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Supreme Court of Kentucky

2018-SC-000274-DG

NORTON HEALTHCARE, INC. APPELLANT/CROSS-APPELLEE

ON REVIEW FROM COURT OF APPEALS
V. CASE NO. 2016-CA-000322
JEFFERSON CIRCUIT COURT NO. 13-CI-01418

DONNA DISSELKAMP APPELLEE/CROSS-APPELLANT

AND

2019-SC-000102-DG

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OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING

I. BACKGROUND.

Donna Disselkamp relied on circumstantial evidence at trial to support her age-discrimination claim under the Kentucky Civil Rights Act against her former employer, Norton Healthcare, Inc. Under Kentucky case law, an age-discrimination claimant, like Disselkamp, attempting to prove age discrimination using circumstantial evidence must first make a legally

sufficient initial showing under what is known as the *McDonnell Douglas* framwork[1] that she can prove, among other elements, that her employer replaced her with a substantially younger person. The primary issue is whether the trial court committed reversible error by requiring the jury, rather than the trial court itself, to make the specific factual determination about whether Norton replaced Disselkamp with a substantially younger person. Like the Court of Appeals, we hold that instructing the jury to decide this *McDonnell Douglas* element was reversible error by the trial court. Accordingly, we affirm the decision of the Court of Appeals to reverse the judgment and remand this case to the trial court for further proceedings.

II. THE FACTS LEADING UP TO DISSELKAMP'S SUIT AGAINST NORTON.

Disselkamp began working as a supervisor of Imaging Services at Norton Suburban Hospital in 2002.[2] As supervisor, Disselkamp was responsible for preparing Quality Management Team (QMT) reports, wherein she collected data from patients' records each month and randomly sampled the data regarding points such as patient-shield reports and ultrasound observations. The purpose of the QMT reports was to monitor whether Norton's employees were

[1] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973).

[2] This opinion will refer to both "Norton Hospital" and "Norton Suburban Hospital" as simply "Norton." As far as we can tell from the parties' briefs, the specific "Suburban" location of Norton Hospital only matters to explain some parts of witness McGinnis's testimony. Disselkamp, McGinnis, and all other Norton employees and supervisors who testified at trial worked at the Suburban location of Norton Hospital. McGinnis explained during her testimony that she felt uncomfortable providing testimony adverse to Norton in this case because, even though she left the Suburban location and began working at another Norton hospital sometime after Disselkamp was terminated, Norton Hospital was still McGinnis's employer.

adhering to institutional policy requirements. Disselkamp maintained a "QMT binder" with the data needed to create the reports.

In 2012, Norton terminated employment of Disselkamp's immediate supervisor, Kevin Hendrickson, and replaced him with Lori Bischoff. In October that same year, Disselkamp emailed Bischoff the QMT reports, at Bischoff's request, reflecting the data collected from the previous three months. As requested by Bischoff, Disselkamp later sent most of the supporting data used to draft the reports, but she did not include July reports relevant to the patient-shielding for radiation protection ("the patient-shielding report") and the ultrasound observations ("the ultrasound report"). Disselkamp was able to obtain a copy of the July ultrasound report, and she asked another employee to do another random sampling of the July data for the patient-shielding report. When Disselkamp presented this information to Bischoff, Bischoff complained that Disselkamp "recreated" data to support her previously submitted report. Bischoff then met with her supervisor, Norton's System Director of Imaging Services, Richard Schilling, and Norton's Human Resources Manager, Tracy Patton, to discuss her uneasiness over Disselkamp's QMT report.

According to a Corrective Action Report (CAR) created by Bischoff following the meeting with Schilling and Patton, Disselkamp was found to have knowingly presented false data in her QMT report because she submitted the report without having all the data needed to validate it. The CAR stated that this behavior could not be tolerated because the QMT reports affected patient care and were disseminated to organizations responsible for accrediting and regulating health-care providers. Disselkamp provided a written response

denying the accusation, claiming that she reviewed the patient-shielding and ultrasound reports before submitting the QMT report and was simply unable to locate them when they were requested. Disselkamp explained that she suspected her copy of the patient-shielding report was misplaced while moving into a new office. Norton terminated Disselkamp's employment in October 2012. At the time of her termination, Disselkamp was 60 years old, had over 30 years' experience in radiology and mammography, and had over seven years' management experience. Disselkamp provided evidence that Norton eventually replaced her with a 48-year-old woman, Michele Meyers.

In February 2013, Disselkamp sent a demand letter to Norton stating her legal claims against Norton. And the following month, she sued Norton for age discrimination in violation of the Kentucky Civil Rights Act[3] and for retaliation under the theory that she was terminated for complaining about her former supervisor's, Hendrickson's, behavior before he was replaced by Bischoff.

