IN THE COURT OF APPEALS OF IOWA

No. 7-052 / 05-1994
Filed May 9, 2007

KIMBERLY S. JASPER,
Plaintiff-Appellant,

vs.

H. NIZAM, INC., d/b/a KID UNIVERSITY and MOHSIN HUSSAIN, Individually and in his Corporate Capacity,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Kimberly S. Jasper appeals the trial court's grant of the defendants' motion for directed verdict and entry of judgment in favor of the defendants in wrongful termination in violation of public policy claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Andrew Legrant and Mark D. Sherinian, of Sherinian & Walker, West Des Moines, for appellant.

Gordon R. Fischer, of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Zimmer and Baker, JJ.

BAKER, J.

We filed our opinion in this case on March 28, 2007, but subsequently granted defendant Mohsin Hussain's petition for rehearing. Our March 28, 2007, decision is therefore vacated, and this opinion replaces it. Kim Jasper appeals the trial court's grant of the defendants' motion for directed verdict and entry of judgment in favor of the defendants. A conditional new trial is awarded and the case remanded to the district court. Jasper may avoid a new trial by agreeing to reduce the award for emotional distress from $100,000 to $20,000. If a new trial is held, the jury should be instructed on punitive damages, and evidence that the defendant had operated another daycare center that was cited for violating children/teacher ratio regulations should be admitted.

I. Background Facts and Proceedings

Kim Jasper was employed as the director of Kid University, a children's daycare center located in Johnston, Iowa, from August 10 through December 1, 2003. Her duties as director included the supervision of staff, ensuring the safety of the children, maintaining good relationships with parents, and ensuring the center was in compliance with applicable laws and regulations. H. Nizam is the corporate entity that operated Kid University. Mohsin Hussain is the President, and his wife, Zakia Hussain, is the Vice President of the corporation.

Prior to Jasper's employment, the center had been investigated by the Iowa Department of Human Services (DHS) in response to a parent complaint concerning the children/teacher ratio. The investigation uncovered a number of deficiencies at the center. As a result of the investigation, DHS checked on the center regularly, including frequent announced and unannounced visits.

Jasper and the Hussains had regular conversations about the children/teacher ratio and staff expenses. Initially, Mohsin Hussain told Jasper to do what she needed to do to comply with the State's staffing ratio requirements. Within a few weeks of her hire, however, Mohsin Hussain told Jasper they could not afford to run the center with payroll expenses so high. During November 2003, Jasper and Krysti Christensen, the center's Assistant Director, met with the Hussains on three occasions to discuss staffing and expenses.

At trial, Jasper testified that she explained to them that she could not cut staff hours any more without violating the state regulations, and she was not willing to do that. Mohsin Hussain testified that he never told Jasper to cut staff, and her termination had nothing to do with the children/teacher ratios.

Jasper was involuntarily terminated from Kid University on December 1, 2003. At the time of her termination, she was given a letter, signed by Mohsin and Zakia Hussain, that listed a number of reasons for her termination, including insubordination, failure to notify the Hussains when she would leave the building, failure to organize and staff a booth at the Johnston Farmers Market, "a different agenda," failure to keep the Hussains informed of events at the center, problems with organizing and maintaining children/teacher ratios, improper use of the telephone, and "[t]oo many staff hours considering the enrollment." Jasper was given the termination letter by Dan Scholtes, who had been hired by Hussain to replace Jasper.[1] After Jasper's termination, a parent meeting was held to

[1] Jasper testified that, upon giving her the termination letter, Scholtes told her she needed to leave the building immediately and escorted her toward the door. When Jasper protested because she wanted to retrieve her personal belongings and she needed to get her children who attended the center, Scholtes threatened to call the

discuss the change in the director position and other parent concerns. When questioned about Jasper's termination, Hussain insinuated that some money had been missing.

After the termination, Jasper did not obtain full-time employment until April 2004. Her family had been living in a house owned by the Hussains, which they were required to vacate by February 1, 2004.[2] During this time, Jasper suffered frequent crying spells and had difficulty sleeping. At one point, she was taken to the hospital due to an anxiety attack and was prescribed anti-depressant and anti-anxiety medication. She was socially withdrawn, distraught, and short with her children. Jasper gained considerable weight during this time.

