STATE OF MICHIGAN

COURT OF APPEALS

WARREN SHOULDERS,

Plaintiff-Appellant,

v

J.A. KNIGHT and HEAT CONTROLLER, INC.,

Defendants-Appellees.

UNPUBLISHED
December 9, 1997

No. 196473
Jackson Circuit Court
LC No. 95-073120 CK

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an opinion and order granting defendants' motion in limine excluding certain evidence. We affirm in part and reverse in part.

Plaintiff served as president of defendant Heat Controller, Inc. (HCI), a company owned and operated by defendant James A. Knight, from 1991 until his employment was terminated on June 10, 1995. This case arises out of plaintiff's claim that he was discharged in violation of § 701 of the Civil Rights Act (CRA), MCL 37.2701; MSA 3.548(701), because he opposed defendants' discriminatory acts.

During discovery, plaintiff, Knight, and several other individuals, including employees of HCI and family members of Knight, were deposed. These depositions revealed that Knight would not allow women to hold salaried or management positions at HCI. Additionally, the women who worked for HCI did not receive bonuses because the bonuses were distributed at the Christmas party, and only men were invited to the party. Knight also reprimanded employees for interviewing black applicants and commonly used racial slurs.

Defendants filed a motion in limine requesting that the trial court exclude (1) "any evidence of [defendants'] alleged predisposition to discriminate based on race and sex," (2) "any evidence of alleged acts of discrimination that [plaintiff] did not refuse to participate or that he himself did not oppose," and (3) "any evidence of alleged mistreatment of individuals by [defendant] Knight that was not based on race or sex." At the hearing on the motion, the trial court ruled that Knight's prior acts of discrimination, standing alone, were not relevant to plaintiff's claim that he was terminated for his failure

to engage in discriminatory practices. The court also found such evidence to be inadmissible character evidence under MRE 404(b). However, the trial court ruled that plaintiff could introduce evidence that Knight rewarded employees for engaging in discriminatory practices or disciplined employees for failing to engage in such practices.

To clarify the court's ruling, plaintiff subsequently filed a motion in limine that included an offer of proof consisting of citations to deposition testimony that plaintiff wished to use at trial. After additional hearings, the court issued an opinion finding that Knight's discriminatory views were a character trait governed by MRE 404(b), and that plaintiff sought to show that Knight acted in conformance with his character. Applying the test from *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Court found that even if plaintiff had a proper purpose for the evidence, the prejudicial effect substantially outweighed the probative value of the evidence. This interlocutory appeal followed.

In its opinion and order, the trial court based its ruling on the proposition that plaintiff was claiming "that Mr. Knight used a disciplinary and/or reward system to ensure that employees would conform to his views." However, contrary to the lower court's finding, plaintiff is actually claiming that he was terminated for opposing Knight's discriminatory practices, in violation of MCL 37.2701; MSA 3.548(701). That section of the CRA provides in relevant part:

> [A] person shall not:
>
> (a) Retaliate . . . against a person because the person has opposed a violation of [the CRA] . . . .

In order to establish a prima facie case of unlawful retaliation under this section, a plaintiff must demonstrate (1) that he or she has opposed violations of the CRA and (2) that the opposition was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1310 (CA 6, 1989), *Johnson v Honeywell Information Systems, Inc.*, 955 F2d 409, 415 (CA 6, 1992).

Plaintiff first argues that the trial court erroneously analyzed the admissibility of the evidence at issue under MRE 404(b). We agree. MRE 404(b), which governs the admission of other bad acts, provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is not implicated under the circumstances of this case because the discriminatory acts at issue are not "other" acts being used to prove Knight's character in order to show that he acted in conformity therewith, but rather are the acts that form the basis of plaintiff's claim. Plaintiff maintains

that he was terminated because of his opposition to Knight's discriminatory policies and practices concerning women and minorities. Evidence of specific acts of discrimination that occurred during plaintiff's employment at HCI, to which plaintiff expressed his opposition, goes directly to his prima facie case. *Booker, supra; Johnson, supra*.

Although MRE 404(b) is not implicated, the admissibility of the evidence at issue must still be analyzed under MRE 401, 402, and 403. Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). "Unfair prejudice" does not mean "damaging." *Id.*, p 75. Any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.*, p 75-76. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

In this case, we conclude that the trial court erroneously excluded portions of the proffered evidence. With respect to the information about which plaintiff would testify [Offer of Proof 40-41; Third Addendum to Offer of Proof 9-13], the trial court abused its discretion in not allowing plaintiff to testify regarding the information or by limiting admission depending on the context of the statements or actions. To reiterate, plaintiff is required to establish (1) that he has opposed violations of the CRA and (2) that the opposition was a significant factor in an adverse employment decision. *Johnson, supra; Booker, supra*. Because the proffered evidence involves plaintiff's opposition to Knight's actions or plaintiff's attempts to act contrary to Knight's discriminatory practices, it is relevant to the instant action. MRE 401. Although damaging, the prejudicial effect of this evidence does not outweigh its probative value. MRE 403.

The trial court also abused its discretion by excluding or limiting the admission of the information about which defendant Knight would testify [Offer of Proof 11-20; Third Addendum to Offer of Proof 19-22]. The fact that discriminatory practices existed at HCI and whether certain employees opposed the practices are matters in issue in this action. *Mills, supra*, p 61. Although some of Knight's deposition testimony does not directly relate to plaintiff's opposition to Knight's discriminatory practices, it does support plaintiff's claim that discriminatory practices, in violation of the CRA, existed at HCI. Further, the existence of these discriminatory practices is relevant to the instant action because plaintiff maintains that he was terminated for his opposition to these actions, and Knight denies that plaintiff informed him that these practices were in violation of the law. This proffered evidence has a

tendency to make the existence of a material fact -- whether plaintiff was terminated for his opposition to Knight's discriminatory practices -- more or less probable than it would be without the evidence.

The trial court also abused its discretion in ruling that Knight's admission, that plaintiff or other employees discussed with him the impropriety of his policies regarding hiring women and minorities [Offer of Proof 11; Third Addendum to Offer of Proof 20], would be admissible only to the extent that Knight acknowledged that his actions were in violation of the law. Plaintiff does not have to establish that Knight understood that his actions were in violation of the law. Clearly, Knight's admission that plaintiff opposed his actions is relevant to the instant action.

Plaintiff also sought to introduce evidence of Knight's discriminatory policies and practices through other individuals, including David Duane, controller and assistant treasurer of HCI [Offer of Proof 1-6; Third Addendum to Offer of Proof 14-18]; Richard Best, senior accountant at HCI [Offer of Proof 7-10]; Mary Reichel, customer service representative at HCI [Offer of Proof 22-27]; Janeen Cargill, Knight's secretary [Second Addendum to Offer of Proof 4-24]; James Hoaglin, an employee of HCI [Third Addendum to Offer of Proof 1-8]; Duane Kezele, former employee of HCI [Offer of Proof 28]; Faith Knight, defendant Knight's wife [Addendum to Offer of Proof 1-15]; Carol Knight Drain, Knight's daughter [Addendum to Offer of Proof 16-19]; Karyn Maddock, applicant for management position at HCI [Offer of Proof 29]; and Richard Mida, an accountant who performed work for HCI [Second Addendum to Offer of Proof]. Essentially, the proffered testimony from these individuals confirms that Knight engaged in discriminatory conduct by excluding black persons from employment at HCI and excluding women from management positions. A majority of this evidence, however, does not relate to plaintiff's opposition to such conduct or to his termination. Because this evidence is cumulative and because it does not directly tend to prove the fact in support of which it is offered – that plaintiff was terminated for opposing Knight's discriminatory practices – the trial court did not abuse its discretion by excluding a majority of this proffered evidence.

However, to the extent that the David Duane's testimony concerned discussions with plaintiff and Knight about Knight's exclusion of black persons from employment and women from management [Offer of Proof 3], the evidence is admissible. The trial court abused its discretion by excluding this evidence because it directly concerns plaintiff's opposition to Knight's discriminatory actions. Further, the court also abused its discretion by excluding potential testimony from Janeen Cargill, Knight's secretary, concerning plaintiff's opposition to Knight's discriminatory conduct and plaintiff's termination [Second Addendum to Offer of Proof, 5, 8, 14, 23]. This evidence also directly relates to plaintiff's opposition to Knight's discriminatory actions, and although damaging, the prejudicial effect of such evidence does not outweigh its probative value. Finally, the court did not abuse its discretion by finding that James Hoaglin's testimony, that Knight told HCI employees plaintiff's departure was due to philosophical differences between Knight and plaintiff [Third Addendum to Offer of Proof 8], would be admissible.

Affirmed in part and reversed in part.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff