UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-4223-CIV-UNGARO-BENAGES

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CALDER RACE COURSE, INC.,

Defendant.
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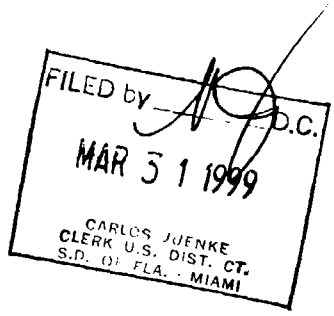

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon the Defendant's Motion for Summary Judgment, filed August 28, 1998.

THE COURT has considered the above-referenced Motion and the pertinent portions of the record and is otherwise fully advised in the premises. The Plaintiff filed the Complaint on May 1, 1998 on behalf of four claimants. The Complaint alleges that the Defendant violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, by depriving the claimants of equal employment opportunities because of their age. On August 28, 1998, the Defendant filed the instant Motion for Summary Judgment arguing that the undisputed facts show that the Plaintiff failed to establish a *prima facie* case of age discrimination and even if it had, the Defendant articulated legitimate nondiscriminatory reasons for not rehiring the claimants. In response, the Plaintiff contends that the Defendant's stated reasons for not rehiring the claimants were pretextual. It is hereby

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ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED for the reasons set forth below.

FACTS

The undisputed material facts are as follows:

Calder is a pari-mutuel race track open to the public on a seasonal basis. (Mahony Affidavit at ¶ 2). At the beginning of each season, typically in May, Calder hires hundreds of employees to work at its betting windows and in its money rooms to manage the flow of money at the race track. (Mahony Affidavit at ¶ 3). The employees are hired on a seasonal basis, meaning that each employee is hired to work only during the current season. (Mahony Affidavit at ¶ 3). Many of Calder's seasonal employees typically work at other race tracks during the tracks' respective seasons. (Mahony Affidavit at ¶ 3). Calder's money room employees are assigned their positions on the basis of skill levels, qualifications, and seniority. (Mahony Affidavit at ¶ 5).

Prior to May 1996, Calder had nine money rooms located around the racetrack and a main money room. (Mahony Affidavit at ¶ 7). Each money room is run by a division head, and each division head reports to the head cashier who in turn reports to Patrick Mahony, the Vice President of Mutuels. (Mahony Affidavit at ¶ 7). Mahony is responsible for the management of Calder's money rooms, the money room personnel, and the tellers. (Mahony Affidavit at ¶ 6; Mahony Depo. at 5-6). As Vice President, Mahony has the authority to hire and fire employees and is the ultimate decision maker as far as employment matters and money room personnel. (Mahony Depo. at 6, 12-13).

Each of the claimants, Anderson, Carratt, Corcell, and Poer, had been a division head at Calder prior to the 1996-1997 season. (Mahony Affidavit at ¶ 9). Anderson, who was born in 1922, was first hired by Calder in 1970 when he was 48 years old. (Mahony Affidavit at ¶ 10). Carratt was first hired by Calder in 1974 when he was 49 years old. (Mahony Affidavit at ¶ 11). Carratt was born in 1925. (Mahony Affidavit at ¶ 11). Corcell, who was born in 1929, was first hired by Calder in 1987 when he was 58 years old. (Mahony Affidavit at ¶ 12). Poer, who was born in 1927, was first hired by Calder in 1982 when he was 55 years old. (Mahony Affidavit at ¶13).

In December 1995, Mahony prepared Calder's budget for the 1996-1997 racing season. (Mahony Affidavit at ¶ 15; Mahony Depo. at 28-29). Because of Calder's declining on-track business, Mahony found it economically necessary to streamline Calder's operations and reduce overhead expenses. (Mahony Affidavit at ¶ 15; Mahony Depo. at 30). Accordingly, Mahony cut 10-15% of Calder's employees from the budget. (Mahony Affidavit at ¶15). Meanwhile, due to the introduction of night time simulcast racing, it was necessary to change the manner in which Calder's money rooms operated for the 1996-1997 racing season. (Mahony Affidavit at ¶ 16). It was no longer possible to count all the money after the finish of the last live race because after the last live race, the betting windows remained open for the night time simulcast racing. (Mahony Affidavit at ¶16; Mackie Depo. at 20; Gantz Depo. at 12-13). Therefore, all money was counted the following morning, and this required fewer counters than had been necessary under the previous system. (Mahony Affidavit at ¶16). As part of the restructuring of Calder's money rooms, the teller/mini-dealer position was created which is a hybrid of teller and division head and required proficiency on the teller machine. (Mahony Affidavit at ¶ 19; Mackie Depo. at

10; Gantz Depo. at 18, 25). In order to become a teller/mini-dealer, an individual is required to attend a training course and pass a test. (Mahony Affidavit at ¶ 19).

