[Cite as *Mittler v. OhioHealth Corp.*, 2013-Ohio-1634.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Martina Mittler,	:	
Plaintiff-Appellee,	:	
		No. 12AP-119
v.	:	(C.P.C. No. 09CV-16452)
OhioHealth Corporation,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 23, 2013

William J. O'Malley, for appellee.

Littler Mendelson, P.C., Alison M. Day and *Melanie A. Houghton*; *Terri Meldrum*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, OhioHealth Corporation, appeals from a judgment of the Franklin County Court of Common Pleas entered for plaintiff-appellee, Martina Mittler, on her age discrimination claim under R.C. 4112.14. Because plaintiff did not establish a prima facie case of age discrimination, we reverse.

I. Facts and Procedural History

{¶ 2} On May 16, 1988, plaintiff began working for defendant as a staff nurse in the neonatal intensive care unit ("NICU") at Riverside Methodist Hospital. In 2000, Nationwide Children's Hospital and OhioHealth entered into a contractual relationship in which Nationwide Children's Hospital assumed management of the NICU. Although plaintiff remained an employee of OhioHealth, she was required to comply with the policies and procedures of both OhioHealth and Nationwide Children's Hospital.

Defendant terminated plaintiff's employment on March 19, 2009. At the time of her termination, plaintiff was 54 years old and had been working exclusively in the NICU for nearly 21 years.

{¶ 3} Defendant terminated plaintiff's employment following two incidents, both of which occurred on March 16, 2009. In the first, plaintiff took a photograph of a volunteer who was holding twin infant patients. Plaintiff distributed one copy of the photograph to the volunteer and retained a second copy she intended to give to the infants' mother. Later that day, the infants' mother informed plaintiff she did not want volunteers to hold her infants. As a result, plaintiff decided not to disclose the photograph to the mother.

{¶ 4} After her conversation with the mother, plaintiff showed the photograph to Joanna Sutton, the nurse educator in the NICU, who advised plaintiff that allowing the volunteer to take a copy of the photograph constituted a violation of the Health Insurance Portability and Accountability Act ("HIPAA"). Plaintiff then spoke to Kelly Mexicott, a nurse practitioner, who also advised plaintiff that distributing the photograph to the volunteer was a HIPAA violation. Although plaintiff admitted she was aware she was required to report suspected or actual HIPAA violations, plaintiff did not report the incident to management, but instead took the photograph home with the stated intention of destroying it.

{¶ 5} In the second incident, plaintiff and Pam Hamilton mistakenly administered eye drops to the same twin infant patients. After administering them, plaintiff realized the drops were intended for another set of infants. Although plaintiff admitted to knowing she was required to file an incident report after administering an incorrect treatment to a patient, she did not file an incident report; she testified that she stated, "well, we'll just act like this didn't happen." (Tr. Vol. II, 107, 185-86.) Plaintiff also did not note on the medical administration record that the eye drops had been administered to the patients, although she admitted she was required to do so.

{¶ 6} According to Hamilton, plaintiff denied the eye drop incident to a nurse practitioner and unit clerk. After plaintiff left at the end of her shift, Hamilton informed a nurse practitioner and Shaun Stewart, a clinical nurse manager, that she and plaintiff

mistakenly administered eye drops. Hamilton also documented the medication on the medication administration record and filed an incident report documenting the error.

{¶ 7} At the time of the two incidents, OhioHealth's Performance Management Policy governed plaintiff's job performance. Pursuant to the policy, an employee's serious misconduct was grounds for immediately terminating his or her employment without progressive corrective action. The policy defined serious misconduct with examples including, but not limited to, "[u]nauthorized access, release, or use of confidential information concerning a patient, the organization, or another associate. (i.e. HIPAA violation)," and "[a]buse and/or negligence of duty with a potentially serious impact on the organization." (Joint exhibit No. 1, at OHH-210.)

{¶ 8} The policy permitted nonmanagement employees to file an appeal of written performance improvements or corrective actions, including termination of employment, using the problem review process. The problem review process prescribed a three-step procedure that employees subject to involuntary termination were to follow: (1) the terminated employee was required to file a written statement with the area vice president, who responded with a verbal decision regarding the issue; (2) if the employee was not satisfied, the employee could appeal to the review committee, which issued a nonbinding recommendation to the senior operating officer; (3) the senior operating officer reviewed the findings of the review committee and issued a final decision in writing to the employee.

{¶ 9} After Hamilton alerted her to the nature of the incidents, Stewart investigated and prepared written summaries for the other clinical nurse managers and Melissa Hamms, a member of the Nationwide Children's Hospital management team who had authority over employment decisions in the NICU pursuant to the agreement between Nationwide Children's Hospital and OhioHealth. On March 17, 2009, Kari Kennedy, another clinical nurse manager, reviewed the summary Stewart prepared and called plaintiff to obtain her version of the incidents. Hamms, too, investigated the incidents and discussed the appropriate course of action with individuals in OhioHealth management, OhioHealth human resources department, and Nationwide Children's Hospital management. On March 19, 2009, Kennedy and Hamms notified plaintiff of the decision to terminate her employment.

{¶ 10} Plaintiff appealed her termination under the problem review process. After meeting with plaintiff, the problem review committee unanimously recommended plaintiff's employment be reinstated and a lower level of corrective action applied. In the final stage of the problem review process, Bruce Hagen, then—president of Riverside Methodist Hospital, sent plaintiff a letter dated April 23, 2009, informing her of his decision to uphold the termination based on serious misconduct as the policy defined it.

{¶ 11} Plaintiff filed her complaint on November 4, 2009, alleging age discrimination in violation of R.C. 4112.14. Defendant filed a motion for summary judgment on August 25, 2010, asserting no genuine issues of material fact remained to be tried because plaintiff could not establish the fourth element of a prima facie case and could not prove defendant's articulated legitimate, nondiscriminatory reason for termination was pretextual. After the parties fully briefed the issues, the trial court, on September 30, 2011, denied defendant's motion for summary judgment, finding genuine issues of material fact existed.

{¶ 12} A bench trial commenced on December 19, 2011. On December 22, 2011, after completing the trial, the court granted judgment to plaintiff in the form of a bench opinion pursuant to Civ.R. 52, followed with an entry of judgment on January 24, 2012.

