2014 IL App (4th) 131067-U

NO. 4-13-1067

FILED
August 26, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DAVID PICKETT,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macon County
ARCHER-DANIELS-MIDLAND, a Foreign Corporation,	)	No. 10L144
Defendant-Appellee.	)	Honorable
	)	Thomas E. Little,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiff's statement of facts, taken from the allegations in the amended complaint and from the response to the defendant's motion for summary judgment, does not comply with Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013).

(2) Plaintiff failed to establish the trial court erred in giving a jury instruction that defined "adverse employment action" for the jury.

(3) The trial court did not err in submitting special interrogatories to the jury, as the interrogatories were not confusing and plaintiff forfeited additional challenges to the interrogatories by not supporting the contentions with argument or authority.

(4) Plaintiff failed to establish the trial court committed reversible error by choosing defendant's proposed burden-of-proof and issues instructions, as plaintiff made no argument he suffered serious prejudice as a result of the trial court's decision.

(5) Plaintiff did not establish the trial court's evidentiary rulings, excluding certain evidence as irrelevant, constituted reversible error.

¶ 2 In September 2013, a jury found for defendant, Archer-Daniels-Midland Company (ADM), on plaintiff David Pickett's claims of race and gender discrimination and retaliation. Pickett appeals, arguing the trial court erroneously (1) gave the jury three special interrogatories that were compound and confusing; (2) chose ADM's proposed jury instructions on the issues and burdens of proof, which he alleged inaccurately stated the law, over Pickett's proposed jury instructions; (3) provided the jury with an improper instruction on the meaning of "adverse employment action;" and (4) excluded certain evidence as irrelevant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2011, Pickett, an African-American male, filed an amended complaint against ADM, asserting he was not hired for the position of Divisional Human Relations (HR) manager for the Milling Division (HR Manager Milling position) due to his race and gender and in retaliation for his April 2010 employment complaint against his supervisor, Fern Kathleen Whitley. According to his amended complaint, Lori Zywiec, a Caucasian female, was hired for the HR Manager Milling position in July 2010.

¶ 5 In September 2013, a jury trial was held on Pickett's claims of race discrimination (775 ILCS 5/2-102(A) (West 2010)), gender discrimination (775 ILCS 5/2-102(A) (West 2010)), and retaliation. Pickett's first witness was Janet Brannam, a payroll specialist with ADM. Brannam testified Pickett earned the title of senior labor representative in July 2008. As of March 1, 2013, Pickett earned $111,492 in salary. Regarding Zywiec's salary, Brannam testified Zywiec's first entry on the form is dated December 15, 2005. On that date, Zywiec's title was HR manager. She earned $70,000. On September 1, 2010, Zywiec had a salary increase of

$9,612, bringing her yearly salary to $87,096. This equated to an increase of 12.4%.

¶ 6 Fern Kathleen Whitley testified she was the vice president of labor relations in 2005. In 2009, she became vice president of HR. In her role as vice president of labor relations, Whitley directly supervised Pickett. As Pickett's supervisor, she completed annual evaluations of him and met with him regularly. In his 2007 evaluation, Whitley reported Pickett "successfully negotiated several contracts" and continued "to learn from each contract." Whitley further reported Pickett led nonunion organizing drives and continued to improve "his research skills." She deemed him "very successful."

¶ 7 Whitley described ADM Milling Company (ADM Milling). ADM Milling was a wholly owned subsidiary of ADM. It processed wheat. The corporate office for ADM Milling was in Kansas City, Missouri. In 2010, ADM Milling did not have a dedicated HR professional. Discussions with Mark Kolkhorst, the manager of ADM Milling, to create the position began in spring 2010. Kolkhorst wanted someone with an education who was qualified in more than salaried administration. He wanted an individual capable of managing office workers. There were no written requirements for the position. Whitley and Kolkhorst did not discuss salary. Whitley assisted Kolkhorst in identifying candidates for the job. At this time, Whitley had 53 individuals reporting to her.

¶ 8 According to Whitley, the company had a practice of posting for positions. This practice, however, did not extend to all positions: "There were positions where there are qualified candidates within the workforce and you—you see if they are a good fit for that role." The HR Manager Milling position was not posted because Whitley knew of qualified candidates within HR. If she did not know of one, the position would have been posted. Whitley did not

recall a written requirement for a posting but acknowledged, at her deposition, she stated a written policy requiring posting jobs did exist.

