STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN BULL-EHINGER, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	Nos. 293034, 293035 Ingham Circuit Court
INGHAM REGIONAL MEDICAL CENTER, Defendant-Appellant.	LC No. 07-001047-CL

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

At the close of a trial in this age discrimination case, the jury found in favor of plaintiff Mary Ann Bull-Ehinger, and the trial court entered a judgment awarding her $905,810 in damages. The court later awarded Bull-Ehinger attorney fees and costs. Defendant Ingham Regional Medical Center (Ingham) appeals as of right from these orders, and we affirm.

I. BACKGROUND FACTS

In March 2006, Ingham appointed Dr. Dennis Perry as its Medical Director for Case Management and Utilization Review. In that role, Perry supervised the activities of approximately nine case managers employed at Ingham's Greenlawn campus. Case managers review patient records to verify insurance coverage, assist in evaluating additional patient care needs, and arrange for necessary care following hospitalization. Ingham also employed five social workers. Hospital social workers give patients and their families emotional counseling, help plan for patient care after discharge, and connect patients with care resources inside and outside the hospital. At the time of Perry's appointment to the case management department, the social workers reported to Dr. Michael Hunt in the hospital's psychiatry department.

Under Hunt's supervision, the social workers worked in separate hospital departments according to their individual interests and subspecializations, and they divided responsibility for the remaining patients whose problems fell within other medical specialties. In 2003, Ingham

hired Bull-Ehinger, the oldest of the five social workers, to work in the department of oncology.[1] Bull-Ehinger obtained a master's degree in social work in 1982, and had previously worked in both a hospital setting and private practice. Throughout her tenure at Ingham, Bull-Ehinger spent most of her time assisting oncology patients. In May 2006, Hunt appointed Bull-Ehinger, then age 61, as the hospital's lead social worker. Polly LeTourneau, who commenced full-time employment at Ingham in 2006, concentrated in cardiac patients, while Magdalena Lewis, hired in 2004, worked primarily with stroke victims. Lisa Cutcher, joined Ingham in April 2006, and saw patients located throughout the hospital.[2] LeTourneau testified at trial that Bull-Ehinger was a "good supervisor," who possessed excellent clinical skills.

In October 2006, Ingham transferred the administrative management of the social workers to the case management department. Shortly thereafter, Hunt completed final performance evaluations of Bull-Ehinger, LeTourneau, Lewis and Cutcher. In the "team orientation competency" category, Hunt scored Bull-Ehinger nine out of 10 points, and he rated her overall performance at 8.75 out of 10. Hunt assessed LeTourneau, Lewis and Cutcher at eight out of 10 for teamwork, and gave them overall scores of 8.25, 8, and 7.5, respectively. Perry reviewed Hunt's evaluations of the social workers and "signed off on them." Perry also met with the social workers individually and learned that they had separate areas of interest. At a second meeting with Bull-Ehinger, Perry commented that she was "old school," and divested her of responsibility as the hospital's lead social worker.

In January 2007, Perry reorganized the social workers' responsibilities, imposing a "floor-based system." Perry assigned Bull-Ehinger to the oncology unit, as well as the surgical intensive care unit, the cardiac care unit and the emergency room. After a period of time, it became evident that Bull-Ehinger had a higher workload than the other social workers. LeTourneau characterized Bull-Ehinger's assignment as a "tough caseload." In contrast, Lewis perceived that she did not have enough work. Perry acknowledged that Bull-Ehinger worked the longest hours, but opined that she spent "too much time with the patients" and had to "change with the times."

In mid-February 2007, the four social workers met with Perry and proposed a reallocation of their workloads. All four advocated that Lewis assume more responsibilities by relieving Bull-Ehinger of some patients. Perry agreed to the social workers' plan "on a trial basis." In mid-March 2007, Perry spoke with the social workers to determine how they had adjusted to the new work allocation. None of them expressed any complaints. Within the next month, Perry encountered Cutcher in a hospital hallway and noticed that she appeared overwhelmed. LeTourneau had called in sick that day, and Lewis also had the day off. Cutcher advised Perry that she had asked Bull-Ehinger for help, but Bull-Ehinger could not provide any assistance.

