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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1080**

Greg Peterson,
Appellant,

vs.

City of Richfield,
Respondent.

**Filed April 8, 2019
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-17-3758

Charlie R. Alden, Gilbert Alden PLLC, Burnsville, Minnesota; and

J. Ashwin Madia, Madia Law LLC, Minneapolis, Minnesota (for appellant)

Julie Fleming-Wolfe, Fleming-Wolfe Law, P.A., St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Slieter,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant Greg Peterson seeks to overturn the judgment entered in favor of his former employer, respondent City of Richfield (city), following a jury verdict on his age-discrimination and retaliation claims. Peterson argues that the district court abused its

discretion when it denied his motion for a new trial based on the court's failure to give a jury instruction on pretext. Because the jury instructions fairly and correctly stated the law, and because appellant was not prejudiced by the omission of the pretext instruction, we conclude that the district court did not abuse its discretion and we affirm.

FACTS

The city hired Peterson as a police officer in 1997. In April 2012, Peterson filed his first age-discrimination lawsuit against the city, alleging that the police department discriminated when it removed him from the special-investigations unit. The district court held a bench trial and entered judgment for Peterson in September 2013. In April 2014, Peterson filed his second age-discrimination suit against the city, alleging that he and three other officers "were discriminated against based on age in connection with their participation in a promotional examination for a Detective position, in which two officers, aged 29 and 31, were promoted ahead of the more experienced officers." The district court granted summary judgment to the city and Peterson appealed.

While his appeal was pending, in August 2015, Peterson was injured on the job and filed a report that described experiencing "neck pain, pain in his right shoulder, and increased numbness in his right arm and hand, which worsened over the course of several weeks." Peterson filed for workers' compensation benefits, and was placed on Family and Medical Leave Act (FMLA) leave. Peterson began physical therapy, and his FMLA leave was extended several times.

In March 2016, this court reversed the district court's summary judgment in Peterson's second age-discrimination lawsuit. *See Peterson v. City of Richfield*, No. A15-

0925, 2016 WL 1081234, at *1 (Minn. App. Mar. 21, 2016). We held that there were genuine issues of material fact relating to Peterson’s claim that the city had retaliated against him for “winning his prior age discrimination case.” *Id.* at *8. We remanded the case for trial on the retaliation claim. *Id.* at *9.

Meanwhile, Peterson applied to the Public Employees Retirement Association (PERA) for duty disability benefits related to his August 2015 injury. His application stated that he was “disabled from performing the normal duties of a police officer, and that his disablement is expected to persist for at least one year.” The application included medical opinions from Peterson’s doctors that he was “unable to perform” the duties of a police officer.

The city then notified Peterson that it intended to terminate his employment. The city’s letter stated that Peterson’s disability application included “medical documentation” that he would not be able to return to his position as a police officer. After conducting a hearing, the city discharged Peterson on July 1, 2016.¹

Peterson’s second age-discrimination lawsuit proceeded to a jury trial in November 2016. The jury returned a verdict in Peterson’s favor, determining that Peterson’s prior

¹ Under the Due Process Clause of the Fourteenth Amendment, a public employee is entitled to a pretermination hearing and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42, 105 S. Ct. 1487, 1493 (1985). This pretermination hearing, commonly referred to as a *Loudermill* hearing, “need not definitively resolve the propriety of the discharge,” but should serve as “an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545-46, 105 S. Ct. at 1495. On June 28, 2016, the city held a *Loudermill* hearing discussing Peterson’s termination.

lawsuit and his age were both motivating factors in the city's decision to not promote him to detective.

In March 2017, Peterson sued the city alleging, in part, discriminatory reprisal in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363A.15 (2018), and claiming that the city discharged him because of his two prior lawsuits for age discrimination. Peterson also alleged that the city violated the Workers' Compensation Act (WCA), Minn. Stat. § 176.82, subd. 1 (2018), when it discharged him in retaliation for seeking workers' compensation benefits.² The city denied any wrongdoing and asserted that it discharged Peterson because he had been off work for several months and there was no indication that he would be able to return to work as a police officer.

The city moved for summary judgment. After a hearing, the district court granted the city's motion as to some of Peterson's claims, but denied the city's motion on Peterson's claims for reprisal in violation of the MHRA and retaliatory discharge in violation of the WCA. Both of those claims were tried to a jury in March 2018.

