

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DENNIS BARBRE,

Plaintiff–Appellant,

v

CITY OF DETROIT,

Defendant–Appellee.

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UNPUBLISHED

October 4, 1996

No. 181775

LC No. 91-116953-CZ

Before: Jansen, P.J., and Reilly and M.E. Kobza,\* JJ.

PER CURIAM.

Plaintiff appeals as of right the jury’s verdict of no cause of action in favor of defendant regarding plaintiff’s claim of sex discrimination and the trial court’s order granting a directed verdict in defendant’s favor regarding the claim of race discrimination. We affirm.

Plaintiff, a white male, began working for defendant in 1981 as a Senior Engineering Technician in the Document Control Section in defendant’s Water and Sewerage Department. In November of 1989, plaintiff expressed an interest in receiving the position of Administrative Assistant I (“AAI”). Alternatively, plaintiff wished to be given the status of an AAI while remaining in the Document Control Section. Plaintiff’s supervisor felt that plaintiff was qualified to be an AAI, and wrote a memorandum recommending him for an AAI position. However, plaintiff was denied the AAI position, and in 1992, a female employee was promoted from the position of Senior Engineering Technician to that of an AAI. Plaintiff alleged in his complaint that defendant discriminated against him because of his race and sex.

On appeal, plaintiff raises two issues. He first argues that the trial court abused its discretion in admitting an exhibit which was an expunged written reprimand against plaintiff. He also argues that the trial court’s decision to include a supplemental jury instruction was reversible error.

First, plaintiff argues that exhibit 108 was improperly admitted into evidence. Plaintiff argues that the testimony concerning exhibit 108, as well as the exhibit itself, were not relevant. Plaintiff also argues that the exhibit was improperly admitted because the document was not disclosed to him during

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

discovery. Moreover, plaintiff claims that after the trial court eventually disallowed exhibit 108, no curative instruction was given to the jury to disregard the earlier testimony.

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 669; 538 NW2d 420 (1995). Under MRE 402, all relevant evidence is admissible, except as otherwise provided, and evidence which is not relevant is not admissible. Relevant evidence is that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the case more probable or less probable than it would have been without the evidence. MRE 401. Evidence which is relevant may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow the use of such evidence. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

Exhibit 108 is a written reprimand of plaintiff by defendant, wherein plaintiff was admonished for alleged hostility on the job. According to exhibit 108, plaintiff was angry and kicked at a guardhouse door in a supervisor's lot. In allowing exhibit 108 into evidence, the trial court determined that the evidence of plaintiff's past behavior was more probative than prejudicial. It was within the trial court's discretion to allow the jury to consider whether plaintiff's past hostility played a role in defendant's decision to deny plaintiff the AAI position. The trial court also ruled that the exhibit would be admitted for the limited purpose of showing that defendant did not promote plaintiff based upon his character. Moreover, the trial court properly allowed plaintiff's testimony explaining the circumstances surrounding the reprimand.

Furthermore, we acknowledge that subsequent to exhibit 108's admittance at trial, plaintiff introduced evidence that the reprimand had been expunged from plaintiff's employment file. However, at the time the trial court initially allowed exhibit 108 into evidence, it had no documentary evidence showing that the reprimand had been expunged from the record. Therefore, the trial court acted properly with the information it had at the time. Further, the trial court ruled, after the expungement was brought to its attention, that the exhibit be stricken from the record. Finally, we note that plaintiff failed to request a curative instruction concerning exhibit 108. Accordingly, we find that the trial court did not abuse its discretion in allowing exhibit 108 or the surrounding testimony into evidence under these circumstances.

Plaintiff next argues that the trial court erred in allowing a supplemental jury instruction concerning his theory that the discrimination was pretextual. Plaintiff contends that giving the supplemental jury instruction was reversible error because the standard jury instruction was confusing and redundant.

When the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions, upon request, if the supplemental instructions properly inform on the applicable law and are supported by the evidence. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995). A proposed supplemental instruction must be modeled as nearly as practicable

after the style of the standard jury instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative. MCR 2.516(D)(4). Moreover, the determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). This discretion is to be exercised in the context of the particular case, with due regard for the adversary's theories of the case and counsel's legitimate desire to structure an argument to the jury. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 123; 492 NW2d 761 (1992). An appellate court will not reverse for an instructional error under MCR 2.516 unless it concludes that noncompliance with the rule resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985).

While instructing the jury in this case, the trial court read the standard jury instruction on employment discrimination regarding disparate treatment, SJI2d 105.03. The trial court also added a supplemental instruction, which read:

The soundness of the employer's business judgment may not be questioned as a means of showing that the employer's legitimate nondiscriminatory reasons for not promoting the employee were a pretext for discrimination.

We believe that the trial court properly added the above supplemental instruction in response to plaintiff's theory that defendant had pretextually discriminated against him. Specifically, plaintiff argued that defendant's claim that there were no vacant AAI positions was a pretext for discrimination, especially since a female employee from a different department received an AAI position. Because SJI2d 105.03 did not include any discussion of pretextual discrimination, and because plaintiff raised such a theory, the trial court's addition of a supplemental instruction was both warranted and proper. Therefore, we find that the trial court did not abuse its discretion in allowing defendant's supplemental instruction regarding pretextual discrimination.

Further, we do not agree with plaintiff that the instruction was confusing or redundant. Because SJI2d 105.03 does not include any discussion of pretextual discrimination, the supplemental jury instruction was not redundant. Also, we do not agree that the supplemental instruction was confusing. As a whole, the jury instructions adequately and accurately informed the jury of the applicable law and the parties' theory of the case. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 608; 478 NW2d 66 (1991). Accordingly, the supplemental instruction was not inconsistent with substantial justice. MCR 2.613(A).

Affirmed.

/s/ Kathleen Jansen

/s/ Maureen Pulte Reilly