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[1] Bull-Ehinger was at least 20 years older than LeTourneau, Lewis and Cutcher.

[2] The fifth social worker, Barb Zielinski, always worked in the departments of obstetrics and pediatrics. Ingham designated her as a case worker, and she did not share responsibilities with the other social workers.

Perry did not speak to Bull-Ehinger, and soon thereafter decided to terminate Bull-Ehinger's employment and hire an additional case manager.

On April 11, 2007, Perry informed Bull-Ehinger that he needed "to lay off a social worker and … that social worker is you." Bull-Ehinger recalled that when she questioned why Perry had selected her, Perry replied, "[T]he fact is that you are old guard. You are too wedded to oncology social work." Although Perry admitted at trial having previously told Bull-Ehinger that she was "old school," he denied that her age motivated his termination decision.[3] Perry claimed that he terminated Bull-Ehinger because he had elected to hire another case manager, necessitating the elimination of a social worker position, and Bull-Ehinger's "strong-willed," "opinionated" and "possessive" personality caused "unrest among the [other] social workers." After terminating Bull-Ehinger, Perry hired another case manager. Within several months, Perry arranged for Nancy Shea, a bachelor's degree social worker employed at Ingham's Pennsylvania campus, to transfer to the Greenlawn campus.

At trial, Bull-Ehinger presented her testimony, Perry's testimony and that of several other social workers. Ingham rested after the presentation of Bull-Ehinger's evidence. The jury found that Ingham had discriminated against Bull-Ehinger on the basis of her age, and awarded her $70,681 for current economic damages, $16,266 for future economic damages, and $750,000 for past, present and future noneconomic damages. Ingham moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial and remittitur of the noneconomic damage award. The trial court denied Ingham's motions, and later awarded Bull-Ehinger attorney fees and costs totaling $73,157.

II. INGHAM'S CHALLENGES TO THE VERDICT

Ingham initially asserts that the trial court should have granted a directed verdict or JNOV because Bull-Ehinger did not introduce legally sufficient evidence that age discrimination motivated the termination of her employment. We review de novo a trial court's rulings on motions for a directed verdict and JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in th[e] light [most favorable to the nonmoving party] fails to establish a claim as a matter of law." *Id*. In reviewing the trial court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 71-72; 600 NW2d 348 (1999). "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court

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[3] Perry also denied having used the term "old guard." In considering Ingham's claims of error, we have reviewed the facts in the light most favorable to Bull-Ehinger, as we must. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998).

may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).[4] When reviewing a trial court's denial of a defendant's motion for a directed verdict or JNOV in an age discrimination case, the ultimate question is whether the plaintiff presented evidence sufficient to permit a reasonable jury to find that she was discharged because of her age. *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986).

A. BULL-EHINGER'S PRIMA FACIE CASE

Ingham asserts that Bull-Ehinger failed to establish a prima facie case of age discrimination because she presented no evidence that (1) Ingham replaced her with a younger worker, and (2) she was qualified for the case manager position filled after her termination. The Civil Rights Act (CRA) forbids employers from discriminating against individuals with respect to employment, compensation, or a term, condition, or privilege of employment, because of age. MCL 37.2202(1)(a). Michigan has adopted the burden-shifting framework promulgated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), for deciding whether a plaintiff asserting a CRA claim has set forth a prima facie case. This approach permits a plaintiff to establish a rebuttable prima facie case of discrimination "on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination." *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001). A plaintiff presents a rebuttable prima facie case of unlawful discrimination by showing that (1) she belonged to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 538 n 8. On establishment of a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id*. If a defendant produces a legitimate nondiscriminatory reason, the presumption is rebutted and the burden returns to the plaintiff to show that the defendant's reasons were not the true reasons, but mere pretexts for discrimination. *Id*.

