STATE OF MICHIGAN

COURT OF APPEALS

HAROLD HANLIN,

Plaintiff-Appellant and Cross-Appellee,

v

INDIANA-MICHIGAN POWER COMPANY, and JAMES CARPENTER,

Defendants-Appellees and Cross-Appellants.

UNPUBLISHED
March 13, 1998

No. 192532
Berrien Circuit Court
LC No. 94-002897 CL

Before: Hood, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right the jury verdict in favor of defendants in this civil rights action. We affirm.

I

First, plaintiff claims that the trial court should have granted his pretrial motion for summary disposition. Plaintiff argues that defendants' affirmative action plan is invalid under *Adarand Contractors, Inc v Pena*, 515 US 200; 115 S Ct 2097; 132 L Ed 2d 158 (1995). We disagree.

Plaintiff brought his claim solely under the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.* In *Victorson v Dep't of Treasury*, 439 Mich 131, 142; 482 NW2d (1992), our Supreme Court stated that we can look to federal Title VII cases for guidance in interpreting our civil rights act. However, when dealing with affirmative action, a claim made under Title VII is subject to different standards than a claim under the federal constitution. See *Taxman v Bd of Ed of Twp of Piscataway*, 91 F3d 1547, 1559 (3rd Cir, 1996), quoting *Johnson v Sana Clara Co Transportation Agency*, 480 US 616; 107 S Ct 1442; 94 L Ed 2d 615 (1987); see also *Cunico v Pueblo Sch Dist No 60,* 917 F2d 431, 437 (1990). *Adarand* is a case that deals with a claim brought under the federal constitution, not Title VII, and we read nothing in *Adarand* to affect Title VII, let alone state claims brought under our civil rights act.

II

Next, plaintiff claims that the trial court erred in refusing to admit into evidence the results of tests taken by the successful applicants, and the comment of the hiring supervisor that a human resources administrator stated that the results had to be thrown out. Plaintiff argues that because defendants determined that the tests were inappropriate after the applicants took them, it shows that they were trying to rig the process to support their hiring decision. Defendants stated that the tests were discarded because they were not a valid measure of potential job performance.

The decision to admit or exclude evidence is a matter within the trial court's discretion, and an abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). In this case, because the tests were not given to every applicant, only the four applicants who were offered positions, we find the test results to be of questionable relevance. Even if the successful applicants did not do well, we do not know how the other applicants would have performed. As a result there is no basis for comparison. Therefore, we find no abuse of discretion in the trial court's action regarding the test results. As for the fact that the results were thrown out, one inference could be that this was done because the results did not support the hiring decision. However, allowing such evidence would create a whole other issue--whether the tests were in fact a valid measure of potential job performance. Accordingly, the trial court limited the proofs to avoid the issue of the validity of the tests, and potential confusion of the jury. See MRE 403. We cannot say that such action was an abuse of discretion.

III

Next, plaintiff claims that the trial court erred in refusing to allow evidence of a remark made by a human resources administrator to a white male that he was the wrong color or sex to apply for a position with defendants.

In this case, we disagree with the trial court that the statement was not relevant. The statement could create an inference as to how much weight defendants place on race or gender in relation to relative qualifications when making employment decisions. However, we think it was within the trial court's discretion to limit the proofs in an effort to avoid confusing the jury and unfairly prejudicing defendants. See MRE 403. Admission of such evidence could place every employment decision made, and process used, by defendants at issue and subject to scrutiny. As a result, we do not think the trial court's action amounted to an abuse of its discretion.

IV

Next, plaintiff takes issue with the jury instructions and verdict form given to the jury. We review jury instructions in their entirety, and do not extract them piecemeal. Reversal is not required if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991). If the jury charge, including instructions and verdict form, is erroneous or inadequate, reversal is required

only where failure to do so would be inconsistent with substantial justice. See *Willoughby v Lehrbass*, 150 Mich App 319, 335-337; 388 NW2d 688 (1996).

In this case, *Victorson* states the applicable law for determining the merit of plaintiff's claim. While the instructions and verdict form do not mirror *Victorson*, we are of the opinion that, in their entirety, the instructions and verdict form were not inconsistent with substantial justice.

V

Next, plaintiff claims that the trial court erred in refusing his final peremptory challenge. We disagree.

During voir dire, plaintiff passed on peremptory challenges. Immediately thereafter, defendants passed on peremptory challenges. The trial court then concluded that the jury had been selected. Plaintiff's pass acted as a "waiver of further challenge to the panel as constituted at that time." MCR 2.511(E)(3). Because defendants passed immediately following plaintiff's pass, the panel was not reconstituted. As a result, because the panel was constituted of the same members as when plaintiff passed, he could not challenge the panel further. The trial court did not deny plaintiff a peremptory challenge.

VI

Last, plaintiff claims that the trial court erred in allowing into evidence the Department of Labor review and analysis of defendant's 1994 affirmative action plan, as well as post-hiring performance of the persons hired for the position.

Plaintiff raises admission of the Department of Labor review in the title to this issue, but does not argue it in the body of his brief. As a result, the issue is waived. *Midland v Helger Construction Co*, 157 Mich App 736, 745; 736 NW2d 218 (1987).

At trial, when defendants sought to admit only a portion of the 1994 affirmative action plan, plaintiff objected. However, when asked if plaintiff would have an objection to the admission of the whole plan, plaintiff answered in the negative. Plaintiff can not now claim error to action to which he contributed. See *Bercel Garages, Inc v Macomb Co Rd Comm*, 190 Mich App 73, 84; 475 NW2d 840 (1991).

As for the post-hiring performance of the persons hired, plaintiff makes no specific references to the trial transcripts to guide our review. During our review of the record, we came across four instances. In three of these instances, plaintiff's objections were sustained, and he sought no further action. As a result, we find no error. The other instance occurred during the cross-examination of plaintiff. Plaintiff's testimony was to the effect that the identification specialist jobs were critical to the proper functioning of the nuclear plant, and having unqualified persons in those positions could be disastrous, and, in plaintiff's opinion, the persons hired were not qualified. The trial court allowed, for impeachment purposes, defendants to ask plaintiff if it would surprise him to learn that the persons hired were performing well. We do not consider allowing defendants to ask that question for the limited

purpose of impeachment to be an abuse of discretion. To the extent that there were other references to post-hire conduct we did not locate, we consider plaintiff's failure to reference and argue them to amount to a waiver of any claim.

Because of our disposition of plaintiff's claims, we need not address defendant's cross appeal.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ William B. Murphy