Throughout pretrial discovery, Disselkamp made repeated requests for certain documents from Norton, seeking disclosure of such things as any emails referencing the CAR created for Disselkamp's alleged misconduct and Disselkamp's QMT binder. Norton eventually conceded that it could not find some of the requested documents and admitted that many of them had been destroyed. The protracted delay in Norton's response and the ultimate unavailability of these documents prompted a motion from Disselkamp for a missing-evidence jury instruction at trial. The trial court denied this motion. After the trial court denied Norton's motion for summary judgment, finding

[3] Kentucky Revised Statutes (KRS) 344.010, *et seq.*

issues of material fact concerning, among other things, whether Disselkamp was replaced by a substantially younger employee, Disselkamp's case was tried before a jury over a ten-day period.

III. THE JURY TRIAL IN CIRCUIT COURT RESULTS IN A VERDICT FOR NORTON.

Disselkamp and Norton each called several witnesses to testify about the facts and events that occurred before and after Disselkamp's termination. Several current and former employees of Norton also testified regarding the alleged discrimination they experienced or observed while working for Norton; including Pam McGinnis, 64-year-old Barbara Colvin, 57-year-old Lee Ann Neuman, 51-year-old Denise Dusch, 56-year-old Connie Hicks, 54-year-old Donna Magee, and 58-year-old Patrick Anderson.

Colvin, another imaging supervisor at Norton who eventually left Norton after Disselkamp was terminated, testified that Bischoff asked her to clean out Disselkamp's office and throw away her QMT binder but that she ignored the instruction and kept the binder in her office, believing Disselkamp might need the binder if a lawsuit occurred. Before Colvin left Norton in 2014, she admonished several other employees not to throw Disselkamp's binder away when they cleared out Colvin's office.

Pam McGinnis, a nurse who worked under Disselkamp's supervision, testified at length about: the culture in the imaging department at Norton; alleged comments made and behaviors exhibited by Hendrickson to female employees; alleged comments made by Bischoff and Schilling vowing to retaliate against Disselkamp for complaining about Hendrickson's harassing behavior; and alleged comments made by Schilling to McGinnis regarding his

disappointment and anger that McGinnis complained about Hendrickson's harassing behavior. McGinnis also testified that Bischoff told her that Bischoff would have to "find a reason" to terminate Disselkamp, as Bischoff was directed to do so, and that it was supposed to have been done by Hendrickson. When asked by Norton why she did not mention during her discovery deposition that Bischoff informed her that she had to find a reason to fire Disselkamp, McGinnis stated that she was not asked such a question, and that she was only instructed to answer truthfully the questions she was asked and not to elaborate. When Norton asked if there was any other information she was withholding, McGinnis testified that there was "probably" a lot more information to which she could testify, but she was not asked at her deposition. McGinnis was not asked during re-direct to elaborate on this statement. The trial court then released McGinnis as a witness.

When trial resumed the morning after McGinnis testified, Disselkamp informed the trial court that McGinnis called Disselkamp over the evening recess and told her that she had more pertinent information to offer about Bischoff's alleged discriminatory conduct against Disselkamp but that she did not get the chance to relate that information in her testimony the preceding day because the lawyers did not ask her the right questions. The additional information concerned an alleged meeting McGinnis attended during which Bischoff discussed a plan to bring in "new, young, fresh faces" and terminate older employees, including Hicks, Neuman, Colvin, and Disselkamp, the latter two of which were supposed to have been terminated by Hendrickson before he left Norton. The trial court found that the phone call between Disselkamp and McGinnis, initiated by McGinnis, did not violate any court order or admonition

and granted permission to Disselkamp's attorney permission to speak directly with McGinnis.[4]

Bischoff testified, among other things, that: she did not terminate anyone because of age, nor was she directed by anyone to do so; she did not delete any email she received from Disselkamp and did not know why Norton could not produce the emails during discovery; and Norton created an addendum to the 2012 third-quarter QMT report noting that it had performed a new random sampling of the July 2012 data and that the data from the new random sampling did not change the underlying results of the QMT report created by Disselkamp.

Following Bischoff's testimony, the court had further discussions with counsel about whether Disselkamp would be permitted to recall McGinnis as a witness. The trial court declined Disselkamp's request to allow her to recall McGinnis as a witness despite acknowledging that the proposed testimony would be beneficial to Disselkamp and that it could not point to a specific case or statute to support its decision. The trial court observed that it would be fundamentally unfair to allow a witness who had been deposed and examined at length in discovery to retake the stand during trial after conferring privately with the plaintiff.

The trial court did allow Disselkamp to make a testimonial offer of proof in which McGinnis recounted the meeting she attended where Bischoff discussed her plan to fire older employees and bring in younger ones.

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[4] There was discussion with the trial court about whether Disselkamp's attorneys could speak with McGinnis outside the presence of Norton's attorneys because McGinnis was still a Norton employee. Eventually, it was agreed that Disselkamp's attorneys could speak to McGinnis.

