

Respondent obtained a contract to perform dietary services for Lafayette LTC, Inc. on June 8, 2015.

Respondent fired Petitioner a month later, on July 8, 2015. The reason Respondent gave Petitioner for her firing was that things were not "working out." Respondent immediately replaced Petitioner, age fifty-nine (59), with a forty-two (42) year old. Respondent had interviewed and retained all of the predecessor's dietary staff except Petitioner. Respondent did not interview Petitioner.

In interrogatories, Respondent was asked to state "any and all reasons why Plaintiff was terminated. . . ." Respondent answered that Petitioner was: "terminated due to her poor work performance [consisting of] . . . failure to perform tray card audits and seating charts timely; and failure to make corrections to those charts." At deposition, Respondent's decision-maker, District Manager Elizabeth House, expanded the reasons for discharge by stating that Petitioner was also fired because she "talked to the dietary staff . . . in a rude and inappropriate manner. . . ."

In evidentiary materials submitted in its summary judgment motion, Respondent stated that it also discharged Petitioner because "surveys from the Department of Health and Human Services," had found "discrepancies" in the dietary function of the facility.

Although much of Petitioner's evidence was not mentioned in the Fifth Circuit opinion, Petitioner submitted substantial evidence disputing the reasons assigned by Respondent.

For example, Petitioner submitted the testimony of a supervisor who had worked under Petitioner for twenty-two (22) years. This supervisor testified that Petitioner was not rude, never had any problem with either her co-employees or residents, and that the supervisor was "shocked" when Petitioner was terminated.

A dietician, who had personally witnessed Petitioner's work for twelve (12) years, testified there were never any issues with her treatment of staff.

Regarding the Respondent's claims that Petitioner was fired because of "discrepancies" in a Department of Health and Human Services' survey, Respondent's decision-maker admitted that she "had not" seen the survey when she made the decision to terminate Petitioner. Furthermore, the survey lists fifteen (15) deficiencies in other departments of the nursing home, but only three (3) in the dietary unit. These three (3) deficiencies are described as causing only "minimal harm" or only "potential harm."

Regarding Respondent's claim that Petitioner had not timely prepared "tray card audits" or a "seating chart," Petitioner testified that she could not perform these minor tasks immediately since Respondent had demanded she work on numerous other assigned tasks.

Respondent's general claim that Petitioner was a poor performer was inconsistent with her last performance appraisal of June 2014, which described her as "produc[ing] large quantities of work under short time frames," having "years of valuable experience," and having a "deep concern for the residents of the facility that does not go unnoticed."

The district court granted summary judgment by finding that the reasons offered by Respondent "are more than valid to warrant the plaintiff's termination." App. 21.

The Fifth Circuit Court of Appeals affirmed the grant of summary judgment. While not mentioning much of Petitioner's evidence, the Court of Appeals

credited Respondent's evidence that it had "concerns with [Petitioner's] treatment of the kitchen staff and nurses," App. 4; relied upon the survey which had "identified deficiencies related to the timeliness and temperature of the food service," App. 3; opined that Petitioner's previous record of good performance was not probative since "[Petitioner] herself contends she had new and different responsibilities under [Respondent]," App. 9; and found "evidence of positive reviews from a former employer does not make [Respondent's] explanation pretextual." App. 9.

The Fifth Circuit held that it would not "try in court the validity of good faith beliefs as to an employee's competence." App. 10, citing *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995).

Neither the district court, nor the Fifth Circuit, cited the leading case from this Court directing when judgment as a matter of law is appropriate in an age discrimination case. That case, *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000), held that "a plaintiff's prima facie case [replacement by a substantially younger employee], 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."

In this case, Petitioner proved a *prima facie* case since she proved that she was displaced by an employee seventeen (17) years her junior, and she presented evidence that the reason Respondent cited for her discharge (poor performance) was false. Because

the present case is typical of a large number of courts of appeals' opinions which either disregard *Reeves*, or give the case such a narrow construction as to make it impossible to prove discrimination without an admission by the employer, Petitioner requests the Writ be granted.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT 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.

"In modern American work environments, savvy employers know that blatant statements of bias should be neither memorialized in writing nor uttered by their employees, particularly decision makers." Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 320 (2010). Accordingly, discrimination cases must be proved by circumstantial evidence. This is not a second-class-type of evidence. To the contrary, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17 (1957).

Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 140 (2000):

> granted certiorari, . . . to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, . . . (1973)), combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves answered this question affirmatively, holding 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. By rejecting the requirement that further proof was required, *Reeves* overruled the so-called "pretext plus" requirement of some of the circuits. *Reeves*, 530 U.S. at 140.

Nevertheless, leaving ambiguity, *Reeves* also noted that there may be circumstances where an employee is not entitled have a jury decide her discrimination case, despite having offered evidence of a *prima facie* case and evidence of pretext. *Reeves* described these cases as cases where "the record conclusively revealed some other, nondiscriminatory 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." *Reeves*, 530 U.S. at 148.

Concurring, Justice Ginsburg recognized that the *Reeves*' holding might require this 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 pretext] in order to survive a motion for judgment as a matter of law." *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring).

Petitioner's case is an "appropriate" one for this Court to determine "more precisely the circumstances" in which it is proper to grant summary judgment, despite evidence of a *prima facie* case and evidence of pretext.

Several academic articles have demonstrated a trend in some of the courts of appeals, including the Fifth Circuit, to disregard *Reeves* or to give it such a narrow construction as to make it impossible for plaintiffs to prove discrimination without direct evidence, such as an admission of discrimination. *See* 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"); 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) (stating 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) (stating that lower federal courts have "systematically undermined the powerful tool of inference drawing, which was once a hallmark of the factfinder's evaluation of evidence, without grappling with the attendant Seventh Amendment problem"); Randall John Bunnell, *Summary Judgment Principles in Light of* Tolan v. Cotton*: Employment Discrimination Implications in the Fifth Circuit*, 63 Loy. L. Rev. 77, n. 63 (2017), observing that "a mere five months [after *Reeves*], . . . [a jury verdict in] *Vadie*[1] was thrown out by a panel of the Fifth Circuit that refused to follow Reeves."[2] Such "marginalization of the jury

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[1] *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000).

[2] *Vadie* is one example of the trend of some of the courts of appeals to disallow juries to decide employment discrimination cases without direct evidence. *See*, *e.g.*, Kevin M. Clermont and Stuart J. Schwab, *Employment Discrimination Plaintiffs in*

undermines the democratic vision of full participation and may discourage citizen respect for the legal system in general." Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 328 (1995).

A 2017 law review article documents that some, but not all, circuits disregard *Reeves* by applying the very "pretext-plus" standard which *Reeves* rejected.

> A 2005 survey of the circuit courts of appeals found that the First, Eighth, and Eleventh

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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 Clichés 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' ").

> Circuits, along with our own Fifth Circuit, tend to favor and utilize a pretext-plus approach. Conversely, the Second, Third, Fourth, Seventh, Ninth, and Tenth Circuits tend to apply either a pretext-only or pretext-may approach. However, this survey was only able to show "more or less" the *tendencies* of the circuits. Drawing clean, firm lines among circuits is all but impossible because further inconsistences [sic] appear within *intra*-circuit splits. Thus, the applicable standard depends not only on the circuit hearing the case, but also on "the panel members, the facts, and the type of case."

Randall John Bunnell, *Summary Judgment Principles in Light of* Tolan v. Cotton*: Employment Discrimination Implications in the Fifth Circuit*, 63 Loy. L. Rev. at 87 (footnotes omitted) (emphasis in original).

In 2014, Theresa M. Beiner, following an extensive examination of cases, found that some circuits merely pay "lip service" to *Reeves*, and described other circuits as "confused" about the meaning of *Reeves*. Theresa M. Beiner, *The Trouble With* Torgerson*: the Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 Nev. L.J. 673, 685-86 (2014), writes:

> Several circuits still hold to – or at least pay lip service to – the old standard and express reluctance to grant summary judgment in employment discrimination cases. Other circuits appear to apply a tougher standard to plaintiffs who are trying to overcome a defendant's motion for summary judgment. And

> still others are simply confused, with some courts within the circuit favoring summary judgment and others still expressing reluctance. However, regardless of what a lower court says about the standard it is applying, defendants are often successful when moving for summary judgment in employment discrimination cases. Thus, even in circuits that exercise caution, defendants frequently win summary judgment motions.

The Fifth Circuit, in this case, expressly refused to follow certain principles that are explicitly stated in *Reeves*. For example, *Reeves* wrote that in deciding whether to grant judgment as a matter of law, the court is to "give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Reeves*, 530 U.S. at 151. In Petitioner's case, the Fifth Circuit did not follow this admonition. Instead of accepting as true Petitioner's [nonmovant's] evidence of good performance, the Fifth Circuit accepted as true the testimony of Respondent's decision-maker, who claimed that Petitioner was a poor performer or, at least, that Respondent had a "good faith" belief that Petitioner was a poor performer. App. 10. Accepting as true Respondent's claim that Respondent had a "good faith" belief that Petitioner was a poor performer, App. 10, disregards *Reeves*' teaching that "[c]redibility determinations. . . ." are "jury functions, not those of a judge." *Reeves*, 530 U.S. at 150-51.

The Fifth Circuit also disregarded the pre-*Reeves*' established principle that "[t]he state of a man's mind is as much a fact as the state of his digestion." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (internal citation omitted). Whether Respondent fired Petitioner because she was old or because it had a "good faith" belief that she was a poor performer is a question of Respondent's state of mind and is, therefore, a question of fact.

The Fifth Circuit also disregarded *Reeves* since that court never considered as evidence the fact that Petitioner had made a *prima facie* case by demonstrating that she performed her job well for over three (3) decades, and was then replaced by an employee seventeen (17) years her junior. *Reeves* corrected the Fifth Circuit because that court had "disregarded critical evidence favorable to petitioner – namely, the evidence supporting petitioner's prima facie case. . . ." *Reeves*, 530 U.S. at 152.

Just as this Court found it necessary in *Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 1886 (2014), to vacate summary judgment granted in an unreasonable force case brought under the Fourth Amendment because the Fifth Circuit "improperly weighed evidence and resolved disputed issues in favor of moving party, ..." this Court should again grant *certiorari* in order to correct the Fifth Circuit by directing the principles of *Tolan* and *Reeves* must be followed. It is idle for this Court to render opinions if the lower courts are free to disregard these opinions or to interpret the opinions so narrowly that their holdings have no force.

CONCLUSION

This is the "appropriate case" described by Justice Ginsburg in *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring), for this Court to grant the Writ in order to define more precisely when an employee in an employment discrimination case may be denied her Seventh Amendment right to have a jury determine the facts.

"The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944). Taking away from the jury such questions as whether Respondent replaced Petitioner with an employee seventeen (17) years her junior because the employer believed Petitioner was a poor performer, diminishes the Seventh Amendment.

Respectfully submitted,

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