Due to the decline of on-track business and the advent of night time simulcast racing, Mahony identified the four least busy money rooms at Calder that had the smallest number of clerks. (Mahony Affidavit at ¶17; Mahony Depo. at 23; Gantz Depo. at 14). Mahony scheduled those four money rooms for immediate closure. (Mahony Affidavit at ¶ 17; Gantz Depo. at 14). The rooms slated for closure were the divisions which previously had been headed by Anderson, Carratt, Corcell, and Poer. (Mahony Affidavit at ¶ 14). Mahony decided to keep one of the four rooms, the paddock room, open after discussing with Ed Mackie the possibility that too many rooms had been identified for closure. (Mahoney Depo. at 31-33; Mackie Depo. at 22, 61). Prior to the 1996-1997 season, Corcell was the paddock room division head.

In 1996, Bill Doolen, who had been employed at Calder for twenty years, opted not to reassume the position of head cashier during the 1996-1997 racing season due to medical problems. (Mahony Affidavit at ¶ 18). Instead, Doolen requested to serve as a division head in one of Calder's money rooms. (Mahony Affidavit at ¶ 18). Mahony decided to place Doolen in the paddock money room, the division previously headed by Corcell. (Mahony Affidavit at ¶¶ 18, 23). Mahony based his decision on the fact that of all the division heads, Corcell was the last one to become a division head.[1] (Gantz Depo. at 29-30). Ed Mackie was promoted to head cashier when Doolen became a division head. (Mahony Affidavit at ¶ 18).

At the beginning of every Calder racing season, each individual wishing to be hired or rehired for the season must submit a written application. (Mahony Affidavit at ¶ 3; Mahony

[1]Corcell became a division head sometime in 1992 or 1993. (Corcell Depo. at 33).

Depo. at 14; Mackie Depo. at 30; Comegys Depo. at 11). Calder opens its office in mid May to accept applications from former employees and new applicants. (Mahony Depo. at 14). Absent unusual circumstances, a division head is typically rehired to the same division in which he or she had worked the year before. (Mahony Depo. at 15). "They would apply each year and then be available for the opening of the meeting in whatever their capacity has been." (Mahony Depo. at 15). Comegys testified that "Well, every time since I became a division head at each track I've had the same division. So if I started - - when I started to work full-time as a division head I had the same division at each track, as most division heads always - - we always just go back to the same one. We don't rotate divisions, we work at the same one all of the time." (Comegys Depo. at 29).

Each of the claimants applied to work at Calder in the 1996-1997 racing season, but none of the claimants was rehired as a division head for the 1996-1997 season. (Mahony Affidavit at 36). Approximately one week prior to the 1996-1997 racing season, Mahony individually advised each of the claimants that Calder was downsizing, a few divisions were being closed, and certain jobs were being eliminated. (Mahony Affidavit at ¶ 20; Mahony Depo. at 41; Anderson Depo. at 43; Carratt Depo. at 29). Mahony explained to each of the claimants that they were not being rehired as division heads because of the restructuring and because he had selected the "best five" qualified individuals for the divisions that were to remain open. (Mahony Depo. at 42, 45, 49; Anderson Depo. at 91; Carratt Depo. at 38-39; Poer Depo. at 36).

Although Mahony ultimately decided who to hire for the 1996-1997 season, Mackie and Gantz had input into the decision. (Mahony Depo. at 37; Mackie Depo. at 19, 24; Gantz Depo. at 18-19). Mackie and Gantz, based on their experience working with the applicants, made hiring

recommendations to Mahony. (Mahony Depo. at 37-38). Mahony, Gantz, and Mackie met and decided who the "best five" division heads were based primarily on their collective evaluation of the skills and qualifications of the candidates as well as their seniority. (Mackie Depo. at 24-25). In deciding whom to rehire, Mahony, Mackie, and Gantz considered what the job duties would be in the money rooms remaining open, the volume of business in each of those rooms, which division heads consistently balanced the money better, who performed best as division head, and which division heads displayed the ability to handle more windows. (Mahony Depo. at 39; Mackie Depo. at 25-26; Gantz Depo. at 20).[2] The also considered the extent to which the candidates had experience as division heads in the rooms that were to remain open. Because the divisions to remain open were the rooms with the largest number of windows, the highest volume of business, and the largest number of clerks, the decision had to be made as to which individuals were best equipped to handle the busy rooms. (Mackie Depo. at 61-62). According to Gantz, "[o]ver the years, division heads sort of fell into a niche of what they could handle." (Gantz Depo. at 20).

For the 1996-1997 season, Calder rehired as division heads John Gantz, Betty Comegys, Dave Levy, and Tom Barrett. (Mahony Affidavit at ¶ 14; Mahony Depo. at 36). Gantz testified that he recommended Comegys' because her "paperwork was always neat and I trained her years ago and she does it my way." (Gantz Depo. at 21). Mackie recommended Comegys because "[s]he was better than the ones we didn't keep." (Mackie Depo. at 51). Moreover, Mackie stated that Comegys was better at balancing, staying on top of the work, and working more efficiently.

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[2]Mackie indicated that seniority was not a factor in considering who to rehire as division head. (Mackie Depo. at 26).

(Mackie Depo. at 51). As for Barrett, Gantz indicated that "[h]e does a good job, handles a big division and never has a problem." (Gantz Depo. at 21). Mackie testified that Barrett balanced consistently and quicker than the others and that "he ran a busier division and was used to handling the check activity . . . he was one of the five that we would keep." (Mackie Depo. at 51-52). With respect to Levy, Gantz stated "he ran the toughest division with a check cashing window and everything. He didn't always make it easy on himself but the end result was he balanced." (Gantz Depo. at 22). Mackie testified that Levy was his fifth choice and that "he was running the biggest division at the time with the information windows and everything." (Mackie Depo. at 52). As for the decision to rehire Gantz as a division head, Mackie stated that "John is one of the best. . . . He wasn't above average, he was excellent. . . . He just did his job really good, better than anybody else." (Mackie Depo. at 53).

According to Mackie, Anderson "wasn't the most competent one of the ones I had worked with. . . . Well, he was never in the largest divisions in the race track, and wasn't one of the faster ones to balance on a daily basis." (Mackie Depo. at 43). With respect to Carratt, Anderson stated that "he wasn't one of the best ones, never was in one of the larger divisions. He was always in a slower division, and I'm not positive, but I think that floor that he was at never had cashiers either." (Mackie Depo. at 46). Mackie described Corcell's quality of work as "less than average." He also indicated that in his opinion, Corcell "wasn't keeping up with what he should have kept up with, didn't balance the first time out many times, we would have to look for discrepancies, wasn't one of the best." (Mackie Depo. at 47). Mackie also characterized Poer's work quality as "less than average." (Mackie Depo. at 49). He stated that Poer was slow at counting money and that he did less work than the average person. (Mackie Depo. at 49). The

division heads who were rehired for the 1996-1997 season were, according to Mackie, Mahoney, and Gantz, better qualified to handle the responsibilities associated with the busiest divisions. (Mackie Depo. at 50-53; Mahony Depo. at 39; Gantz Depo. at 20).

When Mahony informed the claimants that they would not be rehired as division heads for the 1996-1997 season, he also offered each of them the teller/mini-dealer position if they attended training and passed the requisite test. (Mahony Affidavit at ¶19; Poer Depo. at 36; Anderson Depo. at 43; Corcell Depo. at 52; Gantz Depo. at 14). Anderson declined on the spot when he was offered the teller/mini-dealer position. (Anderson Depo. at 43-44, 47, 49; Mahony Affidavit at ¶ 20). Carratt was offered the teller/mini-dealer position and was given time to think it over, but he never called back about the offer. (Carratt Depo. at 42-44; Mahony Affidavit at ¶ 20). Poer attended the first day of the requisite training to become a teller/mini-dealer but then never returned. (Poer Depo. at 39, 68; Mahony Affidavit at ¶ 20. Corcell underwent the requisite teller/mini-dealer training, passed the test, and worked one day as a teller/mini-dealer before quitting. (Corcell Depo. at 69-71; Mahony Affidavit at ¶ 20).

