

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HASSAN H. SHERIF : CIVIL ACTION
v. :
ASTRAZENECA, L.P., et al. : NO. 00-3285

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

April 3, 2002

Presently before the court is defendants' Motion in Limine to Preclude Certain Testimony and Documents. The Motion addresses three categories of evidence and argument that the plaintiff seeks to introduce at trial: (1) testimony of James Lodigiani; (2) testimony of Ms. Anya De Rosa and J. Todd Alderfer, M.D.; and (3) argument that an adverse inference should be made against defendants because of the spoliation of certain personnel records relating to plaintiff. This court held a pre-trial conference on March 19, 2002. At the conference, the parties agreed that the second and third issues need not be decided pre-trial but would be deferred until the appropriate time during trial. The parties, however, have requested a ruling regarding the proposed testimony of James Lodigiani. For the reasons that follow, the Motion in Limine regarding Mr. Lodigiani's testimony is denied.

In a Memorandum dated May 16, 2001, Judge James McGirr Kelly summarized the factual background of this case as follows:

[Plaintiff Hasson H.] Sherif was employed by AstraZeneca and its predecessors in various sales and sales management positions. In 1997, he was hired as a Developmental Specialist in the Philadelphia Customer Sales Unit ("PCU") of Astra-Merk [sic], a predecessor to AstraZeneca.

In August of 1998, Sherif was informed that he had not submitted expense reports since the beginning of the year. He compiled those expense reports and submitted them in September. Shortly thereafter, Sherif was informed of concern with the timeliness and accuracy of his expense reports and that an investigation was under way. Sherif was suspended with pay pending investigation of his expenses. In November of 1998, Sherif was allowed to return to work at AstraZeneca, but with a demotion to Pharmaceutical Specialist and with a six month probationary period. Sherif's salary remained below the previous average for Development Specialists, however, and almost \$10,000 below the current average. Sherif was criticized for asking a manager questions at a meeting.

Sherif then filed complaints with the Pennsylvania Human Relations Commission ("PHRC") and the EEOC. Following the complaints, Sherif alleges he was given mis-configured computer software, was not visited by his supervisor in the field and his sales were not reported correctly. Sherif blamed his sub-par sales levels on the mis-configured software. Sherif was told he was being held to a different standard than anybody else, criticized for taking vacation in May of 1999, and received an annual pay increase of 1.5% when the average was 4.5%. Sherif was ultimately terminated on May 24, 1999.

Sherif v. AstraZeneca, L.P., 2001 WL 527807, at *1 (E.D. Pa. May 16, 2001) (footnote omitted).

Based on the above employment actions, plaintiff sued AstraZeneca, L.P. and three of its employees, Robert C. Stoner, Letitia A. Baldez, and Chester P. Yuan, for employment discrimination on the basis of race, sex, religion, ethnic origin, and perceived disability, and retaliation, under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq., the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101, et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 951, et seq.

James B. Lodigiani worked at Astra Merck from 1993 to June of 1998. At the time of his departure, he was the Executive Director of Strategic Planning for Astra Merck. (Lodigiani Dep. at 7.) Lodigiani sued Astra Merck in June of 1997 claiming he was denied a promotion to the position of Vice President of Marketing Sales because he was a male. Instead, a female, Nancy Wysenski, received the higher-level job. The action filed by Lodigiani was

settled. Lodigiani no longer works for Astra Merck. On June 28, 2001, the parties took the deposition of James B. Lodigiani. Plaintiff seeks to admit statements made to Lodigiani by the following individuals: (1) Matthew Emmens, who in January 1997, was the President and Chief Executive Officer of Astra Merck, Inc., and (2) Michael R. Herman, who was the Executive Director of Field Sales for the company.

According to Lodigiani, Emmens told him sometime in February of 1997, that “he had to promote” Nancy Wysenski over him, although he later acknowledged that his performance was “exceptional.” (Lodigiani Dep. at 14-17.) In March of 1997, in response to Lodigiani’s inquiry as to why he was denied a promotion, Emmens made a comment to Lodigiani about “overall dealing with females in the organization.” (Lodigiani Dep. at 18.) Lodigiani also testified that Michael Herman told him that he “had gotten the short end of the stick and had not been treated fairly in being passed over for promotion in favor of Ms. Wysenski.” (Lodigiani Dep. at 48-49.) Lodigiani explained further: “I remember Mike [Herman] just making a comment that, you know, he felt that it was unfair and inappropriate and – but that we just had to move along and be a part of the new Astra Merck.” (Lodigiani Dep. at 52.)

Defendants object to the above-described testimony of Lodigiani on the grounds of relevance and on the basis that admission of the testimony will cause unfair prejudice to the defendants and cause confusion of the issues. See Fed. R. Evid. 403.¹ Federal Rule of Evidence 401 defines relevant evidence 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

¹ The court understands that defendants reserve the right to object at trial to Lodigiani’s testimony on other grounds, such as the statements are inadmissible hearsay.

would be without the evidence.” The Third Circuit has stated that “Rule 401 does not raise a high standard.” Hurley v. Atlantic City Police Dep’t, 174 F.3d 95, 109-10 (3d Cir. 1999), cert. denied, 528 U.S. 1074 (2000). Our Court of Appeals has repeatedly warned against trial courts imposing “blanket evidentiary exclusions in discrimination cases.” Quinn v. Consol. Freightways Corp. of Delaware, 2002 WL 397222, at *5 (3d Cir. Mar. 8, 2002) (quoting Glass v. Philadelphia Elec. Co., 34 F.3d 188, 195 (3d Cir. 1994)). Plaintiff argues that the statements of Emmens, made in his capacity as President and CEO of Astra Merck, are relevant “to show the corporate culture in which a company makes its employment decision, and may be used to build a circumstantial case of discrimination.” Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 333 (3d Cir. 1995).

The court agrees with plaintiff and finds that the statements by Mr. Emmens are relevant. Emmens made the statements in 1997, a year before plaintiff was denied a promotion and later suspended. At the time, Emmens was President and CEO of the entity which employed both plaintiff and Lodigiani.² Even though Emmens did not participate in the decisions adversely affecting plaintiff, this is of no consequence under Third Circuit jurisprudence. Our Court of Appeals has held “that discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of

² Defendant AstraZeneca, L.P. is a successor to Astra Pharmaceuticals, L.P., which was a successor to Astra Merck. (Motion in Limine at 2, 4; Amended Complaint ¶¶ 2, 5.) Astra Merck hired plaintiff and he later became an employee of Astra Pharmaceuticals. (Defs.’ Pretrial Mem. at 3 n.1.) In 1997, Matthew Emmens became President and CEO of Astra Merck and remained in that position through the end of 1998. (Lodigiani Dep. at 15, 64.) Effective July 1, 1998, Astra Merck became known as Astra Pharmaceuticals, L.P. (Amended Complaint ¶ 37.) In October and November of 1998, plaintiff was suspended and demoted. (Amended Complaint ¶¶ 72-74, 93.)

discrimination.” Abrams v. Lightolier, Inc., 50 F.3d 1204, 1214 (3d Cir. 1995). Plaintiff’s theory is that as a matter of corporate policy, males employed by Astra Merck were treated differently than women. Emmens’ statements to Lodigiani, if believed by the jury, support plaintiff’s theory. See also Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 641 (3d Cir. 1993) (court may consider as circumstantial evidence the atmosphere in which the company made its employment decisions); Roebuck v. Drexel Univ., 852 F.2d 715, 733 (3d Cir. 1988) (discriminatory remarks of University President admissible since he had a significant influence on the attitudes and procedures of decisionmakers).

Likewise, Michael Herman’s statement to Lodigiani is relevant. According to the testimony of Chester P. Yuan, the decision to demote plaintiff was made by himself, Robert L. Stoner and Mr. Herman. (Yuan Dep. at 126.) Herman’s comments to Lodigiani that he felt the promotion of a woman over Lodigiani was “unfair and inappropriate,” but that “we just had to move along and be a part of the new Astra Merck” may be interpreted by the jury, along with Emmens’ comments, as supporting plaintiff’s theory that Astra Merck adopted a policy of favoring females over males (“the new Astra Merck”), that Herman’s decision to demote plaintiff was an implementation of that policy, and that the reasons proffered by defendants for the plaintiff’s demotion were merely a pretext for discrimination. See Hurley, 174 F.3d at 110 (“Evidence of harassment of other women and widespread sexism is also probative of ‘whether one of the principal nondiscriminatory reasons asserted by [an employer] for its actions was in fact a pretext for . . . discrimination.’”) (quoting Glass, 34 F.3d at 194).³

³ The court recognizes that the jury could also interpret Herman’s statement to mean that Herman personally abhorred unequal treatment and therefore it was highly unlikely that Herman would discriminate against plaintiff. However, the significance of Herman’s

Federal Rule of Evidence 403 provides, in pertinent part, that “[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.” As explained above, the proposed trial testimony of James Lodigiani is probative. Herman’s statements to Lodigiani are especially probative because, according to Chester Yuan, Herman participated in the decision to demote plaintiff. As the Third Circuit has stated: “Because discriminatory comments by an executive connected with the decisionmaking process will often be the plaintiff’s strongest circumstantial evidence of discrimination, they are highly relevant and a trial court’s decision to admit such evidence should ordinarily be upheld.” Abrams, 50 F.3d at 1215.

Our Court of Appeals has held that under Rule 403, “evidence that is otherwise relevant and admissible may only be excluded if the probative value of the evidence is substantially outweighed by its prejudicial effect.” United States v. Universal Rehabilitation Serv. (PA), Inc., 205 F.3d 657, 664 (3d Cir. 2000) (en banc) (emphasis in original). “Federal Rule 403 creates a presumption of admissibility, and . . . district courts may utilize the rule only rarely to cause the exclusion of evidence.” Id. Moreover, Rule 403 only protects against evidence that is “unfairly prejudicial.” The Third Circuit explained:

It does not offer protection against evidence that is merely prejudicial, in the sense of being detrimental to a party’s case. Rather, the rule only protects against evidence that is unfairly prejudicial. Evidence is unfairly prejudicial only if it has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” It is unfairly prejudicial if it “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish,” or otherwise “may cause a jury to base its decision on something other than the established propositions in the case.”

statement is for the jury, not this court.

Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980) (citations omitted).

The evidence offered by plaintiff will not cause “unfair prejudice” to defendants as that term is used in Rule 403. The defendants can easily answer the evidence by calling Messrs. Emmens and Herman as witnesses to explain their comments. Furthermore, the court will give an instruction to the jury explaining the limited purpose of the evidence should defendants request such an instruction. Such an instruction will minimize any risk of unfair prejudice to the defendants. See Universal Rehabilitation Serv., 205 F.3d at 669 (finding limiting instructions to the jury cured the prejudicial effect flowing from the introduction of a guilty plea).

Likewise, the court does not anticipate that defendants will have to engage in a “mini-trial” of the circumstances of Lodigiani’s complaint against Astra Merck, which might lead to jury confusion. Plaintiff does not seek the admission of evidence concerning Lodigiani’s lawsuit and subsequent settlement with Astra Merck. As outlined above, plaintiff seeks only to admit Emmens’ and Herman’s statements. Additionally, the court does not understand plaintiff’s offer of proof to include testimony by Lodigiani as to his belief that he was mistreated by Astra Merck because of his sex. If plaintiff did seek to introduce such testimony, he would have a much greater burden to overcome an objection under Rule 403. As the Third Circuit has stated, such “testimonials” of former employees are “less probative” and “more inflammatory” than statements of executives of the employer. Abrams, 50 F.3d at 1215. Since plaintiff is not seeking to introduce such a “testimonial,” there will be less of a need for the defendants to elicit extensive testimony as to the circumstances of Lodigiani’s employment by Astra Merck. While the court understands that defendants may wish to introduce some evidence of the circumstances

of Lodigiani's employment, the court is confident that such evidence will not confuse or mislead the jury, especially with a limiting jury instruction.

For all the above reasons, the court denies defendants' Motion in Limine only as it relates to the testimony of James Lodigiani. The court will consider the other issues raised in the Motion at the time of trial.

BY THE COURT:

THOMAS J. RUETER
United States Magistrate Judge