IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JOHN TEMPLEMIRE,	)	
	)	
Appellant,	)	
	)	**WD74681**
v.	)	
	)	**OPINION FILED:**
	)	**December 26, 2012**
W&M WELDING, INC.,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Pettis County, Missouri
The Honorable Robert L. Koffman, Judge

Before Division Two: Lisa White Hardwick, Presiding Judge, and James M. Smart, Jr., and Karen King Mitchell, Judges

John Templemire appeals a jury verdict in favor of his former employer, W&M Welding, Inc., on Templemire's claim of retaliatory discharge in violation of section 287.780[1] of the Workers' Compensation Act. Templemire raises two claims of instructional error. First, he argues that the verdict-director's requirement that Templemire's workers' compensation claim was the "exclusive factor" in his employer's decision to terminate him is contrary to the law, and he should have been entitled to relief if the jury found that his workers' compensation claim was merely a "contributing factor." Second, he argues that, in light of the verdict-director's use of

[1] Statutory citations are to RSMo 2000, unless otherwise noted.

"exclusive factor" language, the jurors should have received a pretext instruction advising them that they could find exclusive causation if the employer's claimed justification for termination was merely a pretext and its true reason was retaliation for Templemire exercising his workers' compensation rights. Finding no error, we affirm.

Factual Background[2]

Templemire began working for W&M Welding ("employer") on October 10, 2005. Templemire's job duties consisted of painting, driving trucks, washing parts in the wash bay, and general labor. On January 9, 2006, Templemire suffered a severe injury when a large beam that he was helping another worker move fell on and crushed his foot. Templemire was immediately taken to the emergency room, and he thereafter received surgery and ongoing treatment for his foot. He subsequently filed a workers' compensation claim based upon the injury, and he received benefits. Following his injury, Templemire was off work for three to three and one-half weeks. When he returned to work, his doctors placed him on various restrictions, which included taking breaks for fifteen minutes out of every hour to elevate and rest his foot. His employer placed him on light duty by assigning him to be a tool room assistant.

During the entire tenure of his employment, Templemire had only one disciplinary write-up, and that was for failing to wear a paint mask in the paint booth. This write-up occurred after Templemire's injury. Templemire was generally regarded as a good worker and a nice guy by his co-workers and supervisors.

On November 29, 2006, Templemire arrived at work around 6:45 a.m. Gary McMullin, the owner of the company, had received a request from a customer to have a railing painted and ready to pick up by 4:30 that afternoon. Before the railing could be painted, it had to be washed.

[2] When reviewing claims involving instructional error, "we view the evidence and inferences that may be drawn therefrom in the light most favorable to the submission of the instruction." *Mehrer v. Diagnostic Imaging Ctr., P.C.*, 157 S.W.3d 315, 323 (Mo. App. W.D. 2005).

Nick Twenter, Templemire's supervisor, advised him that later on that day, there would be a railing in the wash bay that Templemire needed to wash, but it was not quite ready yet that morning. Twenter assigned Templemire to take several trucks to Bryant Motors for inspections until the railing was ready to be washed. Templemire took three different trucks to Bryant Motors, with the last one being dropped off just before the lunch hour. After Templemire returned from dropping off the third truck, Twenter sent him out to a job site to deliver some materials. After that, another supervisor sent Templemire to pick up some tools, and Templemire returned around 12:30 p.m. After he returned, Templemire cut some material for a customer, and around 1:50 p.m., he headed out of the tool room toward the wash bay to wash the railing. Before reaching the wash bay, Templemire stopped to rest his foot.

At the same time, McMullin approached Templemire and said, "Why isn't that 'F'ing' rail done?" Templemire advised McMullin that the rail had just arrived in the bay. McMullin responded by saying, "I don't give an 'F.' I wanted the 'F'ing' thing done, and you didn't do it, so get out the 'F'ing' door." Templemire reminded McMullin of his need to elevate his foot, but McMullin told him again to "get out the 'F'ing' door." Templemire asked why McMullin was firing him, and McMullin replied, "because I wanted the 'F'ing' railing done, and you haven't washed the 'F'ing' railing." Templemire asked McMullin, "[a]re you sure you want to do that, because I'm going to go home and call workman's comp?" McMullin said, "I don't give an 'F' what you do, this is my 'F'ing' place." Templemire then left and contacted Liz Gragg, the insurance adjuster on his workers' compensation claim.

Following her conversation with Templemire, Gragg contacted McMullin to discuss Templemire's termination. McMullin advised Gragg that he told Templemire to wash some parts, Templemire refused, and McMullin fired him. Gragg relayed Templemire's information that he was going to take a break and then wash the rail, but McMullin interrupted her to say that

Templemire "takes breaks at 3PM." Gragg reminded McMullin of Templemire's need for more frequent breaks, and McMullin went on a tirade about Templemire "milking his injury," and indicated that Templemire could "sue him for whatever reason, that's what he pays premiums for and the attorneys."

Templemire subsequently filed a lawsuit against his employer under section 287.780, alleging workers' compensation retaliation. At trial, McMullin testified to a different series of events on November 29, 2006. McMullin indicated that he had placed the rail into the wash bay by 7:00 a.m., directed Templemire to wash it immediately and not allow any of his supervisors to assign him another task before washing the rail, and then went to a meeting at 7:30. McMullin testified that when he returned around 9:30 a.m., the railing still had not been washed, and he found Templemire taking a break. McMullin indicated that Templemire told him he needed a break for his foot, and if McMullin didn't like it, he should call Templemire's doctor and take it up with him. McMullin advised Templemire that he didn't work for Templemire's doctor and that Templemire was terminated. McMullin testified that he discharged Templemire for insubordination.

Templemire presented evidence that McMullin had previously referred to injured employees as "whiners," and a witness testified that he had been a past W&M Welding employee who also filed a workers' compensation claim and was later terminated. Templemire further presented evidence about another employee who had multiple disciplinary write-ups and a drug problem but had not been terminated; and this employee had never filed a workers' compensation claim. Another witness testified that he overheard Templemire's conversation with McMullin on the day of Templemire's termination; he testified that McMullin yelled at Templemire, saying, "[a]ll you do is sit on your ass and draw my money." Templemire further

presented evidence that the only disciplinary write-up in his file was received after his injury and was based upon a type of violation for which other employees did not receive write-ups.

Before and during the instruction conference, Templemire argued that the applicable MAI verdict-director misstated the law insofar as it required a finding that his filing a workers' compensation claim was the exclusive factor in his employer's decision to terminate him. Templemire offered an alternative verdict-director indicating that the jury could find in his favor if the workers' compensation claim was merely a contributing factor to his employer's decision. In the alternative, Templemire offered a pretext instruction, which advised the jury that it could find exclusive causation if it found that his employer's stated reason for Templemire's termination was not the true reason, but was merely a pretext. The court refused both the alternative verdict-director and the pretext instruction.

During closing argument, both Templemire and his employer focused on the true reason for Templemire's discharge, directing the jury that that was really the only question they needed to decide. The jury found in favor of W&M Welding. Templemire appeals.

Standard of Review

Both of Templemire's points on appeal argue error in the manner in which the jury was instructed.

Rule 70.02(a)[3] directs that jury instructions "shall be given or refused by the court according to the law and the evidence in the case." The word, "shall," as used in Rule 70.02(a) does not permit discretion on the part of the trial judge if the proffered instruction is required by law and supported by the evidence. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 397 (Mo. App. W.D. 2011). An instruction is required by law under three circumstances: (1) if it is in the Missouri Approved Instructions, Rule 70.02(b); (2) if it is not in MAI but is otherwise required

[3] Rule citations are to Missouri Court Rules (2012), unless otherwise noted.

by statute, *In re Care and Treatment of Lewis v. State*, 152 S.W.3d 325, 329-30 (Mo. App. W.D. 2004) (applying § 632.492, RSMo Cum. Supp. 2003); or (3) if the law has been materially altered following the promulgation of the applicable MAI instruction, such that the applicable instruction no longer complies with the substantive law, thus requiring the giving of a modified version of the approved MAI instruction. *State v. Edwards*, 60 S.W.3d 602, 612 (Mo. App. W.D. 2001).

If the instruction at issue is one required by law and supported by the evidence, our review of the trial court's action is *de novo*. *Marion v. Marcus*, 199 S.W.3d 887, 892-94 (Mo. App. W.D. 2006) (finding review of a trial court's refusal of a required instruction to be *de novo* in light of the court's lack of discretion to refuse under the language of Rule 70.02(a)). But where the proffered instruction is not required under any of the above scenarios, we review the trial court's decision for abuse of discretion. *McCullough*, 349 S.W.3d at 396.

Analysis

Templemire raises two claims on appeal, both involving alleged instructional error. In his first point, he argues that the trial court erred (1) in submitting a verdict-director requiring the jury to find that Templemire's exercise of his rights under the Workers' Compensation Act was the exclusive factor in his employer's termination decision and (2) in refusing Templemire's proffered verdict-director requiring only a contributing factor causation standard. In his second point, he argues, in the alternative, that the court erred in refusing to submit a pretext instruction, which allowed the jury to find for Templemire if it determined that his employer's proffered reason for the termination was untrue and merely a pretext for its true retaliatory motive.

Point I

Templemire first claims that the trial court improperly instructed the jurors when it required them to find that Templemire's exercise of his rights under the Workers' Compensation

Act was the exclusive cause, rather than a contributing factor, in his employer's termination decision. We disagree.

The verdict-directing instruction, given by the trial court and based on MAI 23.13, provided:

> On the claim of plaintiff for compensatory damages for retaliatory discharge against defendant, your verdict must be for plaintiff if you believe:
>
> First, plaintiff was employed by defendant, and
>
> Second, plaintiff filed a worker's compensation claim, and
>
> Third, defendant discharged plaintiff, and
>
> Fourth, the *exclusive cause* of such discharge was plaintiff's filing of the worker's compensation claim, and
>
> Fifth, as a direct result of such discharge plaintiff sustained damage.

(Emphasis added.)

The trial court refused Templemire's proposed verdict-director, which modified MAI 23.13 by substituting the "contributing factor" standard from MAI 31.24 (applicable to discrimination claims), for the "exclusive cause" language of MAI 23.13 (workers' compensation retaliatory discharge). However, "[w]hen an MAI instruction is applicable, its use is mandatory, and the failure to give the MAI instruction is error." *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 355 (Mo. App. W.D. 2012) (internal citation omitted). Generally, when, as here, the instruction "follow[s] the language of the appropriate MAI[ ] exactly, 'this court has no power to declare the submission of the MAI instruction erroneous.'" *Id*. (quoting *Wailand v. Anheuser Busch, Inc.*, 861 S.W.2d 710, 717 (Mo. App. E.D. 1993)). But Templemire argues that the "exclusive cause" language of MAI 23.13 is contrary to a recent decision of the Supreme Court of Missouri, and "[w]ell-established law states that an MAI instruction cannot be given if it conflicts with the substantive law." *State v. Scott*, 278 S.W.3d 208, 213 (Mo. App. W.D.

2009). As noted above, if the law has been materially altered following the promulgation of the applicable MAI instruction, such that the applicable MAI instruction no longer complies with the substantive law, the court is required to give a modified version of the approved MAI instruction. *Edwards*, 60 S.W.3d at 612.

Section 287.780 provides that "[n]o employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter." In *Hansome v. Nw. Cooperage Co.*, 679 S.W.2d 273 (Mo. banc 1984), our Supreme Court laid out the elements a plaintiff must prove to be entitled to relief under the statute. "The action authorized by this statute has four elements: (1) plaintiff's status as employee of defendant before injury,[4] (2) plaintiff's exercise of a right granted by Chapter 287, (3) employer's discharge of or discrimination against plaintiff, and (4) *an exclusive causal relationship between plaintiff's actions and defendant's actions*." *Id.* at 275 (emphasis added). The Court reaffirmed these elements, including the exclusive causation factor, in *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. banc 1998).

Templemire argues, based upon dicta in *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. banc 2010), that "exclusive cause" is not the proper standard, and that the proper standard should be "contributing factor," as is used in wrongful discharge cases arising under both the Missouri Human Rights Act and the public-policy exception to the employment-at-will doctrine. Although the language in *Fleshner* pointing out the lack of statutory support in section 287.780 for an "exclusive causation" standard may well indicate the Court's inclination to change the standard in a future case like this one, *Fleshner* was a public-policy exception case and did not involve a claim under section 287.780. *Id.* at 92-93 (noting that "there is a key

[4] In *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707-08 (Mo. banc 2006), it appears that this first element of *Hansome* was changed to the extent that the plaintiff does not necessarily need to be an employee *before* the injury occurred.

distinction between workers' compensation retaliation cases and public-policy exception cases"; namely that "[w]orkers' compensation cases arise under statute, while public-policy exception cases arise under the common law of torts," and that "[a]n exclusive causation standard is inconsistent with the proximate cause standard typically employed in tort cases").[5]

As it stands, *Hansome* and *Crabtree* are the most recent Missouri Supreme Court decisions on point, and, as the Court stated in *Crabtree*, "[o]nce this Court by case law has resolved the elements of a cause of action pursuant to sec. 287.780, neither the trial court nor the court of appeals is free to redefine the elements in every case that comes before them." *Crabtree*, 967 S.W.2d at 71 (citing Mo. Const. art. V, § 2); *see also Blair v. Steadley Co*., 740 S.W.2d 329, 332-33 (Mo. App. S.D. 1987) (relying on *Hansome* to reject a claim of error in instructing a jury on the exclusive causation standard under section 287.780).

Here, the jury was properly instructed according to the elements of section 287.780 under the most recent decision by the Missouri Supreme Court on point. Even if we disagree with the Court's identification of those elements, we are not at liberty to find otherwise.[6]

Point I is denied.

Point II

In his second point on appeal, Templemire argues that under the "exclusive causation" standard, the jury should be given a pretext instruction. At trial, Templemire offered the following instruction, modeled after Eighth Circuit Model Civil Jury Instruction 5.95:

> You may find that plaintiff exercising his workers compensations rights was the exclusive cause of defendant's decision to discharge plaintiff if the defendant's stated reasons for its decision are not the true reasons, but are a pretext to hide retaliation against plaintiff for exercising his workers compensation rights.

[5] *Fleshner's* discussion of the "exclusive causation" standard as it applies in workers' compensation cases is dictum. While it appears that our Supreme Court was questioning the continued validity of that standard, *Fleshner* does not expressly reject its application in the workers' compensation context nor is the court's language sufficiently clear to allow us to conclude that the court has overturned *Hansome* and *Crabtree*, *sub silentio*.

[6] While we fail to see anything in the language in section 287.780 that requires the application of an "exclusive causation" standard, we are obligated to follow binding precedent from our Supreme Court.

The Missouri Approved Instructions do not contain a pretext instruction.

Templemire argues that "[w]ithout an instruction directing the jury on the law regarding pretext in Missouri, they are directed to find that if there is *any reason for the termination other than retaliation*, even if that reason is suspect, the defendant is entitled to a verdict." He further argues that the language of the exclusive causation verdict-director "may leave the jury confused about the weight to be afforded to pretext and unable to understand that pretextual reasons for termination allow for a finding that the filing of a workers' compensation claim was the exclusive cause of the termination." In evaluating Templemire's argument, we must determine whether giving such an instruction is required or is within the trial court's discretion.

A. A pretext instruction is not required.

To determine whether the trial court erred in refusing Templemire's pretext instruction, the first question we must address is whether a pretext instruction was required by law. If so, we then look to see if Templemire's offered instruction was "simple, brief, impartial, free from argument, and [did] not submit to the jury or require findings of detailed evidentiary facts." Rule 70.02(b). As discussed above, because the pretext instruction proffered by Templemire was a non-MAI instruction, it is his burden to demonstrate that the MAI instructions submitted actually misstate the law so that a non-MAI instruction is *required*. *McCullough*, 349 S.W.3d at 397 ("'To require the giving of a non-MAI, a party must prove that the MAI instructions submitted to the jury misstate the law.'" (quoting *McBryde v. Ritenour School Dist.*, 207 S.W.3d 162, 168 (Mo. App. E.D. 2006))).[7] This he does not do; instead, he argues only that in the absence of a pretext instruction the jury *might* have been confused. That the jury *might* have been confused does not meet the burden for demonstrating that a non-MAI instruction is required. Because a

[7] As noted above, a party could also prove that a non-MAI instruction was required if it is required by statute or other law. *See In re Care and Treatment of Lewis v. State*, 152 S.W.3d 325, 329-30 (Mo. App. W.D. 2004).

pretext instruction is not required in this context, we review the trial court's refusal of Templemire's instruction for abuse of discretion. *McCullough*, 349 S.W.3d at 396.

B. Whether to submit a pretext instruction in a workers' compensation retaliation case is wholly within the court's discretion.

This court recently addressed the need for a pretext instruction in a wrongful termination case arising under the Missouri Human Rights Act. *McCullough*, 349 S.W.3d at 391-92. In *McCullough*, the plaintiffs sued their employer for race and age discrimination under the MHRA. *Id*. at 392. At trial, the plaintiffs offered various pretext instructions, all of which were refused by the court. *Id*. at 396. On appeal, this court found no error in the court's refusal of the pretext instructions in light of the fact that giving the instructions would have been inconsistent with the MHRA. *Id*. at 398-99. In reaching this decision, this court relied on the Missouri Supreme Court's holding in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. banc 2007), wherein the Court rejected the use of the typical burden-shifting analysis applied in federal employment discrimination cases in cases arising under the MHRA.[8] *Id*. at 398. In the absence of a burden-shifting framework placing a burden upon the plaintiff to prove pretext, there is no place for a pretext instruction, and submitting one to the jury would have been inconsistent with the MHRA. *Id*. at 398-99.

While *McCullough* is instructive, it is not determinative. Unlike in the MHRA and public-policy exception contexts, Templemire's case arises in the Workers' Compensation

[8] Under federal law, there are two different frameworks for burden-shifting in employment discrimination cases. *Daugherty*, 231 S.W.3d at 819 n.6. Where the evidence of discrimination is indirect (as it is in most cases), the courts follow a three-prong burden-shifting framework wherein the plaintiff bears the initial burden of establishing a prima facie case; once the plaintiff makes this showing, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment decision; the burden then shifts back to the plaintiff to prove that the defendant's articulated reason is merely pretext for a true discriminatory intent. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Where the evidence of discrimination is direct, however, the courts employ a two-prong burden-shifting framework whereby the plaintiff first presents direct evidence that an improper consideration (such as age, race, disability, sex, etc.) "played a motivating part in [the] employment decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (discussing the burden-shifting framework in "mixed-motive" cases). Once the plaintiff has made this showing, the burden shifts to the defendant to prove that it would have made the same decision absent consideration of the illegitimate factor. *Id*.

context. And in this context, the federal burden-shifting framework still applies. *See Wiedower v. ACF Indus., Inc.*, 715 S.W.2d 303, 307 (Mo. App. E.D. 1986) (applying the three-prong *McDonnell Douglas* burden-shifting framework in a section 287.780 case involving *indirect* evidence of retaliatory intent); and *Hopkins v. Tip Top Plumbing and Heating Co.*, 805 S.W.2d 280, 284 (Mo. App. W.D. 1991) (applying two-prong *Price Waterhouse* burden-shifting framework in a section 287.780 case involving *direct* evidence of retaliatory intent).

Although a pretext instruction is not required, because the burden-shifting analysis is used, we agree with Templemire that a pretext instruction, such as Eighth Circuit Model Jury Instruction 5.95,[9] could assist the jury in its determination of the ultimate facts – specifically, whether an employer's apparently pretextual justification for termination is evidence of retaliatory intent.

That being said, however, it is within the court's discretion whether to submit such an instruction to the jury.[10] Here, the trial court did not abuse its discretion in refusing Templemire's instruction. One factor that leads to this conclusion is that Templemire's particular instruction may not have accurately stated the law. Although it was modeled after Eighth Circuit Model Jury Instruction 5.95, it omits a key phrase from that model instruction. Specifically, Templemire's instruction omits the model instruction phrase, "if it has been proved," before the phrase, "that the defendant's stated reasons for its decision . . . are not the true reasons, but are a pretext . . . ." This phrase is key in the model instruction to reflect the shifting burden of proof. A plaintiff in federal court does not prevail in this kind of case by

[9] The Model Instruction, as used according to federal law, states:
You may find that the plaintiff's (age) (race) (sex) was a [motivating] [determining] factor in the defendant's (decision) if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason, but [(is) (are)] a pretext to hide [(age) (race) (sex)] discrimination.

[10] This is true in the Eighth Circuit as well. *See Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001) ("We do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."). In addition, a trial court generally does not abuse its discretion in refusing to give a non-required instruction. *State v. Leisure*, 810 S.W.2d 560, 574 (Mo. App. E.D. 1991) (finding no abuse of discretion in the court's refusal of a non-MAI instruction).

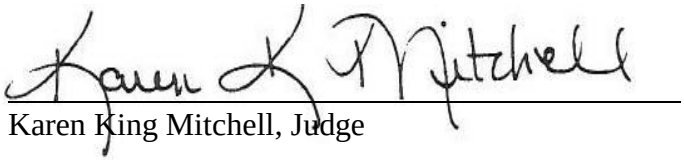
simply *claiming* pretext; he or she bears the burden of *proving* pretext. The way Templemire's instruction was drafted does not reflect his burden of proving pretext.

In short, while we agree with Templemire that a pretext instruction could be beneficial to the jury, and therefore it would not have been an abuse of discretion for the trial court to give a proper pretext instruction, we do not believe such an instruction is required. Nor do we believe that the court abused its discretion in refusing the proffered instruction.

Point II is denied.

Conclusion

Under the current state of the law, the trial court properly instructed the jury on the exclusive causation factor of Templemire's workers' compensation retaliation claim. And the court's refusal of Templemire's proffered pretext instruction did not constitute an abuse of discretion. The judgment is affirmed.



Karen King Mitchell, Judge

Lisa White Hardwick, Presiding Judge,
and James M. Smart, Jr., Judge, concur.