After the close of proof, the trial court held the first jury-instruction conference. The trial court's proposed instructions directed the jury that it "shall find for Disselkamp if" it found, among other things, that "Disselkamp's age (60) was a substantial motivating factor in Norton's decision to terminate her employment; . . . AND Disselkamp was replaced by a substantially younger person." The trial court rejected Disselkamp's request that the age-discrimination jury instruction be modified to include a definition of *substantially younger*. Disselkamp also filed a memorandum objecting to the trial court's insertion of the substantially-younger person requirement into the jury instructions, arguing that the substantially-younger person factor must be resolved by the trial court's ruling on motions for summary judgment or directed verdict. Disselkamp also objected to the trial court's inclusion of Tracy Patton's name in the retaliation instruction, arguing that Disselkamp offered no evidence that supported a finding that Patton retaliated against her. The trial court rejected Disselkamp's arguments, finding that the substantially-younger requirement was properly included in the age-discrimination jury instruction because it was an element of the *McDonnell Douglas* framework and that Patton's name was properly included as a potential retaliator because Patton was accused of being a retaliator in Disselkamp's complaint and pre-discovery. The jury returned a verdict in Norton's favor on both of Disselkamp's claims.

IV. THE COURT OF APPEALS REVERSES THE JUDGMENT.

Disselkamp appealed the judgment to the Court of Appeals, making the following arguments: (1) the trial court erred in not allowing McGinnis to be recalled as a witness; (2) the trial court erred in declining to include a missing-

evidence, or spoliation, instruction; (3) the trial court erred in including Patton's name among the list of potential retaliators in the retaliation jury instruction; (4) the trial court erred in providing in the retaliation jury instruction that the jury could find for Disselkamp only if it found that the individuals responsible for her termination were aware that she complained about "harassment *and* gender discrimination," making it seem as though the jury was required to find that Disselkamp complained about two separate matters; and (5) the trial court erred in inserting the *McDonnell Douglas* substantially-younger requirement into the age-discrimination jury instruction.

As to the first argument, the Court of Appeals found that the trial court had the authority under KRE[5] 611 to determine whether it would allow McGinnis to be recalled as a witness and held it was not an abuse of discretion to deny Disselkamp's request to recall McGinnis. As to the second argument, the Court of Appeals held the trial court did not abuse its discretion in declining to give a missing-evidence instruction because there was no evidence presented that the requested evidence was "unaccountably missing" or was lost due to conduct by Norton that went beyond "mere negligence."[6] The Court of Appeals observed that even if the failure to give a missing-evidence instruction were an abuse of discretion, the trial court's failure here was harmless. Disselkamp's theory was that Bischoff used Disselkamp's actions in preparing the QMT reports as a pretext for discrimination and retaliation. However, it was

[5] Kentucky Rules of Evidence

[6] The Court of Appeals relied solely on this Court's decision in *University Medical Center, Inc., v. Beglin*, 375 S.W.3d 783, 792 (Ky. 2011) in considering Disselkamp's second argument.

"undisputed that Disselkamp could not produce the patient-shielding or ultrasound reports when requested, and Bischoff testified a resampling of this data yielded the same results Disselkamp reported." Therefore, Disselkamp was not prejudiced by Norton's failure to produce the requested evidence.

As to the third argument, the Court of Appeals found that including Patton's name in the retaliation instruction, even if erroneous, was harmless because the instruction allowed the jury to find for Disselkamp if *either* "Richard Shilling, Lori Bischoff, *or* Tracy Patton" retaliated against Disselkamp, and it was not prejudicial because there was evidence presented that Patton participated in the decision to terminate.

As to the fourth argument, the Court of Appeals found that this argument was not preserved for appeal because Disselkamp did not object when the trial court offered a retaliation instruction that required the jury to find that Disselkamp complained of "harassment *and* gender discrimination," and Disselkamp's tendered jury instructions on the claim were not sufficiently different to alert the trial court to the alleged error.[7]

Most significantly for our review today, the Court of Appeals reversed the judgment and remanded the case to the trial court based on Disselkamp's fifth

[7] Disselkamp's tendered instructions provided that the jury would find for Disselkamp if it found that "Disselkamp's complaints about being harassed and/or adversely treated due to her gender were a but for factor in Defendant's decision to terminate her employment." The instructions submitted to the jury provided that the jury would find for Disselkamp if "Disselkamp engaged in a protected activity, i.e., complained to Norton, in good faith, about harassment and gender discrimination by Kevin Hendrickson[] . . . and there was a causal connection between Disselkamp's termination and her complaints about Kevin Hendrickson." The Court of Appeals found that the only difference between the two instructions was Disselkamp's use of "and/or" instead of "and," and Disselkamp did not explain how this minor difference would call the trial court's attention to the alleged error.

argument. Here, the appellate panel agreed with Disselkamp that the substantially-younger requirement should not have been included in the jury instructions because *substantially younger* was a legal question for the trial court to determine based on the circumstances of the case. The Court of Appeals noted that the Kentucky Civil Rights Act, is interpreted consistently with applicable federal anti-discrimination laws,[8] and "Age discrimination cases under the federal [a]ge Discrimination in Employment Act ("ADEA"), 29 U.S.C.[9] §§ 621–634, are analyzed under the same framework as employment discrimination cases under Title VII."[10] In Title VII cases, the jury is called on to determine whether the defendant intentionally discriminated against the plaintiff,[11] which can be proven by the plaintiff by presenting either direct evidence of the defendant's animus, or, in absence of direct evidence, presenting circumstantial evidence by satisfying the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*[12] to prove discrimination.[13]

The Court of Appeals found that the *McDonnell Douglas* framework is to be used only as a burden-shifting mechanism to ensure only legitimate age-discrimination cases based on circumstantial evidence are submitted to the

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[8] *Williams v. Wal-Mart Stores Inc.*, 184 S.W.3d 492, 495 (Ky. 2005).

[9] United States Code.

[10] *Williams,* 184 S.W.3d at 495 (citing *Grosjean v. First Energy Corp.*, 349 F.3d 332, 335 (6th Cir. 2003)).

[11] *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983).

[12] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668.

[13] *Williams*, 184 S.W.3d at 496 ("Under the *McDonnell Douglas* framework a plaintiff can establish a prima facie case of age discrimination by proving that he or she: (1) was a member of a protected class, (2) was discharged, (3) was qualified for the position from which they were discharged, and (4) was replaced by a person outside the protected class.").

jury. If the plaintiff establishes the prima facie case, a presumption of illegal discrimination arises, and the burden then shifts to the defendant to produce evidence of a legitimate reason for terminating the plaintiff to survive a motion for a directed verdict. If the defendant is successful in satisfying this burden, the *McDonnell Douglas* framework then "drops from the case" and the fact-finder is then called on to determine whether the termination was discriminatory.[14] Based on this standard, the Court of Appeals found that the jury instructions failed Kentucky's bare-bones jury-instruction test and misstated the law. The court held that these errors prejudiced Disselkamp because there was no way of knowing whether the jury found for Norton because it believed that Norton did not terminate Disselkamp because of her age *and* because it believed that Disselkamp was not replaced by someone substantially younger or because it believed Norton terminated Disselkamp because of her age *but* Disselkamp was not replaced by someone substantially younger. The Court of Appeals also provided the trial court with a model jury instruction for Disselkamp's age-discrimination claim that would be appropriate for use at trial on remand:

> You will find for the Plaintiff under this instruction if you are satisfied from the evidence that her age was a substantial motivating factor in Defendant's decision to take adverse employment action against her. Otherwise you will find for Defendant under this instruction.

V. THE CASE BEFORE THIS COURT.

Norton's central argument is that the Court of Appeals' opinion should be reversed and the jury's unanimous defense verdict reinstated because the jury

[14] *Aikens*, 460 U.S. at 714–15, 103 S. Ct. at 1481.

instructions on the age-discrimination claim did not misstate the law. Conversely, Disselkamp argues that the Court of Appeals' opinion should be reversed only insofar as it finds that the retaliation instruction did not misstate the law, the trial court did not err in refusing to allow McGinnis to be recalled as a witness, and that the trial court did not err in refusing to grant a missing-evidence instruction.

A. Challenges to the Age-Discrimination and Retaliation Jury Instructions.

We will first consider the parties' arguments with respect to the challenges to the age-discrimination and retaliation jury instructions because similar principles and standards of review apply.

1. Preservation and Standard of Review.

CR[15] 51(3) provides that:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

As this Court explained in *Sand Hill Energy, Inc. v. Smith*, "[t]he underlying purpose of CR 51(3) is to 'obtain the best possible trial at the trial court level' by 'giv[ing] the trial judge an opportunity to correct any errors before instructing the jury.'"[16] The party challenging jury instructions given at trial may preserve the challenge for appeal by making an objection, either oral or written, before the court instructs the jury, that specifically states "the

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[15] Kentucky Rules of Civil Procedure.

[16] 142 S.W.3d 153, 162–63 (Ky. 2004) (quoting *Cobb v. Hoskins*, 554 S.W.2d 886, 887 (Ky. App. 1977), and *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 72–73 (Ky. 2000), respectively).

matter to which he objects and the ground or grounds of his objection," or by offering his own proposed instructions which "fairly and adequately" present his position.[17]

> Kentucky appellate courts have explained that a tendered instruction will not fairly and adequately present the party's position as to an allegation of instructional error when: (1) the omitted language or instruction was not contained in the instruction tendered to the trial court; i.e., when the allegation of error was not presented to the trial court at all; (2) the minor differences between the language of the tendered instruction and the instruction given by the trial court would not call the trial court's attention to the alleged error; or (3) the tendered instruction itself was otherwise erroneous or incomplete.[18]

A properly preserved challenge to the contents of a given jury instruction is a question of law subject to de novo review on appeal. [19] But if a party fails to

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[17] CR 51(3).

[18] *Sand Hill Energy, Inc.,* 142 S.W.3d at 163–64 (citations omitted).