The parties submitted proposed jury instructions. Both submissions included the motivating-factor instruction. Peterson also proposed a pretext instruction, which stated:

[Peterson is] not required to produce direct evidence of unlawful motive. You may infer [the city's] motive from the existence of other evidence—for example, through explanations that you find were really pretextual. "Pretextual" means false, or if true, not the real reason for the action taken.

² Peterson had asserted two additional claims against the city: that the city violated his constitutional right to due process by discharging him without a proper *Loudermill* hearing, and that the city failed to offer Peterson reasonable accommodations and engage in an interactive process in his return to work. The district court dismissed these claims on summary judgment and neither claim is at issue in this appeal.

Pretext may be shown by a constellation of evidence including different treatment of similarly situated employees, that the employer's proffered explanation is unworthy of credence, or that it is unlikely that the employer would have acted on the basis of the proffered reason.

The district court denied Peterson's request to include the pretext instruction, and Peterson objected before the case was submitted. The district court instructed the jury on the motivating-factor standard and neither party objected. The jury returned a special verdict for the city, determining that Peterson's previous lawsuits were not a motivating factor in the city's decision to terminate him, and finding that Peterson's workers' compensation lawsuit was not a motivating factor in the city's decision to terminate him.

Peterson moved for a new trial arguing that the district court's failure to include a pretext instruction was reversible error and he was entitled to a new trial under Minn. R. Civ. P. 59.01(f). After a hearing, the district court determined that it correctly instructed the jury on the elements of retaliation, that Peterson was not prejudiced by the lack of a pretext instruction, and denied Peterson's motion for a new trial. Peterson appeals.

D E C I S I O N

Peterson argues that the district court abused its discretion when it denied his motion for a new trial based on the court's failure to instruct the jury on pretext. The district court may grant a new trial because of "[e]rrors of law occurring at the trial." Minn. R. Civ. P. 59.01(f). Errors of law include errors in jury instructions. *See Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). A district court has broad discretion to determine jury instructions, and this court "will not reverse where jury instructions overall fairly and correctly state the applicable law." *Daly v. McFarland*,

812 N.W.2d 113, 122 (Minn. 2012) (quotations omitted). But a “new trial is required if the jury instruction was erroneous and such error was prejudicial to [the objecting party] or if the instruction was erroneous and its effect cannot be determined.” *Id.* (quotations omitted). A jury instruction is erroneous if it “materially misstates the law.” *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). “An error is prejudicial if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury.” *Youngquist v. W. Nat’l Mut. Ins. Co.*, 716 N.W.2d 383, 386 (Minn. App. 2006) (quotation omitted). This court will not reverse a district court’s denial of a new-trial motion absent a “clear abuse of discretion.” *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012).

A. The district court did not abuse its discretion in denying Peterson’s motion for a new trial because the jury instructions fairly and correctly stated the law.

Primarily, Peterson relies on *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801 (Minn. App. 1993), *aff’d as modified*, 509 N.W.2d 365 (Minn. 1993), to support his argument that the district court erred by not giving a pretext instruction. In that case, McGrath sued TCF, his former employer, alleging wrongful discharge in violation of whistleblower laws after he reported that TCF’s overtime policy violated the law. 502 N.W.2d at 803-04. After a favorable verdict, the district court entered judgment for McGrath, and TCF appealed. *Id.* at 804. TCF argued it was entitled to a new trial because the district court failed to instruct the jury that TCF was liable only if it found that the “overtime violations reports were the substantial causative factor in his discharge.” *Id.* at 805-07.

In a published decision, we reversed and remanded for a new trial. First, we determined that the jury charge misstated the applicable law because it did not use the three-part *McDonnell-Douglas* analysis for a mixed-motive claim. *Id.* at 807 (citing *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 119 n.7 (Minn. 1991)). Next, we determined that TCF was prejudiced by the incorrect jury instructions. *Id.* The opinion explained that:

TCF offered many legitimate reasons for McGrath's discharge. Under the *McDonnell Douglas* analysis, McGrath bears the burden of proving TCF's proffered reasons are pretextual. The instruction used by the trial court did not require the jury to even consider whether TCF's proffered reasons for discharge were pretextual. Because the jury was instructed to find the bank liable if McGrath's discharge was motivated, in whole or in part, by his overtime violations report, the jury could have found for McGrath even if it would also have determined TCF's reasons were not mere pretext.

Id. (citations omitted).

McGrath petitioned for review, which the supreme court granted “for the sole purpose of clarifying” our opinion. 509 N.W.2d at 365. Ruling en banc and without granting oral argument, the supreme court modified our opinion. *Id.* First, the supreme court stated that our opinion misstated the *McDonnell-Douglas* standard by suggesting in footnote 2 “that an employer could avoid liability even if an illegitimate reason played a role in the discharge so long as the other proffered reason was not pretextual.” 509 N.W.2d at 366 (citing 502 N.W.2d at 807 n.2). Citing its own precedent, the supreme court held that, “even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason ‘more likely than not’ motivated the discharge

decision.” *Id.* Thus, the supreme court modified our opinion to say that, on remand, the jury should be instructed consistent with the motivating-factor test in supreme court precedent. *See id.* (citing *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 627 (Minn. 1988) and *Sigurdson v. Isanti Cty.*, 386 N.W.2d 715 (Minn. 1986)). In all “other respects,” the supreme court denied the petition for review. *Id.*

Peterson argues that *McGrath* requires a pretext instruction because, without a pretext instruction “the jury has not been instructed to apply the *McDonnell Douglas* test.” We disagree. Neither our opinion in *McGrath* nor the opinion as modified by the supreme court held that a pretext instruction is required in every case. Reading *McGrath* as modified by the supreme court, *McGrath* directs us that a district court must instruct the jury on the motivating-factor test under Minnesota law.

Peterson disagrees that *McGrath*’s holding should be read as focusing on the motivating-factor test because we reversed for instructional error and the jury had been given the motivating-factor instruction. This is incorrect. The district court had instructed the jury that it “would have to decide ‘whether TCF’s discharge of McGrath was motivated *in whole or in part* by’” McGrath’s report of TCF’s violations of the law. 502 N.W.2d at 804 (emphasis added). As explained by our court’s opinion, the instruction’s use of “in part” erroneously told the jury that it “could have found for McGrath even if it would also have determined TCF’s reasons were not mere pretext.” *Id.* at 807. The motivating-factor instruction, on the other hand, tells the jury to determine whether the plaintiff has proven that “an illegitimate reason ‘more likely than not’ motivated the discharge decision.” 509 N.W.2d at 366.

With *McGrath* in mind, we turn to the jury instructions in this case. The district court instructed the jury on the preponderance of the evidence and on the motivating-factor standard:

You will be asked to provide answers on a verdict form called a special verdict form. The greater weight must support your answer to all questions, . . . This means that all of the evidence regardless of which party produced it, must [lead] you to believe that the claim is more likely true than not true. . . .

Your verdict must be for [Peterson] . . . if [Peterson] has proven that his age discrimination and retaliation lawsuit was a motivating factor in [the city's] decision to terminate [Peterson]. . . .

[Peterson's] age discrimination and retaliation lawsuit was a 'motivating factor' if it played a part or role in [the city's] decision to terminate [Peterson]. However, [Peterson's] lawsuit need not have been the only reason for [the city's] decision to terminate him. . . . An employer can be found liable if an employee shows that one factor motivating the decision to terminate is driven by discriminatory or retaliatory intent.

Based on *McGrath* and other supreme court precedent, we conclude that the district court's instructions stated the correct legal standard by directing the jury to determine whether Peterson's former lawsuits were a motivating factor in his discharge by the greater weight of the evidence.³ While the jury instructions did not use the word "pretext," the district

³ Peterson appears to also claim that the supreme court's opinion modifying *McGrath* held that a "pretext instruction permits the jury to infer the existence of a retaliatory motive if it disbelieved" the employer's reasons. We see no such discussion in the supreme court's opinion and Peterson does not cite to specific language to support his argument. Peterson also appears to be arguing that a plaintiff may satisfy his burden of proof by relying on circumstantial evidence and we agree. But, as the district court noted in its new-trial order, the jury was instructed regarding direct and circumstantial evidence. Thus, we reject

court nonetheless correctly instructed the jury that Peterson's lawsuits need not have been the only reason for the discharge decision.

Peterson also contends that *Cox v. Crown CoCo, Inc.*, supports his argument that a pretext instruction is mandatory. 544 N.W.2d 490, 497 (Minn. App. 1996). In *Cox*, like *McGrath*, the employer argued that the jury instructions were erroneous because the district court failed to instruct the jury that the employee was required to prove that the employer's reasons for termination were "pretextual." *Id.* This court affirmed after determining that the district court did not err because "the trial court gave the instruction that [the employer] had requested," including the "pretext" language that the employer, on appeal, claimed was missing. *Id.* *Cox* did not determine that a pretext instruction was necessary, only that an appellant cannot claim error in a jury instruction when the district court gave the instruction requested by appellant. *See id.*⁴

Peterson's suggestion that the jury was not instructed it could infer the city's "real" and improper reason for discharging Peterson.

⁴ Peterson also argues that caselaw from the federal appellate courts supports his argument that he was entitled to a pretext instruction. But, as noted by the district court, the Eighth Circuit has determined that it is not reversible error for the district court to "fail to give a pretext instruction." *See Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001). Peterson acknowledges that *Moore* contradicts his position on appeal and argues that other circuits have held that a pretext instruction is required. It is true that there is a federal circuit split on this issue. *Compare Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280-81 (3d Cir. 1998) (holding that it is reversible error not to give a pretext instruction), *with Fite v. Dig. Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000) ("While permitted, we doubt that such [a pretext] explanation is compulsory, even if properly requested."). But this court applies Minnesota law. *See Simmons v. Fabian*, 743 N.W.2d 281, 290 n.5 (Minn. App. 2007) ("[W]e are bound only by decisions of the Minnesota Supreme Court and the United States Supreme Court."). And we have determined that the district court in this case instructed the jury on the correct legal standard under *McGrath*.

The district court in this case correctly instructed the jury that the motivating-factor standard applies to an employee's discrimination claim. Because the district court's instructions to the jury stated the applicable law fairly and correctly, we affirm.

B. Peterson failed to demonstrate that he was prejudiced by the lack of a pretext instruction.

Even if this court were to decide that the district court abused its discretion in failing to give a pretext instruction, a new trial is only required if the error was prejudicial to Peterson. *See Daly*, 812 N.W.2d at 122; *Apache Plaza, Ltd. v. Midwest Sav. Ass'n*, 456 N.W.2d 729, 732 (Minn. App. 1990) ("Jury instruction errors are not grounds for reversal unless the error is prejudicial."), *review denied* (Minn. Aug. 23, 1990). "An error is prejudicial if there is a reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *Youngquist*, 716 N.W.2d at 386 (quotations omitted).

It is appellant's burden to demonstrate prejudice from an erroneous jury instruction. *See Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 48 (Minn. 1997). It is also appellant's duty to order a transcript "of those parts of the proceedings not already part of the record which are deemed necessary for inclusion in the record." Minn. R. Civ. App. P. 110.02, subd. 1(a); *see also Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995) (providing that appellant bears the burden of providing an adequate record).

Peterson did not order the entire trial transcript for the appellate record. Instead, he included only those portions of the transcript in which he presented his proposed pretext instruction, the district court's decision to deny his request, the district court's decision to

deny the city's motion for a directed verdict, the jury instructions as read to the jury, the closing arguments, and arguments on Peterson's motion for a new trial. The city argues that the record is inadequate for this court to determine prejudice. We agree.

In Peterson's reply brief to this court, he acknowledges that his attorney discussed pretext in his opening statement and closing argument. He contends, however, that he was prejudiced by the omission of a pretext instruction because "pretext is an inherently difficult concept that has eluded state and federal judges." We are not persuaded because Peterson is unable to establish any prejudice to him. *Daly*, 812 N.W.2d at 122. And, because the record is inadequate, we cannot determine whether Peterson was prejudiced by the omission of a pretext instruction. Therefore, Peterson has failed to meet his burden to show prejudice.

In sum, we conclude that the district court did not abuse its discretion in denying Peterson's motion for a new trial. Accordingly, we affirm.

Affirmed.