¶ 9 According to Whitley, she had the task of performing the initial screening process for the position. Two others were involved in the process of filling the position: Case McGee and Kolkhorst. Whitley did not ask Pickett if he was interested in the position, but she acknowledged he indicated multiple times he was interested in an HR Manager Milling position. Whitley was aware Pickett previously made a complaint involving her at the Office of Compliance and Ethics at ADM. Whitley testified Pickett reported she used discriminatory practices on a daily basis. Whitley denied Pickett's complaint caused her resentment.

¶ 10 Whitley testified three candidates came to mind for the HR Manager Milling position: Zywiec, Scott Bushey, and Andy Richars. Whitley talked with Bushey, a labor representative, about the position. Bushey worked in the staffing area in the corporate office. He also worked in the plant as an HR manager. Bushey had a Master of Business Administration degree. Bushey was not interested. Whitley also spoke to Richars about the position. Richars worked in staffing, hiring "a lot of the professionals within the company." Richars had a degree and a wide knowledge of a variety of things, including unemployment benefits and the scholarship program. Richars was also not interested in the position.

¶ 11 According to Whitley, she recommended Zywiec, a Caucasian female, for the position. Zywiec had a degree and was previously the head HR person for a different company. Zywiec had worked on succession and staffing and was interested in the position. Whitley discussed Zywiec with McGee, who agreed with Whitley's list of candidates. After Zywiec was hired, Whitley announced the hiring to her direct reports via e-mail. In her announcement,

Whitley mentioned the position required a bachelor's degree, experience as an HR manager, and the "ability to move to Overland Park." This led to a series of e-mails between Whitley and Pickett. In the first, Pickett asked why the position was not posted. Whitley responded she had spoken "with all the qualified candidates and no one was interested except" Zywiec, and Zywiec would be promoted to the new position.

¶ 12 Whitley stated, when asked who had the idea of creating the position for HR Manager Milling, "[i]t was a collaborative effort, but one that Mark Kolkhorst asked me about" in spring 2010. In 2008, two years earlier, Pickett told Whitley he wanted to create the HR Manager Milling position and he wanted the position.

¶ 13 According to Whitley, she knew of Pickett since he worked in the Peoria plant. After his work at the Peoria plant, Pickett worked in the Office of Compliance in the safety area. When a labor-relations position opened, Whitley approached Pickett about moving into her area. Whitley believed the move into labor relations was a lateral move, not a promotion. While he worked in Whitley's group, Pickett received raises. Pickett's focus in labor relations was in the hourly workforce and in the operations or plant side of the business.

¶ 14 Whitley testified Pickett was not qualified for the HR Manager Milling position. Pickett lacked experience developing the salaried and corporate workforce. He had not been involved in succession planning and relocation of people, and he did not have a degree. Whitley denied Pickett's race or gender was part of the decision. Pickett's prior complaint, which resulted in no action against Whitley, was not part of the decision. After Pickett's complaint was determined to be unfounded, he continued to receive raises while working under Whitley.

¶ 15 Upon questioning by Pickett, Whitley testified she could not remember, of the 53

people who reported to her, how many were African-American. When asked to name individuals other than Pickett who were African-American in her department in 2010, she could name two. Bushey and Richars are Caucasian males.

¶ 16 Michael D'Ambrose testified he began working for ADM in 2006. He was Whitley's supervisor. At the time of his testimony, D'Ambrose was the senior vice president of HR. In this role, D'Ambrose was responsible for ADM employees around the world, including how they were paid, the organizational structure, training and development, and management succession. D'Ambrose testified he was aware of qualifications for the HR Manager Milling position in 2010. He was not aware of any written qualifications. Kolkhorst set the qualifications. D'Ambrose had no input into the qualifications. D'Ambrose did not believe a college degree was required, but he did not think he informed anyone of this before Zywiec was hired.

¶ 17 D'Ambrose stated in 2010, ADM Milling did not have a dedicated HR professional. D'Ambrose was involved in discussions with the leaders of ADM Milling about the potential for such a position. D'Ambrose testified the new position was significant. To make the company successful, a close relationship between the business president and the HR manager would be important. The HR Manager Milling position would report directly to Kolkhorst.

¶ 18 According to D'Ambrose, Pickett, who was responsible for working with unions in facilities around the country, was not qualified for the position. Pickett's career was entirely in labor relations. He worked in a plant and did some work in safety. To be qualified for the HR Manager Milling position, the individual should have experience in compensation at the most senior level and about training and development. For example, the individual would need to

know how to take someone who was a plant manager and make that individual the next president of ADM Milling. Labor relations was not a function for the HR Manager Milling position. Pickett's age and race were not considered. The fact Pickett made a complaint about Whitley previously did not influence D'Ambrose.

¶ 19 McGee, vice president of investor relations, testified in 2010 he was the director of global compensation. In that role, he was responsible for the compensation of ADM employees. His involvement in selecting the individual to fill the HR Manager Milling position began when Whitley presented him with three individuals she deemed qualified candidates. McGee considered the candidates and agreed with the selection. McGee testified a bachelor's degree or an associate's degree was not required for the position but was preferred.

¶ 20 According to McGee, Pickett's responsibilities in his job included negotiating collective-bargaining agreements with union representatives and advising management on contracts and in third-party grievances. McGee did not consider Pickett qualified for the position because his experience was in labor relations. Zywiec, in contrast, had experience in recruiting and compensation. Zywiec, when placed in the HR Manager Milling position, received a 12.4% salary increase. This increase included both her promotion and her annual merit increase, which was 3.5% . After her promotion, Zywiec earned approximately $87,000. The move from Pickett's position would have been a lateral move. A person earning $100,000 would not have received a raise as a result of the move to HR Manager Milling.

¶ 21 Jennifer Preston, director of employee and labor relations at ADM, testified she managed the labor-relations team, which was responsible for negotiating labor contracts, conducting arbitrations, and handling grievances. In her position, Preston supervised Pickett.

Pickett handled negotiations for various contracts. He presented "a couple of arbitrations over the years," as well as grievance meetings. Pickett provided general advice to managers on matters about contract language or wages. Pickett was not involved in talent management, executive compensation, succession planning, college recruiting, or benefits for salaried employees. Preston always rated Pickett as "meets performance." Each year since 2009, Pickett received an annual performance raise, with the exception of 2009, when he received a lump sum.

¶ 22 Preston testified Pickett confided he believed Whitley was not giving him adequate opportunities. Preston had not seen anything to make her believe Whitley discriminated against Pickett because of his race. Whitley had made no comments about Pickett's gender or indicated any desire to retaliate against him. Preston could not identify another African-American on the HR team in 2009.

¶ 23 Pickett testified on his own behalf. At the time of his testimony, Pickett's position was senior employee and labor-relations representative. He began working for ADM in May 1982 in the Peoria corn plant. Pickett began in utility. He advanced through a few positions to production supervisor. He then moved to the feed house and was promoted to superintendent. In his time at ADM, Pickett also worked in the milling area where fermentation was used to make ethanol. He was then promoted to health and safety manager. He took on a dual role at that time and became an HR manager. Pickett was the first HR manager in the field for ADM, at the Peoria plant. He held this position for six months. The Peoria plant was an operational facility. It was not related to the commercial or corporate side of ADM. Pickett made a lateral move, for which he received a compensation package, to the corporate office in 2001, when he "went into corporate compliance health and safety auditing" and then into labor relations in 2005. During

his time at ADM, he had received many merit raises. In August 2008, Pickett's salary increased to $100,500—the same amounts as Pickett's salary in July 2010.

¶ 24 Pickett denied Whitley's testimony she recruited Pickett for her department. According to Pickett, in 1998, he met Jim Quinn at an HR function at the corporate office, who asked if he would be interested in moving into labor relations. In 2005, a position opened. At that time, Pickett was already in the corporate office. Quinn, then the vice president of labor relations and Whitley's predecessor, asked Pickett if he would join labor relations. Pickett did. Pickett acknowledged he could not know whether Quinn spoke with Whitley regarding this move.

¶ 25 Pickett testified he spoke with Whitley regarding the HR Manager Milling position in 2008. Pickett told Whitley he was interested in creating the new position. Whitley said, "by all means." At that time, Whitley gave Pickett her seat on the International Association of Operative Millers. "[A] couple of other times," Pickett asked Whitley if there would be an opportunity for creating the position and if he would get to apply and interview for the position.

¶ 26 According to Pickett, he had HR-manager experience. As the HR manager at the Peoria plant, Pickett performed all of the HR duties. At the feed house, he had a similar role.

¶ 27 Pickett testified he learned of the HR Manager Milling position when he received the group e-mail stating Zywiec had been given the job. Pickett did not know whether the job had been posted. Pickett did not believe there was anything in the role he could not have done. There was nothing in Decatur that would have prevented him from taking the job in Overland Park, Kansas. Pickett testified, given his 31 years of experience at ADM, the HR Manager Milling position was "definitely a promotion."

¶ 28 Pickett testified he, Whitley, and John Kelly, from the office of compliance, had a conference call in July 2010 to discuss the promotion. Whitley told Pickett "the hiring program would have kicked [him] out of the system because [he] did not have a college degree." Pickett responded that was "kind of weird" because there was an HR manager in Marshall, Minnesota, without a college degree and his name would have been kicked out of the system but was not. Pickett testified the man's name is Todd Denney and he is Caucasian. Whitley responded Denney was working on his degree. Pickett acknowledged he did not know Denney personally and had no personal knowledge as to his level of education, and he did not believe Denney had an associate's degree.

¶ 29 Matthew Varble testified he worked at ADM from June 2000 through July 2007. During his time at ADM, he worked at the corporate headquarters in Decatur. According to Varble, his first year, he worked in the corporate labor-relations department as a labor-relations representative. After that, he worked in the corporate-compliance and ethics departments.

¶ 30 According to Varble, he visited ADM a number of times after his employment there ended. He saw Pickett at ADM's Randall Research Center building in May 2010. Varble knew the personnel who worked there, including Whitley and Pickett. When he went to see Pickett, he noticed Pickett sitting outside a glass-window conference room. Inside the conference room, the entire labor-relations department, including Whitley and the administrative staff, was holding a meeting. Varble asked Pickett why he was not at the department meeting. Pickett reported he was no longer invited. After Varble asked if this had occurred frequently, Pickett said it had. Varble told Pickett, who appeared upset, he needed to do something about the situation.

¶ 31 Varble testified he did not know everyone, but he knew there were no individuals in the area outside the conference room other than Pickett. Varble observed Whitley speaking at the head of the table. Varble admitted he did not know the topic of the meeting.

¶ 32 ADM called Kolkhorst, the president of ADM Milling, to testify. The entire management team of ADM Milling was in Overland Park. In the United States, ADM Milling had 23 flour mills, two dry-corn mills, a milo-milling location, and two mix plants. ADM Milling also had mills in Canada, the Caribbean, and the United Kingdom. ADM Milling employed approximately 2,400 employees.

¶ 33 Kolkhorst testified, in early 2010, he looked at the management team and determined they were spending a lot of time on HR matters, so he decided they needed a dedicated HR person at the facility. Kolkhorst was looking for someone who could liaison with Decatur and be a generalist in all aspects of HR. He wanted an individual who could perform executive development and succession planning, and assist with relocations and employee matters. Kolkhorst was not looking for someone who could help with labor relations. Kolkhorst wanted a good communicator, who could work with the salaried staff and with experts in other places and plants. Kolkhorst wanted someone with a degree, preferably an HR background or a business-type background. Kolkhorst preferred someone internal to ADM. Kolkhorst spoke with the HR group in Decatur and expressed what he was looking for. Candidates were sourced for him to interview. The HR office had a candidate they wanted ADM Milling to interview. Zywiec visited the Overland Park office and met with several members of the management team.

¶ 34 Kolkhorst stated he made the decision to hire Zywiec. She met the position's criteria. Zywiec was an internal ADM employee, who understood the workings of ADM, and

she had experience as an HR director with an outside company. Zywiec had compensation and benefits experience, as well as experience with succession planning and plant closures. Zywiec also had a degree. Kolkhorst considered neither the gender nor the race of the candidate. Kolkhorst only interviewed one person for the position. She fit the job very well. If she did not, Kolkhorst would have requested more candidates.

¶ 35 According to Kolkhorst, he and Pickett had met, but he did not know him well. Pickett was not interviewed because he was not on Kolkhorst's radar. The HR department presented the candidates to him. When determining salary, Kolkhorst looked at Zywiec's salary, which was around $77,000, and concluded that was representative of what a field HR representative was making. He talked to the HR department and concluded the job would be a promotion, and they needed someone to promote to it. Kolkhorst acknowledged the HR Manager Milling position would not have been a promotion for every other position in the company.

¶ 36 Kolkhorst testified, as he looked at the salary range, it would have been in a range under $100,000. Kolkhorst stated it was unlikely he would have hired someone for the position that was not in the right range.

¶ 37 Pickett testified in rebuttal. Pickett confirmed Varble's testimony regarding the meeting from which Pickett was excluded. Pickett testified Whitley excluded him from other meetings after he filed his complaint on April 30, 2010, until around December 2011. Pickett would see the group in meetings "all the time," and he did not receive notices or e-mails regarding the meetings. Pickett acknowledged, however, he did not directly report to Whitley in 2010 or 2011. He could not recall ever attending any such meetings before April 30, 2010.

¶ 38 During deliberations, the jury sent out questions to the trial court: (1) "Is each question on Race Discrimination-Special Interrogatory to be considered mutually exclusively [*sic*]?"; (2) "Same question for Gender Discrimination-Special Interrogatory?"; and (3) "In other words, should Question #1 on each page be considered before the issues of Gender or Race are considered?" The court responded, "Yes." Within an hour, the jury sent another question, asking, "If we vote 'No' on all Special Interrogatories, then we have no way of compensating the Plaintiff, David L. Pickett?" The court responded, "Yes."

¶ 39 The jury found for ADM on all counts. This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. Insufficient Statement of Facts

¶ 42 Pickett's Statement of Facts violates Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013), which mandates the statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Pickett's Statement of Facts, in his own words, was "predominately taken from the verified amended complaint and [his] response to the motion for summary judgment." It is a one-sided presentation in just under two pages. It does not include trial testimony or holdings of the trial court. It does not contain the facts necessary to an understanding of the case.

¶ 43 B. Defendant's Instruction No. 5

¶ 44 Although Pickett, in his brief, first challenges three special interrogatories, we begin with his argument regarding ADM's proposed instruction No. 5, which Pickett calls "the most egregious instruction." Pickett references this instruction in his arguments regarding the special interrogatories.

¶ 45 ADM's proposed instruction No. 5 defined "adverse employment action," an element of Pickett's discrimination claims, for the jury. Pickett maintains the last sentence of the instruction did not apply to the case and misled the jury as to the law and facts. The full instruction reads as follows:

> "Plaintiff must prove that not being selected for the ADM Milling Company Human Resources Manager position ('HR Manager position') by Defendant was a 'materially adverse employment action.' Not everything that makes an employee unhappy is a materially adverse employment action. It must be something more than a minor or trivial inconvenience. A materially adverse employment action is one that significantly alters the terms and conditions of the employee's job. For example, a materially adverse employment action exists when someone's pay or benefits are decreased; when his job is changed in a way that significantly reduces his career prospects; or when job conditions are changed in a way that significantly changes his work environment in an unfavorable way. A lateral or lessor [*sic*] position that would not have resulted in higher pay is not an adverse employment action."

¶ 46 The task of determining which jury instructions to give to the jury belongs to the trial court, which has discretion in fulfilling this task. *Myers v. Heritage Enterprises, Inc.*, 354 Ill. App. 3d 241, 245, 820 N.E.2d 604, 608 (2004). This court will not disturb a court's decision

on jury instructions absent an abuse of discretion. *Id.* "Whether a trial court abused its discretion depends on whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Id.* When the issue is whether the applicable law was accurately conveyed, the question is one of law and our review is *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131. If faulty jury instructions misled the jury and caused prejudice to the appellant, reversal is required. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274, 775 N.E.2d 964, 973 (2002).

¶ 47 Pickett's argument is twofold. First, he maintains a factual problem was created: "[t]here was simply no sufficient evidence presented by [ADM] at trial that this position was not a promotion." Pickett points to his testimony showing the existence of a relocation package and the fact the HR position would have required a transfer. He further points to testimony showing Zywiec received a raise for the promotion.

¶ 48 Pickett's argument is contradicted by the record. The record shows ADM presented ample evidence from which the jury could determine the HR Manager Milling position was not a promotion for Pickett. Kolkhorst testified he would not have paid $100,000 to the new manager. Pickett, at the time Zywiec was hired, earned $100,500. Zywiec, after her promotion, earned under $90,000. Any testimony regarding the relocation package was insufficient to establish the package itself would have resulted in a promotion for Pickett. Pickett testified he knew one existed, but he did not know the details of a package. Pickett also failed to ask any ADM witness about the relocation package offered to Zywiec or any package offered in similar situations. Pickett could have asked McGee, ADM's vice president of investor relations,

Kolkhorst, or Whitley. He did not do so.

¶ 49 Pickett's second argument is ADM's proposed instruction No. 5 misled the jury as to the law. This "argument" is contained in one sentence. It is not supported by argument or authority. Pickett did not develop any legal argument a lateral change, like the one presented in testimony here, is an adverse employment action. Pickett's briefing failure is in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***."). This argument is forfeited. *Country Mutual Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 255, 918 N.E.2d 1195, 1207 (2009) ("it is neither the function nor the obligation of this court to act as an advocate or search the record for error") (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993)).

¶ 50 Pickett failed to make a legally supported argument he was prejudiced by the challenged sentence. To amount to reversible error, Pickett had to prove the instruction misled the jury *and* he was prejudiced. See *Schultz*, 201 Ill. 2d at 274, 775 N.E.2d at 973. Pickett simply asserted he was prejudiced. That is insufficient under Rule 341(h)(7), and the argument is forfeited.

¶ 51 We further note Pickett's counsel conceded the instruction. While objecting and arguing "there's certainly no reference in any Illinois decision I'm aware of that ever says you advise a jury in the state court case what an adverse employment action is," counsel stated, "this isn't the end of the world if you gave this particular instruction in the case because I think we can still argue it, and we'll still prove it anyway."

¶ 52 C. Special Interrogatories

¶ 53 Pickett challenges three special interrogatories requested by ADM and given to

the jury: ADM's proposed instruction Nos. 19, 20, and 21. The first two, for race and gender discrimination, contain similar language. For those two, Pickett argues they presumed the failure to promote Pickett was not an adverse employment action and were impermissibly compound.

¶ 54 Our Code of Civil Procedure expressly permits special interrogatories. See 735 ILCS 5/2-1108 (West 2012). When requested by a party, the jury "must be required *** to find specially upon any material question or questions of fact submitted to the jury in writing." *Id.* They are to be "tendered, objected, to, ruled upon and submitted to the jury as in the case of instructions." *Id.*

¶ 55 This court held a special interrogatory is in proper form when it satisfies four criteria: "(1) it is a single question; (2) it relates to an ultimate issue of material fact, such that a response to the interrogatory would control an inconsistent general verdict returned by the jury; (3) its terms are simple, unambiguous, and understandable by the jury, so that the jury knows what it is deciding; and (4) it is not repetitive, confusing, or misleading." *Snyder v. Curran Township*, 281 Ill. App. 3d 56, 61, 666 N.E.2d 818, 822 (1996). A court should read a special interrogatory in the context of the other instructions to decide how the interrogatory was understood and ascertain if the jury was confused. *Simmons v. Garces*, 198 Ill. 2d 541, 563, 763 N.E.2d 720, 735 (2002). On review, an appellate court will find reversible error in the submission of a defective special interrogatory only when proof of prejudice to the complaining party or jury confusion occurred. *Niewold v. Fry*, 306 Ill. App. 3d 735, 747, 714 N.E.2d 1082, 1091 (1999).

¶ 56 We begin with the language of the special interrogatories. Both ADM-proposed instruction No. 19 (race discrimination) and No. 20 (gender discrimination) have the same first

question:

> "Question #1: Did Plaintiff prove by a preponderance of the evidence that not being selected for the ADM Milling Company Human Resources Manager position ('HR Manager position') constitutes an adverse employment action?
>
> _____ No
>
> _____ Yes[.]"

The remaining part of the interrogatories are the same, except for the terms "race" and "gender," with the "race" term appearing in Special Interrogatory No. 19 and "gender" appearing in Special Interrogatory No. 20:

> "If you answered 'yes' to question #1, go on to question #2. If you answered 'no' to question #1, your verdict must be for the Defendant on Plaintiff's [Gender/Race] Discrimination count.
>
> Question #2: With respect to the position of HR Manager position awarded by Defendant to Lori Zywiec in July 2010, did Plaintiff prove by a preponderance of the evidence that Defendant did not select Plaintiff for that position because of Plaintiff's [gender/race]?
>
> _____ No
>
> _____ Yes
>
> If you answered 'yes' above, then proceed to Plaintiff's verdict form. If you answered 'no' above, your [verdict] must be for the

Defendant on Plaintiff's [Gender/Race] Discrimination count and you should proceed to the next interrogatory."

¶ 57 We disagree with Pickett's argument the special interrogatories misled the jury by suggesting the failure to promote was not an adverse employment action. Pickett does not develop this argument. He simply asserts the question was confusing and cites, in support, *Smart v. City of Chicago*, 2013 IL App (1st) 120901. In *Smart*, the first district held the following question was confusing in that it was a compound question and presumed the defendant was contributorily negligent: " 'Was the contributory negligence of Todd Smart, if any, greater than 50% of the approximate cause of his injuries?' " *Id*. ¶¶ 23, 37, 38.

¶ 58 ADM's proposed instruction Nos. 19 and 20 do not assume an adverse employment action occurred. The jury was instructed in ADM's proposed instruction No. 5 as to the definition of "adverse employment action." While the jury was not specifically instructed the failure to promote is an adverse employment action, Pickett conceded to the instruction's use and cannot now complain. In addition, unlike the instruction in *Smart*, which asked two questions (was the defendant contributorily negligent and did such negligence amount to over 50% of the cause) (*id.* ¶ 23), the first questions in ADM's interrogatories asked one. Both asked if Pickett established he suffered an adverse employment action. This conclusion also resolves Pickett's argument the special interrogatories were impermissibly compound.

¶ 59 Pickett's last argument regarding these two special interrogatories is that the question of what is an adverse employment action is a question of law that should have been resolved by the trial court. In support, Pickett cites *Goranowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 2013 IL App (1st) 121050, ¶ 5, 991 N.E.2d 837, for the proposition "[t]he

concept of adverse employment action is a question of law to be determined by the court and cannot be the subject of a special interrogatory which may only test the jury as to ultimate[-]fact questions." Pickett misstates *Goranowski*, which concerns whether a *duty* was owed to the plaintiff. It does not hold an "adverse employment action is a question of law." Pickett cites no other authority for his proposition the question of whether ADM's decision not to interview or hire Pickett was an adverse employment action was one of law for the trial court and not a question for the jury.

¶ 60 In fact, case law cited by ADM establishes the question is one for the jury. See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006) (finding the jury's findings the actions of the employer were "materially adverse" were adequately supported). Pickett has not established error occurred when the trial court submitted these special interrogatories to the jury.

¶ 61 Regarding ADM's proposed instruction No. 21, Pickett contends the instruction asked the jury to decide a question of law by using "but for" in a question regarding the retaliation claim.

¶ 62 ADM's proposed instruction No. 21, a special interrogatory on retaliation, states the following, in relevant part: "With respect to ADM Milling Company Human Resources Manager position awarded by Defendant to Lori Zywiec in July 2010, did Plaintiff prove by a preponderance of the evidence that but for Plaintiff's prior complaints of discrimination, Defendant would not have selected Lori Zywiec for the position, but rather would have selected Plaintiff?"

¶ 63 Pickett makes a two-sentence "argument" on this issue. He contends, without

citation to authority, the " 'but for' standard is a federal standard not applicable to Illinois cases and the jury should not have been given a special interrogatory making that legal determination." Given Pickett's failure to develop the argument or support it with any authority, the argument is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived ***.").

¶ 64 We further find Pickett's reference to the jury questions does not indicate confusion. In addition, this argument was not developed and is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 65 D. Jury Instructions on the Issues and Burdens of Proof

¶ 66 Pickett contends the trial court erred by refusing to give his proposed instruction Nos. 10 and 12 on the issues and burdens of proof and choosing to give ADM's proposed instructions instead. Pickett maintains his proposed instructions correlated with the Illinois Pattern Jury Instructions and adequately stated the law. Pickett further argues the instructions proposed by ADM improperly advised the jury of federal proof requirements in race and gender cases.

¶ 67 ADM responds by arguing the trial court's decision was proper. ADM emphasizes the Illinois Pattern Jury Instructions on which Pickett based his proposed instructions were negligence and willful and wanton counts, although neither cause of action was alleged in this case. ADM further maintains Pickett's proposed instructions on burden shifting were improperly based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which ADM contends is limited to summary judgment guidance and not appropriate for juries (see *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 767 (7th Cir. 2006)). ADM concludes Pickett makes no argument he was prejudiced by the decision, and the jury concluded Pickett's claims fail as

the jury found there was no adverse employment action.

¶ 68 We need not decide whether ADM's proposed instructions were erroneous or whether Pickett's proposed instructions were improperly rejected, because Pickett fails to argue, much less establish, his right to a fair trial was prejudiced. To obtain reversal on the ground the jury was improperly instructed, the party must establish not only the jury was misled by a faulty instruction, but also his right to a fair trial suffered " 'serious prejudice.' " *Studt*, 2011 IL 108182, ¶ 28, 951 N.E.2d 1131 (quoting *Heastie v. Roberts*, 226 Ill. 2d 515, 543, 877 N.E.2d 1064, 1082 (2007)); see also *Schultz*, 201 Ill. 2d at 274, 775 N.E.2d at 973. Pickett only references this requisite for reversal at the end of his argument, stating he was "denied *** a fair trial." Without argument or citation to authority, Pickett forfeited any argument he was prejudiced (see Ill. S. Ct. R. 341(h)(7) (Feb. 6, 2013)) and cannot obtain reversal on this ground.

¶ 69 E. Evidentiary Rulings

¶ 70 Pickett next challenges three evidentiary rulings by the trial court. Parties are, in general, entitled to present evidence relevant to their theory of the case. *Maffett v. Bliss*, 329 Ill. App. 3d 562, 571, 771 N.E.2d 445, 453 (2002). Evidence that tends to prove a fact in controversy or render a matter at issue more or less probable is relevant. *Id.* The question of whether evidence is admissible lies within the discretion of the trial court; this court will not disturb a finding on the admissibility of evidence absent an abuse of discretion. *Id.* Even if the trial court abused its discretion in an evidentiary ruling, reversal is not warranted unless the record shows the existence of substantial prejudice that affected the trial's outcome. *In re Leona W.*, 228 Ill. 2d 439, 460, 888 N.E.2d 72, 83 (2008).

¶ 71 1. *Pickett's 2008 Expectations Document*

¶ 72 Pickett contends the trial court committed reversible error by refusing to enter into evidence a four-page document entitled "FY 2008 Expectations: Aligning Performance." According to Pickett, this document showed he was interested in the position of "Milling Division Human Resource Manager." Pickett maintains the issue in this case is whether Whitley told Kolkhorst in 2008 that Pickett identified the HR Manager Milling position and believed he was qualified for it. According to Pickett, if Whitley did not tell Kolkhorst, the jury could ascertain Whitley had some animus against Pickett. If Whitley told Kolkhorst, Pickett reasons, the jury could determine Kolkhorst was not telling the truth when he stated he created the job in the spring of 2010.

¶ 73 We are not convinced the document, created in 2008, is relevant to whether Pickett suffered retaliation or racial or gender discrimination in July 2010. We need not decide the issue, however, because Pickett cannot establish he was prejudiced by the alleged error as the jury heard the evidence Pickett sought to have introduced when he submitted his proposed exhibit No. 7. Whitley testified Pickett approached her regarding the position in 2008. Whitley testified before the jury she knew Pickett was interested in the position that did not yet exist and he mentioned his interest more than once. Moreover, during closing argument, Pickett argued Whitley and Kolkhorst lied about the fact Kolkhorst created the position in 2010.

¶ 74 2. *Richars's Payroll Records*

¶ 75 Pickett contends the trial court erroneously granted ADM's motion *in limine* to exclude payroll records of Andy Richars. Pickett argues Whitley testified she talked to Richars, one of only three candidates she identified to Kolkhorst, regarding the HR Manager Milling position. Richars was not interested, and not interviewed. Pickett maintains the payroll records

of Richars would have undermined ADM's argument someone at his salary would not have been considered or hired for the position.

¶ 76 However, Whitley testified she did not set the salary for the HR Manager Milling position, nor did she consider current salary in determining who qualified candidates might be. ADM notes Pickett did not request the records in discovery or seek to depose Richars. Pickett does not dispute this argument. The exclusion was not an abuse of discretion and there was not substantial prejudice to Pickett. See *id.* (concluding reversal is not warranted for an improper evidentiary ruling absent substantial prejudice).

¶ 77 3. *Varble's Testimony Regarding ADM Practices Before July 2007*

¶ 78 Pickett maintains Varble, an employee of ADM from June 2000 to July 2007, would have testified to ADM's posting requirements in 2007. In an offer of proof, Varble testified there was a written policy of procedure in effect for posting notices of vacancies for management employees. Varble identified a January 2006 letter regarding job postings. The trial court, according to Pickett, improperly excluded this evidence from the jury, particularly in light of the trial court's decision to prevent Pickett from asking D'Ambrose, "What information do you have about ADM's policy of posting jobs in the year 2000? *** If any."

¶ 79 We find no abuse of discretion in the trial court's decision to exclude Varble's testimony. Varble's testimony was relevant only to the posting practices up to his leaving ADM in 2007. Varble had no knowledge as to the posting requirements in July 2010.

¶ 80 III. CONCLUSION

¶ 81 We affirm the trial court's judgment.

¶ 82 Affirmed.