

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT ROBINSON,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

and

DARREN SMITH,

Defendant.

UNPUBLISHED

March 22, 2011

No. 290824

Wayne Circuit Court

LC No. 04-402201-CL

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Robert Robinson appeals a jury finding of no cause of action against his former employer, Ford Motor Company, regarding his hostile work environment claim premised on same-sex sexual harassment.¹ Affirmed.

This is not the first time that this case has been before this Court. In 2004, Robinson filed his complaint alleging a hostile work environment based on same-sex sexual harassment under the Elliott-Larsen Civil Rights Act (CRA)², along with claims of assault and battery and intentional infliction of emotional distress against Ford and Smith. The trial court granted partial summary disposition to Ford on Robinson's common law tort claims, but denied Ford's request for dismissal of the same-sex sexual harassment claim. Because whether same-sex sexual harassment constituted a cognizable claim under the CRA was an issue of first impression, Ford appealed the denial of summary disposition to this Court. This Court held:

¹ The jury did award Robinson damages in the amount of \$41,000 against his former co-worker, Darren Smith, on his claims of assault, battery and intentional infliction of emotional distress.

² MCL 37.2101 *et seq.*

The CRA contains a phrase identical to that which was interpreted by *Oncale [v Sundowner Offshore Servs, Inc, 523 US 75; 118 S Ct 998; 140 L Ed 2d 201 (1998)]* under title VII. Specifically, MCL 37.2202(1)(a) prohibits, “discriminate[ion] . . . because of . . . sex” in a “term” or “condition” of employment. The language of the CRA does not exclude same-gender harassment claims. Accordingly, we reject defendant’s claim that the CRA excludes same-gender, hostile-work-environment claims.³

The matter was remanded back to the trial court for further proceedings.⁴

Before proceeding to trial, Ford and Smith submitted several motions in limine seeking to restrict testimony and evidence. Following a hearing on the motions, the trial court’s rulings were reduced to an order on August 9, 2008, which included the following as relevant to this appeal:

1. The exclusion of evidence of unrelated prior wrongs or acts.
2. The exclusion of any reference to agreements or actions pertaining to payment of Smith’s attorney fees by Ford.
3. Limitations on testimony by experts and/or treaters on causation and credibility pertaining to Robinson’s diagnosis of post-traumatic stress disorder (PTSD).

The jury trial commenced on September 8, 2008, and closing arguments were made on October 7, 2008. On October 9, 2008, the jury returned a verdict in favor of Ford on Robinson’s claim of hostile work environment based on same-sex sexual harassment, but awarded Robinson a judgment of \$41,000 against Smith on the tort claims of assault and battery and intentional infliction of emotional distress.

Robinson’s first allegation of error involves the trial court’s exclusion of evidence regarding Ford’s payment of part of Smith’s attorney fees. A trial court’s decision to admit or exclude evidence is typically reviewed for an abuse of discretion.⁵ “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.”⁶ Unpreserved issues are reviewed for plain error affecting substantial rights.⁷ In

³ *Robinson v Ford Motor Co*, 277 Mich App 146, 153; 744 NW2d 363 (2007).

⁴ *Id.* at 157-158.

⁵ *Campbell v Dep’t of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

⁶ *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

⁷ *Wolford v Duncan*, 279 Mich App 631, 641; 760 NW2d 253 (2008).

accordance with the plain error rule, the objecting party is required to demonstrate that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right.⁸

When Robinson initiated his lawsuit, Smith had not retained counsel. As the litigation unfolded, Ford provided Smith with names of suggested counsel, but did not dictate who Smith should retain. Ford did agree to pay up to \$30,000 of the attorney fees incurred by Smith in defending this action. Ford and Smith sought to preclude any reference at trial to this fee agreement arguing such information would be more prejudicial than probative and would potentially mislead the jury into believing that Ford would also indemnify Smith against any possible judgment incurred. Robinson countered that such information was relevant and demonstrated bias such that Smith would structure his testimony favorably to Ford. Smith acknowledged he was biased against Robinson based simply on the accusations made and the necessity of defending himself in court. Smith and Ford contended that the after-the-fact fee agreement was not relevant to the events that allegedly transpired in the workplace and should be precluded to avoid misleading the jury. The trial court granted the motion in limine indicating that the introduction of such evidence would result in “confusing the issues.”

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁹ “The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant.”¹⁰ Consistent with this statement, this Court has recognized:

[I]t is always permissible upon cross-examination of an adverse witness to pursue facts that may bear on a witness’s bias. A witness’s credibility is a primary question for the jury to evaluate, and questions eliciting bias, prejudice, or interest are appropriately allowed within the trial court’s discretion.¹¹

Yet, not all relevant evidence is deemed admissible as even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹²

Robinson asserts that the trial court erred in ruling to exclude evidence of the fee agreement between Smith and Ford as it demonstrated bias and was relevant to Smith’s

⁸ *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

⁹ MRE 401.

¹⁰ *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

¹¹ *Stadium Auth v Drinkwater*, 267 Mich App 625, 653; 705 NW2d 549 (2005) (internal citations omitted).

¹² MRE 403.

credibility because of the resultant pecuniary interest for Smith in the outcome of the litigation for Ford. Contrary to Robinson's argument, evidence of the existence of the fee agreement was not necessary to demonstrate Smith's bias or to call into question his credibility as a witness. It is self-evident, based on the alignment of the parties in the litigation, that Smith would have animosity toward Robinson and be aligned with Ford as a co-defendant. Smith's self-interest as a party having to defend against the allegations is an obvious source of bias and needs no explanation to the jury. Similarly, evidence was available that Smith was an employee of Ford, having been reinstated to a position with the automaker, making that relationship and the potential for partiality self-evident. These circumstances serve to negate Robinson's argument regarding the need to address the existence of the fee agreement to demonstrate bias.

Inextricably intertwined with his assertion of bias, Robinson also contends that the fee agreement served to call into question Smith's credibility. The purpose advanced for the introduction of this evidence was adequately served by the employment relationship between Smith and Ford. Contrary to Robinson's implication, the fee agreement did not comprise the usual type of pecuniary interest asserted to expose a witness' bias as under the facts presented as there is no evidence that payment of part of Smith's attorney fees was conditioned on any particular testimony or outcome. Smith's primary pecuniary interest was in avoiding the imposition of any liability for his own behavior. It would have also been in his personal interest to shift blame onto Ford to potentially minimize any judgment rendered against him. Certainly, Smith's self-interest in the outcome of the litigation provided sufficient opportunity for Robinson to attack his credibility without the necessity of potentially misleading or confusing the jury because of the fee agreement. Given the existence of all of these alternative avenues to achieve the same purpose of exposing Smith's bias and questioning of his credibility, the trial court's determination that information regarding the fee agreement would result in confusion of the issues was not an abuse of discretion. Even if this Court were to determine that the trial court's decision on this issue could be construed as a close question, "[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion."¹³

Robinson's next contention of evidentiary error pertains to the trial court's exclusion of testimony regarding earlier incidents of same-sex sexual harassment that did not involve Robinson. Specifically, Robinson sought to introduce evidence regarding incidents of alleged male-on-male sexual harassment involving a previous Ford supervisor, Marc Smith that worked for a period of time with Darren Smith in 1996 to 1997. Marc Smith was not employed by Ford when the incidents alleged by Robinson occurred having been discharged for his inappropriate behavior years earlier. Intermingled with his argument for admission of this evidence was his contention that other evidence demonstrating Ford's disparate treatment of complaints of sexual harassment by female employees compared to male employees should also be admissible. This proffered evidence was to demonstrate the context or historical background of the incidents or workplace mentality and Ford's awareness of the occurrence of such behavior on a long-standing basis. Robinson argues that the alleged disparity in the treatment of complaints of sexual

¹³ *Lewis*, 258 Mich App at 200.

harassment by male and female employees demonstrated Ford's failure to deal with such behavior consistently or to take prompt remedial action when the complaints were brought by men. Robinson contended that Darren Smith's history with Marc Smith helped to explain Darren Smith's "pattern of activity."

Ford sought to preclude this evidence based on the lack of relevance as Robinson was not involved in any of these earlier incidents, which were outside the applicable statute of limitation for the current claims. Robinson never worked with Marc Smith and the location where many of the alleged incidents involving female employees occurred was not specific or related to Robinson's work area. Ford argued the trial court needed to set parameters to avoid the unnecessary prolongation of trial and to preclude what would amount to mini-trials on unrelated incidents. Marc Smith's discharge for inappropriate behavior was also deemed irrelevant by Ford as, unlike Darren Smith, he was never reinstated because as a supervisor he was not subject to the collective bargaining agreement. Ford further contended that whether Darren Smith was ever victimized by Marc Smith was irrelevant and would only serve to create a "sideshow" that would distract the jury from the events pertaining to Robinson and result in prejudice to Ford.

The trial court determined that incidents of sexual harassment against females constituted a "collateral" matter and were not relevant. The trial court also expressed concern that much of what Robinson wished to admit into evidence constituted improper prior bad acts evidence regarding irrelevant events. The incidents that involved Marc Smith were also rejected by the trial court based on their occurrence outside the statute of limitation for this case and were deemed irrelevant as Robinson was not involved.

When asked why evidence pertaining to Marc Smith was relevant, Robinson's counsel indicated it touched on issues of credibility that Smith had engaged in the alleged behaviors and provides an explanation of why he engaged in such activities. Counsel for Ford and Smith challenged this statement asserting that Smith did not assert a blanket denial of the alleged behavior. This led the trial court to examine in detail each of the types of allegations to determine if there was any possible correlation between Darren Smith's behavior and that of Marc Smith. Reviewing the types of incidents demonstrated that either Smith did not deny the activity or that the same type of activity did not occur in the incidents involving Marc Smith. Based on Robinson's inability to demonstrate a relationship between Marc Smith's behavior and that of Darren Smith toward Robinson, the trial court granted Ford's motion to preclude this evidence.

At the outset, we find that any relevance of the acts committed by Marc Smith is particularly tenuous as this individual never worked with Robinson and the events described occurred four years before the allegations that comprise this complaint. The events Ford and Smith sought to preclude were clearly separate from the allegations brought by Robinson as they involved a different time period and individuals.

Robinson was also unable to demonstrate that many of the behaviors engaged in by Marc Smith were the same as those alleged to have occurred between Darren Smith and Robinson making them irrelevant. Admission of evidence pertaining to Marc Smith was unnecessary or potentially duplicative as Darren Smith acknowledged a number of the behaviors alleged. Contrary to Robinson's purported reason for seeking to admit these incidents into evidence,

because Darren Smith acknowledged a number of these behaviors occurred, credibility was not an issue. Similarly, Robinson's contention that Darren Smith's exposure to the behavior of Marc Smith resulted in the "abused becoming the abuser" does nothing to further his assertion that the events he alleges occurred. The mere fact that Darren Smith observed or was the target of inappropriate behavior by Marc Smith in the workplace is irrelevant. Darren Smith's possible victimization does not necessarily or automatically lead to the conclusion that he engaged in the behaviors alleged by Robinson, particularly as Robinson offered no evidence or expert testimony to support such a "victimization theory." Proof of such a theory only serves to explain Darren Smith's behavior, not to verify that it was actually perpetrated as alleged by Robinson.

Addressing the preclusion of evidence of the Marc Smith events as being outside the applicable statute of limitations period, this Court has declined to rule that "injuries occurring outside the limitations period may never be used as evidence to support a claim for an injury occurring within the limitations period."¹⁴ Rather,

acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination. This evidence is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court . . . a plaintiff cannot *recover* for any injury suffered as a result of a prior act occurring outside the limitations period. However, we find no reason why the use of such acts as background evidence should not be subject to Michigan's evidentiary rules and the trial court's discretion to admit it.¹⁵

This ruling recognizes that an inherent distinction exists between events involving a specific plaintiff that occurred outside the statute of limitation period that are used to demonstrate a continuing pattern of behavior directed at or involving that same individual from events that may be similar in nature but involve an entirely different person. In the later situation, issues arise pertaining to relevance and the potential to confuse or mislead a jury regarding matters that are, at best, collateral in nature and not dispositive of whether the events alleged in the current complaint occurred.

Robinson implicitly asserts that the Marc Smith incidents are relevant as in a hostile work environment case the work environment is evaluated from a reasonable person standard viewing the "totality of the circumstances,"¹⁶ and that the Marc Smith incidents demonstrate the context and background of the environment he worked in and Ford's tolerance for inappropriate same-sex sexual harassment. The problem that arises is that the events proffered by Robinson did not involve him and are not directly relevant to his claim of the circumstances he was required to

¹⁴ *Campbell*, 286 Mich App at 238.

¹⁵ *Id.* (emphasis in original, footnote omitted).

¹⁶ *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 305; 660 NW2d 351 (2003) (citation omitted).

deal with in his work environment. The mere fact that similar behaviors occurred between different individuals and Ford's response to those incidents in the past is not dispositive regarding Robinson's experiences at work. As recognized by the trial court, the proper focus in a hostile work environment case is not on past practices or incidents, but rather on the current response of Ford to the allegations comprising Robinson's complaint.

The decision to admit or exclude evidence is reviewed by this Court for an abuse of discretion by the trial court.¹⁷ But, "[e]stablishing an abuse of discretion is . . . quite difficult, for an abuse will only be found when the decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."¹⁸ While the jury was not apprised of every possible incident or nuance of behavior within the work environment, they were subject to a significant amount of evidence and testimony, spanning days of trial and numerous witnesses, regarding the actual incidents alleged by Robinson. Because this case involved a considerable amount of testimony covering many incidents, the trial court acted within its discretion when it determined that additional evidence regarding earlier historical events, not involving Robinson, would both waste the court's time and, in all likelihood, confuse the jurors.¹⁹

Robinson next contends the trial court erred by permitting Ford's expert Dr. Thomas Gutheil to opine on Robinson's credibility by testifying to various inconsistencies or discrepancies in his description of the events pertaining to his harassment claim. Specifically, Robinson argues that the trial court committed reversible error by allowing Ford's expert to testify regarding credibility and causation while precluding the various professionals that directly provided treatment services to Robinson from opining on these same issues.

The issue first arose when Ford sought before trial, through a motion in limine, to preclude testimony by the treating professionals regarding whether they believed Robinson's version of the alleged events. The discourse between the trial court and attorneys regarding limitations on expert and treater testimony was lengthy and thorough at the motion in limine. The trial court granted the motion based on its concerns regarding the solicitation of opinion testimony of the professionals providing treatment to Robinson for PTSD relevant to their qualifications under *Daubert*, the trial court's gatekeeper function and the need to avoid duplication of testimony in what was anticipated to be a lengthy trial.

The dispute resurfaced during trial regarding application of the wording of the order memorializing the motion in limine ruling, which indicated, "Limitations on testimony by experts and/or treaters on causation and credibility pertaining to Robinson's diagnosis of post-traumatic stress disorder (PTSD)." Following extended discussion, the trial court reasserted its

¹⁷ *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

¹⁸ *Pena*, 255 Mich App 303 (internal citations and quotation marks omitted).

¹⁹ MRE 403.

position regarding distinctions between the treating professionals as fact witnesses and expert witnesses. It is important to note that Robinson does not raise as an issue on appeal Gutheil's status or qualification as an expert witness or directly contest the methodology he relied on in forming his expert opinion. Instead, Robinson contends that it was improper to permit Gutheil to opine regarding inconsistencies or discrepancies he asserted existed in the medical records. The references alluded to by Robinson involved Gutheil's testimony explaining the basis or reasons for his opinion.

Impliedly, Robinson takes issue with the perceived differences in handling of treating professionals as fact witnesses and those designated solely as expert witnesses. Our Supreme Court has distinguished a fact witness from an expert witness by defining the latter as not being a person "having knowledge of relevant facts," but rather one who gives opinion testimony which could not "be secured by means of a subpoena."²⁰ The basis for such a distinction is also contained within the rules of evidence. Specifically:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.²¹

In contrast, an expert

may testify . . . in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.²²

In order for an expert to offer opinion testimony:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.²³

In accordance with these rules, Gutheil explained as part of the basis for his opinion the existence of specific factual discrepancies or inconsistencies within the medical records of Robinson's description of several of the alleged incidents and how those descriptions changed

²⁰ *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970) (internal quotation marks omitted).

²¹ MRE 701.

²² MRE 702.

²³ MRE 703.

over time and with each re-telling. The contested testimony was not used to challenge Robinson's credibility or to address issues of causation but rather to explain how Gutheil arrived at his expert opinion. This was important with regard to Gutheil's rejection of Robinson's diagnosis of PTSD and suggestion that a personality disorder would better explain symptomology.

To the extent that Gutheil addressed Robinson's credibility it was tangential to his explication of his diagnostic impression. Gutheil indicated that he did not view Robinson as malingering. Rather, Gutheil opined that Robinson engaged in "symptom exaggeration," which he defined as being "less conscious, less deliberate or intentional . . . [i]t's something he really can't help doing, may not even know he's doing it." Gutheil concluded that malingering and symptom exaggeration "both raise questions for examination and exploration and corroboration about how much you can take what is being said as accurate description."

It is important to note that this testimony was elicited after various professionals treating Robinson testified regarding the basis for their diagnoses. For instance, Dr. Leon Rubenfaer indicated that he did not find that Robinson had "embellish[ed]" and specifically opined that Robinson lacked "any self-serving motive." Similarly, Eugene Vander, Robinson's social worker, opined that in conducting his assessment that he believed Robinson. And Dr. Richard Feldstein indicated he did not find Robinson to be malingering even though he specifically "looked for exaggerations, distortions, misrepresentations, unwillingness to answer questions and the reasonableness of patient's presentations with what would be expected in a given circumstance."

To the extent that Robinson contends differential treatment in the solicitation of opinion testimony regarding credibility from expert and treating witnesses, a comparison of the testimony of the various treating professionals and Gutheil demonstrate no substantive difference. While Robinson may argue that the testimony he elicited was artificially constrained by the trial court's order, in reality this appears to be a distinction without a difference as the treaters clearly opined before the jury that Robinson's reports of the incidents and events were consistent and without embellishment. As a result, Ford and Smith were, through Gutheil's testimony, afforded an opportunity to contest those representations.

It is also disingenuous for Robinson to suggest that Gutheil merely "scoured" the record seeking out purported inconsistencies. This characterization of Gutheil's method or approach was made by Robinson's counsel and not Gutheil. If this is an attack on Gutheil's method or professionalism in approaching his role as an expert it is diminished by Robinson's own treating professional, Feldstein, who indicated that he reviewed the record and Robinson's statements for discrepancies and inconsistencies. The difference is in results attained, not method. As such, Robinson has no legitimate basis to complain.

Robinson next challenges the trial court's instruction to the jury that it could not consider Ford's reinstatement of Darren Smith in its determination of whether Ford took prompt and

immediate remedial action following notice of Robinson's claim of sexual harassment. Our Supreme Court has determined the standard of review for alleged instructional errors in civil proceedings to be de novo.²⁴ In addition:

Jury instructions are to include "all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." Instructional error warrants reversal if the error "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'"²⁵

While instructional errors are typically reviewed de novo on appeal, an issue alleging the applicability or accuracy of a requested jury instruction is reviewed for an abuse of discretion.²⁶ Similarly, this Court reviews the decision of a trial court to grant or deny a request for a nonstandard jury instruction for an abuse of discretion.²⁷ Jury instructions are also to be reviewed in their entirety and should not be evaluated on a piecemeal basis.²⁸ Reversal is not necessitated if, on whole, the theories of the parties and the applicable law were fairly and adequately presented to the jury.²⁹ Further, "a verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial."³⁰

The challenged jury instruction stated, in relevant part:

In deciding whether Ford Motor Company took adequate and prompt remedial action to stop Darren Smith from further alleged sexual harassment of Robert Robinson, the bargain [sic] for and subsequent reinstatement of Darren Smith should not lead you to find that Ford Motor Company failed to take prompt and adequate remedial action after it had notice to stop further alleged harassment of Mr. Robinson.

²⁴ *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002).

²⁵ *Id.* (citations omitted).

²⁶ *Lewis*, 258 Mich App at 211; *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993).

²⁷ MCR 2.516(D)(4); *Houston v Grand Trunk WR Co*, 159 Mich App 602, 608; 407 NW2d 52 (1987).

²⁸ *Bordeaux*, 203 Mich App at 169.

²⁹ *Id.*; see also *Lewis*, 258 Mich App at 211.

³⁰ *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 627; 792 NW2d 344 (2010) (citation omitted).

By the term prompt and adequate remedial action, I mean that the employer must take steps reasonably calculated to stop the harassment of the plaintiff. And considering the totality of the circumstances, you may not consider the reinstatement of Darren Smith which was taken pursuant to the collective bargaining process when deciding whether Ford violated state law prohibiting discrimination. Review Ford's sole action and not any action Ford took collectively with the UAW.

Considerable discourse occurred between the trial court and counsel regarding the form and content of this instruction. As indicated by the wording of the instruction, during the trial the jury was made aware that although Ford had terminated Smith's employment, he was subsequently reinstated through the collective bargaining process.

While developing the final jury instructions the trial court indicated its reasoning for precluding consideration of Smith's reinstatement, indicating a concern regarding federal law preemption and the problem of distinguishing between Ford's own actions and those that occurred subsequently in conjunction with the union. As implied by the trial court, "the relevant inquiry concerning the adequacy of the employer's remedial action is whether the action reasonably served to prevent future harassment of the plaintiff."³¹ There is no dispute that Ford, after being placed on notice and undertaking an investigation, terminated Smith. The trial court correctly recognized that any subsequent action pertaining to Smith's reinstatement does not address the adequacy of Ford's response after obtaining notice of the events but rather deals with collateral issues impacted by the existence of a collective bargaining agreement and, thus, begins to stray into the realm of federal law. The subsequent reinstatement of Smith is not dispositive with regard to whether Ford took "prompt and adequate remedial action." More importantly, as the jury did not find Smith's behavior to attain the level of sexual harassment or was not found to be "inherently sexual" in nature, the necessity of determining either the speed or adequacy of Ford's response was rendered moot as the jury did not need to make a determination on that element. Consequently, the trial court's preclusion of the jury's consideration of that reinstatement was irrelevant and unnecessary with regard to the verdict.

Finally, Robinson takes issue with the trial court's provision of a non-standard supplemental jury instruction addressing same-sex sexual harassment. To evaluate this contention of error it is necessary to review the jury instruction as a whole. The following is a recitation of the challenged jury instruction pertaining to Ford:

These are the employment discrimination instructions that apply to Defendant Ford Motor Company. I'm going to give you a cautionary instruction as an overview of the Michigan Civil Rights Act.

The law provides that an employer shall not discriminate against a person regarding employment, compensation or a term [sic] condition of [sic] privilege

³¹ *Chambers v Tretco*, 463 Mich 297, 319; 614 NW2d 910 (2000).

of employment because of sex. Anti-discrimination laws, such as our Civil Rights Act, is [sic] the law that's at issue here. They're not intended to be general civility codes. These laws are not designed to purge the workplace of all boorish, vulgar offensive or even harassing conduct that does not satisfy the statutory definition of sexual harassment. And I'm going to describe the elements of that following this cautionary instruction.

The Civil Rights Act does not prohibit genuine, but innocent, differences in the ways men and women routinely interact with members of the same sex or the opposite sex. The prohibition of harassment on the basis of sex only forbids behavior that is so objectively offensive as to alter the conditions of the victim's employment.

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment, an environment that a reasonable person would find hostile or abusive, is not sexual harassment discrimination.

Ordinary socializing in the workplace, such as male-on-male horseplay, must not be mistaken for discriminatory conditions of employment. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering all the circumstances. Careful consideration of the social context in which particular behavior occurs and is experienced by its target is your inquiry.

A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the behind if he heads onto the field even if the same behavior would reasonably be experienced as abusive by the coaches [sic] secretary, whether that person was male or female, back at the office.

The real social impact of workplace behavior often depends on the constellation of surrounding circumstances, expectations and relationships which are not fully captured by a single recitation of the words used or the physical acts performed.

Common sense and appropriate sensitivity to social context will enable you to distinguish between simple teasing or roughhousing among members of the same sex and conduct which a reasonable person in the plaintiff's position would find inherently sexual, severely hostile or abusive.

Now, with that, I want to give you the precise definitions of the elements that you have to look for when you're trying to determine whether or not parties have met their burden of proof.

On plaintiff's claim of hostile environment sexual harassment against Ford Motor Company, Mr. Robinson has the burden of proving the following elements, and I'll define these terms in a moment.

That he was subjected to communication or conduct on the basis of gender and that he was subjected to unwelcome sexual conduct or communication and that he was subjected to a sexually hostile work environment and that the employer was legally responsible for the sexually hostile work environment and that he has suffered damages.

So, your verdict will be for the plaintiff if the plaintiff has proved all of these elements. And your verdict will be for Ford Motor Company if Robbie Robinson has failed to prove any one of these elements.

Now, when I use the phrase unwelcome sexual conduct or communications, I mean that plaintiff, Robbie Robinson, is the recipient of unwanted conduct or communication that is inherently sexual.

When I use the phrase sexually hostile work environment, I mean the work environment was so tainted that, in the totality of the circumstances, the unwelcome sexual conduct complained of had the purpose or effect of substantially interfering with his employment or created an intimidating, hostile or offensive employment environment.

You must view the conduct or communication complained of from an objective standard deciding how a reasonable person would have perceived the conduct or communication alleged in this case.

As a preliminary matter when charging the jury, the trial court emphasized the importance of the jury “consider[ing] my instructions as a whole. Don’t pick out one instruction you like and following it and disregard others.”

Jury instructions are addressed by the court rules, which provide in pertinent part:

(2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if

- (a) they are applicable,
- (b) they accurately state the applicable law, and
- (c) they are requested by a party.

* * *

(4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model

instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative.³²

A trial court's authority to give a supplemental jury instruction has been addressed by this Court, which stated:

[w]hen the standard instructions do not properly cover an area, a trial court is required to give requested supplemental instructions if they properly inform the jury of the applicable law. However, it is error to instruct the jury on a matter not supported by the evidence. The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion.³³

Reversible error will not be deemed to have occurred if, on balance, the theories of the respective parties and the applicable law are adequately and fairly presented to the jury.³⁴

To evaluate Robinson's contention regarding the applicability and accuracy of the instruction it is useful to compare the trial court's language to the standard jury instructions and case law pertaining to same-sex sexual harassment. The statement "[t]he law provides that an employer shall not discriminate against a person regarding employment, compensation or a term [sic] condition of [sic] privilege of employment because of sex" is part of the standard civil jury instructions.³⁵ Similarly, the trial court's language, from the paragraph that states "On plaintiff's claim of hostile environment sexual harassment against Ford Motor Company, Mr. Robinson has the burden of proving the following elements" through the end of the cited instructions are also taken directly from the standard jury instructions.³⁶ Robinson concedes that the parties agreed on the inclusion of a supplemental jury instruction that would explain to the jury that the CRA is not intended to act as a general code of civility. Consequently, any issue regarding the propriety of that reference within the challenged instruction should be deemed waived.³⁷

Considering the remainder of the language of the instruction, Robinson's contention that it is not an accurate statement of the law cannot be sustained. Specifically, the portion of the instruction encompassing "The Civil Rights Act does not prohibit genuine, but innocent, differences in the way men and women routinely interact with members of the same sex or the

³² MCR 2.516(D).

³³ *Guerrero v Smith*, 280 Mich App 647, 661; 761 NW2d 723 (2008) (citations omitted).

³⁴ *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

³⁵ M Civ JI 105.01.

³⁶ M Civ JI 105.14; 105.18; 105.20.

³⁷ *Chastain v Gen Motors Corp*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002).

opposite sex,” through the example of the working environment for the professional football player and concluding with the paragraph, “Common sense and appropriate sensitivity to social context” are all taken directly and almost word-for-word from the U.S. Supreme Court in *Oncale*.³⁸ Given the source from which this language was directly derived, there is no alternative but to “acknowledge that it would have ‘properly inform[ed] the jury of the applicable law.’”³⁹

It is important to note the trial court’s bifurcation of this instruction to distinguish its general, “cautionary” directive from the elements the jury was required to find to determine whether either party had met their burden of proof. The cautionary portion of the instruction encompassed the *Oncale* language, while the language pertaining to the actual elements of the offense were derived strictly from the civil jury instructions. Inclusion of the football player workplace example was not intended to reflect the necessary proofs in this case. Rather, it was to demonstrate to the jury the importance of evaluating the allegations in their particular social context and within the totality of the circumstances, as dictated by case law. Instead of complaining that the example did not reflect the evidence in this particular case, we find that such a distinction was appropriate so as not to improperly guide or influence the jury. Because this was part of the cautionary instruction and not the elements portion, it should not have coincided with the factual circumstances of this case.

Robinson also complains of the use of the term “horseplay” within the instruction. Once again, to the extent he contends the use of this term is inconsistent with the law, we would point out that the language is directly taken from *Oncale*.⁴⁰ The same is true of Robinson’s criticism of the comparison or characterization of “ordinary socializing in the workplace” with “male-on male horseplay”⁴¹ as this language is also derived from *Oncale*. Robinson’s assertion that use of the term “horseplay” is not consistent with the evidence is disingenuous at best, as he commensurately complains that use of this term slants the instruction to coincide with Ford’s theory of the case. Any use of this term by Ford in questioning of witnesses or argument was sufficiently addressed by the trial court’s instruction to the jury that questions, statements or comments and arguments by the attorneys did not constitute evidence, as jurors are presumed to follow their instructions.⁴² As the term is used within the cautionary portion of the instruction, the intent is clearly to assist the jury in distinguishing between rowdy or vulgar behavior and that which is “inherently sexual.” Robinson also takes issue with the failure of the trial court to define the term “horseplay.” It should be noted that Robinson never requested the trial court to include or formulate a definition of this word for the jury and, therefore, such an issue should be deemed waived. This contention is also seriously undermined by the fact that the term

³⁸ *Oncale*, 523 US at 81-82.

³⁹ *Guerrero*, 280 Mich App at 662 (citation omitted).

⁴⁰ *Oncale*, 523 US at 81.

⁴¹ *Id.*

⁴² *Bordeaux*, 203 Mich App at 164.

“horseplay” was used and discussed with the jury during voir dire. Specifically, when questioning the jury the trial court queried:

Is there anyone here who has any difficulty with the concept that horse play [sic] and harassment can be sometimes at least be very different things. All horse play [sic] is not necessarily harassment. Anybody have a problem with that concept?⁴³

Perhaps more telling is the fact that Robinson’s counsel, when questioning prospective jury members asked, “Would you see the male on male mail [sic] harassment as some form of horse play [sic]?”

The contention that the trial court failed to fully explicate that behavior characterized as “horseplay” did not necessarily preclude it from being “inherently sexual” is without merit. First, Robinson did not ask for an instruction to differentiate these terms, thereby waiving the issue. In fact, when discussing the jury instructions Robinson’s counsel specifically acknowledged, “Your Honor, the lawyers can argue to the jury the difference between horseplay and the activities that took place here that are clearly sexual. Those are self evident.” Second, during voir dire the trial court indicated when questioning prospective jury members that “the concept of horseplay and harassment can be sometimes at least be very different things. All horseplay is not necessarily harassment.” This indicates that overlap can exist and that neither term is mutually exclusive. Finally, viewing the full instructions in context, the term is defined. Specifically:

Ordinary socializing in the workplace, such as male-on-male horseplay, must not be mistaken for discriminatory conditions of employment. The objective severity of harassment should be judged Common sense and appropriate sensitivity to social context will enable you to distinguish between simple teasing or roughhousing among members of the same sex and conduct which a reasonable person in the plaintiff’s position would find inherently sexual, severely hostile or abusive.

These statements, when viewed as a whole indicate a continuum of behavior ranging from “horseplay” or “roughhousing,” which is characterized as “ordinary socializing in the workplace” to “inherently sexual, severely hostile or abusive” behavior. As properly instructed by the court, the distinction is in the severity and context of the behavior.

To the extent that Robinson contends the jury was confused based on their responses to the verdict form, this comprises mere speculation and conjecture. There is no inherent discrepancy regarding the jury’s response to the questions on the verdict form pertaining to Ford. The jury affirmatively found that “Darren Smith subject[ed] Robert Robinson to unwanted communication or conduct because of his gender.” Subjection to behavior on the basis of gender is a necessary element to prove sexual harassment. The evidence in this case indicated that

⁴³ Trial Transcript dated September 8, 2008, pp 96-97.

Smith directed his behavior primarily toward other male employees and that females were not treated by Smith in the same manner as members of his own sex. As such, the jury's response on this element is consistent with the proofs. But, the jury responded negatively to the following: "Did Darren Smith subject Robert Robinson to unwanted communication or conduct that was inherently sexual and that amounted to sexual harassment?" This question clearly coincides with an element to be proved in a sexual harassment claim. While Robinson may be disappointed that the jury did not find his behavior to rise to the level of "inherently sexual and that amounted to sexual harassment," such a determination is not inconsistent with its initial determination that the behavior was based on gender. Because the jury did not seek clarification or instruction from the trial court regarding the verdict form any suggestion by Robinson that the jury was confused is without any factual basis and is rejected.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Talbot