On December 9, 2003, Jasper filed a petition against the defendants for wrongful discharge in violation of public policy, alleging that she was terminated for refusing to understaff the center. In January 2004, the defendants filed a pre-answer motion to dismiss, which was denied. In July 2005, defendants filed a motion for summary judgment, which was denied. The matter proceeded to jury trial on September 12, 2005. Prior to submission of the case to the jury, the defendants moved for directed verdict. The trial judge reserved ruling on the motion and submitted the case to the jury**.**

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police. When she tried to get her children, Scholtes stepped in front of her and forced her out of the building. Eventually some other teachers brought her children out to her. At trial, Scholtes denied escorting Jasper out of the building. He admitted that he did not allow her to retrieve anything from the office. Scholtes testified that, after Jasper left the building, she was talking to parents in the parking lot. He therefore called the sheriff's department, and an officer came to the center.

[2] A few days after her termination, Jasper was served a three-day notice to quit. Ultimately, the Jaspers were not required to leave the premises until February 1, 2004.

On September 16, 2005, the jury returned a verdict in favor of Jasper, awarding her $26,915 for lost past earnings, $100,000 for past pain and suffering, and $39,507.25 for expenses and additional services.

On October 28, 2005, the defendants filed a post-trial motion denominated a "motion for directed verdict." On December 2, 2005, the trial judge granted the defendants' motion for directed verdict and entered judgment in favor of the defendants. The trial judge held that Jasper failed to show the existence of a clearly recognized and well-defined public policy supporting her cause of action and failed to meet her burden with regard to causation. Jasper appeals.

II. Standard of Review

At the outset, the court notes that this appeal is from the grant of a directed verdict in favor of the defendants. Although denominated a "directed verdict," the court finds that review should be on the basis of a judgment notwithstanding verdict as a verdict had been returned. *See* Iowa R. Civ. P. 1.1003(2) ("If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the court may then . . . enter judgment *as though it had directed a verdict . . .*" (emphasis added)). We review the trial court's ruling on a motion for directed verdict for correction of errors at law. *Summy v. City of Des Moines*, 708 N.W.2d 333, 343-44 (Iowa 2006) (citing *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005)). We also review the trial court's court ruling on a motion for judgment notwithstanding verdict for correction of errors at law. *Gibson v. ITT Hartford Ins. Co*., 621 N.W.2d 388, 391 (Iowa 2001). We view the evidence in the light most favorable to the party opposing the motion. Iowa R. App. P.

6.14(6)(*b*). We take into consideration "every legitimate inference that may fairly and reasonably be made." *Midwest Home Distrib., Inc. v. Domco Indus. Ltd.,* 585 N.W.2d 735, 738 (Iowa 1998) (citations omitted). "[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." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105, 122 (2000) (citations omitted). It is not the court's task to determine how we would have ruled on the evidence presented. *Tudor v. Charleston Area Med. Ctr., Inc*., 506 S.E.2d 554, 565 (W.Va. 1997). Our "task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Id.*

III. Wrongful Discharge

Discharge of an at-will employee is unlawful when it violates public policy. *Lloyd v. Drake Univ*., 686 N.W.2d 225, 228 (Iowa 2004). To succeed on a tort claim for wrongful discharge in violation of public policy, a plaintiff must prove:

> (1) The existence of a clearly defined public policy that protects an activity.
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> (2) This policy would be undermined by a discharge from employment.
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> (3) The challenged discharge was the result of participating in the protected activity.
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> (4) There was lack of other justification for the termination.

Id. (citing *Davis v. Horton,* 661 N.W.2d 533, 535 (Iowa 2003)).

The Iowa Supreme Court has recognized that "[s]ome courts are beginning to articulate" elements one through four as (1) the clarity element, (2)

the jeopardy element, (3) the causation element, and (4) the absence of justification element. *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275, 282, fn. 2 (Iowa 2000) (citing *Gardner v. Loomis Armoured, Inc*., 913 P.2d 377, 382 (Wash. 1996); *Collins v. Rizkana*, 652 N.E.2d 653, 657 (Ohio 1995)).

A. Clarity of Public Policy

To determine whether a clearly defined public policy exists, the Iowa Supreme Court has "generally looked only to our statutes and state constitution." *Lloyd*, 686 N.W.2d at 229 (citation omitted). The court has also recognized that

> other states have looked to other sources, such as judicial decisions and administrative rules. Regardless of the source, however, "we proceed cautiously *and will only extend such recognition to those policies that are well recognized and clearly defined."* Only such policies are weighty enough "to overcome the employer's interest in operating its business in the manner it sees fit," which we have long and vigorously protected.

Id. (citations omitted).

"Over the years, [the Iowa Supreme Court] ha[s] recognized a number of clearly defined public policies." *Id.* (citing *Fitzgerald*, 613 N.W.2d. at 285-89 (public policy in favor of providing truthful testimony)); *see also Teachout v. Forest City Cmty. Sch. Dist*., 584 N.W.2d 296, 300-01 (Iowa 1998) (public policy in favor of reporting suspected child abuse); *Tullis v. Merrill*, 584 N.W.2d 236, 239 (Iowa 1998) (public policy in favor of permitting employees to make demand for wages); *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (public policy in favor of permitting employees to seek partial unemployment benefits); *Springer v. Weeks & Leo Co*., 429 N.W.2d 558, 560-61 (Iowa 1988) (public policy in favor of permitting employees to seek workers' compensation for work-related injuries).

"However, when [the Iowa Appellate Courts] have not previously identified a particular public policy to support an action, the employee must first identify a clear public policy which would be adversely impacted if dismissal resulted from the conduct engaged in by the employee." *Fitzgerald*, 613 N.W.2d at 282 (footnote omitted) (citing *Yockey v. State*, 540 N.W.2d 418, 420-21 (Iowa 1995) (the public policy in favor of permitting employees to seek workers' compensation benefits not jeopardized by termination from employment for missing work following injury); *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994) (no public policy in favor of presumption of innocence in work place to give rise to an action for wrongful discharge for conduct which resulted in criminal charges); *French v. Foods, Inc*, 495 N.W.2d 768, 771-72 (Iowa 1993) (presumption of innocence not an actual public policy)).

> To determine whether a public policy has been implicated, the trial court
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> > must decide as a matter of law whether a particular employee act is protected by public policy . . . . We have recognized an employee's cause of action if the discharge is in retaliation for performing an important and socially desirable act, exercising a statutory right or refusing to commit an unlawful act. These distinctions have been more clearly expressed as three categories of protected employee conduct: (1) exercising a statutory right or civil obligation; (2) refusing to engage in illegal activities; or (3) reporting criminal conduct to supervisors or outside agencies.

Butts v. Univ. of Osteopathic Med. & Health Scis., 561 N.W.2d 838, 841 (Iowa Ct. App. 1997) (quoting *Borschel v. City of Perry,* 512 N.W.2d 565, 567 (Iowa 1994); citing *Werner, The Common Law Employment at Will Doctrine: Current Exceptions for Iowa Employees,* 43 Drake L.Rev. 290, 314 (1994)).

This court turns to the issue of whether Jasper was discharged in violation of public policy. In support of her assertion that she was, in fact, discharged in

violation of public policy, Jasper first relies on Iowa Code chapter 237B as establishing the public policy applicable in these circumstances. *See* Iowa Code § 237B.1(3) (2003) ("The standards established by [DHS] shall be broad facility standards *for the protection of children's safety.*") (emphasis added). Iowa Administrative Code 441-109.8(237A) provides specific staff ratio requirements. When Chapter 237B and the Iowa Administrative Code are considered, particularly in conjunction with one another, it appears there is statutory support for a finding that there is a clear public policy that adequate staffing is required for the health and safety of the children.

The Iowa appellate courts do not appear to have had occasion to consider whether there is a clearly defined public policy in this particular situation.[3] There is, however, authority that the protection of children is a defined public policy. The Iowa Supreme Court has stated:

> Our legislature has enacted a statute for the reporting and investigation of suspected cases of child abuse. The general assembly has determined that [c]hildren in this state are in urgent need of protection from abuse . . . [W]e think the forceful language of the statute articulates a well-recognized and defined public policy of Iowa from which such protection can be implied.

Teachout, 584 N.W.2d at 300-01 (citations omitted).

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[3] Other jurisdictions have found the existence of public policy under similar circumstances. *See McQuary v. Bel Air Convalescent Home, Inc.*, 684 P.2d 21, 23 (Or. Ct. App. 1984) (holding protection of nursing home patients is an important public policy); *Tudor v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 554, 567 (W.Va. 1997) (holding a state requirement that a hospital unit be properly staffed to ensure adequate care for patients, "especially children . . . , who must depend upon others to protect their medical interests and needs," is a statement of substantial public policy).

Both Chapter 237B and the Iowa Administrative Code provide strong evidence that the need for adequate staffing at daycare centers is a well-recognized and defined public policy of Iowa. Further, it is a violation of public policy to terminate an employee for refusing to do an illegal act. *Jones v. Lake Park Care Ctr., Inc.,* 569 N.W.2d 369, 377 (Iowa 1997). The clearly defined public policy element is met.