In mid to late June, approximately one month after the 1996-1997 Calder racing season began, Mackie, previously Calder's head cashier, accepted the mutuels manager position at Hialeah racetrack. (Mahony Affidavit at ¶ 21; Mahony Depo. at 52; Mackie Depo. at 35). Mahony then promoted Gantz to the head cashier position at Calder. (Mahony Affidavit at ¶ 21; Mahony Depo. at 52; Gantz Depo. at 5). At that point, Gantz's division head position became open, and Ray Loretto, who had been employed at Calder for eleven years, was hired to fill the vacant division head position for Calder's 1996-1997 season. (Mahony Affidavit at ¶ 21; Mahony Depo. at 53-54; Mackie Depo. at 36). Mahony, Mackie, and Gantz made the decision

regarding Loretto because they determined he was the most qualified to fill the position and the individual most capable of handling the biggest division.[3] (Corcell Depo. at 69; Mahony Depo. at 53-54; Mackie Depo. at 36). Corcell stated that Mahony told him that Loretto was selected to replace Gantz because "[w]e feel we picked the best five. . . . Well, we didn't think you could handle 56 windows." (Corcell Depo. at 69). Gantz recommended Loretto to Mahony because he felt that Loretto had a high skill level and substantial potential. (Mahony Depo. at 55). Mackie indicated that Loretto "was a good money room man. He was learning, he was responsible, he was conscientious, really would get upset if he was out of balance, which made him balance even more, he did a good job for us at Gulfstream and we thought he could handle that job." (Mackie Depo. at 55-56).

LEGAL STANDARD

The procedure for disposition of a summary judgment motion is well established. Summary judgment is authorized only when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

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[3]The Defendant claims that at the time Loretto was selected to become a division head in mid to late June 1996, each of the claimants either had refused to come to work in the positions offered for the 1996-1997 racing season or had assumed the position and quit. In any event, according to the Defendant, none of the claimants was employed by Calder at the time the division head position became available in mid to late June. (Mahony Affidavit at ¶ 21; Gantz Depo. at 22, 24-25). The Plaintiff, however, contends that Loretto became a division head no later than June 1, 1996, and that Corcell was still employed by Calder at that point and thus a candidate for the available division head position. (Corcell Depo. at 58). Corcell testified that on June 2, 1996, after seeing Loretto in the division room, he went to Mahony's office to find out why Loretto was there instead of him. According to Corcell, on June 2, 1996, Mahony explained to him "we feel that we picked the five best. . . . Well, we didn't think you could handle 56 windows." (Corcell Depo. at 69).

matter of law.

Fed. R. Civ. P. 56. The party moving for summary judgment has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In applying this standard, the *Adickes* Court explained that when assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. All reasonable doubts about the facts should be resolved in favor of the non-movant. *Id.*

The party opposing the motion may not simply rest upon mere allegations or denial of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the non-moving party must make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion

with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

LEGAL ANALYSIS

It is unlawful under the ADEA for an employer to "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(1). The Court uses a three-step burden-shifting framework in ADEA employment discrimination cases. *See Schoenfeld v. Babbit*, 1999 WL 111785 (11th Cir. 1999); *Maddow v. Proctor & Gamble Co., Inc.*, 107 F.3d 846 (11th Cir. 1997); *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995). Under this analysis, as under Title VII, the initial burden is on the plaintiff to establish a *prima facie* case of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993); *Texas v. Burdine*, 450 U.S. 248 (1981); *Schoenfeld*, 1999 WL 111785 at *8. If the plaintiff establishes a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. *St. Mary's*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254; *Schoenfeld*, 1999 WL 111785 at *8. Assuming the defendant meets its burden, the plaintiff then has an opportunity to rebut the defendant's reasons by showing that they are pretextual. *St Mary's*, 509 U.S. at 507; *Burdine*. 450 U.S. at 254; *Schoenfeld*, 1999 WL 111785 at *8; *Jameson*

v. Arrow Co., 75 F.3d 1528 (11th Cir. 1996). The plaintiff, in establishing pretext, may not rely on mere conclusory allegations and assertions, but instead must present "concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext." *Earley v. Champion International Co.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

In an employment discrimination such as this one, a plaintiff must produce sufficient evidence from which a court can infer that the defendant-employer based its employment decision on an illegal action. *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997) (*citing Alphin v. Sears Roebuck & Co.*, 940 F.2d 1497, 1500 (11th Cir. 1991). The plaintiff may establish a *prima facie* case of age discrimination by using any of the following three types of evidence: (1) direct evidence; (2) circumstantial evidence; or (3) statistical evidence. *See Zaben v. Air Prods. & Chemicals*, 129 F.3d 1453 (11th Cir. 1997); *Corbin v. Southland International Trucks*, 25 F.3d 1545, 1548 (11th Cir. 1994). In this case, the Plaintiff bases its *prima facie* case on direct evidence and circumstantial evidence.