However, after a case has been tried to a jury on its merits and "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *US Postal Service Bd of*

[4] A similar standard governs an appellate court's review of a trial court's ruling on a motion for JNOV. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005).

Governors v Aikens, 460 US 711, 715; 103 S Ct 1478; 75 L Ed 2d 403 (1983).[5] In *Aikens*, the United States Supreme Court explained that after a trial on the merits, a reviewing court must instead focus its inquiry on whether the plaintiff has proven intentional discrimination. *Id*. "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation of proof." *Id.* at 716 (internal quotation omitted). Thus, at the close of evidence, "[t]he plaintiff retains the burden of persuasion . . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 256; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Alternatively stated, "[t]he issue of whether plaintiff established a prima facie case is subsumed on appeal into whether the plaintiff has sustained his or her ultimate burden." *Bruno v W B Saunders Co*, 882 F2d 760, 764 (CA 3, 1989), quoting *Dreyer v Arco Chem Co*, 801 F2d 651, 654 (CA 3, 1986). Consequently, we find no merit in Ingham's position that the trial court should have directed a verdict in Ingham's favor on the basis that Bull-Ehinger did not present a prima facie case of discrimination.

Furthermore, we reject Ingham's contention that to sustain her ultimate burden of proof, Bull-Ehinger had to prove that a younger worker replaced her.[6] In *Town v Michigan Bell Tel Co*, 455 Mich 688, 695 (opinion by Brickley, J); 568 NW2d 64 (1997), our Supreme Court observed that to create a rebuttable presumption of discrimination, a plaintiff must introduce evidence that she "was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) *others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct*." *Id*. (emphasis added). Similarly, in *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001), the Supreme Court described the fourth element of a prima facie discrimination case as encompassing the concept that "the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." Our Supreme Court's portrayal of fourth element of a prima facie discrimination case mirrors the United States Supreme Court's reference in *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 312; 116 S Ct 1307; 134 L Ed 2d 433 (1996), that the plaintiff in a case brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 *et seq*., need not prove that an employer replaced her with a person outside the protected class of employees. "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as [she] has lost out *because of [her]* age. . . . Because it lacks probative value, the fact that an ADEA plaintiff was

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[5] We recognize that federal decisions in civil rights cases often supply guidance, but are not binding on Michigan courts. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997).

[6] The record does not reveal Nancy Shea's age. Ingham produced no evidence that Bull-Ehinger's replacement was actually older than Bull-Ehinger. Rather, Ingham appears to argue that because neither side presented any evidence of Shea's age, Bull-Ehinger's entire case fails.

replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." *Id*. (emphasis in original).

We next highlight that Ingham has mischaracterized the prong of the prima facie case concerning a fired employee's qualifications. Ingham insists that Bull-Ehinger neglected to show "that she would have been qualified for the case manager position filled after the termination of her employment." However, in *Town*, 455 Mich at 699, our Supreme Court set forth the following standard for determining whether a plaintiff has met the qualification requirement of the prima facie case: "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." In support of that statement, the Supreme Court cited several cases, including *Menard v First Security Services Corp*, 848 F2d 281, 285 (CA 1, 1988), in which the United States Court of Appeals for the First Circuit stated, "To establish that he was 'qualified' a complainant must show that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." (Emphasis and internal quotation omitted). In *Vincent v Brewer Co*, 514 F3d 489, 495 (CA 6, 2007), the United States Court of Appeals for the Sixth Circuit summarized this principle as follows: "To establish this element [of a prima facie case], a plaintiff must show that her performance met her employer's legitimate expectations at the time of her discharge." Here, no evidence suggested that Ingham fired Bull-Ehinger due to poor performance as a social worker. Perry characterized Bull-Ehinger as "very qualified as a social worker," and also emphasized, "She is an excellent social worker. There is no reason to even discuss that. She knows what she's doing." The record therefore reflects that Bull-Ehinger established a prima facie case of age discrimination.