B. Jeopardy

Having resolved the public policy issue, the Court turns to an examination of the second element, whether the policy would be undermined by a discharge from employment, also referred to as the "jeopardy" element.

> Once a clear public policy is identified, the employee must further show the dismissal for engaging in the conduct jeopardizes or undermines the public policy. Thus, this element requires the employee to show the conduct engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct . . . . Thus, when the conduct of the employee furthers public policy or the threat of dismissal discourages the conduct, public policy is implicated.

Fitzgerald, 613 N.W.2d at 283-84 (citations omitted).

The court finds that, if Jasper's dismissal was due to her refusal to cut staff below the minimum staffing requirements, such a dismissal does jeopardize and undermine the public policy. The jeopardy element is met.

C. Causation

With regard to whether the challenged discharge was the result of participating in the protected activity, also referred to as the "causation" element, "[t]he causation standard is high." *Id.* at 289. The court is required to determine if a reasonable fact finder would conclude Jasper's refusal to staff below state-

mandated levels "was the determinative factor in the decision to discharge" her. *Id.* (citing *Teachout,* 584 N.W.2d at 300).

While questions regarding the existence of a public policy and whether the policy is undermined by a discharge from employment are questions for the court to resolve, "the elements of causation and motive are factual in nature and generally more suitable for resolution by the finder of fact." *Id.* at 282. "[I]f there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute." *Id.* at 289.

In reviewing the issue of causation, the Iowa Supreme Court has stated:

> The employee's engagement in protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee. A factor is determinative if it is the reason that "tips the scales decisively one way or the other," even if it is not the predominant reason behind the employer's decision. Thus, we examine the evidence to determine whether a reasonable fact finder could conclude that [the protected activity] was the determinative factor in the [employer's] decision to fire her.

Teachout, 584 N.W.2d at 301-02 (quoting *Smith v. Smithway Motor Xpress, Inc.,* 464 N.W.2d 682, 686 (Iowa 1990) (citations omitted).

Where the evidence simply establishes that the employee's termination occurred after the employer learned the employee had engaged in a protected activity, such evidence alone is insufficient to establish causation. *Id.* at 302; *see also Phipps v. IASD Health Servs. Corp.,* 558 N.W.2d 198, 203 (Iowa 1997) (holding mere temporal relationship between the protected conduct and the discharge is not sufficient evidence of causation). However, evidence showing a causal connection in addition to the timing of the adverse employment action is sufficient evidence of causation. *See City of Hampton v. Iowa Civil Rights*

Comm'n, 554 N.W.2d 532, 536 (Iowa 1996); *Niblo* v. *Parr Mfg., Inc.*, 445 N.W.2d 351, 353 (Iowa 1989); *Springer,* 429 N.W.2d at 562.

Such a showing may be made by circumstantial evidence. *See e.g. Adams v. Green Mountain R.R. Co.,* 862 A.2d 233, 237 (Vt. 2004) ("'An employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.'") (quoting *Rosenberg v. Vt. State Colleges,* 852 A.2d 599, 602 (Vt. 2004)).

> Nevertheless, when a plaintiff relies on the timing of an adverse employment decision to show improper motive, the record must support an inference that the timing is suspect. There must be some evidence other than chronology that gives the factfinder reason to believe that the timing is an indication of improper motive.

Adams, 862 A.2d at 237 (citing *Teachout,* 584 N.W.2d at 302 (Iowa 1998) (holding the mere fact that adverse employment decision occurred after protected activity is not, standing alone, sufficient to support finding that decision was in retaliation for engaging in protected activity)).

Causation was disputed in this case, and the jury found in favor of Jasper. The trial court found that the evidence of causation was insufficient to meet her burden because there was no evidence that Hussain ever directly instructed Jasper to violate DHS staffing regulations and Jasper "did not present any credible evidence about the staff/child ratios at the center at the relevant times to prove staff reductions would have resulted in regulatory violations." The court noted that, while there was substantial evidence in the record to support the fact that Hussain was concerned about overstaffing, "[t]here is a difference, however, between a legitimate concern about the costs of overstaffing and desiring the center to be understaffed in violation of DHS regulations."

Jasper asserts that in setting aside the jury verdict, the trial court disregarded the direct and circumstantial evidence regarding causation. It is not surprising there was no direct instruction to specifically violate DHS staffing regulations – very seldom will there be such direct evidence of wrongful termination in violation of public policy cases. In *Niblo v. Parr Mfg. Inc.,* 445 N.W.2d 351, 353 (Iowa 1989), a terminated employee filed a wrongful termination claim, alleging the employer terminated her in violation of public policy because she planned to file a workers' compensation claim. The defendant employer asserted there was insufficient evidence that the employee was going to file a workers' compensation claim. *Id.* The employee had been fired after she told the company president she needed protective equipment and medical treatment. *Id.* The Iowa Supreme Court held that "[d]irect and circumstantial evidence are equally probative . . . . A jury could deduce from this evidence that the plaintiff was discharged because she was threatening to file a claim for these benefits." *Id.*

There was substantial evidence that the desire by the Hussains to have Jasper violate the regulations was the determinative factor in the decision to discharge. Evidence of causation presented at trial included the December 1, 2003 termination letter, which refers to Hussain's concerns with overstaffing[4] and testimony regarding November 2003 meetings between Jasper, Krysti

[4] The termination letter states Jasper was terminated for a number of issues, including, "Went to DHS office. Why? . . . [t]oo many staff hours considering the enrollment . . . organizing and maintaining ratio of teacher/kids was a problem."

Christensen, and the Hussains.[5] Jasper testified that when she and Christensen met with the Hussains in early November 2003, she explained to them that she could not cut staff hours without violating state regulations, and she was unwilling to do that. Jasper further testified that when she told the Hussains that the DHS representative visited frequently to check the ratio, Mrs. Hussain told her, "What Ann Williams doesn't know won't hurt her."[6]

Ann Williams, a DHS child care consultant, testified that prior to Jasper being hired, she had documented significant concerns with the center, and in February 2003, she had received and investigated a parent complaint regarding ratio issues at the center.[7] Williams testified that there were improvements made during Jasper's tenure, that she and Jasper had discussed Hussain's desire to cut back staff hours, and that Williams's conversations with Hussain regarding the state's requirements for staffing were "met with either reluctance or a lack of understanding."

Jessie Thompson, a former center employee, testified that the required ratio in the one-year-old room was one-to-four. After Jasper's termination, Thompson would often be alone with five to six babies, and she would have to leave the children alone in the room in order to use the restroom. The jury could

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[5] Christensen, the center's Assistant Director, testified that they met on several occasions to try to come up with ideas on how to cut staff. Christensen also testified that she and Jasper both told Hussain they could not staff below the DHS ratio standards, and that if they cut any further, they would violate the standards.

[6] Tammy Frommelt, Jasper's sister who previously worked as a private child care consultant for the center, testified that when they discussed the ratio issue, Mrs. Hussain told her, "It doesn't matter what the State doesn't know when they're not here."

[7] Williams testified that other concerns included the toys being inadequate, lack of cleanliness, inadequate food and paper supplies (i.e. paper towels and toilet paper), and an unlicensed driver transporting children.

infer from this that Hussain, having fired Jasper, was then able to have his wish of staffing the center in violation of DHS regulations.

The record does not contain evidence that the Hussains explicitly told Jasper to cut staff below the required ratio. Based upon the circumstantial evidence presented at trial, however, the jury could reasonably infer that Jasper's refusal to cut staff ratios was the determinative factor in Hussain's decision to terminate her employment. *See Teachout,* 584 N.W.2d at 301-02; *see also Reeves,* 530 U.S. at 147, 120 S. Ct. at 2108, 147 L. Ed. 2d at 119 ("it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation"); *Gibson v. ITT Hartford Ins. Co*, 621 N.W.2d 388, 391 (Iowa 2001) ("If reasonable minds could differ on an issue of fact, the issue is for the jury."). The causation element is met.

D. Absence of Justification

This case also presents an issue with regard to whether there was lack of other justification for the termination, i.e., whether the absence of justification element was met. "[A] plaintiff must not only satisfy the court on the public policy and jeopardy elements of the tort, but offer adequate evidence from which a lack of justification for termination can be inferred." *Fitzgerald*, 613 N.W.2d at 282.

The jury found in favor of Jasper on the justification element. Although they discussed the issues regarding staffing ratios and costs on numerous occasions, Hussain never provided Jasper with documentation regarding job performance issues, nor that her employment was in jeopardy. When asked at a parent meeting about Jasper being "let go," Hussain implied that some money

had been missing. At trial Jasper responded to each of the reasons for termination listed in the December 1, 2003 letter.

