STATE OF MICHIGAN

COURT OF APPEALS

CLIFTON GILMORE,

Plaintiff-Appellee,

v

CITY OF MUSKEGON,

Defendant-Appellant.

UNPUBLISHED
April 28, 2000

No. 211475
Muskegon Circuit Court
LC No. 97-336270-CZ

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

In this employment-discrimination case, defendant appeals as of right from orders denying defendant's motions for summary disposition and for judgment notwithstanding the verdict, new trial, or remittitur, and entering the jury's verdict for plaintiff. We affirm.

Plaintiff, a black man, twice applied for an advertised position with defendant's water and sewer department. He achieved a very high score on the written test, was interviewed in person, and became one of three finalists for the position. Defendant's procedure was to identify the three highest-scoring contenders and allow the department head to select from that pool. Plaintiff had the second best overall score; the job went to a white man who had the highest overall score.

When that employee departed shortly thereafter, plaintiff was again a finalist, this time the one with the highest overall score; his co-finalists were a Native American who was also repeating as a finalist and a white male who had achieved the fourth-highest overall score in the initial screening process. This time the job went again to the white applicant.

Plaintiff brought suit under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., and obtained a judgment in the amount of $60,000. Defendant argues on appeal that certain statistical evidence was improperly admitted, that plaintiff failed to present sufficient evidence from which a racial animus could be inferred, that the trial court failed to respond properly to the jury's requests for additional information and to have testimony repeated, and that even if plaintiff was entitled to the judgment, the jury's award of damages exceeded what the evidence could support. We reject each claim of error.

Defendant argues that the trial court erred in admitting plaintiff's statistical evidence. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of that discretion. *Franzel v Kerr Manufacturing Co*, 234 Mich App 600, 614; 600 NW2d 66 (1999). Over objection, plaintiff presented evidence that defendant's water and sewer department had only a single black employee out of a total of twenty and that this placed the percentage of blacks in defendant's water and sewer department lower than that in eighteen of defendant's twenty-one departments.

"The use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual." *Dixon v WW Grainger*, 168 Mich App 107, 118; 423 NW2d 580 (1987). Defendant argues, however, that evidence of under-representation of a class of persons in the workforce may not serve as evidence of racial discrimination in the absence of evidence regarding the availability of members of that class for the job. Although defendant cites cases from other jurisdictions that stand for this proposition,[1] defendant concedes that Michigan has not established such an evidentiary rule. Assuming, without deciding, that the cases cited are applicable here, and that the challenged evidence was admitted in error, we conclude that reversal is not warranted in this case because plaintiff did not rely exclusively on this evidence to establish a prima facie case and submitted substantial additional evidence in support of his case.[2]

"An error in the admission of evidence will be found if it affects a substantial right of a party." *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998), citing MRE 103. Such error is not harmless if it was prejudicial, and requires reversal "if refusal to take this action appears inconsistent with substantial justice." *Merrow, supra* at 634, citing MCR 2.613(A) and *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996). Here, even assuming error, defendant is not entitled to a new trial. The refusal to grant a new trial on the basis of the challenged evidence is not inconsistent with substantial justice because apart from this evidence, plaintiff presented substantial evidence from which a jury could have inferred that defendant acted with improper racial animus. Further, the challenged evidence was put in perspective through defendant's examination of the witness.[3]

Defendant next asserts that the trial court erred in denying its motions for summary disposition under MCR 2.116(C)(10) and for directed verdict. We disagree. To present a jury-submissible question of racial discrimination, "a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998) (Weaver, J., joined by Boyle & Taylor, JJ.); accord *id.* at 186 (Mallet, C.J., concurring in part and dissenting in part). Our task is to view the evidence in the light most favorable to plaintiff to determine whether there existed a factual question over which reasonable minds could differ. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999) (summary disposition);[4] *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995) (directed verdict).

In this case, beyond the statistical evidence, plaintiff showed the following: that he was twice passed over in favor of white applicants—the second time in favor of one with a lower overall examination score; that the head of defendant's water and sewer department suspiciously asked plaintiff

why he scored so well on the written test and gave plaintiff a consistently lower score for the oral examination than did his co-interviewer; and that in interoffice communications the department head gratuitously mentioned the races of the applicants, understated some of plaintiff's qualifications, and held against plaintiff that plaintiff had certain business aspirations.[5] Further, the jury was free to disbelieve the department head's testimony offering race-neutral reasons for his actions and his protestations that race had never been a motivating factor. *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 209; 591 NW2d 685 (1998), reversed on other grounds sub nom *Nabozny v Burkhardt*, 461 Mich 471 (2000) ("this Court . . . must defer to the trier of fact's ability to observe witnesses, determine credibility, and weigh testimony"). Further, plaintiff testified that he never received a letter of a sort that defendant routinely sent advising applicants of an opportunity to retest for an opening. We conclude that this evidence, considered as a whole, could lead a reasonable juror to conclude that defendant acted with improper racial animus in this instance and thus that the trial court committed no error in allowing this case to go to the jury.