By producing evidence of nondiscriminatory reasons for terminating Bull-Ehinger's employment, Ingham moved the pertinent inquiry in this case to the ultimate question whether she proved age discrimination. Once Perry proffered legitimate, nondiscriminatory reasons for firing Bull-Ehinger, she bore the burden of proving that Perry's articulated reasons for her dismissal constituted pretexts for age discrimination. We now consider whether Bull-Ehinger met that burden.

B. SUFFICIENCY OF THE EVIDENCE OF DISCRIMINATION

Ingham avers that no evidence substantiated Bull-Ehinger's claim that age discrimination amounted to "a determining factor in the decision" to terminate her employment. *Town*, 455 Mich at 697. Ingham disputes that Perry's use of the terms "old school" and "old guard" create an inference of intentional discrimination against Bull-Ehinger, and maintains that "scant" evidence supported Bull-Ehinger's claim that she received less favorable treatment than the younger social workers. Bull-Ehinger counters that substantial record evidence demonstrates that Perry's articulated reasons for firing her were pretexts for age discrimination.

"The general rule in an age discrimination case is that, to survive a motion for a directed verdict, the plaintiff must present evidence that, when viewed in a light most favorable to the plaintiff, would permit a reasonable jury to find that the plaintiff was discharged because of age." *Meagher v Wayne State Univ*, 222 Mich App 700, 709-710; 565 NW2d 401 (1997). When a defendant proffers a legitimate, nondiscriminatory reason for a termination decision, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor,

is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Hazle*, 464 Mich at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff may meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 US at 256. An age discrimination plaintiff satisfies her burden of proof by showing by a preponderance of the evidence that the employer's seemingly legitimate reasons for its decision in fact qualified as pretexts for discrimination. *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133, 143; 120 S Ct 2097; 147 L Ed 2d 105 (2000).

A plaintiff can establish pretext by substantiating that the proffered reasons for the adverse employment action (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). In *Reeves*, 530 US at 147, the United States Supreme Court elaborated regarding the evidentiary methods available to age discrimination claimants, "[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." (Emphasis in original). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id*.

Ingham averred that Perry terminated Bull-Ehinger because (1) she failed to carry her share of the workload and was not a "team player," (2) she remained unwilling to adapt to changes in the department, like the floor-based work allocation plan, and (3) the department needed another case manager. Perry testified that in March 2007, he perceived that Lewis, LeTourneau and Cutcher "weren't happy" with the work reallocation initiated a month earlier, and believed that their unhappiness derived from Bull-Ehinger's "behaviors," including her "possessive[ness]" toward oncology. In Ingham's view, Bull-Ehinger's opposition to Perry's original organizational plan and her insistence on maintaining the February 2007 shift in work allocation, exhibited her unwillingness to participate in the department as a team player. Perry expressed that Bull-Ehinger remained wedded to working in oncology and telegraphed to him and the other social workers that she did not have time to work in other departments. Perry additionally opined that the case management department needed another case manager because, contrary to his expectations, the four social workers had not assumed responsibility for arranging subacute rehabilitation discharges, leaving this task to overworked case managers.

Bull-Ehinger produced evidence reasonably tending to prove that each of these articulated reasons for firing her lacked credibility. In response to Ingham's claim that she did not cooperate with Perry's leadership and the new roles he envisioned for the social workers, Bull-Ehinger introduced considerable evidence that all four social workers always functioned as a team, and that none of her colleagues perceived her as divisive, selfish or unhelpful. For example, Bull-Ehinger established that Hunt had given her a higher score in the category of teamwork than any of the other social workers. Although Perry testified that Hunt's November 2006 performance evaluations were "irrelevant to me," he admitted that he had never placed any negative entries in Bull-Ehinger's personnel file and had not received any complaints about her from the other social workers or anyone else at the hospital.