[19] As we explained in *Sargent v. Shaffer*, Kentucky courts "distinguish between two types of alleged errors involving jury instructions. The first type of instructional error is demonstrated by the claim that a trial court either (1) failed to give an instruction required by the evidence, or (2) gave an instruction that was not sufficiently supported by the evidence. . . . The second type of instructional error is represented by the claim that a particular instruction given by the trial court, although supported by the evidence, was incorrectly stated so as to misrepresent the applicable law to the jury. . . . When the question is whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard for appellate review is whether the trial court abused its discretion. . . . However, when it comes to the second type of instructional error—whether the text of the instruction accurately presented the legal theory—a different calculus applies. Once the trial judge is satisfied that it is proper to give an instruction, it is reasonable to expect that the instruction will be given properly. The trial court may enjoy some discretionary leeway in deciding what instructions are authorized by the evidence, but the trial court has no discretion to give an instruction that misrepresents the applicable law. The content of a jury instruction is an issue of law that must remain subject to de novo review by the appellate courts. In summary, a trial court's decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed de novo." 467 S.W.3d 198, 203–04 (Ky. 2015), *as corrected* (Aug. 26, 2015) (citations omitted).

preserve properly a challenge to jury instructions in the trial court, the challenge is not entitled to appellate review.[20]

As to the parties' challenge to the age-discrimination jury instruction, this issue is properly preserved for appellate review based on Disselkamp's tendered jury instruction on the age-discrimination claim and her memorandum of law that argued against inclusion of the "substantially younger person" requirement in the jury instructions. Because this jury-instruction issue concerns the content of the instructions, this is an issue of law subject to de novo review.

As to Disselkamp's challenge to the retaliation jury instruction, the trial court's instruction stated that the jury could return a verdict in her favor if it found that:

- Disselkamp engaged in a protected activity, i.e., complained to Norton in good faith, about harassment and gender discrimination by Kevin Hendrickson;
- Richard Shilling, Lori Bischoff, or Tracy Patton, the individuals responsible for terminating Disselkamp's employment, were aware of Disselkamp's complaints of harassment and gender discrimination by Kevin Hendrickson at the time the decision was made to terminate Disselkamp's employment;

  AND

- There was a causal connection between Disselkamp's termination and her complaints about Kevin Hendrickson.

[20] *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 427 (Ky. 2010), *as modified on denial of reh'g* (Dec. 16, 2010), ("We conclude that KLC did not comply with CR 51(3), and therefore was not entitled to demand a new trial on alleged errors that it failed to bring to the trial court's attention in an adequate and timely manner. . . . KLC's compliance with CR 51(3) at the end of a three-week jury trial would have not only allowed the trial court to fairly evaluate the matter, it would have enabled the Hills to protect their interest in avoiding the need for a second trial.").

Disselkamp objects to two propositions included in the above instruction. First, she argues that by including Human Resources Manager Tracy Patton's name among the list of potential retaliators, the trial court "commented on the evidence and inserted another potential retaliator that the jury well knew had no motive to terminate Ms. Disselkamp." There is no dispute that Disselkamp properly preserved this issue for appeal,[21] and, as such, the standard of review is de novo.

Second, Disselkamp points to the requirement in the retaliation instruction that provided that the jury could only return a verdict in Disselkamp's favor if it found that Disselkamp engaged in a protected activity by complaining to Norton about "harassment *and* gender discrimination" by her former supervisor, Kevin Hendrickson. Disselkamp argues that this part of the instruction improperly required her to prove she complained to Norton about two separate matters. Unlike the first claim of error regarding the retaliation instruction, the parties dispute whether Disselkamp preserved this issue for appeal. But the parties do not dispute that Disselkamp's only argument for proper preservation in accordance with CR 51(3) is that she tendered her own set of proposed jury instructions for her retaliation claim that varied slightly from the instructions submitted to the jury.

Disselkamp's proposed retaliation jury instruction provided the following:

> [Y]ou will find for the Plaintiff Donna Disselkamp under this instruction if you are satisfied from the evidence that Donna Disselkamp's complaints about being harassed and/or adversely treated due to her gender were a but for factor in Defendant's

[21] Disselkamp orally objected to including Ms. Patton's name as a potential retaliator in the instruction provided to the jury, arguing that there was no evidence that Patton fired Disselkamp in retaliation for Disselkamp complaining to Norton about Hendrickson's alleged unlawful conduct.

decision to terminate her employment. Otherwise you will find for Defendant."

As stated above, the Court of Appeals found that Disselkamp did not preserve this issue by simply tendering her own set of proposed instructions because Disselkamp's instructions and the trial court's instructions on the retaliation claim were not so different as to "fairly and adequately present the party's position as to an allegation of instructional error." We agree.

The nuanced difference between the two instructions with respect to the kind of conduct in which Disselkamp engaged is minor, as Disselkamp's instruction differs from the trial court's only by use of the grammatical device *and/or* in place of the conjunction *and.* Even if the difference between the two instructions cannot be dismissed as trivial, it cannot be said that the trial court was made aware of Disselkamp's grounds for her objection—that being that the instruction improperly required the jury to find that she complained about two separate matters when KRS 344.280 protected a person who "opposed a practice declared unlawful" under the chapter—so that the trial court truly had an opportunity to address the alleged error. Again, CR 51(3) required Disselkamp "fairly and adequately" to present her position on the challenged instruction.