II. Assignments of Error

{¶ 13} Defendant appeals, assigning three errors:

> 1. The trial court erred in denying Appellant's motion for summary judgment on Appellee's age discrimination claim.
>
> 2. The trial court erred in finding that Appellee satisfied the fourth prong of the *prima facie* case, that she was replaced by, or that her discharge permitted the retention of, a person not belonging to the protected class.
>
> 3. The trial court erred in finding that Appellee proved by a preponderance of the evidence that she was terminated because of her age.

III. First Assignment of Error – Summary Judgment

{¶ 14} Defendant's first assignment of error asserts the trial court erred when it denied defendant's motion for summary judgment. "Ordinarily, 'the denial of a motion for summary judgment is not a point of consideration in an appeal from a final judgment

entered following a trial on the merits.' " *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 13 (10th Dist.), quoting *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156 (1994).

{¶ 15} Under *Capella*, the trial court's denial of defendant's motion for summary judgment does not present a reviewable issue because the trial court denied the motion due to the existence of genuine issues of material fact, as opposed to a pure question of law, and a subsequent trial resulted in a verdict for plaintiff, the nonmoving party. *See Capella III* at ¶ 13-14, citing *Continental Ins.* at 156. Pursuant to *Capella*, we overrule defendant's first assignment of error.

IV. Second and Third Assignments of Error – Prima Facie Case and Pretext

{¶ 16} Defendant's second and third assignments of error contend the trial court erred as a matter of law: (1) in determining plaintiff established the fourth element of her prima facie case, and (2) in not concluding plaintiff failed to prove defendant's proffered reasons for terminating her were pretext.

{¶ 17} In a civil case, if some competent, credible evidence going to all the essential elements of the case supports the trial court's judgment, a reviewing court will not reverse it as being against the manifest weight of the evidence but must affirm it. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. Because defendant does not challenge the weight of the evidence or even dispute the facts, we review the trial court's judgment to determine whether the judgment is contrary to law. *Wise v. Ohio State Univ.*, 10th Dist. No. 11AP-383, 2011-Ohio-6566, ¶ 6, citing *Heffern v. Univ. of Cincinnati Hosp.*, 142 Ohio App.3d 44, 51 (10th Dist.2001).

{¶ 18} Plaintiff's complaint alleged defendant discriminated on the basis of age in violation of R.C. 4112.14. R.C. 4112.14(A) provides: "No employer shall * * * discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job." R.C. 4112.99 authorizes civil actions for any violations of R.C. Chapter 4112.

A. *The McDonnell Douglas Burden-Shifting Framework*

{¶ 19} "To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent" and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766 (10th

Dist.1998), citing *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 583 (1996). Absent direct evidence of age discrimination, a plaintiff may indirectly establish discriminatory intent using the analysis promulgated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as adopted by Supreme Court of Ohio in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), and modified in *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723.

1. The Prima Facie Case

{¶ 20} Under the test as revised in *Coryell*, a plaintiff must demonstrate that he or she: "(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Coryell* at paragraph one of the syllabus, modifying and explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991), syllabus. Establishing a prima facie case "creates a presumption that the employer unlawfully discriminated against the employee." *Williams v. Akron*, 107 Ohio St. 3d 203, 2005-Ohio-6268, ¶ 11, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

2. The Employer's Burden of Production

{¶ 21} If a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for discharging the employee. *Caldwell v. Ohio State Univ.*, 10th Dist. No. 01AP-997, 2002-Ohio-2393, ¶ 61, quoting *Burdine* at 253. The employer meets its burden of production by submitting admissible evidence that " '*taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action,' " and in doing so rebuts the presumption of discrimination that the prima facie case establishes. (Emphasis sic.) *Williams* at ¶ 12, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993).

3. Pretext

{¶ 22} Finally, if the employer meets its burden of production, a plaintiff must prove by a preponderance of the evidence that the employer's legitimate, nondiscriminatory reasons of the employer were merely a pretext for unlawful discrimination. *Barker* at 148. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with

the plaintiff." O*hio Univ. v. Ohio Civ. Rights Comm.*, 175 Ohio App.3d 414, 2008-Ohio-1034, ¶ 67 (4th Dist.), quoting *Burdine* at 253. " '[A] reason cannot be proved to be "a pretext *for discrimination*" unless' " plaintiff demonstrates " '*both* that the reason was false, *and* that discrimination was the real reason.' " (Emphasis sic.) *Williams* at ¶ 14, quoting *St. Mary's Honor* at 515.

B. *Plaintiff Did Not Establish Prima Facie Case*

{¶ 23} Defendant asserts plaintiff failed to establish a prima facie case, requiring the trial court's judgment be reversed as a matter of law. Plaintiff initially responds that we may not review the sufficiency of her prima facie case after a trial on the merits. Contrary to plaintiff's contention, we are permitted to review whether the plaintiff established the elements of a prima facie case. *See Williams* at ¶ 30 (stating that "permitting an appellate court to revisit plaintiff's evidence in support of the prima facie case of discrimination, even after the case has been decided by a jury on the merits, * * * supports the well-founded rule that a plaintiff must prove essential elements of his or her case-in-chief before any defense is necessary").

{¶ 24} Plaintiff alternatively contends the trial court properly concluded she established the fourth element of her prima facie case. Although the trial court's bench opinion does not mention the first three elements of the prima facie case, the parties do not dispute that plaintiff established them; they dispute only the fourth element. The trial court determined plaintiff established the fourth element, stating that plaintiff "was replaced by a person of substantially younger age, and * * * her discharge permitted the retention in the NICU of persons of substantially younger age." (Tr. Vol. IV, 77.)

1. Replaced by Person of Substantially Younger Age

{¶ 25} In order to prove under R.C. 4112.02 that a person of substantially younger age replaced her, a plaintiff cannot merely recite that the defendant hired new employees, but instead must present evidence that another employee actually replaced her by assuming a "substantial portion" of her duties. *Mazzitti v. Garden City Group, Inc.*, 10th Dist. No. 06AP-850, 2007-Ohio-3285, ¶ 22. The trial court's judgment does not designate who replaced plaintiff, but plaintiff argues the trial court could have concluded that Jamie Armstrong replaced her.

