STATE OF MICHIGAN

COURT OF APPEALS

ELLEN KNICKERBOCKER,

Plaintiff-Appellee,

v

INTEGRATED HEALTH SERVICES OF RIVERBEND, INC. and INTEGRATED HEALTH SERVICES, INC.,

Defendants-Appellants.

UNPUBLISHED
September 24, 1996

No. 183121
LC No. 90-003791

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

In this age discrimination case, defendants appeal by right the judgment for plaintiff under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. On appeal, defendants argue that the trial court incorrectly denied their motions for summary disposition, directed verdict, judgment notwithstanding the verdict, and remittitur. We affirm.

In 1973,[1] defendants' predecessor hired plaintiff, then aged forty-three, as a nursing home administrator at the Riverbend Nursing Home. Plaintiff remained in that employment for many years, under defendants' predecessor. In 1988, defendants purchased the Riverbend facility. In 1989, defendants named Judith Sutton as plaintiff's regional supervisor. That summer, Sutton asked plaintiff if she had a retirement plan. When plaintiff responded that she would continue working until she was sixty-five, Sutton replied that she was glad plaintiff had a plan, that everybody should have one, and that she had a plan. Then, in September 1989, Sutton confronted defendant with reports from an anonymous group of employees that detailed plaintiff's allegedly abusive management techniques. Sutton repeatedly told plaintiff that "this is your bright, young people that are saying this." Plaintiff could not explain the complaints, as throughout 1989 she had consistently received bonuses from defendants' corporate officers awarding her management achievements.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In an October 1989 memorandum, Sutton told plaintiff that her commitment to improving employee morale and facility operations was imperative to her continued employment. Sutton again told plaintiff that her "bright, young people" were dissatisfied with her, and used this phrase consistently when she discussed their alleged morale problems. After a meeting between plaintiff and her subordinates failed to elicit further complaints, however, Sutton told plaintiff that there were probably no problems to be addressed. At the end of 1989, Sutton completed plaintiff's yearly evaluation and gave her consistently lower marks than she had received under previous supervisors. Nonetheless, in December 1989, defendants' senior vice president again monetarily awarded plaintiff for her commitment and professionalism.

In early 1990, Sutton revealed to plaintiff the identities of the "bright, young people" who were complaining. Plaintiff felt that Sutton accepted the younger employees' word over her own explanations of pertinent events. On February 5, 1990, Sutton placed plaintiff on a thirty-day interim probation for her "negative management style and . . . disastrous [profit and loss] review." Defendants nevertheless transferred Sutton and removed plaintiff from probation on February 14, 1990. One of defendants' officials, who was plaintiff's former supervisor, told plaintiff that, after speaking with her employees, he was unable to see the problems that Sutton alleged that plaintiff had with her department heads.

Patrick Finn then became plaintiff's supervisor. Plaintiff heard rumors that she would be fired at the beginning of June 1990. On May 28, 1990, defendants fired plaintiff. Finn told plaintiff that the situation between her and her employees had not improved and that the family of a patient at the Riverbend facility had complained about her. Defendants replaced plaintiff with a twenty-nine-year-old employee.

At the 1994 trial, a jury found in favor of plaintiff and awarded her $125,000 in economic damages and $200,000 in emotional damages . Defendants appeal.

Defendants first contend that the trial court erred in denying their motion for summary disposition because plaintiff did not raise genuine issues of material fact regarding whether she was qualified for her position and whether their reasons for firing her were merely a pretext for age discrimination. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, no genuine issue regarding any material fact exists and the moving party is entitled to summary judgment as a matter of law. This Court considers the factual support for a claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed to leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition, this Court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). We review a denial of summary disposition pursuant to MCR 2.116(C)(10) de novo. *Jackhill*, *supra*.

Because plaintiff succeeded in raising triable issues of fact regarding defendants' liability for age discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., the court properly denied defendants' motion for summary disposition. Michigan statutory law prohibits discrimination in employment on the basis of age. MCL 37.2202; MSA 3.548(202). A plaintiff can establish a prima facie case of age discrimination by showing: (1) that she was a member of a protected class, i.e., an individual between the ages of forty and seventy, and was discharged; (2) that she was qualified for the position; and (3) that she was replaced by a younger person.[2] *Manning v Hazel Park*, 202 Mich App 685, 697; 509 NW2d 874 (1993). As part of a prima facie case, a claimant who asserts an intentional discrimination claim must establish that the discharging party had a discriminatory predisposition and that the party committed an act that furthered the predisposition. *Rasheed v Chrysler Corp*, 445 Mich 109, 135; 517 NW2d 19 (1994).

