

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1390

JAMES G. EASON,
d/b/a Geomet Mfg. Co.,
Plaintiff-Appellant,

versus

FLEMING COMPANIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA 3 88 2750 R)

(August 24, 1993)

Before REAVLEY, KING, and GARWOOD, Circuit Judges.

PER CURIAM:*

James G. Eason brought this action in November 1988, asserting that his former employer, Fleming Companies, Inc., violated the Age Discrimination Employment Act when it laid him off. A jury trial was conducted, and the jury rendered a verdict that Fleming did not discriminate against Eason on the basis of his age. The district court entered a judgment in accordance

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

with the jury's verdict, and Eason now appeals from that judgment. We affirm.

I. BACKGROUND

A. Facts

Fleming Companies, Inc. is a wholesale distributor of perishable and non-perishable food items to retail outlets located throughout the nation. Fleming's operations are divided into four regions, one of which is designated "the Southern Region," which consists of New Mexico, Oklahoma, Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, Tennessee, Kentucky, North Carolina, Virginia, and West Virginia. The distribution aspect of Fleming's operations is managed through "General Merchandise Divisions" (GMD's). Prior to January 26, 1987, Fleming maintained two GMD's in the Southern Region--one in Dallas, Texas and another in Columbus, Georgia.

Eason was born on November 27, 1928. He was hired by Fleming in February 1981 (at the age of fifty-two) as an electric data processing manager (EDP manager) in Fleming's Dallas GMD. The EDP department provides electronic information storage and retrieval services--for example, the tracking of inventory balances, sales and other financial records, customer billing, and shipping orders--throughout a given GMD, and provides Fleming's accounting department with the information needed to maintain the GMD's financial records. Accordingly, the EDP relies heavily upon the use of complex computer systems and programs. As the EDP manager, Eason held overall responsibility

for the EDP processing department in the Dallas GMD, and he acted as the GMD's primary contact with Fleming's regional information systems development staff. According to Fleming, during his employment, Eason was never rated better than a satisfactory performer by any of his supervisors¹ and "Fleming's Regional Information Systems Development Staff experienced numerous problems working with Eason in dealing with computer problems and systems enhancements."

Fleming announced that it would be closing its Columbus GMD in May 1987, and it actually closed the GMD in July 1987.² As a result of this closing, and following a series of employee transfers to other Fleming divisions located in the Southern Region, two skilled management employees in the Columbus GMD-- Mark Greathouse and James Wilder--were left without positions. Accordingly, Fleming compared these two employees with their counterparts in the Dallas GMD to determine who were the better employees. Greathouse was compared with Norm Newton, the controller in the Dallas GMD. Wiley Raper, president of the Dallas GMD, determined that Newton was the better employee.

¹ In the brief he has submitted to this court, Eason asserts that he "never received less than a satisfactory rating during the entire time he was employed with [Fleming], and every year received salary increases placing him higher within his salary range than almost all other department heads." He also states that, prior to his termination, he "received recognition and awards that were based upon his performance as well as the performance of his department, for which he was responsible."

² According to Fleming, "[t]he Columbus GMD was closed primarily because Fleming could not generate enough sales volume in that Division to make it profitable."

Greathouse, accepting a demotion rather than being dismissed, transferred to the chief accountant position in the Dallas GMD. Raper also compared Eason with Wilder and determined that Wilder was the more competent EDP manager; at the time this comparison was made, Eason was fifty-eight years old and Wilder was forty-nine years old.³ Because there were no other EDP positions available in the Southern Region, Eason was notified of his lay-off in June 1987. Fleming compensated Eason for three weeks of accrued vacation time and gave him the equivalent of four weeks of salary in severance pay.

B. Proceedings

In July 1987, Eason filed a charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC), alleging that he had been terminated based upon his age and in violation of the Age Discrimination in Employment Act (ADEA). At the time he filed this charge, Eason filled out an EEOC questionnaire, executed an affidavit in support of his charge, and was interviewed by an EEOC investigator. Following an investigation of Eason's charge, the EEOC issued a determination that Fleming had not discriminated against Eason based upon his age. Eason appealed this determination to the EEOC's Washington, D.C. office, but his appeal was denied.

In November 1988, Eason then brought this action in federal district court, again alleging that he had been laid off from his

³ Wilder had worked for Fleming as its Columbus EDP manager since being hired in September 1985.

employment with Fleming in violation of the ADEA. Eason's case was tried to a jury, which rendered a verdict in favor of Fleming, concluding that Eason had failed to prove that he had been discriminated against on the basis of his age. The district court entered a final judgment in favor of Fleming, and Eason appeals from that judgment.

II. DISCUSSION

Eason's appeal consists of challenges to several evidentiary rulings made by the district court. Specifically, Eason asserts that the district court abused its discretion and committed reversible error in: (1) admitting the EEOC's determination of no probable cause (a determination that Eason was not laid off based upon his age); (2) not admitting a General Accounting Office (GAO) report concluding that the EEOC generally does not adequately investigate charges of discrimination; (3) refusing to admit Fleming's interrogatory responses, which contain the names and birth dates of those who held the EDP manager position after Eason's replacement, Wilder, resigned; and (4) refusing to admit the testimony of Frank Rowe, a Fleming employee at the time Eason was laid off.

A. Standard of Review

This court has recognized that, because of her or his involvement in the trial, a district court judge often has superior knowledge and understanding of the probative value of evidence. See Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989). Therefore, we show considerable deference to the

district court's evidentiary rulings,⁴ reviewing them only for a clear abuse of discretion. See Seidman v. American Airlines, Inc., 923 F.2d 1134, 1138 (5th Cir. 1991); Jackson v. Firestone Rubber Co., 788 F.2d 1070, 1075 (5th Cir. 1986) (the district court has wide and flexible discretion regarding the admissibility of evidence); McNeese v. Reading & Bates Drilling Co., 749 F.2d 270, 274 (5th Cir. 1985). In fact, we will reverse a judgment based upon an improper evidentiary ruling "only where the challenged ruling affects a substantial right of a party." Jones v. Benefit Trust Life Ins. Co., 800 F.2d 1397, 1400 (5th Cir. 1986); Cates v. Sears, Roebuck & Co., 928 F.2d 679, 686 (5th Cir. 1991); Koonce v. Quaker Safety Products & Manufacturing Co., 798 F.2d 700, 720 (5th Cir. 1986); see also FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected") (emphasis added).

B. The Evidentiary Rulings in Dispute

(1) **The EEOC Determination.** Eason's first challenge is to the district court's admission of the EEOC's determination of no probable cause for discrimination. Specifically, at trial, Eason requested through a motion in limine that the EEOC determination be excluded from the evidence. After hearing Eason's other evidence and arguments, the district court denied Eason's motion in limine, overruled his objections, and admitted the EEOC's

⁴ See Sullivan v. Rowan Companies, Inc., 952 F.2d 141, 146 (5th Cir. 1992).

determination into evidence. On appeal, Eason asserts that the district court committed reversible error in admitting the EEOC's determination because (1) its probative value was outweighed by its prejudicial effect, and (2) it was not sufficiently trustworthy under Rule 803(8)(C) of the Federal Rules of Evidence.⁵

It is well-established that, in employment discrimination cases brought under Title VII of the Civil Rights Act and the ADEA, EEOC determinations regarding a plaintiff's claims of discrimination are not binding on the trier of fact. Smith v. Universal Services, Inc., 454 F.2d 154, 157 (5th Cir. 1972). Nevertheless, this court has recognized that EEOC determinations constitute reports of public agencies under Rule 803(8)(C) of the Federal Rules of Evidence,⁶ and that they are generally probative evidence concerning contested issues in employment discrimination cases. See McClure v. Mexia Independent School District, 750 F.2d 396, 400 (5th Cir. 1985). Consequently, we have held that EEOC determinations may constitute admissible evidence in employment discrimination cases. See, e.g., Smith, 454 F.2d at

⁵ Rule 803(8)(C) provides:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

⁶ McClure, 750 F.2d at 400; Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980), cert. denied, 448 U.S. 1113 (1981).

158; Peters v. Jefferson Chemical Co., 516 F.2d 447, 450 (5th Cir. 1975); Garcia, 618 F.2d at 272; Dickerson v. Metropolitan Dade County, 659 F.2d 574, 579 (5th Cir. 1981); Turpen v. Missouri-Kansas-Texas Railroad Co., 736 F.2d 1022, 1026 (5th Cir. 1984). We also have held that EEOC determinations are equally admissible in jury and non-jury employment discrimination cases. McClure, 750 F.2d at 400. However, we have recently concluded that, despite their probative value, EEOC determinations may be excluded from evidence (a) where they fail to satisfy the trustworthiness requirement under Rule 803(8)(C) of the Federal Rules of Evidence or, (b) pursuant to Rule 403 of the Federal Rules of Evidence, where the court determines that their probative value is substantially outweighed by their prejudicial effect. Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992).

(a) Rule 803(B)(C) Challenge.

Rule 803(8)(C) creates a rebuttable presumption that reports prepared by government officials--including opinions and conclusions contained in such reports--are admissible as exceptions to the hearsay rule.⁷ Moss, 933 F.2d at 1305. A party may overcome this presumption by affirmatively demonstrating that the report lacks trustworthiness. Id. at

⁷ The justification for this exception to the hearsay rule is the assumption that public officials will perform duties properly and the unlikelihood that they will remember details independent of the record. See FED. R. EVID. 803(8) (Advisory Committee Note) (West 1992); Moss v. Ole South Real Estate, Inc., 933 F.2d 1300, 1305 (5th Cir. 1991).

1307. To make a trustworthiness determination, courts must evaluate the report's reliability by focusing upon the methodology behind the report rather than upon its findings and conclusions. Id. at 1307-08; see also United States v. Puente, 826 F.2d 1415, 1418 (5th Cir. 1987). Consequently, the party opposing the admissibility of a government report must demonstrate that it was compiled utilizing methods that cannot be relied upon; general complaints that the report is incomplete or inaccurate go to the weight afforded the report rather than to its admissibility. Moss, 933 F.2d at 1307.

Eason's challenge to the EEOC's determination in the case before us is that the report is not trustworthy because certain evidence was not submitted to the EEOC and Eason was never interviewed by the EEOC subsequent to his initial intake interview. We conclude that this challenge bears more upon the determination's completeness than its trustworthiness. See Moss, 933 F.2d at 1307. Specifically, Eason is arguing essentially that the report is not trustworthy because it is incomplete; he does not actually challenge the EEOC's methods in compiling the report--for example, the EEOC's use of the questionnaire completed by Eason, his interview, and his affidavit.⁸

⁸ In his reply brief, Eason packages his challenges so as to more closely approximate a legitimate challenge under Rule 803(8)(C) by stating that "the facts and conclusions contained in the EEOC determination are untrustworthy because (1) they are the product of an unreliable investigative methodology, and (2) the lack of credible sources of the information contained in the Determination." Eason also criticizes the determination as being based on the work of non-investigative EEOC personnel. We conclude, however, that, based upon our review of the

Accordingly, we conclude that, under the circumstances presented in the case before us, the district court did not abuse its discretion in refusing to exclude the EEOC determination.

(b) **Rule 403 Challenge.** Eason also raises a Rule 403 challenge to the admissibility of the EEOC determination. Rule 403 provides that,

[a]lthough 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.

To determine whether evidence should be excluded pursuant to Rule 403, courts must balance the prejudicial effect of the evidence against its likely probative value. Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1075 (5th Cir. 1986); Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 618 (5th Cir. 1988). Therefore, Rule 403 determinations are inextricably bound with the facts of a particular case, and they will not be disturbed absent a showing of "clear abuse." Shipp v. General Motors Corp., 750 F.2d 418, 427 (5th Cir. 1985). Because Rule 403 permits the exclusion of probative evidence, it is an extraordinary remedy that must be used sparingly,⁹ and we have cautioned that it may not be utilized to vitiate the presumption

determination in light of the entire record before us, these challenges are still not substantive enough for us to hold that the determination is untrustworthy and that the district court abused its discretion by admitting it.

⁹ Herrington v. Hiller, 883 F.2d 411, 414 (5th Cir. 1989); Dartez v. Fibreboard Corp., 765 F.2d 456, 461 (5th Cir. 1985).

in favor of the admissibility of government reports set forth in Rule 803(8)(C). See Moss, 933 F.2d at 1308; Cortes, 977 F.2d at 201 ("[T]he balancing test of Rule 403 should not be misused in such a way that would end the presumption that evaluative reports are admissible hearsay under Rule 803(8)(C).") (internal quotation omitted).

We have reviewed the EEOC determination in light of the entire record before us. Although the EEOC determination is merely a summary of evidence in the record, it is a summary fully supported by the record. Moreover, the district court provided the jury with three cautionary instructions regarding the determination, and we conclude that these instructions sufficiently clarified the probative value of the determination for the jury. Finally, to support his challenge, Eason relies heavily upon our recent decision in Cortes, 977 F.2d 195, a case we find readily distinguishable from the case before us.¹⁰ Therefore, we conclude that, in light of the court's cautionary instructions, the general admissibility of government reports under Rule 403 as discussed above, and our review of the

¹⁰ Cortes involved a challenge to a district court's decision to exclude an EEOC determination pursuant to Rule 403 on the grounds that its probative value was substantially outweighed by its possible prejudicial effect. 977 F.2d 202. We held that, even if the district court erred by inferring that the plaintiff was never interviewed, its decision to exclude the determination did not amount to an abuse of discretion. Our decision was based on the fact that "the documents contain only a few factual findings and most of these regard a retaliation charge, which Cortes withdrew before trial." Id.

determination in light of the entire record, the district court did not abuse its discretion by admitting the EEOC determination.

(2) **The GAO Report.** Eason also contends that the district court erroneously excluded a report prepared by the GAO which asserts that the EEOC does not adequately investigate charges of discrimination. This report specifically criticizes three EEOC investigatory procedures, and Eason asserts that it is admissible pursuant to Rule 803(8). According to Eason,

the cumulative effect of allowing Defendant to introduce the EEOC determination of no discrimination, and at the same time excluding the GAO Report, was that Eason was severely and irreparably prejudiced. In essence, the jury considered evidence of the ultimate expert in a discrimination case, the EEOC, without it being allowed to consider evidence that the EEOC has failed to properly investigate a large percentage of cases. These facts demonstrate a clear abuse of discretion and constitute reversible error.

In response, Fleming asserts that "the District Court properly excluded the GAO report because it was not listed in Eason's List of Exhibits, and because the report was not probative of the investigation conducted by the EEOC into Eason's Charge of Discrimination." In support of this proposition, Fleming relies upon Rule 16(e) of the Federal Rules of Civil Procedure, which instructs judges to enter pre-trial orders to define the scope of the issues at trial.

Pursuant to Rule 16, district court judges have wide latitude in formulating orders governing trial proceedings, and such orders only can be modified upon a showing of manifest injustice. Book v. Nordrill, Inc., 826 F.2d 1457, 1460 (5th Cir. 1987) ("Rule 16 gives a trial judge wide latitude in governing

the proceedings, and can only be modified upon a showing of manifest injustice."). Moreover, when a district court has required the identification of exhibits pursuant to a Rule 16 pretrial order, the district court has broad discretion in deciding whether to admit unlisted exhibits into evidence. Robert v. Conti Carriers & Terminals, Inc., 692 F.2d 22, 24 (5th Cir. 1982) ("A trial judge has broad discretion in deciding whether to admit evidence not included in pretrial orders."); Burdis v. Texas & Pacific Railway Co., 569 F.2d 320, 323 (5th Cir. 1978) ("[T]he rule in this Circuit is that decisions concerning variance from the pretrial order are within the sound discretion of the trial judge as interpreter of the pretrial order.") (internal quotation omitted). The failure to timely identify an exhibit is a sufficient reason to deny its admission. Gilbert v. Tulane University, 909 F.2d 124, 127 (5th Cir. 1990) ("The district court has broad discretion in deciding whether to admit into evidence exhibits not listed in the pre-trial order.").

Eason disclosed the GAO report for the first time when he moved for its admission on the third day of trial, and it was excluded based upon Eason's failure to comply with the district court's pretrial scheduling order. Eason attempts to rebut this basis for not admitting the evidence by asserting that it was offered as unanticipated rebuttal evidence in light of the district court's admission of the EEOC determination. We find it difficult to imagine that the admission of the EEOC determination

was wholly unanticipated. Moreover, because the GAO report is a general attack on EEOC investigations, it would have been reasonable for the district court to conclude that the report was not sufficiently probative of the EEOC's investigation of Eason's charges. We conclude, therefore, that the district court did not abuse its discretion by refusing to admit the GAO report.

(3) **The Interrogatory Responses.** Eason also challenges the district court's refusal to admit Fleming's interrogatory responses. These responses indicate that Wilder, who was approximately ten years younger than Eason when he was chosen over Eason, was ultimately replaced by two individuals who were substantially younger than Eason. According to Eason, these interrogatory responses constitute evidence of other wrongful acts, which is admissible pursuant to Rule 404(b) of the Federal Rules of Evidence,¹¹ or "habit" evidence admissible pursuant to

¹¹ Rule 404(b) provides that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

Rule 406 of the Federal Rules of Evidence.¹² Eason also asserts that

The facts and the controlling law of this case indicate that the ages of Shirley and Hoffman are relevant, pursuant to F.R.E. 404(b) and 406, to show the plan, intent, and/or practice of Fleming of favoring younger employees. The trial court's exclusion of this evidence was misplaced and constitutes clear abuse of discretion.

Fleming argues that this evidence is inadmissible because (a) it is not proper "habit" evidence pursuant to Rule 406; and (b) it is irrelevant pursuant to Rules 401, 402, and 403 of the Federal Rules of Evidence.¹³

(a) **Rule 406.** Pursuant to Rule 103(a)(2) of the Federal Rules of Evidence, "in asserting objections to a trial judge's exclusion of evidence, a party is required . . . to carefully articulate every ground for which the evidence is admissible." Reese v. Mercury Marine Division of Brunswick Corp., 793 F.2d 1416, 1421 (5th Cir. 1986). "Failure to do so renders the

¹² Rule 406 provides that:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

FED. R. EVID. 406.

¹³ Fleming also asserts that Rowe's testimony is inadmissible pursuant to Rule 26(e) of the Federal Rules of Civil Procedure since Eason failed to supplement his interrogatory responses. Because, as is discussed below, we conclude that the evidence at issue was properly excluded on the other grounds asserted by Fleming, we do not reach this issue.

district court's ruling reversible only upon a finding of plain error." Id.

Eason never notified the district court that Fleming's interrogatory responses were being offered specifically as "habit" evidence pursuant to Rule 406 of the Federal Rules of Evidence. Moreover, the evidence at issue consists only of two incidents in which Fleming placed an employee younger than Eason in the EDP manager position subsequent to his replacement's resignation. As we explained in Weil v. Seltzer, 873 F.2d 1453, 1460 (D.C. Cir. 1989), "habit refers to the type of nonvolitional activity that occurs with invariable regularity. It is the nonvolitional character of habit evidence that makes it probative." In Weil we concluded that the evidence of a doctor's treatment of five former patients did not constitute habit as envisioned in Rule 406. Id. at 1460-61. Similarly, we conclude now that the district court did not commit plain error by determining that Eason's evidence of two hiring incidents was insufficient to establish the nonvolitional nature of activity required by Rule 406. See Reyes v. Missouri Pacific Railroad Co., 589 F.2d 791, 795 (Cir. 1979) (four prior convictions for public intoxication spanning a three and one-half year period are of insufficient regularity to rise to the level of habit evidence).

(b) Rules 401, 402, and 403. Pursuant to Rules 401 and 402 of the Federal Rules of Evidence,¹⁴ evidence is relevant and admissible only if it tends to make the existence of any fact that is of consequence in the litigation more or less probable. See Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1318 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 264 (5th Cir. 1980). Nevertheless, pursuant to Rule 403 of the Federal Rules of Evidence, a district court may exclude relevant evidence "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." See Harpring v. Continental Oil Co., 628 F.2d 406, 410 (5th Cir. 1980) (affirming a district court's refusal to admit comparative evidence pertaining to other employees in an employment discrimination context), cert. denied, 454 U.S. 819 (1981).

¹⁴ Rule 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 would be without the evidence." FED. R. EVID. 401. Rule 402 provides that:

[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402.

The evidence at issue consists of the ages of just two employees who were hired to replace Eason's replacement-- employees who were not even candidates for the EDP manager position at the time Eason was laid off. Although it is possible that such evidence may be admissible under other circumstances, we conclude that admitting such evidence in the case before us may have unnecessarily complicated the issues and confused the jury. Accordingly, we cannot conclude that the district court's refusal to admit this evidence constitutes an abuse of discretion.

(4) **The Rowe Testimony.** Eason's final evidentiary challenge is that the district court erroneously excluded Rowe's testimony that Wilder lacked the knowledge required to serve as EDP manager. According to Eason,

the district court's exclusion of Rowe's testimony unfairly deprived Eason of any opportunity to carry his ultimate burden of proof and predetermined the jury's credibility assessments by shielding them from corroborative evidence which would have otherwise affected those assessments.

According to Fleming, Rowe's testimony was properly excluded because (1) Rowe was not placed on Eason's list of witnesses, as was required by the district court's Rule 16(c) pre-trial order, (2) Rowe was not an unanticipated rebuttal witness, and (3) Rowe's testimony would be wholly repetitive and duplicative.

As stated supra in Part II.B.(2), district courts have wide discretion to enforce the mandates of their pretrial orders pursuant to Rule 16 of the Federal Rules of Civil Procedure. This court has held that the failure to list a witness pursuant

to a Rule 16 pretrial order constitutes sufficient justification for excluding that witness' testimony. See, e.g., Lirette v. Popich Brothers Water Transport, Inc., 660 F.2d 142, 144-45 (5th Cir. 1981) (holding that the district court did not abuse its discretion in excluding the testimony of a witness not identified until the morning of trial); Newman v. A.E. Staley Manufacturing Co., 648 F.2d 330, 333 (5th Cir. 1981) ("Failure of a district court to allow defendant to present a witness who was not named in a required witness list to testify contrary to the plaintiff's evidence is not an abuse of discretion if the defendant was on notice that the plaintiff would present the evidence at issue."). Eason's entire case rests on an assertion that he was fired because of his age rather than because Wilder was a better employee. Moreover, in defense to Eason's claim, Fleming has asserted that Eason was, at best, a marginal employee. Accordingly, we reject Eason's assertion that he could not have foreseen the need to introduce evidence suggesting that Eason was actually a better EDP manager than Wilder, and that Wilder lacked the requisite knowledge for the EDP position. In short, if Eason intended to introduce Rowe's testimony on this matter, Rowe should have been listed as a witness in compliance with Rule 16.

As for Eason's assertion that Rowe's testimony was offered as rebuttal evidence, the record establishes that the actual purpose of this testimony was to corroborate the testimony of Eason. Specifically, in disputing Fleming's assertion that Wilder was a better EDP manager than Eason, Eason testified that,

between the time it was announced that the Columbus EDP would be closed and the time Eason was terminated, Wilder conferred with Eason on a regular basis concerning professional matters relating to Wilder's job as EDP manager. According to Eason, these questions demonstrated Wilder's lack of knowledge. In fact, Eason expressly states in his brief that the substantive purpose of introducing the Rowe testimony was to corroborate this testimony by Eason. This court has held that rebuttal evidence may not be used merely to continue the plaintiff's case-in-chief, and such evidence is not admissible merely to remedy a defect in the plaintiff's case-in-chief. See Cates, 928 F.2d at 685 ("Rebuttal must be kept in perspective; it is not to be used as a continuation of the case-in-chief."); Page, 673 F.2d at 139-40 (affirming district court's determination that party was attempting to remedy a defect in their case-in-chief through rebuttal testimony). Moreover, district courts have discretion to exclude cumulative or duplicative evidence, and the district court could have reasonably concluded that Rowe's testimony was repetitive of Eason's. Jolley v. Welch, 904 F.2d 988, 992 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 769 (1991). Accordingly, we conclude that the district court did not abuse its discretion by refusing to admit Rowe's testimony.

C. Cumulative Error Assertion

Eason's final assertion is that "[t]he cumulative effect of the trial court's evidentiary rulings was to unfairly limit Eason's entire case to basically his own uncorroborated word

while at the same time allowing Fleming to put on all sorts of corroborative and prejudicial evidence beyond its own word." We disagree.

We have considered Eason's specific challenges to the district court's evidentiary rulings and found no error, never mind any reversible error--that is, error affecting Eason's substantial rights.¹⁵ And the record establishes that Eason was given the opportunity to fully develop his theory that Fleming replaced him with Wilder based upon his age; the jury rejected that theory. We conclude that, based upon our review of the district court's evidentiary rulings and the record, the case before is not one in which the cumulative effect of evidentiary errors amounts to substantial prejudice.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment in favor of Fleming.

¹⁵ FED. R. CIV. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."); see Konce v. Quaker Safety Products & Manufacturing Co., 798 F.2d 700, 720 (5th Cir. 1986) ("Even if the district court's exclusion of [evidence] were erroneous, the error would not require reversal unless it affected the substantial rights of a party."); Dartez v. Fibreboard Corp., 765 F.2d 456, 469 (5th Cir. 1985) (evidentiary rulings by a trial judge may be treated as harmless if the error does not affect the substantial rights of the parties).