{¶ 26} At the time of her termination, plaintiff worked exclusively during the day shift. Armstrong was the next nurse hired to work in the NICU. Hamms, however, testified Armstrong only worked on the night shift and therefore did not assume plaintiff's duties. Plaintiff points to no evidence disputing Hamms' testimony in that regard. *See Valentine v. Westshore Primary Care Assoc.*, 8th Dist. No. 89999, 2008-Ohio-4450, ¶ 87 (noting that although plaintiff established defendant hired three new employees following her termination, she failed to present "any evidence establishing that these three people replaced her").

{¶ 27} Hamms additionally testified no nurses transferred to the day shift in the months following plaintiff's termination; instead, plaintiff's duties were "absorbed by the other people working her shift." (Tr. Vol. I, 163, 184.) Plaintiff admits her coworkers assumed her duties but argues that evidence of age discrimination lies in the fact that the average age of the remaining NICU employees was younger than plaintiff. Plaintiff's argument ignores that, as a matter of law, plaintiff was not replaced since her duties were redistributed among the other nurses in the NICU. "[A] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work." *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir.1990).

2. Retention of a Person of Substantially Younger Age

{¶ 28} The remaining issue under the fourth element is whether plaintiff's termination permitted the retention of employees of a substantially younger age. Plaintiff admits defendant, following plaintiff's termination, continued to employ persons in the NICU who were within the protected class. Where a variety of people assume an employee's duties, at least one of whom is in the protected class, the fourth prong of the *Barker* test necessarily is not satisfied. *Smith v. E.G. Baldwin & Assoc., Inc.*, 119 Ohio App.3d 410, 416 (10th Dist.1997), citing *Shepard v. The Limited Inc.*, 10th Dist. No. 92AP-1440 (June 8, 1993).

{¶ 29} Although *Coryell* modified the fourth prong of the prima facie case by allowing plaintiff to prove that the discharge permitted the retention of a person of substantially younger age rather than having to prove a person not belonging to the protected class replaced her, *Coryell* does not alter the application of *Smith*, 119 Ohio

App.3d 410, in this case: the record reflects that some of the nurses who assumed plaintiff's duties were older than plaintiff. *See Fenton v. Time Warner Entertainment Co.*, 2d Dist. No. 19755, 2003-Ohio-6317, *discretionary appeal denied*, 102 Ohio St.3d 1410, 2004-Ohio-1763; *Vickers v. Wren Industries, Inc.*, 2d Dist. No. 20914, 2005-Ohio-3656, ¶ 26-27, *discretionary appeal denied*, 107 Ohio St.3d 1425, 2005-Ohio-6124.

{¶ 30} In *Fenton*, the court reconsidered and overruled its prior decision as obvious error in light of its holding in *Lincoln v. ANR Advance Transp. Co.*, 2d Dist. No. 16975 (Nov. 13, 1998). Time Warner discharged Fenton, who was 50 years old at that time, and initially reassigned Fenton's duties to three employees, one of whom was 58 years old. Later, Time Warner reassigned those same duties to two other employees, both of whom were at least 40 years old. The court determined "the presumption of discriminatory intent [was] not warranted" in those circumstances because Fenton's duties were reassigned to individuals within the protected class and, as a result, found that Fenton failed to establish the fourth prong of the prima facie case. *Fenton* at ¶ 14.

{¶ 31} In *Vickers*, the plaintiff, who was 58 years old at the time of his termination, pointed to the employer's retention of two employees under 40 years of age as evidence establishing the fourth element of his prima facie case. The court, however, noted the employer also retained several employees with plaintiff's same responsibilities who were within the protected class, one of whom was 58 years old. Because plaintiff's duties were reassigned to the retained individuals, some of whom were within the protected class, the court held that plaintiff failed to establish a prima facie case of age discrimination. *Id.* at ¶ 27.

{¶ 32} Plaintiff alternatively contends defendant terminated her and three other nurses within the protected class from March until May 2009 due to a "low census," meaning the ratio of patients to nurses in the NICU was imbalanced and resulted in over-staffing. Plaintiff points to the terminations as evidence of age-based discrimination since the majority of the remaining nursing staff was within the nonprotected class of employees. Plaintiff essentially contends defendant discriminated on the basis of age during a workforce reduction, resulting in the retention of employees of a substantially younger age.

{¶ 33} "[I]f an employer did not replace the plaintiff, but rather consolidated jobs in order to eliminate excess worker capacity, then a work force reduction took place." *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶ 58, citing *Spencer v. Hilti, Inc.*, 116 F.3d 1480 (C.A.6, 1997) (Table). "[I]n cases of a termination due to a [workforce reduction], 'an age discrimination plaintiff carries a greater burden of supporting allegations of discrimination by coming forward with additional evidence, be it direct, circumstantial, or statistical, to establish that age was a factor in the termination.' " *Kundtz v. AT & T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462, ¶ 21, quoting *Dahl v. Battelle Memorial Inst.*, 10th Dist. No. 03AP-1028, 2004-Ohio-3884, ¶ 15. The purpose of requiring the plaintiff to introduce additional evidence in workforce reduction cases is to ensure "there is a chance that the work force reduction is not the reason for the termination." *Woods* at ¶ 57, citing *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir.2006); *Lovas v. Huntington Natl. Bank*, 215 F.3d 1326 (6th Cir.2000), fn. 1 (Table).

{¶ 34} Plaintiff introduced no additional evidence to support her assertion that age discrimination played a factor in the alleged workforce reduction. Although plaintiff cites defendant's terminating three other nurses in the protected class as evidence of age discrimination, the record reveals no reason for their termination other than a reduction in the workforce. Plaintiff thus failed to properly place such figures within a relevant context. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir.1987); *Boggs v. The Scotts Co.*, 10th Dist. No. 04AP-425, 2005-Ohio-1264, ¶ 16 (noting "unelaborated statistics that fail to consider independent variables such as job skills, education, experience, performance or self-selection, were insufficient to establish a material issue of fact"), citing *Dahl* at ¶ 18, citing *Swiggum v. Ameritech Corp.*, 10th Dist. No. 98AP-1031 (Sept. 30, 1999). Similarly, although some exhibits demonstrate that the number of nurses in the NICU within the protected class decreased from March 21, 2009 to November 26, 2011, the evidence again is unelaborated statistics that as a matter of law do not demonstrate a chance that the workforce reduction was not the reason for her termination.