Nor did the court err in responding to inquiries from the jury, including the jury's request to re-examine selected testimony. Approximately forty-five minutes into deliberations, the jury asked the trial court, in reference to the department head's memorandum that listed the races of the three finalists, whether it was *required* that the race of the applicants be included on memoranda concerning hiring, and, specifically, whether the government required this practice. Counsel and the trial court reviewed what testimony there was concerning this matter and ascertained that the request must have pertained to a question put to the department head, "Was that something new that the City was starting to use, was some kind of an identification of minority status?" to which the witness replied, "I believe so, yes." The court, recognizing that this testimony neither spoke of a governmental requirement nor was necessarily tied to the memorandum in question, simply informed the jury that the answer to its question was nowhere in evidence and that the jury must not speculate as to what the answer might be.

Then, several minutes later, the jury asked for a copy of the department head's entire testimony. The court responded as follows:

> The Court is not going to transcribe the testimony at this point, nor am I going to have it read back in full, because I am advised it will take at least an hour and 45 minutes to do that. The Court is always concerned about placing too much emphasis on one party's testimony over that of another's. However, if the jury is hung up on a particular portion of the testimony that they would like reread to them, then you may put that in the form of a question, or a statement, and I will consider that.

There were no further requests from the jury.

The decision whether to allow a jury to re-examine selected testimony is left to the sound discretion of the trial court. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974), citing *Klein v Wagenheim*, 379 Mich 558, 561; 153 NW2d 663 (1967). We find no abuse of discretion here.

We first note that defendant does not argue that it was prejudiced by the trial court's denial of the jury's requests, but asserts only, without citation to authority, that "the Court has no assurance that

[the trial court's] decisions did not deprive Defendant of a fair trial." Defendant continues with the unsupported proposition that "[w]here an error may have been prejudicial, Defendant is entitled to the benefit of the doubt and a new trial, if not a judgment notwithstanding the verdict."

Defendant states that the trial court determined that the department head had testified about the memorandum in question, but in fact the court determined that it was not possible to connect the testimony directly with that document. Our reading of that portion of the transcript confirms the court's impression.[6] Because the witness' testimony was not related to the jury's question, and because providing the testimony would have implied that it was, the trial court properly answered the jury's question by advising the jury that the evidence simply did not cover whether the listing of races followed from any governmental requirement.

Nor did the court err in declining to have a transcript of that witness' entire testimony prepared for jury examination or to spend the better part of two hours having the testimony read back. A court should not refuse a jury's reasonable request to have testimony read back solely because doing so may tend to emphasize that testimony. *Howe, supra* at 676. However, the request was not reasonable in this instance. Again, no testimony bore directly on the question whether a governmental requirement accounted for the noting of races of applicants on the exhibit in question. Further, the court expressly offered to consider any requests for specific excerpts. Because answering the jury's first question by referring to the testimony at issue may have implied a specific relationship to a particular exhibit where none existed, and because the court nonetheless made plain that it stood ready to entertain any reasonable request from the jury for selected rereading, the court's response to the jury's requests constituted no abuse of discretion.

Finally, defendant argues that the jury's award of damages exceeded the highest amount the evidence could have supported. We disagree. This Court reviews a trial court's decision on a motion for new trial or remittitur for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531; 443 NW2d 354 (1989).

The jury determined that after deducting offsets, plaintiff had been damaged in the amount of $50,000 to date, and it further awarded "one year's salary of $10,000." The jury articulated no further distinction between economic and noneconomic damages. The parties agree that the jury calculated economic damages by comparing plaintiff's situation with that of the person whom defendant hired in preference to plaintiff on the second occasion, and neither party accuses the other of any error in arithmetic.

The trial court declared that it would not substitute its judgment for that of the jury unless "the verdict has been secured by improper methods, prejudice or sympathy, or where it is so excessive as to 'shock the judicial conscience,'" citing *Gillispie v Bd of Tenant Affairs of the Detroit Housing Comm*, 122 Mich App 699, 704; 332 NW2d 474 (1983). However, our Supreme Court has abandoned the "shock the judicial conscience" standard for assessing jury awards. See *Palenkas, supra* at 532-533 ("what shocks the conscience of one judge does not necessarily shock the conscience of another"). Instead, a trial court should limit its inquiry to objective considerations relating to the actual conduct of the trial or to the evidence adduced. See *id.* and *Bordeaux v Celotex Corp*,

203 Mich App 158, 171; 511 NW2d 899 (1993). Applying the correct standard, we conclude that defendant was not entitled to remittitur.

Defendant argues that plaintiff failed to mitigate damages by moving from job to job, including leaving one to accept another that paid less, and that plaintiff presented no evidence in support of noneconomic damages. Concerning future damages, defendant points to evidence that plaintiff was about to become a certified welder, which would bring a raise in pay. The trial court stated that the evidence showed that plaintiff "always made successful efforts to keep himself employed," and that in one instance he accepted a lower-paying job because it provided better opportunities for advancement. The court further noted that the damages covered more than lost wages and extended to plaintiff's "humiliation and outrage."

The jury was free to believe that plaintiff endeavored to keep himself gainfully employed and to decline to conclude that he would obtain welder status and accordingly receive a raise. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997) (a jury is free to accept or reject a plaintiff's testimony regarding damages). Further "[t]he defendant bears the burden of proving that the plaintiff failed to make reasonable efforts to mitigate damages." *Morris v Clawson Tank Co*, 459 Mich 256, 266; 587 NW2d 253 (1998). Because defendant in this case merely presents an alternative interpretation of the evidence, defendant has not met its burden of proving that plaintiff failed to mitigate economic damages.

Concerning noneconomic damages, "victims of discrimination may recover for psychic injuries such as humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that flow from discrimination." *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). Defendant argues that plaintiff presented no evidence in support of noneconomic damages. However, plaintiff testified that his dealings with defendant left him feeling belittled and angry, and he elaborated as follows:

> I still feel just saddened . . . from the way that I feel that this whole thing has came [sic] about, and . . . it's just a sad situation to me, to try to better yourself and still get the doors closed in your face. It's just . . . a hurtful thing, you know. It's hard to have a . . . good-paying job with good benefits—and then you have the opportunity to get that, and you can't get it, you know—to try to provide for yourself and your family. . . . I'm just sorry that it's like that.

Because the jury heard evidence of substantial noneconomic suffering on plaintiff's part, defendant's argument that the jury had no evidence to support noneconomic damages must fail.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

[1] The federal cases defendant cites support the proposition that where a plaintiff alleges employment discrimination, evidence that the department involved was peopled overwhelmingly by persons not in the plaintiff's protected class, or that this was true of others holding the same position with the defendant, is not, *standing alone*, sufficient to prove discrimination. See *Grano v Dep't of Development of the City of Columbus*, 637 F2d 1073, 1078-1079 (CA 6, 1980) (noting that "[t]he mere fact that a department is overwhelmingly male does not support an inference of discrimination where there are legitimate special qualifications for employment or advancement and no evidence is introduced as to the number and availability of qualified women," vacating the bench trial judgment in plaintiff's favor and remanding on other grounds); *LeBlanc v Great American Ins Co*, 6 F3d 836, 848 (CA 1, 1993) (affirming the district court's grant of summary judgment to defendant, noting that plaintiff's statistics "are of questionable import, and they stand precariously unsupported by other probative evidence of age discrimination . . . [and there was] no evidence whatsoever to connect the statistics to Great American's specific decision to dismiss LeBlanc," and concluding that the statistical evidence "does not provide a sufficient basis for a reasonable jury to find that Great American terminated LeBlanc because of his age"); and *Smith v General Scanning, Inc*, 876 F2d 1315, 1321 (CA 7, 1989) affirming the district court's grant of summary judgment in defendant's favor, noting that "the fact that only nine of the 106 new hires were over 40 . . . [i]n the absence of evidence regarding the qualified potential applicants from the relevant labor market . . . fail[s] in any way to show discrimination.").

[2] Plaintiff does not argue that the evidence that there was one black employee in the department *alone* supports an inference of race discrimination, but argues instead that he presented a number of pieces of evidence that together supported submitting his case to the jury.

[3] Defendant elicited testimony concerning the available pool of candidates:

> Q. OK. Have you seen any kind of a pattern to explain why, in a department with 20 employees, there was one minority employed?
>
> A. I guess my answer to that would be that—it's kind of a generalized answer with regard to the whole organization, if you will allow me—and that is that, generally speaking, the greater . . . the skill level of a position within the organization, I would say that, generally speaking, there are fewer and fewer minorities who apply for those positions as the level of skill rises through the organization
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> * * *
>
> Q. All right. Plaintiff's Exhibit 22, which is the June, '94 water/sewer maintenance worker final-results chart . . .
>
> * * *
>
> are you familiar with that?
>
> A. Yes, I am.