Bull-Ehinger also offered evidence substantiating her ability to work well with her colleagues and Perry. LeTourneau testified that after Perry stripped Bull-Ehinger of her title as lead social worker, Bull-Ehinger cooperated with her apparent demotion without complaint. Perry conceded that all four social workers had voiced concerns about his initial reallocation of their job duties, grounded on their collective fear that a floor-based plan would compromise continuity of patient care. He also acknowledged awareness that all four social workers collaborated in proposing an alternate work allocation, and that they accepted the changes he initiated. Furthermore, Perry recalled that Bull-Ehinger voluntarily assumed responsibility for organizing educational programs for the hospital staff and had received an appointment to serve on Ingham's "standards of excellence" committee, despite that she worked longer hours than the other social workers.

Finally, Bull-Ehinger refuted Ingham's version of an event that immediately preceded Perry's decision to terminate Bull-Ehinger's employment. Perry recounted that he ran into Cutcher in the hospital on a day when LeTourneau was ill and Lewis had an off day, observed that she appeared "rather overwhelmed," and asked her "what was going on." In Perry's recollection, Cutcher responded that she had asked Bull-Ehinger for help, but Bull-Ehinger could not assist Cutcher. Perry did not seek Bull-Ehinger's explanation for what had occurred, he simply concluded that Bull-Ehinger should have been more forthcoming with assistance. At trial, Bull-Ehinger explained that on the day Cutcher had called for help, Bull-Ehinger was sitting on the floor in a hospital hallway, trying to comfort the crying adult daughter of a cancer patient and convince the woman to relocate from the hallway floor into a conference room. When Bull-Ehinger eventually succeeded in calming and moving the distraught daughter, she returned Cutcher's page, and Cutcher told Bull-Ehinger to "never mind" because Cutcher had taken "care of it." Our review of the record reveals that ample evidence pertinent to teamwork served to cast doubt on Ingham's portrayal of Bull-Ehinger as either disloyal to Perry or her colleagues, or lacking in dedication to her responsibilities. Given the marked inconsistency between Ingham's characterization of Bull-Ehinger as uncooperative and the evidence directly to the contrary, a reasonable jury could have found implausible the teamwork rationale for Bull-Ehinger's termination.

Ingham also suggested that Bull-Ehinger spent too much time working with oncology patients, to the exclusion of other hospital departments. However, Perry admitted that until someone brought it to his attention, he had lacked awareness that to maintain a "commission on cancer" certification, Ingham's oncology team had to include "a dedicated social worker." This evidence tended to substantiate that Bull-Ehinger legitimately concentrated her efforts in oncology. Furthermore, Bull-Ehinger testified that in addition to seeing oncology patients, she had responsibility for all patients in the coronary intensive care unit and picked up cases in other departments whenever asked to do so. Bull-Ehinger also explained that in 2006, she had proposed that the hospital offer social workers training in case management, particularly to assist in the emergency department. This testimony refuted that Bull-Ehinger possessed little or no interest and experience beyond the realm of oncology. Moreover, Perry conceded that he encouraged the other social workers to concentrate their work in the hospital departments that most interested them. When viewed in the light most favorable to Bull-Ehinger, the trial evidence undermined Ingham's claim that Bull-Ehinger was too wedded to oncology to function effectively under Perry's leadership.

Ingham's third basis for Bull-Ehinger's termination related to Perry's desire to add another case manager to his department. Perry acknowledged that budget considerations played no role in his plan to eliminate a social worker position in favor of adding a case manager. And within five months of Bull-Ehinger's departure, Perry hired another full-time social worker. The social worker who replaced Bull-Ehinger had a bachelor's degree, while Bull-Ehinger possessed a master's degree in social work. Taking into account this evidence, a reasonable jury could find that Perry's expressed preference for another case manager was so lacking in credence as to constitute pretext.

Despite this evidence refuting Perry's grounds for terminating Bull-Ehinger's employment, Ingham submits that the jury's disbelief of Perry's testimony does not suffice to prove intentional age discrimination. According to Ingham, because the record reveals no *additional* evidence supporting Perry's discriminatory animus, the trial court erred in denying JNOV. Ingham's argument misperceives Bull-Ehinger's evidentiary burden. In *St Mary's Honor Ctr v Hicks*, 509 US 502, 511; 113 S Ct 2742; 125 L Ed 2d 407 (1993), the United States Supreme Court declared:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination … [and] upon such rejection, no additional proof of discrimination is required. [Emphasis and internal quotation omitted.]

In *Reeves*, 530 US at 147–148, the Supreme Court clarified this concept as follows:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. … Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. … Thus, 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. [Internal quotation omitted.]

Here, a reasonable jury could have rationally inferred that Perry's explanations for terminating Bull-Ehinger masked an illegal motivation to discriminate against the oldest of the hospital social workers on the basis of her age. First, record evidence substantiated that Perry treated Bull-Ehinger less favorably than he did the younger social workers. Perry's initial acts on assuming responsibility for supervising the social workers were to divest Bull-Ehinger of her title as lead social worker and assign her a case load more challenging and time-consuming than those given to the other social workers. Bull-Ehinger testified that Perry rarely observed her working in the oncology department and regularly avoided her efforts to speak with him. Perry

conceded that he "probably" saw less of Bull-Ehinger because he rarely made rounds in the oncology wing. Bull-Ehinger described her perception that Perry deliberately distanced himself from her, while actively engaging in the professional activities of her colleagues. Furthermore, Perry's persistence in criticizing Bull-Ehinger's devotion to oncology conflicted with his ready acceptance of the decisions of the other social workers to focus their efforts in certain departments. And notwithstanding that Perry had issued LeTourneau a verbal reprimand concerning her record-keeping, Perry selected Bull-Ehinger, whose work had never been subject to criticism, for termination. This evidence reasonably signifies that Perry judged Bull-Ehinger's work by different and harsher criteria than he applied to her colleagues, thus treating her in a disparate manner.

Additional circumstantial evidence supported the jury's verdict. At one of their first meetings, Perry told Bull-Ehinger that she had to "change with the times." When he fired her, Perry informed Bull-Ehinger, "the fact is that you are old guard. You are too wedded to oncology social work." Bull-Ehinger questioned him further regarding the reason for her termination, and Perry responded, "[H]asn't anyone talked to you about the workload? … [M]aybe they were afraid to." Ingham correctly contends that Perry's "old guard" comment does not qualify as direct evidence of age discrimination. However, considered in context, Perry's words constitute circumstantial evidence of age-related bias directed at Bull-Ehinger.

Perry used the term "old guard" when he announced to Bull-Ehinger the grounds for her termination. In conjunction with Perry's previous expressions that Bull-Ehinger was "too wedded to oncology social work" and had to "change with the times," his "old guard" remark reasonably suggests that Perry harbored an ageist belief best summarized as "an old dog can't learn new tricks." In context, Perry's words suggest that he considered Bull-Ehinger resistant to change and averse to taking on more responsibility, both stereotyped views of older workers. "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co v Biggins*, 507 US 604, 610; 113 S Ct 1701; 123 L Ed 2d 338 (1993). Because Perry articulated the term "old guard" to specifically describe why he fired Bull-Ehinger, we cannot deem his words ambiguous or abstract. When coupled with abundant evidence that Bull-Ehinger had more qualifications than the remaining social workers and the social worker that replaced her, and the evidence refuting Perry's articulated reasons for her termination, a fact finder could reasonably conclude that Perry's "old guard" sentiment evinced discriminatory intent. Consequently, we conclude that the trial court correctly denied Ingham's motion for a directed verdict or JNOV.