3. Similarly Situated Employees

{¶ 35} Finally, plaintiff contends she can satisfy the fourth prong because evidence demonstrated Kimberly Zornow and Pam Hamilton, similarly situated employees outside the protected class, were treated differently. Although the trial court did not so find, we address plaintiff's contention.

{¶ 36} A plaintiff can establish the fourth element of a prima facie case under the *McDonnell Douglas* test by showing that " 'a comparable non-protected person was treated better.' " *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992); *Valentine* at ¶ 63. "[T]he individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell* at 583. *See also Valentine* at ¶ 89 (noting "the parties to be compared must be similarly-situated in all respects").

{¶ 37} Plaintiff's contention fails, as plaintiff admits that Zornow was within the protected class of employees and therefore does not qualify as a similarly situated, nonprotected comparator. Additionally, unlike plaintiff, Zornow, upon being informed her actions constituted a HIPAA violation, immediately took responsibility for her mistake by reporting the incident, meeting with the family, and deleting the photograph. Zornow also had no prior performance issues and no record of improperly documenting patient medication errors, as did plaintiff.

{¶ 38} Moreover, although Hamilton and plaintiff both erroneously administered eye drops to the same twin infant patients, Hamilton, unlike plaintiff, reported the error to her supervisors, filed an incident report, and charted that medicine was administered to the patients. Such conduct distinguishes her circumstances from plaintiff's and renders the comparison inapposite.

{¶ 39} Since, as a matter of law, defendant did not replace plaintiff with a person of substantially younger age, and plaintiff's termination did not permit the retention of a person of substantially younger age, plaintiff did not satisfy the fourth element of the prima facie case.

C. *Defendant Articulated a Legitimate Nondiscriminatory Reason for Terminating Plaintiff's Employment*

{¶ 40} Although plaintiff's failure to present a prima facie case ends the analysis, we address the remaining steps in the *McDonnell Douglas* framework. As the trial court observed, defendant articulated three reasons for terminating plaintiff: (1) plaintiff's distributing a photo of infant patients to a hospital volunteer in violation of HIPAA; (2) plaintiff's erroneously dispensing eye drops to the same patients; and (3) plaintiff's failure to file a mandatory HIPAA violation report, to chart the erroneous dispensation of eye drops and to file an incident report documenting the error. Defendant supported the legitimate, nondiscriminatory reasons through Hagen's and Hamms' testimony.

{¶ 41} Hagen testified that the two March 16, 2009 incidents formed the primary justification for plaintiff's termination. Hagen added he would not have upheld plaintiff's termination absent her failure to follow the mandatory reporting requirements. Hamms stated the decision to terminate was based upon the photo incident, the medication error, and plaintiff's failure to report both incidents. Hamms grounded her testimony in the policy that required employees to report a HIPAA violation or potential violation, to document medication errors with an incident report, and to chart the dispensation of medicine on a patient's medication administration record.

{¶ 42} Plaintiff does not contest that defendant met its burden as to whether it discriminated against the plaintiff by "clearly set[ting] forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine* at 255.

D. *Plaintiff did not Establish Defendant's Reasons were Pretextual*

{¶ 43} The final step in the *McDonnell Douglas* analysis is whether the trial court erred in determining plaintiff proved that defendant's legitimate, nondiscriminatory reasons were pretext for unlawful discrimination because of age. In that regard, the trial court found defendant "made the termination decision precipitously, without any legitimate effort to investigate, and for the ulterior motive [of] discriminating on the basis of age in order to reduce costs and to address the low census in the NICU." (Tr. Vol. IV, 97.)

{¶ 44} To carry her ultimate burden of proof, a plaintiff must prove either " '(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [her] discharge, or (3) that they were insufficient to motivate discharge.' " *Sweet v. Abbott Foods, Inc.*, 10th Dist. No. 04AP-1145, 2005-Ohio-6880, ¶ 34, quoting *Manzer*

v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir.1994). *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011-Ohio-6054, ¶ 12 (stating "[a] reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason"). The ultimate burden rests with the plaintiff to present evidence that demonstrates discrimination was the real reason for the termination. *Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 31 (stating " '[t]he ultimate inquiry in an employment-based age discrimination case is whether an employer took adverse action "because of" age; that age was the "reason" that the employer decided to act' "), quoting *Miller v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. No. 1-09-58, 2010-Ohio-4291, ¶ 21.

1. Plaintiff Failed to Prove Defendant's Reasons were Factually False

{¶ 45} "The first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are 'factually false.' " *Manzer* at 1084, quoting *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir.1994). Thus, "[i]n 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." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

{¶ 46} Unlike in *Reeves*, on which plaintiff relies, plaintiff admits that the events defendant cited actually occurred. She instead seems to downplay the severity of her actions, suggesting her "taking the photo was reasonable." (Appellee's brief, at 11.) She similarly contends she "did not create an incident report over the matter, but it was a minor, frequently occurring event." (Appellee's brief, at 16.) Since plaintiff does not contend that the defendant's legitimate, nondiscriminatory reasons are factually false, plaintiff cannot establish the first showing as a matter of law. *See Frick v. Potash Corp. of Saskatchewan, Inc.*, 3d Dist. No. 1-09-59, 2010-Ohio-4292, ¶ 46; *Singleton v. Select Specialty Hosp.-Lexington, Inc.*, 391 Fed.Appx. 395, 400 (6th Cir.2010); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 759 (6th Cir.2000).

2. Plaintiff Failed to Prove Defendant's Reasons were Insufficient

{¶ 47} The third type of showing "is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected

class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Manzer* at 1084. Although the trial court found defendant's reasons were insufficient to motivate discharge, plaintiff, as noted above, failed as a matter of law to demonstrate that she was treated differently than similarly situated, nonprotected employees. *See Manzer* at 1084; *Leggett Wire Co.* at 763 (concluding that where conduct differs or mitigating circumstances are present, comparators are not sufficiently similar). Plaintiff did not establish that defendant's legitimate, nondiscriminatory reasons were insufficient to motivate discharge.

