

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 93-7593  
Summary Calendar

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BARBARA POWELL,

Plaintiff-Appellant,

VERSUS

MISSISSIPPI STATE DEPARTMENT OF HEALTH,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Mississippi  
(CA-3:91-48(w)(N))

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(April 27, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant, Barbara S. Powell, challenges the district court's judgment which it entered on a verdict rendered against her in her age discrimination and retaliation action. Her sole argument on appeal is that the Mississippi Department of Health failed to produce sufficient evidence to warrant jury consideration that its failure to promote Ms. Powell was for a reason other than her age. She argues that the court improperly denied her motion for a directed verdict based on defendant's failure to satisfy its burden

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<sup>1</sup>Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of production. Our review of the record persuades us that the district court properly denied Ms. Powell's motion for directed verdict. We therefore affirm.

Ms. Powell, who was born in 1936, began working for the Mississippi Department of Health as a tuberculosis control nurse in April 1976. She was initially classified as a Nurse III, but she was interested in being promoted to a position classified as Nurse IV and made this desire known to department officials.

Ms. Powell filed this suit after two Nurse IV positions were filled in 1987 and 1988 by Frances Fair and Beverly Eby, both of whom were much younger than Ms. Powell. Although Ms. Powell had inquired about the positions and indicated an interest in them, she was not given an opportunity to apply for either position. Instead, the positions were filled through a process called noncompetitive promotional transfer. Under this procedure, vacant positions are filled without advertising or other notice of the department's intention to fill the positions.

After Ms. Powell presented her prima facie case, the Mississippi Department of Health offered evidence to show non-discriminatory reasons for the action it took. Dr. Thompson, chief of the Bureau of Preventive Health Services and a state epidemiologist, was responsible for filling the positions. He testified that he was familiar with both Ms. Fair and Ms. Eby's work as epidemiology nurses at the district level. He testified that Ms. Fair and Ms. Eby were more highly qualified for the positions they attained because as epidemiology nurses, they worked

with a broader range of communicable diseases than Ms. Powell who only worked with tuberculosis. Dr. Thompson also testified that he did not know plaintiff's age or the ages of either Ms. Fair or Ms. Eby until after plaintiff filed her age discrimination complaint.

The ultimate burden of persuasion remains with the plaintiff to establish that the adverse personnel action was for a discriminatory purpose. **St. Mary's Honor Center v. Hicks**, 125 L.Ed.2d 407, 416 (1993). Once the defendant offers a non-discriminatory reason for its actions, the plaintiff must show those reasons are pretextual and that age discrimination was the real reason. **Id.** at 417. The defendants here did provide a non-discriminatory reason for hiring Ms. Fair and Ms. Eby rather than Ms. Powell, namely that they were more qualified for the position. Therefore, the district court did not err in denying Ms. Powell's motion for directed verdict. Accordingly, its judgment is

AFFIRMED.