III. INGHAM'S CHALLENGES TO THE FAIRNESS OF THE TRIAL

Ingham next asserts that improper questioning and argument by Bull-Ehinger's counsel denied Ingham a fair trial, and that the trial court incorrectly denied a new trial on this ground. This Court reviews for an abuse of discretion a circuit court's ruling on a motion for a new trial. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW 2d 686 (2008). Ingham complains that Bull-Ehinger's counsel repeatedly referenced her activities during the 1960's civil rights movement to engender sympathy and inject unfair prejudice. Ingham further contends that Bull-Ehinger's counsel sought to prejudice the jury by questioning witnesses concerning Bull-Ehinger's monetary contributions to the Signet Society, an Ingham building fund. The trial court

denied Ingham's motion, observing that it "didn't see anything particularly outrageous there at all."

"[A]n attorney's comments during trial warrant reversal where they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402 (2003). During the hearing on Ingham's motion for a new trial, defense counsel conceded that the comments were not "very egregious," and volunteered that "if that were the only thing then I don't think I'd even be asking [for a new trial], Your Honor." The comments and questions to which Ingham objects were brief and isolated. The record simply fails to document that Bull-Ehinger's counsel engaged in "a deliberate course of conduct," nor do we deem it probable that the questions or argument exerted a "controlling influence on the verdict." *Id*. at 501-502. We reject Ingham's claim for relief on this ground.

IV. REMITTITUR REQUEST CONCERNING NONECONOMIC DAMAGES AWARD

Lastly, Ingham asserts that the trial court should have remitted the jury's award of $750,000 because it was "grossly excessive."

> In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. The power of remittitur should be exercised with restraint. … A trial court's decision regarding remittitur is reviewed for an abuse of discretion. We review all of the evidence in the light most favorable to the nonmoving party. [*Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008) (citations omitted).]

"[T]he amount required to compensate a party for pain and suffering is imprecise," and "that calculation typically belongs to the jury." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763-764; 685 NW2d 391 (2004). A reviewing court faced with the task of considering whether a verdict is "excessive" must avoid "concomitantly usurping the jury's authority to determine the amount necessary to compensate an injured party." *Id*. at 764. Our Supreme Court has indicated that the factors that this Court should consider include whether (1) the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption or mistake of law or fact, (2) the verdict came within the limits of what reasonable minds would deem just compensation or the injury sustained, and (3) the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. *Id*.

Bull-Ehinger testified that she "loved working in a hospital," and explained as follows her feelings as she left the hospital after Perry fired her:

> Well, I was mad at myself. You know, I have pretty good control but that's hard. I had never been fired from a job in my life. My work was a big part of who I am. And I just felt like, . . . it hurt. I was scared. I felt really mad. I felt like I hadn't had a chance. It just—I mean, I had worked with really good

> performance evaluations. I did a good job, and people consistently told me that, including my own co-workers. And I had moved into Dr. Perry's department less than six months. And like, you know, formally we really didn't even move over into his supervision. I mean, we were under his supervision. He was the boss, but we really didn't move over there until, like, October or November. And this was, like, the second week into April, and all these decisions were made and he never said a word to me just—

Over the next days, Bull-Ehinger described herself as "scared," "outraged," "hurt" and "humiliated." Following her termination from Ingham, Bull-Ehinger acquired part-time employment at a maximum security prison, a job that necessitated a 106-mile round-trip commute. She now works with mentally ill prisoners at another men's prison, to which she commutes 79 miles a day.

As discussed *infra*, we detect no factual basis for Ingham's claim that improper appeals to passion or prejudice influenced the jury's verdict. Nor has Ingham offered any substantive basis for a conclusion that the verdict exceeds that which reasonable minds would view as just, or that the verdict here is disproportionate to verdicts in other age discrimination cases. The record evidence shows that Bull-Ehinger devoted a considerable portion of her ego and professional career to working at Ingham, took great pride in serving as the hospital's designated oncology social worker, and remains emotionally devastated by her abrupt dismissal. In view of this evidence, we cannot conclude that the trial court abused its discretion by refusing to order remittitur.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher