STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA WALKUSKI,

Plaintiff-Appellant,

v

AUTOMOTIVE REPLACEMENT PARTS CO., SIMON INDIANER, ARTHUR INDIANER, ROBERT ZOOK and RICHARD ZECHMEISTER,

Defendants-Appellees.

UNPUBLISHED
January 10, 1997

No. 187085
Wayne Circuit Court
LC No. 93-310112-CZ

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered in favor of defendants following a jury trial. On appeal, plaintiff argues that the trial court abused its discretion in failing to instruct the jury that it could infer that defendants failed to produce the testimony of certain employees of defendant Automotive Replacement Parts (ARPCO) because, if produced, their testimony would have been adverse to the defense. Plaintiff further argues that the trial court erred in permitting defendants to examine plaintiff, as well as ARPCO employee Gail Grossman, regarding alleged incidences of sexual harassment perpetrated by plaintiff herself. We affirm.

We review jury instructions to determine whether the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637-638; 525 NW2d 533 (1994). The failure to give a properly requested instruction requires reversal only where failure to vacate the jury verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 327-328; 377 NW2d 713 (1985); *Callesen v Grand Trunk Western R Co*, 175 Mich App 252, 263; 437 NW2d 372 (1989).

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

Plaintiff argues that the trial court abused its discretion in refusing to deliver SJI2d 6.01(a) to the jury which would have permitted an inference to be drawn that ARPCO's failure to produce certain of its employees at trial indicates that these missing witnesses would have presented testimony adverse to defendants. We disagree. SJI2d 6.01(a) should be issued to a jury where the trial court finds that: (1) the witnesses were under the control of and could have been produced by the non-requesting party; (2) no reasonable excuse for the failure to produce the witnesses has been presented; and (3) the testimony of the witnesses was not equally available to either party and would have been material and uncumulative. See *Note on Use*, SJI2d 6.01.

First, SJI2d 6.01(a) should be given only where the witnesses were under a party's control. Control exists where the missing witnesses are agents of the party. *Isagholian v Transamerica Ins Co*, 208 Mich App 9, 15; 527 NW2d 13 (1994). Here, the missing witnesses were employees of defendant ARPCO and, therefore, agents. *Lincoln v Farfield-Nobel Co*, 76 Mich App 514, 519; 257 NW2d 148 (1974). Consequently, we find that the witnesses were under ARPCO's control and that it was capable of producing them as witnesses at trial.

Second, no excuse was set forth in the record for ARPCO's failure to produce the missing witnesses. However, the mere omission of a party to produce a witness without additional or better knowledge of the matter in dispute than those witnesses actually produced is not so suspicious as to entitle the adverse party to a presumption that SJ12d 6.01 must be delivered. *Barringer v Arnold*, 358 Mich 594, 602-604; 101 NW2d 365 (1960). Here, the missing witnesses, along with produced witness Gail Grossman, were employed by defendant ARPCO. Plaintiff called Grossman as witness as part of her case-in-chief. Grossman testified regarding the procedure by which she was hired by ARPCO, including possible reasons for her being placed in an office position not a warehouse position, as well as the near total prevalence of male employees in warehouse positions and female employees in office positions. Grossman further testified that she requested to be considered for a warehouse position on multiple occasions and was instructed that the company did not assign females to the warehouse. Additionally, Grossman testified regarding allegedly sexist remarks made by both male employees and management personnel to describe female employees at ARPCO. Finally, her testimony served to corroborate plaintiff's allegations regarding the diminution of the terms and conditions of her employment following the arrival of a new supervisor at ARPCO. There is no evidence in the record that the missing witnesses were privy to additional or better knowledge regarding plaintiff's allegations than that provided by Grossman. Therefore, we conclude that their testimony would have been cumulative at best.

Lastly, where a witness is equally available to either party, the presumption that the missing witnesses would testify adversely to one party is not recognized. *Isagholian, supra* at 15-16. Potential witnesses located within the jurisdictional boundaries of the trial court may be equally compelled to appear at trial through the subpoena power of an attorney of record or the court. MCR 2.506(A)(1); MCR 2.506(B)(1). Where a witness was available through the subpoena power, the witness was equally available to both plaintiff and defendant. *Urben v Public Bank*, 365 Mich 279, 287; 112 NW2d 444 (1961). Here, plaintiff could have issued a subpoena to compel the testimony of the missing witnesses, but elected not to do so. Consequently, the missing witnesses were equally available

to either party. Therefore, charging the jury pursuant to SJI2d 6.01(a) would have been inappropriate. Upon review of the jury instructions in their entirety, we find that the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Rice, supra*.

Plaintiff next argues that the trial court improperly admitted evidence with regard to remarks allegedly made by plaintiff herself regarding the sexual orientation of Grossman and that the admission of this evidence was improper and unfairly prejudiced plaintiff before the jury. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Plaintiff argues that such evidence was irrelevant. We agree. We do not believe that evidence of plaintiff's allegedly discriminatory behavior toward Grossman was relevant in assessing the extent of discriminatory behavior by defendants toward plaintiff. While we can conceive of circumstances in which such evidence would arguably be relevant—as, for example, where the widespread use of generally offensive language by all parties in a hostile work environment case is introduced as evidence that such language was not perceived to be offensive by the parties involved-- we do not believe that the instant case poses such a circumstance. Nor do we believe that plaintiff's statements contribute in any significant way toward assessing her credibility in the instant dispute. MRE 608. We therefore believe that the allegedly discriminatory behavior of plaintiff toward Grossman was principally offered as evidence of plaintiff's character and should not have been introduced at trial. MRE 404(a).[1]

Nevertheless, we do not agree with plaintiff that the court's error in admitting such testimony ultimately is error requiring reversal. Error requiring reversal may not be predicated upon an evidentiary ruling unless a substantial right has been affected. MRE 103(a); *Chmielewski v Xermac Inc*, 216 Mich App 707, 710-11; 550 NW2d 797 (1996). Plaintiff argues that the evidence may have caused the jury to view plaintiff as a "bad person". Her sole authority for this argument is the decision of this Court in *Gingold v Berkley Clinic*, 204 Mich App 148; 514 NW2d 469 (1994), where we held that evidence that the plaintiff was arrested at a shopping mall when she claimed to be bedridden was prejudicial because it may have caused the jury to regard the plaintiff as a "bad person". *Id*. at 150. However, *Gingold* was "depublished" and ordered to have no precedential effect by the Supreme Court. 448 Mich 933 (1995). Further, we are unconvinced that the testimony at issue was reversibly prejudicial because the jury was likely to give it undue or preemptive weight, *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-36; 344 NW2d 347 (1983), or that it produced a verdict inconsistent with substantial justice, MCR 2.613(A).

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] We note that this is not a hostile work environment case. While we are cognizant of the trial court's argument that the fact of plaintiff's remarks toward Grossman made it less likely that she was the type of person who would be offended when *she* was characterized in an offensive manner by defendants, we do not understand that the extent to which a plaintiff is "offended" by a defendant's allegedly discriminatory action is an element of a gender discrimination claim under the Michigan Civil Rights Act. MCL 37.2101 et seq; MSA 3.548(101) et seq.