Like the Court of Appeals, we find Disselkamp's argument that the trial court's use of the phrase "harassment and gender discrimination" is not preserved for appellate review, and we decline to consider the merits of this

argument.[22] We consider the remaining challenges to the age-discrimination and retaliation instructions below.

2. Jury Instructions for Disselkamp's Age Discrimination Claim.

The challenged jury instruction the trial court gave on Disselkamp's age-discrimination claim said:

> In this lawsuit, Plaintiff Donna Disselkamp ("Disselkamp") contends that her employment at Norton Suburban Hospital ("Norton") was terminated unlawfully.
>
> You shall find for Disselkamp if you are satisfied by a preponderance of the evidence all of the following:
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> - Disselkamp's employment was terminated;
> - Disselkamp was age 40 or over on the date of termination;
> - Disselkamp's age (60) was a substantial motivating factor in Norton's decision to terminate her employment;
> - Disselkamp was otherwise qualified for her employment position;
>
> AND
>
> - Disselkamp was replaced by a substantially younger person.

The parties raise the following question: Is it a misstatement of Kentucky law to include the *substantially-younger* requirement as established in *McDonnell Douglas Corp. v. Green* in a jury instruction for a claim of age discrimination under the Kentucky Civil Rights Act? The Court of Appeals answered this question in the affirmative and further found that the perceived error was not harmless. The question here is a matter of first impression under our law. And while only the substantially-younger requirement of the

[22] Even though Disselkamp does not request palpable error review of this issue in accordance with CR 61.02, it does not seem that she would be able to show that this error resulted in manifest injustice. *See Nami Res. Co., L.L.C. v. Asher Land & Mineral, Ltd.*, 554 S.W.3d 323, 338 (Ky. 2018) ("To qualify as 'palpable error' under [CR 61.02], an error 'must be easily perceptible, plain, obvious and readily noticeable.' . . . 'Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte*.'" (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006), and *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017), respectively).

McDonnell Douglas framework is at issue in this case, this Court has not had the opportunity analyze whether *any* of the requirements established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* can be properly included in jury instructions for an age-discrimination claim based on circumstantial evidence.

In support of its argument that the Court of Appeals erred on this point, Norton asserts that the Court of Appeals misconstrued and underappreciated the role of the substantially-younger requirement in age-discrimination cases. Norton argues that the requirements of the *McDonnell Douglas* framework may properly be included in age-discrimination jury instructions because it is undisputed that age-discrimination plaintiffs who are relying on circumstantial evidence are required to present proof of these requirements to survive dismissal. In support of this assertion, Norton cites primarily to the United States Supreme Court's decisions in *McDonnell Douglas Corp. v. Green*[23] and its progeny and to this Court's decision in *Williams v. Wal-Mart Stores Inc.*[24] In the alternative, Norton asserts that even if we conclude that the age-discrimination instruction at hand did misstate the law, the error was harmless because the alleged error did not affect the verdict. In other words, Norton asserts that any error in this instruction was harmless because it was a redundancy, merely asking the jury to make a finding of fact on an issue that Disselkamp was required to prove to submit the case to the jury in the first place.

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[23] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668.

[24] 184 S.W.3d at 495. Norton also cites to several other cases decided by this Court and other federal courts that, as explained in more detail below, are not binding in this Court.

In reliance on essentially the same cases, Disselkamp argues that the substantially younger-requirement was originally intended to only act as a burden-shifting mechanism to be used only by the trial court in deciding motions for summary judgment or directed verdict. In other words, Disselkamp argues that the *McDonnell Douglas* framework requirements were never intended to be a fact question for the jury to decide.

Based on our review of the record and supporting case law, we agree with Disselkamp that the instruction at hand misstated the law because it included the substantially-younger requirement as an issue for the jury rather than the judge. And we hold that this error prejudiced Disselkamp. Our holding here is justified based on: (1) the relevant provisions of both the Federal Civil Rights Act of 1964 and the Kentucky Civil Rights Act; (2) the history of the *McDonnell Douglas* framework and its application in the federal courts, specifically with respect to drafting and discussing potential jury instructions; (3) the traditional application of the *McDonnell Douglas* framework to Kentucky court proceedings; and (4) the bare-bones approach to jury instructions adopted by Kentucky courts and its impact on applicable presumptions.

a. The Kentucky and Federal Civil Rights Act

The specific statutory provision for Disselkamp's age-discrimination claim is KRS 344.040(1)(a). That statute makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . age forty (40) and over . . . ." As this Court explained in *Meyers v. Chapman Printing Co.*, "[o]ne important purpose of the Kentucky Civil Rights Act was to incorporate the anti-discrimination 'policies

embodied' in the Federal Civil Rights Acts of 1964."[25] But that purpose is not the only purpose expressed in the Kentucky Civil Rights Act. For example, KRS 344.020(1)(b) provides that one of the purposes is "[t]o safeguard all individuals within the state from discrimination because of . . . age forty (40) and over[;] . . . thereby to protect their interest in personal dignity and freedom from humiliation." And KRS 344.020(2) provides that the Act "shall be construed to further the general purposes stated in this section and the special purposes of the particular provision involved."

Unlike claims asserted under Kentucky's statute, claims for relief from discriminatory practices filed in federal court will be brought under one of two acts, depending on the status or characteristic the claimant believes was the basis for the employer's unlawful discrimination. First, Title VII of the Federal Civil Rights Act of 1964 addresses employment discrimination based on "race, color, religion, sex, or national origin."[26] As codified, the Federal Civil Rights Act provides that "[i]t shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin[.]"[27] Second, the Age Discrimination in Employment Act (ADEA) provides that "[i]t shall be unlawful for an employer-- (1) to fail or refuse to hire or to discharge any individual or

[25] 840 S.W.2d, 814, 817 (Ky.1992) citing KRS 344.020(1)(a)).

[26] 42 U.S.C. § 2000e–2(a).

[27] *Id.*

otherwise discriminate against any individual . . . because of such individual's age[.]"[28]

b. The *McDonnell Douglas* Framework in Federal Courts

The line of cases relevant to Disselkamp's age-discrimination claim begins in 1973 with *McDonnell Douglas Corp. v. Green*. When that case was decided, plaintiffs filing claims under the Federal Civil Rights Act were not entitled to a trial by jury; a right afforded only with the passage of the Federal Civil Rights Act of 1991.[29] In *McDonnell Douglas*, a former employee of the McDonnell Douglas Corporation brought suit against the corporation, in part, for the corporation's alleged racial discrimination in deciding not to rehire the plaintiff, a long-time activist in the civil rights movement, following the plaintiff's participation in several events that targeted the corporation.[30] At the outset, the Supreme Court expressly stated that the critical issue to be determined "concerns the order and allocation of proof in a private, non-class action challenging employment discrimination."[31] In analyzing this issue, the Supreme Court established the following "order and allocation of proof" required in cases such as this:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. . . . The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i)

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[28] 29 U.S.C. § 623(a)(1).

[29] *See* CIVIL RIGHTS ACT OF 1991, Pub.L. 102–166, 105 Stat. 1071, *as codified in* 42 U.S.C. § 1981a(c).

[30] 411 U.S. at 794–96.

[31] *Id*. at 793–94.

> that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [If the employer satisfies its burden, the complainant must then] be afforded a fair opportunity to demonstrate that [employer's] assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, [employer's] refusal to rehire must stand.[32]

Based on this standard, the Supreme Court held that the former employee satisfied its initial burden of establishing a prima facie case of racial discrimination and the employer also satisfied its burden by offering a legitimate, nondiscriminatory reason for refusing to rehire the employee.[33] Because the plaintiff was not afforded the opportunity at trial to respond to the employer's stated reason for refusing to rehire the plaintiff, however, the Supreme Court remanded the case back to the district court.[34] Following this decision, the Supreme Court decided several other cases in an effort to clarify the *McDonnell Douglas* framework.

In 1983, eight years before plaintiffs in Federal Civil Rights Act cases were entitled to a jury trial, the Supreme Court discussed the role of the *McDonnell Douglas* framework in Federal Civil Rights Act cases in *U.S. Postal Servs. Bd. of Governors v. Aikens*, which was another racial-discrimination case. The Supreme Court considered whether a federal district court erred in

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[32] *Id.* at 800–07.

[33] *Id.* at 802–03.

[34] *Id.* at 807.

entering judgment, following a bench trial, in favor of the defendant employer.[35] On appeal to the Supreme Court, the parties focused on the sufficiency of evidence presented at trial to satisfy the employee's burden in establishing a prima facie case.[36] The Supreme Court found that the district court erred by finding in favor of the defendant based on the district court's belief that the employee was required to submit direct evidence of discriminatory intent and erroneously focusing on whether the plaintiff established a prima facie case "rather than directly on the question of discrimination."[37] In so finding, the Court provided the following analysis:

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. By establishing a *prima facie* case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. [If the defendant rebuts the presumption], the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell*. . . . presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity. . . ." The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff. . . ." The *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff." On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other

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[35] 460 U.S. 711, 713, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983).

[36] *Id.*

[37] *Id.* at 717.

> civil litigation. . . . All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof," in deciding this ultimate question.[38]

In 1996, four years after the Supreme Court took notice that plaintiffs bringing claims under the Federal Civil Rights Act are entitled to a jury trial,[39] the Supreme Court again discussed the *McDonnell Douglas* framework in *O'Connor v. Consolidated Coin Caterers Corp.*, which was also the first time the Court considered the framework's application to federal age-discrimination claims brought under the ADEA.[40] In *O'Connor*, the Court was called on to answer whether a plaintiff who claimed his employment was terminated in violation of the ADEA must show that "he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by *McDonnell Douglas*[]."[41] The Fourth Circuit affirmed the District Court's entry of summary judgment in favor of the defendant.[42]

After discussing the specifics of the *McDonnell Douglas* framework, the Supreme Court made clear that while the Fourth Circuit and other federal courts had applied some version of the framework in assessing claims of age discrimination following the Court's decision in *McDonnell Douglas*, the Court

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[38] *Id.* at 713–16.