3. Plaintiff Failed to Prove Defendant's Reasons did not Actually Motivate Discharge

{¶ 48} Under the second type of showing, plaintiff abandons direct attacks on the factual basis of the employer's legitimate, nondiscriminatory reasons and admits that such facts could motivate discharge. *Manzer* at 1084. Instead, plaintiff attempts to prove "that an illegal motivation was *more* likely than that offered by the defendant." (Emphasis sic.) *Id.* "In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup." *Id.*

{¶ 49} The trial court relied on *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir.2003), to find that the "idiosyncratic" and "irrational" decision to terminate plaintiff's employment demonstrates defendant's legitimate, nondiscriminatory reasons are pretext. (Tr. Vol. IV, 80.) *Wexler* concluded "the reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *Id.* at 576, citing *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir.1998). *Wexler*, however, decided a reasonable factfinder could infer pretext due to the unreasonableness of the defendant's decision "[w]hen combined with the age-related statements" the defendant made, coupled with evidence of an employee outside the protected class who was retained despite being similarly situated to Wexler. *Id.*

{¶ 50} Here, plaintiff presented no evidence of age-related statements or of any similarly situated employee outside the protected class whom defendant retained.

Instead, the trial court cited Hagen's decision to disregard the recommendation of the review committee as "[t]he most notable evidence" of defendant's unreasonableness. (Tr. Vol. IV, 80.) Because the recommendation of the review committee was nonbinding, Hagen's decision to uphold plaintiff's termination was consistent with the defendant's policy; no evidence suggests such procedure was markedly different from similar investigations. *See Singleton* at 402 (concluding plaintiff failed to establish the defendant's proffered reasons did not actually motivate discharge since the plaintiff presented "no evidence that the process by which this investigation went forward was different from investigations into similar incidents, or that the process was inconsistent with hospital policy"); *Cf. Skelton v. Sara Lee Corp.*, 249 Fed.Appx. 450, 461-62 (6th Cir.2007) (determining that "even if we assume that Defendant's evaluation process was haphazard * * * there exists no reasonable inference that Defendant discriminated on the basis of age"); *Wigglesworth v. Mettler Toledo Internatl., Inc.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶ 24 (stating that "deviance from a progressive discipline policy does not indicate pretext, especially when the employer warns an employee that it may disregard its policy if it chooses"); *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 397-99 (6th Cir.2008) (rejecting as a matter of law unreasonableness argument despite employee's questioning violations of employer's policy due to policy ambiguities); *Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553, 560-61 (6th Cir.2009).

{¶ 51} The trial court's decision extensively examined the appropriateness of the decision to terminate plaintiff, asking, for example, why "Hagen didn't do more" since "[e]ven a modest inquiry would have shown Ms. Mittler enjoyed the respect of virtually all of her co-workers for an extraordinary career." (Tr. Vol. IV, 83.) Plaintiff similarly argues that her "excellent performance record" undermined the defendant's proffered reasons. (Appellee's brief, at 31.)

{¶ 52} Although the trial court noted plaintiff had the respect of her peers and received positive performance evaluations, such evidence is "precisely the type of 'just cause' arguments which must not be allowed to creep into an employment discrimination lawsuit." *Manzer* at 1084-85. Courts are not to judge whether an employer made the best or fairest decision, but to determine whether the decision would not have been made but for discrimination on the basis of age. *See Knepper* at ¶ 23 (noting "[i]t is important to

keep in mind that the issue before the trial court was not whether [defendant] made the best possible decision in not hiring [plaintiff], but whether it made a discriminatory decision"); *Olive v. Columbia/HCA Healthcare Corp.*, 8th Dist. No. 75249 (Mar. 9, 2000) (pointing out that plaintiff's "exemplary work record" and "long history of achievement with the hospital" do "nothing to advance the conclusion that plaintiff's termination was the product of age discrimination"); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir.1986) (observing that "[t]his Court does not sit as a super-personnel department that reexamines an entity's business decisions"); *Leggett Wire* at 763.

{¶ 53} The trial court also decided "it is reasonable to infer that financial savings were a key factor for Hamms, and in this provided the rationale for age discrimination." (Tr. Vol. IV, 98.) Even if plaintiff presented evidence that defendant's desire to "reduce costs and to address the low census in the NICU" was the motivating factor behind defendant's decision to terminate plaintiff, such evidence does not prove a discriminatory motivation. (Tr. Vol. IV, 97.) *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (noting "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age"); *Karsnak v. Chess Fin. Corp.*, 8th Dist. No. 97312, 2012-Ohio-1359, ¶ 34 (concluding that "[e]liminating an employee's position and distributing her duties to other employees in an effort to increase efficiency is a legitimate and non-discriminatory aim"), citing *Mendlovic v. Life Line Screening of Am., Ltd.*, 173 Ohio App.3d 46, 2007-Ohio-4674, ¶ 43 (8th Dist.); *Olive* (stating "there is no correlation between the hospital's need to cut costs and age discrimination"); *Swiggum*. R.C. 4112.02(A) does not protect an employee from an employer's economically motivated employment decisions; it protects an employee from discrimination on the basis of age. *See Hazen* at 611.

{¶ 54} Plaintiff did not demonstrate that defendant's legitimate, nondiscriminatory reason was false, that those reasons did not actually motivate its decision to discharge plaintiff, or that its reasons were insufficient to motivate discharge. *Manzer* at 1084. Although plaintiff may disagree with the reasons defendant advanced, plaintiff failed to establish a causal connection between the decision to terminate her employment and discrimination on the basis of age. *Dale* at 465 (noting a plaintiff "must establish a nexus between his evidence and age discrimination in that 'but for' his age, he would not have

been terminated"). Plaintiff provided no evidence, direct or otherwise, demonstrating that age was the "but for" cause for defendant's decision. *See Gross* at 180. Because plaintiff failed to establish that discrimination was the reason for defendant's decision to terminate her employment, defendant is entitled to judgment as a matter of law.

{¶ 55} Accordingly, we sustain defendant's second and third assignments of error.

V. Disposition

{¶ 56} Having overruled defendant's first assignment of error, but sustained defendant's second and third assignments of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand with instructions to enter judgment for defendant.

Judgment reversed and cause remanded with instructions.

BROWN, J., concurs.
TYACK, J., concurs in part and dissents in part.

TYACK, J., concurring in part and dissenting in part.

{¶ 57} I respectfully concur in part and dissent in part.

{¶ 58} I believe the trial court was correct in finding that plaintiff established the fourth prong of her prima facie case and that defendants' proffered reason for termination was a pretext.

I. PLAINTIFF'S TERMINATION PERMITTED THE RETENTION OF YOUNGER NURSES

{¶ 59} Plaintiff was able to establish that her termination permitted the retention of a person of substantially younger age. "Prima facie tests are mechanisms by which courts may readily dispose of cases that cannot sustain a particular cause of action. ' "To say that a plaintiff has established a *prima facie* case is simply to say that he has produced sufficient evidence to present his case to the jury, *i.e.*, he has avoided a directed verdict." ' " *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶ 17, quoting *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 505 (1991), quoting *Rose v. Natl. Cash Register Corp.*, 703 F.2d 225, 227 (6th Cir.1983).

{¶ 60} The majority relies on *Smith v. E.G. Baldwin & Assoc., Inc.*, 119 Ohio App.3d 410, 416 (10th Dist.1997), stating that where a variety of people assume an

employee's duties, at least one of whom is in the protected class, the fourth prong of the *Barker* test necessarily is not satisfied. This conclusion ignores both the Supreme Court of Ohio's holding in *Coryell* which directly modified the fourth prong of the test adopted in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), and the ultimate inquiry of whether plaintiff was discharged on account of age. I believe that, in light of *Coryell*, our decision in *Smith* is no longer good law.

{¶ 61} Coryell, age 49, was found to have established the fourth prong of when she was replaced by a 42 year old who was a member of the protected class considered to be "substantially younger." *Coryell* generally. The Supreme Court in *Coryell* explains its reasoning for changing the requirements of the fourth prong of the prima facie from "a person not belonging to the protected class" to "a person of substantially younger age."

> " '[T]here must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption." '
>
> A prima facie case standard requiring evidence that an employee's replacement is outside the protected class is logically disconnected from the employment discrimination that R.C. 4112.14(A) seeks to prevent. Essentially, R.C. 4112.14(A) prohibits employment discrimination on the basis of age. Thus, "the ultimate inquiry * * * [is] whether evidence of age discrimination is present in the case."
>
> To acknowledge that R.C. 4112.14(A) is designed to prohibit age-based discrimination and then *to hold that a claim must fail because although discrimination may have occurred, it occurred in favor of a class member thwarts the statute and tacitly condones the offensive conduct that it was intended to prevent*. This inconsistency is remedied by replacing *Barker's* fourth prong with a requirement that the favored employee be substantially younger than the protected employee. A "substantially younger" test serves R.C. 4112.14(A)'s purpose because it is logically connected to the discrimination that R.C. 4112.14(A) seeks to prevent.

(Citations omitted; fn. deleted; emphasis added.) *Coryell* at ¶ 17-19, quoting *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996).

{¶ 62} Our holding in *Smith* is clearly at odds with the Supreme Court in *Coryell*. *Smith* is based on *Barker*'s fourth prong which *Coryell* directly modified.

{¶ 63} The majorities' application of our holding in *Smith* allows an employer to discriminate based on age and terminate every employee over the age of 39 within a company so long as the slimmest amount of the terminated employees' duties were distributed to one person in the protected class even in the face of overwhelming circumstantial evidence. This is analogous to the example given in *Coryell* in which a strict application of the *Barker*'s fourth prong would allow a 40 year old to claim that a 39-year-old replacement is logically connected to age discrimination, but not allow a 56 year old to make the same claim of their 40-year-old replacement. *Coryell* at ¶ 18.

{¶ 64} In *McDonnell Douglas Corp. v.* Green, 411 U.S. 792 (1973), the standards set forth in *Barker* were never intended to be applied strictly or be rigid, mechanized, or ritualistic. *Kohmescher* at 504. It is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. *Id.* "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' " *Id.* at 505, quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir.1979).

{¶ 65} " 'The fact that one person in the protected class has lost out to another person in the protected class is * * * irrelevant, so long as he has lost out *because of his age*. (Emphasis sic.)" *Coryell* at ¶ 11, quoting *O'Connor* at 312. Our decision in *Smith* clearly goes against the holding in *Coryell* and is no longer good law.

II. EVIDENCE OF DISCRIMINATION AND NOT MERELY A WORKFORCE REDUCTION

{¶ 66} The majority also concludes that OhioHealth may merely be conducting a workforce reduction despite OhioHealth consistently denying this. If this case were in fact a workforce reduction, then plaintiff would carry a greater burden in supporting allegations of discrimination by coming forward with additional evidence, be it direct, circumstantial or statistical, to establish that age was a factor in the termination. *Kundtz v. AT & T Solutions, Inc.*, 10th Dist. No. 05AP-1045, 2007-Ohio-1462. Contrary to the majorities' statement, it is clear plaintiff provided additional evidence that age discrimination did play a factor in plaintiff's termination.

{¶ 67} There was a great deal of evidence heard by the trial court that age discrimination occurred in multiple instances in the NICU and OhioHealth. Much of this

same evidence also proves that OhioHealth's proffered reasons for plaintiff's termination is pretext.

{¶ 68} Testimony was given that nurses, because of their age, felt their jobs were in jeopardy and that they were treated differently because of their age, and that older nurses were picked on by younger management. (Tr. Vol. II, 10-15; 22.)

{¶ 69} Other circumstances surrounding the termination of plaintiff and other older nurses, which were extensively covered at trial, indicated age discrimination. For example, nurse Paula Gibb who suffered an injury while at Riverside was evaluated as to whether she could return to work in May 2009. There was evidence that the evaluation of her physical abilities was unnecessarily difficult, cursory, and unfair. OhioHealth's hastily decided poor evaluation was used as a pretext when the real reason for her termination was her age. Gibb Affidavit attached to Plaintiff's Memorandum Contra to the Motion for Summary Judgment. (Tr. Vol. II, 28, 74.)

{¶ 70} OhioHealth has continually stated that plaintiff was terminated for her violations of hospital policy and not for economic reasons or a workforce reduction which OhioHealth never argued it was performing. The trial court did not find this explanation credible, which is further evidence of discrimination. There was a great deal of evidence given about the termination process of plaintiff, including the memos about the incidents written, how the investigation was initially conducted, the review panel process, and how Hagen made his final determination. The trial court believed that these are all sources of evidence proving that this was not a mere workforce reduction.

{¶ 71} There was evidence presented throughout trial that having every nurse reapply for the charge nurse position showed age discrimination. Charge nurses were paid slightly more, up to $3 more per hour. Charge nurses served in a supervisory role for the shift they worked. The role could lead to a management position in the future. (Tr. Vol. I, 47, 96, 143.) Many older nurses, including plaintiff, who had been serving as charge nurses or assistant nurse managers for years were either discouraged from reapplying and interviewing or denied charge nurse positions. Lynn Spencley Affidavit attached to Plaintiff's Memorandum Contra to the Motion for Summary Judgment. (Tr. Vol. II, 67.) There was no writing made of the reasons a nurse did not receive a charge nurse position and the reasons stated appeared arbitrary or unreasonable. (Tr. Vol. I, 92.)

Hamms, who instigated the reapplication process, when confronted by plaintiff as to why she was not selected as a charge nurse, expressed surprise and promised an inquiry, but never got back to plaintiff despite being the manager who ultimately controlled who became a charge nurse. (Tr. Vol. I, 140-41; Tr. Vol. II, 65.)

{¶ 72} The result of this reapplication process for charge nurses, who had responsibility over an entire shift, resulted in a great reduction of more experienced older nurses in favor of much younger nurses, a few with little more than one year of nursing experience. The process and result of this reapplication is evidence of age discrimination in Hamms and OhioHealth's desire to transfer responsibilities based on age rather than experience.

{¶ 73} Plaintiff was also removed from the steering committee in 2008 after being on it for over a decade. The cited reason was attendance, which conflicted with her day-shift work schedule. Plaintiff was, up to that point, accommodated to block off four hours in order to attend the committee meetings. That option was no longer made available and her work schedule often competed with the committee meeting. (Tr. Vol. II, 67-68.)

{¶ 74} This additional evidence more than meets the requirements of *Kundtz* when alleging age discrimination in workforce reduction cases.

III. EVIDENCE SUPPORTS THE TRIAL COURT FINDING THAT PLAINTIFF WAS REPLACED AND HER TERMINATION PERMITTED THE RETENTION OF YOUNGER EMPLOYEES

{¶ 75} The determination of whether a terminated employee was replaced and/or their duties were redistributed to other employees or whether a workforce reduction is taking place are all evidentiary questions. *Wise v. Ohio State Univ.*, 10th Dist. No. 11AP-383, 2011-Ohio-6566 (we found that competent, credible evidence supporting the trial court's conclusion that a valid workforce reduction occurred because the appellant's position was abolished, and he was not replaced). The trial court found that "plaintiff was replaced be a person of substantially younger age, and that her discharge permitted the retention in the NICU of persons of substantially younger age." (Tr. Vol. IV, 77.) This is an evidentiary determination and should not be overturned unless against the manifest weight of the evidence.

{¶ 76} While the questions of whether *Smith* is still good law and of whether there exists any circumstantial evidence beyond that of a workforce reduction are legal ones.

The actual weighing of the evidence to determine whether there was a replacement or not or whether all of plaintiff's duties were redistributed or eliminated (as a result of a workforce reduction), are issues of fact. As a reviewing court, we must be "guided by the presumption that the findings of the trial court are correct, as the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Ratliff v. Ohio Dept. of Rehab. & Corr.*, 133 Ohio App.3d 304, 309 (10th Dist.1999).

{¶ 77} The majority decision ignores that another nurse besides Jamie Armstrong could be considered a replacement—Denise O'Day—hired January 2010. Hamms testified that O'Day was hired as a contingent nurse. (Tr. Vol. I, 164.) While Maggie Fishell, an OhioHealth Associate Relations Representative, said she was a day-shift nurse. Fishell Affidavit, at ¶ 4, 5; Memoranda in Support of Defendant's Motion of Summary Judgment. Contingent nurses fill in holes and are only required to work two 12-hours shifts per month. (Tr. Vol. II, 71.) It is not indicated anywhere in the record if a contingent nurse can work any shift or is assigned to work only one shift. (Tr. Vol. IV, 5.) It is very reasonable to conclude that contingent nurses filled in when there were holes in the day shift. Whether O'Day is a replacement for Martina Mittler is an evidentiary determination which was supported by being competent and credible. It is not a question of law.

{¶ 78} Further, the majority relies on the statements of Hamms that no nurse transferred to the day shift in the month following plaintiff's termination and that plaintiff's duties were absorbed by other people working the shift. It is clear from the trial court's decision that Hamms was not considered credible. (Tr. Vol. IV, 77-98, Trial Court's Bench Decision.) The trial court found that Hamms was motivated to discriminate based on age, that she instigated many of the discriminatory actions that occurred in the NICU, and that Mr. Hagen and his subordinates had little choice but to support Hamms' termination decisions due to her unique position created by the managerial agreement created by OhioHealth and Nationwide Children's Hospital.

{¶ 79} If not all of the duties of the terminated employee are redistributed, then the termination can result in both the retention of other employees and require a replacement to be hired. This becomes even more likely when multiple employees are terminated and less are hired-on afterwards as replacements. In this case, four nurses in the protected

class were terminated in a two-month period from the day shift at NICU and a night shift nurse was hired contemporaneously. A contingent or day shift nurse was hired eight months later. The trial court found that plaintiff was replaced by a person of substantially younger age, and that her discharge permitted the retention of persons of substantially younger age. This finding is supported by competent and credible evidence going to all the essential elements of the case satisfying the fourth prong of plaintiff's prima facie case.

IV. PLAINTIFF PROVED THAT DEFENDANT'S PROFFERED REASON WAS A PRETEXT AND DID NOT MOTIVATE HER TERMINATION

{¶ 80} Plaintiff has proved by a preponderance of the evidence that defendant's proffered reasons for plaintiff's termination were pretext by showing that they did not actually motivate her discharge. The trial court found that age discrimination was the real motive for plaintiff's termination and not that defendant simply made a business decision or was only motivated by purely economic reasons. Further, the trial court has significant discretion in determining if the proffered reasons are a pretext. If a prima facie case is established, the trial court must exercise discretion in determining whether the employer articulated a nondiscriminatory ground for the discharge. "If so, the court wields yet more discretion in determining whether the purpose was a pretext for discrimination. Each of these links in the procedural chain vests significant discretion in the trial court to make largely subjective decisions. Trial courts make such decisions by applying the relevant factors in light of statutory mandates." *Coryell* at ¶ 24.

{¶ 81} Classifying a termination decision as only a business judgment is not an absolute defense:

> An employer's business judgment, however, is not an absolute defense to unlawful discrimination. ("[A] decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision.").
>
> This court has held that the reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation. ([C]ourts should inquire into "whether the employer made a *reasonably informed and considered decision* before taking an adverse employment action.") * * *

> The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext * * *.").

(Citations omitted; emphasis sic.) *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576-77 (6th Cir.2003).

{¶ 82} An employer is allowed to be unreasonable in its treatment of employees but such unreasonableness can be evidence of pretext, and such evidence does not require accompanying direct evidence of age discrimination in order to be considered, otherwise the *McDonnnell Douglas* framework would be unnecessary. *Wexler*. Pretext does not address the correctness or desirability of reasons offered for employment decisions, it addresses rather the issue of whether the employer honestly believes in the reasons it offers. *Wigglesworth v. Mettler Toledo Internatl.*, 10th Dist. No. 09AP-411, 2010-Ohio-1019, ¶ 19. In order to discredit the employer's proffered reason, a plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. *Id.* The trial court in this case made the factual determination that discriminatory animus motivated defendant, in particular Hamms. Even though "[*g*]*enerally*, deviance from a progressive discipline policy does not indicate pretext, especially when the employer warns an employee that it may disregard its policy if it chooses," it is not always the case as the majority indicates. (Emphasis added.) *Id.* at 24.

{¶ 83} The trial court's decision went into great length about the reasonableness of plaintiff's termination and how the lack thereof was evidence of pretext.

{¶ 84} Age must have actually played a role in OhioHealth's process to terminate plaintiff and, but for her age, she would not have been terminated. If a termination arises as part of a workforce reduction, the fourth element of a *McDonnell Douglas*/*Barker* test requires the plaintiff to provide " 'additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.' " *Geiger v. Tower Automotive*, 579 F.3d 614, 623 (6th Cir.2009), quoting *Barnes v. GenCorp.*, 896 F.2d 1457, 1465 (6th Cir.1990). The plaintiff's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. *Thomas v. Columbia Sussex Corp.*, 10th Dist. No. 10AP-93, 2011-Ohio-17, ¶ 32.

{¶ 85} A plaintiff can prove the ultimate fact of discrimination from the falsity of an employer's belief in its proffered reason. Proof that an employer's explanation is unworthy of credence is one form of circumstantial evidence. The United States Supreme Court states clearly that a trier of fact can find discrimination through false explanations of termination:

> A plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp*. * * *), combined with [a preponderance of] sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA.
>
> * * *
>
> [W]e reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, [*St. Mary's Honor Ctr. v.* Hicks, 509 U.S. 502] stated:
>
> "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." *Id.* at 511, 113 S.Ct. 2742.
>
> 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. ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). 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."

(Emphasis sic; citations omitted.) *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 134, 147 (2000).

{¶ 86} The trial court made several statements that indicate that proffered reason did not motivate termination and that Hamms fired plaintiff because of age discrimination. *Reeves* shows precisely how plaintiff proved her case in that a prima facie case can be established and that defendant's proffered reason is proved false in motivating termination by a preponderance of the evidence which is circumstantial evidence of age discrimination.

{¶ 87} The majority mischaracterizes the trial court's finding implying that economic reasons to address the low census of the NICU were the motivations for plaintiff's termination. The trial court stated in the bench decision:

> [T]he mere fact that President Hag[e]n signed off on the termination does not insulate OhioHealth where the basic firing decision was motivated by age and driven by Ms. Hamms.
>
> * * *
>
> The court also finds that despite all the pious denials from defense witnesses about age not being a motivating factor in this termination at Ms. Hamms['] level, there was, essentially, a desire to discriminate on the basis of age.
>
> * * *
>
> I find [Ms. Hamms] made the termination decision precipitously, without any legitimate effort to investigate, and for the ulterior motive on discriminating on the basis of age in order to reduce costs and to address the low census in the NICU.
>
> * * *
>
> While Mr. Hag[e]n dismissed a potential cost savings from terminating an RN making about $80,000 a year as minuscule balanced against his large overall budget, by the time retirement plan contributions, fringe benefits and other things are considered, and compared with the lower cost for a younger, newer nurse, or simply having the ability to retain existing younger, less expensive nurses, it is reasonable to infer that financial savings were a key factor for Hamms, and in this provided the rationale for age discrimination.

(Tr. Vol. IV, 84, 85, 97-98.)

{¶ 88} The trial court clearly states that *what* the motivation was for the terminations was age discrimination, particularly by Hamms, who fired plaintiff. *Why* age discrimination occurred was because of economic concerns resulting from the low census in the NICU *and* the desire to discriminate on the basis of age. The trial court's judgment cannot be read as finding that there were terminations based only on economic concerns that happened to result in four nurses over the age of 40 losing their jobs. Further, there is competent, credible evidence of age discrimination completely separate and apart from economic reasons that were thoroughly covered at trial. This included evidence of plaintiff being removed from a steering committee. (Tr. Vol. II, 67-68.) A new policy by Hamms requiring all charge nurses on the floor to reapply for the position resulted in many older nurses, including plaintiff, being denied the position. (Tr. Vol. I, 47, 92, 96, 140-43.) Testimony indicated that older nurses felt concerned for their jobs and that they were treated differently because of their age. (Tr. Vol. II, 10-15.)

{¶ 89} Plaintiff was able to show that defendant's proffered reasons for her termination were a pretext. This circumstantial evidence, combined with other evidence of age discrimination presented at trial, shows that age discrimination did take place and that plaintiff would not have been terminated but for her age.

{¶ 90} I do concur with the majority in overruling defendant's first assignment of error but dissent in sustaining defendant's second and third assignments of error.

{¶ 91} Accordingly, I would affirm the judgment of the trial court.