

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS BARBRE,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 181775

LC No. 91-116953-CZ

CITY OF DETROIT,

Defendant-Appellee.

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

KOBZA, J. (concurring in part and dissenting in part).

While I concur with the majority opinion concerning the proper admission of exhibit 108 into evidence at the initial introduction and its subsequent withdrawal, I dissent from the conclusion of the majority concerning the supplement to the standard jury instruction, SJI2d 105.03. I would reverse on the supplement to that instruction being given by the trial court and remand for a new trial.

SJI2d 105.03 reads as follows:

Your task is to determine whether defendant discriminated against the plaintiff. You are not to substitute your judgment for the defendant's business judgment, or decide this case based upon what you would have done.

However, you may consider the reasonableness or lack of reasonableness of defendant's stated business judgment, along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.

The trial court then gave a supplemental instruction in addition to the above standard jury instruction, which read as follows:

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

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

I believe that the supplemental instruction vitiated the second paragraph of SJI2d 105.03 which *does* allow the jurors to consider the reasonableness or lack of reasonableness of defendant's stated business judgment in determining whether discrimination occurred to plaintiff. By using such language as "the soundness of the employer's business judgment *may not be questioned* as a means of showing that the employer's legitimate non-discriminatory reasons for not promoting the employee were a pretext for discrimination," it contradicts the instruction allowing jurors to consider the reasonableness or lack of same of defendant's stated business judgment. Therefore, in the first place, it is confusing to the jurors as to whether they may or may not consider the employer's business judgment or the reasonableness of that stated business judgment. Second, the paragraph of the supplemental instruction by itself is a misstatement of the law as accurately stated in SJI2d 105.03. Third, it adds nothing that is not already in SJI2d 105.03. While the first paragraph does instruct the jurors not to substitute their judgment for the defendant's business judgment, that paragraph is *conditioned* upon the jurors' consideration of reasonableness or lack of reasonableness of that ostensible stated judgment in determining whether there is a pretext allowing discrimination to occur because of that ostensible stated judgment. It is this balancing that is required under the standard jury instruction under the laws of Michigan.

The jurors have to perform two tasks in the standard jury instruction: (1) they are not to substitute their judgment for the defendant's business judgment; and (2) they are to consider the reasonableness of that same stated business judgment. While I would agree that SJI2d 105.03 is not a completely ideal instruction as to the full scope of the law regarding discrimination claims, I conclude after a close scrutiny of the supplement that it does more damage than good in describing the jurors' obligations under the law in reviewing the evidence. Worse, it contradicts that which jurors not only "may" do, but "must" do, that is, use *their* judgment whether the stated business reason is "reasonable." If the supplemental instruction is a correct statement of the law, then the second paragraph of SJI2d 105.03 is not.

Therefore, I dissent and would reverse and remand for a new trial.

/s/ Michael E. Kobza