Once a plaintiff proves a prima facie case of age discrimination, the burden of production shifts to the defendant to rebut the presumption of disparate treatment by articulating some legitimate, non-discriminatory reason for the adverse employment decision. *Lytle v Malady*, 209 Mich App 179, 186-187; 530 NW2d 135 (1995). When this burden is met, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's proffered reason is a mere pretext for discrimination. *Id.* at 188. The plaintiff can do this: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Reviewing the evidence and resolving all reasonable doubts in plaintiff's favor, we conclude that the trial court correctly denied defendants' motion for summary disposition. First, plaintiff established a prima facie case of age discrimination. Defendants conceded that plaintiff was terminated, that she was sixty years old, and that she was replaced by a twenty-nine-year-old. *Manning, supra.*

Plaintiff also demonstrated that Sutton had a discriminatory predisposition against plaintiff by proving that Sutton made negative comments regarding plaintiff's age. *Rasheed, supra.* Although Sutton alleged that she did not have control over plaintiff's termination, defendants terminated plaintiff within three months of Sutton's reassignment. In his deposition, Finn admitted that he had spoken with Sutton about plaintiff, but he stated that he and Sutton only discussed plaintiff in connection with Riverbend's financial operations. Finn stated that prior to his appointment as plaintiff's supervisor, he had very limited knowledge of any problems at Riverbend. Thus, it is reasonable to infer that Finn terminated plaintiff at least based in part on Sutton's evaluation of plaintiff, which was motivated by a discriminatory predisposition. Plaintiff's evidence thus was sufficient to establish a prima facie case of age discrimination.

Defendants then contended that plaintiff was unqualified. Plaintiff established her qualifications by proving her Certificate in Nursing Home Administration from Michigan State University and her employment as a nursing home administrator for approximately twenty-one years for defendants and

their predecessor. Moreover, as late as September 1989, defendants' corporate officers praised and rewarded her administrative skills, which belies their subsequent assertion that she was not qualified.

Defendants countered plaintiff's prima facie case by submitting evidence that they terminated her because they were displeased with her managerial skills and ability to organize fiscal matters. Plaintiff, however, raised triable issues concerning the pretextual nature of defendants' proffered reasons for terminating her. Plaintiff furnished statements from company officials that conflicted with Sutton's evaluation of plaintiff's performance in 1989, thus raising issues concerning the factual basis and credibility of defendants' proffered reasons. Where credibility is at issue, summary disposition is inappropriate. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Further, while defendants claimed that they fired plaintiff because of financial mismanagement of the Riverbend facility, plaintiff presented evidence showing that her facility was enjoying above-average fiscal results in 1990, and that she was fired allegedly for failing to achieve financial results that had yet to be realized nearly one year after her termination. Moreover, plaintiff's evidence showed that defendants' corporate office may have been equally responsible for the mismanagement attributed to plaintiff. Defendants' conflicting statements concerning plaintiff's job performance made summary disposition particularly inappropriate. Because plaintiff submitted evidence to raise triable issues regarding whether defendants' proffered reasons for terminating her had any basis in fact and whether they were sufficient to justify her termination, we conclude that the trial court correctly denied defendants' motion for summary disposition.

Next, we reject defendants' arguments that the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict. Regarding denial of the directed verdict motion, this Court reviews all the evidence presented through the time of the motion to determine whether a question of fact existed. In doing so, we view the evidence in a light most favorable to the nonmoving party, grant her every reasonable inference, and resolve any conflict in the evidence in her favor. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). If reasonable minds could differ whether the plaintiff has met the burden of proof, a motion for directed verdict should be denied. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995). Finally, we recognize the unique opportunity of the jury and the trial judge to observe witnesses and judge credibility. *Lester N Turner, PC v Eyde*, 182 Mich App 396, 398; 451 NW2d 644 (1990).

Viewing the evidence in a light most favorable to plaintiff and resolving any conflicts in her favor, the evidence presented up to the time of defendants' motion for directed verdict reflects that the trial court justifiably denied defendants' motion for directed verdict. Plaintiff established a prima facie case of age discrimination by showing that she was sixty years old when she was terminated, that she was replaced by a twenty-nine-year-old, and that she was qualified for her position. *Lytle*, *supra* at 186 n 2. Because she was not terminated pursuant to an economically motivated reduction in force, plaintiff was not required to establish, as defendants argue, that age was a *determining* factor in her employers' decision to discharge her. *Id.*, at 186.

Although defendants maintained that plaintiff's job performance was unacceptable as of May 28, 1990, plaintiff submitted evidence that defendants were happy with her performance as late as December 15, 1989. Further, when defendants had moved for directed verdict, plaintiff had submitted evidence to raise triable issues concerning the pretextual nature of defendants' proffered reasons for terminating her. Likewise, while Sutton initially maintained that plaintiff's "people problems" were insurmountable, she told plaintiff in December 1989 that she thought the employees' complaints did not amount to much. Moreover, plaintiff was removed from her thirty days' probation on February 5, 1990, and was told by company officials that "they couldn't see the problems that they had been told existed." Although defendants claimed to have received numerous complaints regarding plaintiff from the Riverbend facility's clients, Finn could recall receiving complaints only from one person. As for her alleged fiscal mismanagement, defendants' own records showed that plaintiff's facility was experiencing solid financial performance when defendants accused her of mismanagement. Plaintiff succeeded in establishing triable issues regarding the pretextual nature of defendants' reasons for terminating her by presenting evidence that their reasons either had no basis in fact or were jointly insufficient to justify her termination. *Dubey*, *supra*. Issues pertaining to the weight and credibility of the evidence were properly left for the jury. *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986).

Likewise, we disagree with defendants' argument that the court improperly denied their motion for judgment notwithstanding the verdict. JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1990). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in a light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395; 493 NW2d 441 (1992).

Viewed in a light most favorable to plaintiff, the evidence created jury issues regarding defendants' liability for age discrimination. Plaintiff established a prima facie case of age discrimination and succeeded in raising triable issues regarding the pretextual nature of defendants' proffered reasons for terminating her. Moreover, plaintiff bolstered her prima facie case by submitting other circumstantial evidence that age motivated her termination. Evidence showed that Sutton questioned plaintiff regarding her retirement plans, repeatedly used the phrase "bright, young people" whenever she spoke with plaintiff about the alleged morale problems at the Riverbend facility, and admitted that she believed the complaints of the "bright, young staff" over plaintiff's versions of events. From this evidence, the jury could have reasonably inferred that defendants believed the criticisms of plaintiff's subordinates over her explanation of events because of the differences in age between the parties. The jury could reasonably determine that defendants viewed plaintiff's age as a hindrance in her role as a supervisor of younger employees. The disparity in age between plaintiff and her replacement buttresses this inference. Indeed, when plaintiff expressed her concern to both Sutton and defendants that her advanced age did not coincide with Sutton's vision of defendants' facility as "being staffed by 'bright, young people,'" she received no denial that her age was a factor in the allegations of mismanagement. Therefore, because plaintiff succeeded in establishing a prima facie case of age discrimination, presented evidence that age

was a factor in her termination, and submitted evidence to show that defendants' reasons for terminating her employment were pretextual, the court did not err in denying defendants' motion for JNOV.

Finally, defendants argue that the court erred in denying their motion for remittitur. We review the trial court's decision regarding remittitur for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989). This Court has stated that an abuse of discretion will be found only where an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made. *Cleary v Turning Point*, 203 Mich App 209, 210; 512 NW2d 9 (1993). The trial court, having witnessed the testimony and the evidence as well as the jury's reactions, is in the best position to make an informed decision and to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger. Thus, due deference should be given to the trial court's decision. *Palenkas*, *supra* at 534.

Because the trial court did not abuse its discretion in denying defendants' motion for remittitur, we affirm the jury's award of $200,000 for plaintiff's mental anguish. First, defendants argue that plaintiff presented insufficient evidence to support the trial court's decision to instruct the jury on emotional damages. The trial court correctly decided to instruct the jury on emotional damages. A standard jury instruction, which accurately states the law, must be given when requested by a party and when applicable. MCR 2.516(D)(2); *Walker v Flint*, 213 Mich App 18, 20; 539 NW2d 535 (1995). Emotional damages are compensable in claims for age discrimination brought under Elliott-Larsen. See *Wilson*, *supra* at 40. Contrary to defendants' theory that a party must submit expert testimony or corroborating evidence on the subject of emotional damages, a plaintiff may testify to her own subjective feelings to place emotional damages at issue. See *id*. (verdict for $375,000 for emotional damages upheld where plaintiff submitted "only testimony as to her subjective feelings" after being terminated on the basis of race and gender). Here, plaintiff testified that, for five years, she experienced agony and stigmatization because of her termination. Because emotional damages were applicable in light of the evidence, the trial court's decision to instruct the jury on this issue was not in error.

Moreover, the trial court did not abuse its discretion by allowing the jury's verdict on emotional damages to stand. MCR 2.611(E)(1) provides, in pertinent part, that remittitur is appropriate if the verdict is "excessive," i.e., if the amount awarded is greater than "the highest amount the evidence will support." Nonetheless, if the award falls reasonably within range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the award should not be disturbed. *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989). Defendants terminated plaintiff when she was aged sixty, after seventeen years of service at the Riverbend facility. Plaintiff was forced into the job market and lost self-confidence because of her termination. At one interview, she burst into tears when asked why she left her previous job. Plaintiff stated that her termination left her with the stigma of being fired for misconduct. In light of *Wilson*, *supra*, in which this Court upheld an award of $375,000 for emotional damages in an employment discrimination case, we cannot find that the jury's $200,000 award for emotional damages was unreasonable, even considering the purely subjective nature of plaintiff's evidence. Moreover, the verdict does not appear to stem from

jury bias or prejudice relating to the actual conduct of the trial or the evidence adduced. *Howard v Canteen Corp*, 192 Mich App 427, 436; 481 NW2d 718 (1992). In sum, considering the facts on which it acted, the trial court's denial of defendants' motion for remittitur was justified and therefore was not an abuse of its discretion.

Affirmed.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

[1] For approximately four months in 1975, plaintiff worked at another facility; she returned to Riverbend in May, 1975.

[2] The Supreme Court recently ruled that a plaintiff asserting age discrimination under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 USC 621 *et seq.*, need not prove that he was replaced by a younger person outside the protected class (i.e., under forty years old). *O'Connor v Consolidated Coin Caterers Corp*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (Docket No. 95-354, issued April 1, 1996).