A. Direct Evidence

The Plaintiff first argues that there is direct evidence that the Defendant discriminated against the claimants on the basis of age. In direct evidence cases, the plaintiff must provide evidence that discriminatory statements were made by a decision maker or an individual involved in the particular hiring decision and that such statements were made in conjunction with the hiring decision. *See Trotter v. Board of Trustees of the University of Alabama*, 91 F.3d 1449, 1453-54 (11th Cir. 1996). "Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact . . . without inference or presumption. *Schoenfeld v. Babbitt*, 1999 WL 111785 (11th Cir. 1999); *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th

Cir. 1989). The Eleventh Circuit has held that "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age . . . constitute direct evidence of discrimination. *Schoenfeld*, 1999 WL 111785 at *7; *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1558 n.13 (11th Cir.1988) (indicating that a memorandum stating "Fire [the plaintiff]- he is too old" is an example of direct evidence); *Earley*, 907 F.2d at 1081.

In this case, the Plaintiff points to the depositions of Corcell and Carratt as providing evidence that Gantz and Mahony[4] made comments to them regarding the fact that they collected Social Security benefits and should retire. (Plaintiff's Response to Motion for Summary Judgment at 9).[5] As the Defendant points out, however, the evidence does not reflect when the

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[4]It is undisputed that Mahony was a decision maker with respect to determining whom to hire for the 1996-1997 season. Moreover, the record contains evidence that Gantz was involved in the hiring decisions. *See Trotter*, 91 F.3d at 1453-54 ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision."). As such, for purposes of determining whether this case involves direct evidence of discrimination, the Court will assume that both Gantz and Mahony were involved in the hiring process.

[5]Corcell testified in his deposition:

"In the money room, John Gantz, Barrett, some of the others would make comments about, 'Why don't you give up your job? Retire. You're collecting Social Security. You don't need the money. We, the younger guys, need the money.'" (Corcell Depo. at 89-90).

Carratt testified in his deposition:

"Mr. Gantz and Mr. Loretta, Mr. Tom Barrett, Betty Comegys, nice people, but they said, you know, why don't we give them a break, retire and let them take our jobs." (Carratt Depo. at 85-87).

Carratt also testified:

"Well, the word was around in the money room and got back to Mr. Mahony that I was getting Social Security, which was no secret. After 65, you qualify and several remarks were made that you're on Social Security, why don't you let a younger fellow come in and take your job?"

[Q] "Were these remarks made during the meeting with Mr. Mahony?"

[A] "The only thing, that I was drawing Social Security. He didn't mention to me about letting younger people. That was all done in the main money room with all these young people

comments were made or who specifically made each comment, let alone that the comments were made in connection with the subject employment decisions.

Specifically, Carratt testified only that Mahony had commented at some unidentified time about the fact that Carratt was drawing Social Security benefits. (Carratt Depo. at 85). In fact, Carratt testified that Mahony did not state that the employees over 65 ought to let younger people take the jobs. (Carratt Depo. at 85). As for comments attributed to Gantz, the record is devoid of any evidence indicating whether the comments were made when Gantz was a division head or later when he became a decision maker.[6] There is simply no evidence in the record linking the Social Security comments to the challenged hiring decisions. *See Trotter*, 91 F.3d at 1453-54 (plaintiff must show remarks played a part in the particular hiring decision) (*citing Price Waterhouse v. Hopkins*, 490 U.S. 228 (1991) (plurality opinion)). In any event, assuming the comments were made by decision makers in connection with employment decisions, none of the comments is the type of "blatant remark" from which discrimination can be found "without

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that are still working there now. They always said, 'Why don't you fellows, you old fellows drawing Social Security, why don't you retire and let us young people take your job?'" (Carratt Depo. at 85).

[6]Gantz denies making any comments relating to the claimants' collecting Social Security. (Gantz Depo. at 32).

[Q] "With these four individuals that we've been discussing Anderson, Corcell, Carratt and Poer, did you ever discuss with any of them their retirement?"

[A] "No."

[Q] "Did you ever discuss with any of them their eligibility to collect their full social security benefits?"

[A] "No."

[Q] "Did you ever hear anyone discussing that with them?"

[A] "You hear the talk, but I don't pay much attention to it. I'm not in that age bracket yet, but I'm getting close."

inference or presumption." *Schoenfeld v. Babbitt*, 1999 WL 111785 at *8; *Carter*, 870 F.2d at 581-82. The comments, at most, are merely circumstantial evidence leaving the trier of fact to infer discrimination. *See Schoenfeld*, 1999 WL 111785 at *8; *Burrell v. Board of Trustees of Ga. Military College*, 125 F.3d 1390, 1393 (11th Cir. 1997). Accordingly, the record does not contain direct evidence of age discrimination.

B. Circumstantial Evidence

1. *Prima Facie Case*

In order to establish a *prima facie* case of age discrimination under the ADEA on the basis of circumstantial evidence, the plaintiff must demonstrate that: (1) he was a member of the protected group of persons between the ages of forty and seventy; (2) he applied and was qualified for a position for which the defendant was accepting applications; (3) despite his qualifications, he was not hired; and (4) a substantially younger person filled the position that he sought. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998); *see also Schoenfeld*, 1999 WL 111785 at *9.[7]

The Defendant does not dispute that the claimants are all members of a protected class, that the claimants were qualified to perform the functions of a division head or that the claimants

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[7]The Defendant argues that this case should also be analyzed under the Reduction in Work Force ("RIF") *prima facie* model. The Court finds that the traditional failure to hire *prima facie* case is more appropriate based on the circumstances presented in this case. The evidence is undisputed that age was not a consideration in determining which money rooms to close. The record also reflects that the claimants applied for the 1996-1997 season but were not rehired as division heads. Nonetheless, even under the RIF *prima facie* case, the outcome would be the same because the Plaintiff has failed to present evidence that the Defendant's proffered reasons for its hiring decisions were pretextual. Therefore, the Court finds that as a matter of law the Defendant is entitled to summary judgment under either *prima facie* standard.

were not rehired as division heads for the 1996-1997 Calder racing season. The Defendant disuptes that the evidence shows that the division head positions were filled by individuals substantially younger than the claimants. However, the record reflects that the division head positions were filled by individuals substantially younger than the claimants.[8] *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (an ADEA plaintiff must show that he was replaced by someone "substantially younger," not necessarily by someone under age 40); *Carter*, 870 F.2d at 583. Based on the undisputed evidence, the Court finds as a matter of law that the Plaintiff has met its burden with respect to presenting a *prima facie* case of age discrimination with respect to each claimant.

2. Legitimate, Non-discriminatory Reason

Once a plaintiff meets his or her burden of establishing a *prima facie* case, an inference of discrimination arises and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its hiring decisions. *Burdine*, 450 U.S. at 253; *Schoenfeld*, 1999 WL 111785 at *10; *Turlington*, 135 F.3d at 310. In this case, the Defendant, in providing a legitimate, non-discriminatory basis for not rehiring the claimants as division heads, states that the claimants were not as qualified as the individuals who were selected as division heads for the 1996-1997 season. Mahony, Vice President of Mutuels, with input from Gantz and Mackie, selected division heads on the basis of skill, qualifications, and seniority. (Mahony

[8]At the time the employment decisions were made for the 1996-1997 season, Barrett was 54, Comegys was 61, Doolen was 56, Levy was 54, Gantz was 57, and Loretto was 44. (Plaintiff's Exhibit 5). The claimants were 67, 68, 70, and 74 when Mahony decided not to rehire them as division heads.

Affidavit at ¶ 5). Mahony, Gantz, and Mackie met and decided who, based on subjective and objective criteria, the "best five" division heads were. (Mackie Depo. at 24-25).

In making the decision of whom to rehire, Mahony, Mackie, and Gantz considered what the job duties would be in the money rooms that would remain open, the volume of business in each of those rooms, which division heads consistently balanced the money better, who performed best as division head, and which division heads displayed the ability to handle more windows. (Mahony Depo. at 39; Mackie Depo. at 25-26; Gantz Depo. at 20). Because the divisions to remain open were the rooms with the largest number of windows, the highest volume of business, and the largest number of clerks, the decision had to be made as to which individuals were best equipped to handle the busy rooms. (Mackie Depo. at 61-62; Gantz Depo. at 29). Moreover, in deciding whom to rehire, Mahony also determined that "those people that were in place in those existing money rooms that we left open, certainly . . . they were best qualified to continue operating those rooms." (Mahony Depo. at 39). Gantz testified "[w]e turned around, we knew which divisions were going to be closed. . . . the consensus of opinion was leave the people [in the divisions they had previously worked]." (Gantz Depo. at 29).[9] After discussing the skill, qualification, and seniority of each of the applicants, Mahony decided to rehire Gantz, Comegys, Levy, and Barrett. (Mahony Affidavit at ¶ 14; Mahony Depo. at 36).

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[9]It should also be noted that typically the division heads would return to the same division year after year. Comegys testified "we always just go back to the same one. We don't rotate divisions, we work at the same one all of the time." (Comegys Depo. at 29).

Gantz's deposition also contains evidence that the standard procedure at Calder was to rehire the division heads into the same division in which they previously served the year before.

[Q] "So it would be fair to say that you assume you will be hired into your previous position for each new season unless told otherwise?"

[A] "Correct." (Gantz Depo. at 12).

Based on the undisputed evidence, the Court finds as a matter of law that the Defendant offered legitimate, non-discriminatory reasons for its decision not to rehire Anderson, Poer, and Carratt as division heads. *See Nix v. WLCY Radio/RAHALL Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (holding that an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

With respect to Corcell, Mahony decided to replace him with Doolen when Doolen gave up his position as head cashier due to medical problems. The Defendant states that Doolen was selected to replace Corcell because Corcell was the last individual to become a full-time division head "and just by rights, the head cashier is going to step down and take a division and the last division head steps down and goes back to running the window. (Mahony Affidavit at ¶ 18; Gantz Depo. at 29-30). Thus, the Defendant has articulated a legitimate, nondiscriminatory reason for replacing Corcell. *See Nix*, 738 F.2d at 1187.

Moreover, when Gantz's division head position later opened due to Gantz's promotion to head cashier, Loretto was chosen instead of Corcell. Mahony made the decision regarding Loretto after determining he was the most qualified to fill the position and the individual most capable of handling the biggest division. (Corcell Depo. at 69; Mahony Depo. at 53-54; Mackie Depo. at 36). Corcell stated that Mahony told him that Loretto was selected to replace Gantz because "[w]e feel we picked the best five. . . . Well, we didn't think you could handle 56 windows." (Corcell Depo. at 69). Gantz recommended Loretto to Mahony because he felt that Loretto had a high skill level and substantial potential. (Mahony Depo. at 55). Mackie indicated that Loretto "was a good money room man. He was learning, he was responsible, he was

conscientious, really would get upset if he was out of balance, which made him balance even more, he did a good job for us at Gulfstream and we thought he could handle that job." (Mackie Depo. at 55-56). The Defendant has stated a legitimate, nondiscriminatory reason for selecting Loretto rather than Corcell. *See Nix*, 738 F.2d at 1187.

3. Pretext

Once a defendant articulates a legitimate, non-discriminatory reason for its actions, the initial inference of discrimination "drops" from the case. *See St. Mary's*, 509 U.S. at 510-11; *Schoenfeld*, 1999 WL 111785 at *11. The burden then shifts back to the plaintiff to show that the proffered reason was a pretext for intentional discrimination and that the defendant intentionally discriminated against him. *Burdine*, 450 U.S. at 256; *Schoenfeld*, 1999 WL 111785 at *11. The Eleventh Circuit has held that a plaintiff can show pretext by "presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of the employer's legitimate, nondiscriminatory reasons." *Schoenfeld,* 1999 WL 111785 at *11 (*quoting Combs*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1531 (11th Cir. 1997) (once plaintiff has established *prima facie* case and has presented sufficient evidence to allow fact finder to disbelieve employer's proffered explanation for its action, "that alone is enough to preclude entry of judgment as a matter of law"); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 965 (11th Cir. 1997).

The Plaintiff has attempted to show pretext by arguing that the claimants were more experienced, better qualified, and more skilled than the individuals who were hired as division

heads.[10] The Plaintiff points to the fact that some of the claimants had received "Employee of the Week" awards, had never been disciplined, and had even trained some of the individuals selected to be division heads in the 1996-1997 season. However, the determination of an individual's skill and qualifications to perform the division head job undisputably included subjective and objective judgments by Calder's management. Therefore, even though the claimants might have been qualified to serve as division heads, Mahoney, Mackie, and Gantz felt that Comegys, Levy, Barrett, Gantz, and Loretto were better qualified than the claimants to handle the money rooms in the 1996-1997 season. The Court will not sit as a super-personnel department, second-guessing the Defendant's management decisions. *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466 (11th Cir. 1991) (Federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere.) (citations omitted). The Plaintiff has not provided evidence showing that the Defendant's proffered subjective and objective criteria underlying its hiring decisions were false or not worthy of belief. *Combs*, 106 F.3d at 1531. Accordingly, the Plaintiff has failed to show that the

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[10]With respect to the decision to hire Loretto instead of Corcell for the division head position left vacant by Gantz, the Plaintiff in addition to arguing that Corcell was more qualified than Loretto also disputes the Defendant's rationale that Corcell was not employed by Calder at the time the position became available. The evidence as to when the position opened and when Loretto was hired as division head is in dispute. *See* note 3 *supra*. Nonetheless, the Plaintiff has failed to show that at least one of the Defendant's articulated reasons for hiring Loretto rather than Corcell was pretextual, and therefore the Plaintiff cannot survive summary judgment. *Combs*, 106 F.3d at 1543 ("A plaintiff in a discrimination case based on circumstantial evidence can avoid judgment as a matter of law . . . by producing evidence sufficient to discredit in the mind of a reasonable juror *all* of the defendant's proffered nondiscriminatory reasons for its actions.") (italics added).

reasons articulated by the Defendant were pretextual, and therefore the Plaintiff cannot withstand the Defendant's Motion for Summary Judgment as a matter of law.[11]

As for Mahony's decision to replace Corcell with Doolen, seniority was the sole reason articulated by the Defendant for replacing Corcell rather than any of the other division. In attempting to establish pretext, the Plaintiff presented evidence indicating that Barrett was less senior than Corcell.[12] However, the deposition of Gantz clarifies what the Defendant means by "seniority." For the purposes of determining which division head Doolen should replace, "seniority" refers to the length of time the individual has served as a division head at Calder rather than the date when each individual was initially hired by Calder (which are the dates listed on the exhibit upon which the Plaintiff relies). (Gantz Depo. at 29-30). Gantz indicated that Doolen replaced Corcell because "Corcell was the last person that became a division head." (Gantz Depo. at 29-30). As such, the Plaintiff has failed to establish that the Defendant's

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[11]The Plaintiff also argues that the comments made by Mahony and Gantz quoted in footnote 5, *supra*, are circumstantial evidence of discriminatory intent and evidence of pretext because the comments reflect the decision makers' biased attitudes toward the claimants. As discussed above, however, the record is devoid of any evidence indicating when and in what context the statements were made. Moreover, it is also unclear who specifically made each comment. For instance, in Carratt's deposition, he testifies that "They always said, 'Why don't you fellows, you old fellows drawing Social Security . . . ." (Carratt Depo. at 85). However, Carratt fails to identify who "they" refers to. As such, the comments do not support an inference of discrimination. *See Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318 (1998); *Carter*, 870 F.2d 578; *Martin v. Ryder Distribution Resources, Inc.*, 811 F. Supp. 658, 664 (S.D. Fla. 1992).

Finally, the Court would note that the comment attributed to Mahony that Carratt "is drawing Social Secuirty" was merely an accurate, neutral statement of fact. *Carter*, 870 F.2d at 582.

[12]The Plaintiff also points to the fact that Loretto had less seniority than Corcell. However, Loretto was not a division head at the time that Doolen replaced Corcell, and therefore his seniority is irrelevant because Doolen could not possibly replace him.

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articulated reason for replacing Corcell was pretextual, and therefore the Defendant's Motion for Summary Judgment is granted as to Corcell.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment is GRANTED. It is further

ORDERED AND ADJUDGED that the case is CLOSED for administrative purposes and all pending motions not otherwise ruled on are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 31 day of March, 1999.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Counsel of Record