Q. OK. Does that indicate on it the race of the applicants?

A. Yes, it does.

Q. Is the number of applicants by race, do you think, representative of what you have just described in terms of the higher the specialization and training, the fewer minority applicants for positions?

A. Yes, I would say that's consistent with that.

[4] Our Supreme Court recently clarified the inquiry concerning (C)(10) motions: "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[5] Plaintiff testified that he conditioned his statement to the interviewer regarding his being interested in the restaurant business upon his not obtaining the desired employment with defendant.

[6] Regarding plaintiff's exhibit 26, a memorandum from the department head, Kelly DeFrench, to the city manager recommending a white male, Mr. Buckley, for the position, and identifying the three top-scoring candidates by race, the jury asked, "Is it a requirement for the race to be on memos concerning hiring? Is it required by the government 'for tracking purposes?'"

Defense counsel argued to the court that the court should answer the jury's question because he had asked DeFrench "about that, and he said that was something that . . . the City began doing for tracking purposes." Plaintiff's counsel argued that the court should tell the jury that it did not know the answer to their questions. The court reporter read back the pertinent portions of DeFrench's testimony for the court's review.

The pertinent exchange between plaintiff's counsel and DeFrench had been as follows:

Q. And my question was, again: When you had an opportunity to recommend a minority person, either Mr. Gilmore or Mr. Thompson, you chose to recommend Mr. Buckley?

A. I chose to—I recommended Mr. Buckley based on his qualifications, yes.

Q. And he was and is a white male?

A. I don't know what his nationality is. I believe he is white, yes.

Q. Well, that's what you so indicated in your report to Mr. Mazade, did you not?

A. Yes. I believe he is white.

Q. What did you say in that report?

A. That he is a white male, yes.

Q. And what do you say about Mr. Gilmore?

A. A black male.

Q. And about Mr. Thompson?

A. Indian male.

Q. And you recommended the white male—

A. That's correct.

Q. —whom [sic] you knew had been rated lower than either Mr. Gilmore or Mr. Thompson?

[DEFENDANT'S COUNSEL]: Asked and answered, Your Honor.

THE COURT: Sustained.

[PLAINTIFF'S COUNSEL]: No further questions, your Honor. You may examine.

* * *

BY [DEFENDANT'S COUNSEL]:

Q. Mr. DeFrench, when you were indicating that you didn't know Mr. Thompson's race or color or nationality or national origin at the oral interview—the oral test—Let me get these out of here. We can try to help keep it straight. You haven't seen these, I guess, but here is the oral test (indicating) —which would have been at City Hall?

A. Right.

Q. And then here is the selection (indicating), which would have been at Keating Street?

A. Right.

Q. You have told us that you didn't know Mr. Thompson was American Indian at the oral-test selection. Would you describe for the jury Mr. Thompson's appearance.

A. Mr. Thompson has blond hair.

Q. Pale complexion, dark complexion?

A. Pale complexion, like—you know, light, blond hair, and—you know.

Q. Well, OK. Not what you would expect for an American Indian—

A. No, sir.

Q. —or any other kind of Indian, I suppose?

A. No.

Q. Do you think you can recognize American Indians by their normal appearance, as we think of a typical American Indian?

A. Yes.

Q. Why is that?

A. By their skin tone, by the color of their hair.

Q. OK. *Do you, today, recall how it is that you found out that Mr. Thompson was American Indian, or at least some part American Indian?*

A. *It would have been through one of the documents that I have seen.*

Q. *Was that something new that the City was starting to use, was some kind of an identification of minority status?*

A. *I believe so, yes.*

Q. *At the oral test, are there standardized questions that you ask each of the applicants . . . ?* [Emphasis added.]

As can be seen from the quoted colloquies, DeFrench did not testify with particularity regarding exhibit 26, and he was not asked whether the City was required to identify race in documents pertinent to hiring. The testimony defense counsel relied on came in the context of DeFrench's testimony regarding when he first learned that Thompson was American Indian and referred generally to "one of the documents that I have seen." In fact, the inference is that he was not referring to exhibit 26 because the import of his testimony is that he learned about Thompson from a document someone else prepared, sometime before he prepared exhibit 26. Our review of the record reveals testimony that the City had an affirmative action department and had an affirmative action plan and policy. There is no testimony in the record, however, that the City or DeFrench was required to state the races of candidates in hiring memoranda.