The combination of the lack of a previous warning about job performance issues, the additional justification to the parents that money had been missing, and Jasper's response to the other itemized reasons for termination, are sufficient to allow a reasonable jury to conclude there was a lack of other justification for the termination. *See Fitzgerald,* 613 N.W.2d at 289 (holding a dispute over the existence of other justifiable reasons for the termination is generally for the jury).

Jasper has met the clarity, jeopardy, causation, and absence of justification elements of her wrongful discharge claim. The need for adequate staffing at daycare centers is a well-recognized and defined public policy of Iowa. An employee's dismissal due to a refusal to cut staff below the minimum staffing requirements would jeopardize and undermine the public policy. Based upon the circumstantial evidence presented at trial, the jury could reasonably infer that Jasper's refusal to cut staff ratios was the determinative factor in Hussain's decision to terminate her employment. Finally, there was sufficient evidence to allow a reasonable jury to conclude there was a lack of other justification for the termination. The trial court erred in directing a verdict for defendants or in granting a judgment notwithstanding the verdict.

IV. Damages

The jury found that Hussain wrongfully discharged Jasper and awarded: $26,915 for lost past earnings, $100,000 for past pain and suffering, and $39,507.25 for expenses and additional services, totalling $166,422.25.

Because the trial court found Jasper failed to meet her burden of proof with regard to the public policy and causation elements of her claim, it set aside the jury award.

A. Pain and Suffering

The trial court found Jasper failed to meet her burden of proof with regard to the public policy and causation elements of her claim and therefore set aside the $100,000 the jury awarded for emotional distress. Anticipating the possibility of reversal on appeal, the trial court reduced the $100,000 to $20,000 "both because it appears to be the result of passion or some sort of prejudice and because it lacks evidentiary support." *See Estate of Pearson v. Interstate Power and Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005).

Motions challenging the amount of a verdict are reviewed for an abuse of discretion. *Fisher v. Davis,* 601 N.W.2d 54, 57 (Iowa 1999); *Kuta v. Newberg,* 600 N.W.2d 280, 284 (Iowa 1999). We also review remittitur rulings for an abuse of discretion. *Newberg,* 600 N.W.2d at 285.

The trial court noted that Hussain is of Indian origin, and English is not his first language. He was not a sympathetic witness, and the evidence showed he was "not the best manager and it would have been difficult to work for him. The manner in which he terminated [Jasper] was insensitive at best . . . ." The trial court found a

> strong likelihood that the passions of the jury were aroused against Mr. Hussain and that they were prejudiced against him because of his behavior. The large emotional distress award was likely the result of a desire to punish Mr. Hussain rather than a genuine effort to compensate [Jasper] for emotional distress.

The trial court found that there was not enough evidence in the record to support the jury's $100,000 award for emotional distress. Jasper presented some evidence of emotional distress, e.g., her testimony that she was upset and shaken, she cried a lot and had trouble sleeping, and her anxiety attack. Because the trial court found the $100,000 was an attempt to punish Hussain rather than to justly compensate Jasper, it reduced the award to $20,000 for emotional distress, an amount "appropriate based on the evidence in the record."

Jasper asserts that the trial court erred in reducing these damages because the determination of damages is traditionally a jury function, and the jury's award should be disturbed "only for the most compelling reasons." *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). A verdict should not be set aside or altered unless it is

> (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in evidential support.

Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 659 (Iowa 1969). The most important of the tests is support in the evidence. *Tullis*, 584 N.W.2d at 241. Where there is support in the evidence the others tests rarely arise, but if the verdict lacks support, they all may arise. *Id.*

While a verdict should not be set aside simply because the trial court would have reached a different conclusion, the trial court "always has inherent power to set aside a verdict which fails to do substantial justice between the parties." *Kautman v. Mar-Mac Cmty. Sch. Dist*., 255 N.W.2d 146, 147 (Iowa 1977) (citations omitted).

The testimony of Jasper and her husband was sufficient to support *an award* for emotional distress. *See Shepard v. Wapello County*, 303 F.Supp.2d 1004, 1021 (S.D.Iowa 2003) (holding the testimony of the plaintiff and family members sufficient evidence to support emotional distress damages). "The jury's discretion, however, is not boundless and is limited to a reasonable range supported by the evidence. If the verdict is substantially above that range, the conscience of the Court becomes involved." *Id.*

Jasper cites *Shepard* to support her contention that she submitted adequate evidence to justify the jury's award. In *Shepard,* the plaintiff's emotional distress also resulted from the single incident of being discharged from his job, and the jury awarded $250,000 for emotional distress damages. *Id.* The court found the "anger, confusion, loss of esteem, financial worry, and effect on marital relationships . . . common consequences of an involuntary loss of employment," but that the evidence pertaining to his damages for emotional distress fell "far short of supporting the exceptional verdict returned by the jury." *Id.* at 1024. The court held that a "$250,000 award for emotional distress damages from an unlawful termination of employment is very large, sustainable only upon a showing of a severe degree of emotional distress." *Id.* Because the jury award for emotional distress was excessive, the defendants were entitled to a new trial on the issue of damages. *Id.* The court also noted that it would be appropriate to permit Shepard an opportunity to consent to a remittitur. *Id.*

In fixing the remittitur amount, the court compared Shephard, who had been employed for four years, with the case of a disabled discharged employee, close to retirement, who lost his job after thirty-four years and received $165,000

in emotional distress damages. *Id.* at 1025 (citing *Mathieu v. Gopher News Co.*, 273 F.3d 769, 783 (8th Cir. 2001)). The court also compared Shephard to a case involving a childcare worker who was terminated from a job she had held for three years and whose jury award for emotional distress damages was reduced to $50,000. *Id.* (citing *Kucia v. Southeast Ark. Cmty. Action Corp.*, 284 F.3d 944, 946 (8th Cir. 2002)). The court considered that Shepard had testified that repeated denials of employment applications over a two-year period had taken an emotional toll, compared with the childcare worker who, unlike Shepard, was employed in the same type of work within a year of her termination. *Id.* The court concluded that "the jury could reasonably have found a significant, if not unusually severe, emotional injury and compensated Shepard accordingly" and held that "the maximum amount of damages for mental pain and suffering proved by the evidence is $130,000." *Id.*

In this case, the trial court reduced Jasper's award from $100,000 to $20,000 "both because it appears to be the result of passion or some sort of prejudice and because it lacks evidentiary support." It appears that length of employment with the discharging employer, length of time before locating another job, and likelihood of being able to replace the income and benefits lost, are relevant to the determination of whether a verdict is substantially above a "reasonable range supported by the evidence." *Id.* at 1021. Therefore, because Jasper was employed by the center for less than four months and because she was employed on a full-time basis within five months of her termination, we conclude it was not an error for the trial court to determine that the $100,000 award for emotional damages lacked evidentiary support.

Additionally, the trial court held that the $100,000 award appeared to be "the result of passion or some sort of prejudice." We find that the trial court did not abuse its discretion in finding that the $100,000 award was excessive under these facts. Because we affirm the trial court's ruling that the $100,000 award lacked evidentiary support, we need not reach the issue of whether the award was the result of prejudice. *See Tullis,* 584 N.W.2d at 241 (holding the most important of the tests used to determine whether a verdict should be set aside or altered is support in the evidence).

There is, however, no procedure to simply reduce a jury's award. This Court assumes the trial court's reduction of the award for emotional distress was a remittitur pursuant to Iowa Rule of Civil Procedure 1.1010 without having used that procedure. Iowa R. Civ. P. 1.1010(1) ("[t]he district court may permit a party to avoid a new trial . . . by agreeing to such terms or conditions as it may impose"). "The Court may conditionally grant a motion for new trial but allow plaintiff to avoid a new trial if plaintiff agrees to remit an amount of damages as determined by the Court." *Shepard,* 303 F.Supp.2d at 1024 (citations omitted).

This court is free to impose its own conditions for granting a conditional new trial. *Mead v. Adrian*, 670 N.W.2d 174, 180 (Iowa 2003). In this case, Jasper should be allowed to avoid a trial by agreeing to accept the trial judge's determination of $20,000 in emotional damages. The election to accept the remittitur must be made within thirty days of the filing of the procedendo in the district court.

B. Property Damage

Because the trial court found Jasper failed to meet her burden of proof with regard to the public policy and causation elements of her claim, it set aside the $39,507.25 the jury awarded for expenses and additional services. The trial court went on to note that there is "no case law in Iowa that supports the award of damages for property damage in a wrongful termination case . . . [Jasper] should have pleaded her property damage claim as a separate count based on a different theory of recovery." We agree.

Damages must be proximately caused by the tort in order to allow recovery. *See Albrecht v. Waterloo Const. Co*., 257 N.W. 183 (Iowa 1934) (holding defendant not liable unless negligence claimed had some causal connection with the damages). Jasper contends that her employment contract included the rental of the house, and the property damages she suffered flowed directly from the wrongful termination. Given that Hussain was both Jasper's employer and landlord, there is no doubt there was some connection between Jasper's employment and her housing. However, we find the connection too attenuated to overrule the trial court's ruling on property damages. The wrongful termination did not cause the property damage. Therefore, Jasper may not recover property damages based on her wrongful termination claim.

C. Punitive Damages

The trial court refused to submit the issue of punitive damages to the jury. Because of its finding that the evidence did not rise to the level necessary to establish reckless disregard, the trial judge found that Jasper had not met her burden of proof sufficiently to establish a jury question on the issue of punitive

damages. Jasper asserts that a rational jury could find by a preponderance of clear, convincing, and satisfactory evidence that the Hussains' conduct constituted willful and wanton disregard for her rights, and the trial court erred in refusing to submit the issue of punitive damages to the jury.

Punitive damages are awarded "as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy." *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991) (citation omitted). Discharging an employee for refusing to staff a childcare center at a level below the state-mandated requirements is the type of egregious conduct that supports punitive damages. *See Tullis*, 584 N.W.2d at 241 ("discharging an employee for demanding back wages is the type of egregious conduct that would support substantial punitive damages"). A jury could have determined by a preponderance of clear, convincing, and satisfactory proof that Hussain discharged Jasper in willful and wanton disregard for her employment rights. Because punitive damages would deter future misconduct, if on remand Jasper rejects the remittitur and a new trial is held, the jury should be instructed to consider punitive damages.

D. Evidence From Other Centers

Additionally, the trial judge excluded evidence that Hussain owned another daycare center that had been cited by DHS for violating children/teacher ratios, noting it would be confusing, irrelevant to the issue the jury has to decide, and "even if marginally relevant, . . . unduly prejudicial to the defendants."

Jasper contends that the evidence was admissible for purposes of showing knowledge and intent. Hussain's alleged claim of overstaffing may be

rebutted by this evidence. Similarly, the prior violations may be evidence of motive or intent to staff his centers with employees who will violate DHS regulations. If a new trial is held, evidence that Hussain had operated another childcare center that was cited for violating children/teacher ratio regulations should be admitted.

V. Individual Liability of Supervisor

Hussain contends that Jasper's claim for retaliatory discharge in violation of public policy should only be permitted against the employer, Kid University, Inc., not against Mohsin Hussain as an individual supervisor. This issue was raised in Hussain's motion for summary judgment.[8] Raising the issue on summary judgment, however, does not preserve the issue for appellate review.

> After a full trial on the merits, a previous order denying a motion for summary judgment is no longer appealable or reviewable. At this point in the proceedings, the denial of the motion for summary judgment merges with the trial on the merits . . . .

Kiesau v. Bantz, 686 N.W.2d 164, 174 (Iowa 2004) (citing *Klooster v. N. Iowa State Bank,* 404 N.W.2d 564, 567 (Iowa 1987)).

Although Hussain did raise the issue in his motion for directed verdict, the trial judge, in ruling on the motion, did not address the issue. "When a trial court fails to rule on an issue properly raised, the party raising the issue must file a motion asking the court for a ruling in order to preserve the issue for appeal." *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995); *see also* Iowa R. Civ. P. 1.904(2).

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[8] The trial court found that Hussain, as a corporate officer, could be "held personally liable for torts committed by him, whether or not the torts were committed in the scope of his employment."

> It is a fundamental doctrine of appellate review that issues must ordinarily be both raised *and decided* by the district court before we will decide them on appeal . . . . When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) (citations omitted) (emphasis added). Hussain did not request a ruling from the trial court on this issue pursuant to rule 1.904(2) nor did he properly raise the issue by way of a cross-appeal. Therefore, the issue is not properly before us for decision, and we refuse to disturb the verdict against Hussain should Jasper accept the remittitur. Should there be a new trial, the issue may be raised at that time.

VI. Conclusion

A conditional new trial is awarded and the case remanded to the district court for further proceedings consistent with this opinion. Jasper should be allowed to avoid a new trial by agreeing to reduce the award for emotional distress from $100,000 to $20,000. In the event that reduction is agreed to, interest on the remaining award shall be computed as provided in the original judgment. The election to accept the remittitur must be made within thirty days of the filing of the procedendo in the district court. If a new trial is held, the jury should be instructed on punitive damages, and evidence that Hussain had operated another daycare center that was cited for violating children/teacher ratio regulations should be admitted.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.