[39] *See United States v. Burke*, 504 U.S. 229, 241 n.12, 112 S. Ct. 1867, 1874, 119 L. Ed. 2d 34 (1992).

[40] 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996).

[41] *Id.* at 309.

[42] *Id.* at 309–10.

had not established that the framework applied in ADEA cases.[43] Because the parties in *O'Connor* did not dispute the framework's application in any sense, however, the Court assumed that for the purposes of this case the framework applied. The Court found that the Fourth Circuit's articulation of the framework as it applies to ADEA cases was erroneous because it included as an element that the plaintiff must show that he was replaced by another employee who was not in the protected class, i.e., not over 40 years of age.[44] The Court explained that the purpose of a prima facie case is to require "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion."[45] In age-discrimination cases, such an inference cannot be "drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination based on age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator" than the "irrelevant" factor articulated by the Fourth Circuit.[46]

Finally, in *Vance v. Ball State University*, the Supreme Court considered a plaintiff's retaliation claim brought under the Federal Civil Rights Act, and the relevant issue was the propriety of the Equal Employment Opportunity Commission's (EEOC) guideline definition of a "supervisor."[47] While the facts and applicable standards in *Vance* are not relevant to the present case, *Vance*

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[43] *Id*. at 311.

[44] *Id*. at 312–13.

[45] *Id*. at 312 (citations omitted).

[46] *Id*. at 313.

[47] 570 U.S. 421, 431–32, 133 S. Ct. 2434, 2443, 186 L. Ed. 2d 565 (2013).

is still instructive based on the Court's discussion of the difficulty in including the *McDonnell Douglas* elements in jury instructions. The *Vance* court stated that "[c]ourts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases. And the danger of juror confusion is particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof."[48] In the accompanying footnotes, the Court cited, for example, the Third Circuit's decision in *Armstrong v. Burdette Tomlin Memorial Hospital* for its proposition that in the context of the *McDonnell Douglas* framework, "the prima facie case and the shifting burdens confuse lawyers and judges, much less juries, who do not have the benefit of extensive study of the law on the subject."[49] The Supreme Court also cited the Third Circuit's decision in *Sanders v. New York City Human Resources Administration* for the proposition that "[m]aking the burden-shifting scheme of *McDonnell Douglas* part of a jury charge undoubtedly constitutes error because of the manifest risk of confusion it creates."[50]

Norton directs us to the Sixth Circuit Court of Appeals' decisions in *Cicero v. Borg-Warner Auto, Inc.*,[51] and *Blair v. Henry Filters, Inc.*[52] In *Cicero*,

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[48] *Id.* at 444–45 (citations omitted).

[49] *Id.* at 444–45 n.13 (quoting *Armstrong v. Burdette Tomlin Mem'l Hosp.,* 438 F.3d 240, 249 (C.A.3 2006)).

[50] *Id.* (quoting *Sanders v. New York City Human Resources Admin.*, 361 F.3d 749, 758 (C.A.2 2004)).

[51] 280 F.3d 579 (6th Cir. 2002).

[52] 505 F.3d 517, 526 (6th Cir. 2007). Norton also provided this Court with the list of federal cases that followed the Second Circuit's approach in *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129-30 (2d Cir. 2012) by requiring that disputed elements of a prima facie case be submitted to the jury. This list of federal

there were no jury instructions at issue in the court's decision because the case was on appeal from a trial court's order granting summary judgment. So that case is only instructive in that it espouses the same principles established by the Supreme Court cases discussed at length above regarding the fact issues involved in the plaintiff's prima facie case under the *McDonnell Douglas* framework. In contrast, the Sixth Circuit in *Blair* directly considered jury instructions and established that federal district courts were permitted, but not required, to instruct a jury on the *McDonnell Douglas* burden-switching in "appropriate" discrimination cases that are based on circumstantial evidence.[53] The *Blair* court emphasized, however, that "[w]hen a discrimination case proceeds to trial, **the focus is on the ultimate question of discrimination, rather than the burden-switching framework,** regardless of whether a plaintiff seeks to prove his case through direct evidence or circumstantial evidence."[54]

Based on the principles and standards established and reaffirmed in the cases discussed above, we draw the following preliminary conclusions. First, *McDonnell Douglas* established a burden-shifting framework, and its purpose is to ensure that plaintiff employees who lack direct evidence of discrimination still have an avenue for seeking relief. Second, in all discrimination cases, the ultimate question is "of discrimination vel non."[55] And third, the Supreme

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district court and state appellate court cases may be instructive but are not binding on this Court.

[53] *Blair*, 505 F.3d at 526 n.9.

[54] *Id.* (emphasis added).

[55] *Aikens*, 460 U.S. at 713. Bryan Garner, the Editor in Chief of Black's Law Dictionary, explains that "vel non" is translated to mean "or not." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 921–22 (3rd ed., Oxford 2011). As applied in this

Court has not determined whether the *McDonnell Douglas* framework, admittedly a fact inquiry, is better analyzed by the judge or the jury in federal cases, but the Supreme Court has taken note of the possible dangers associated with including the framework's elements in jury instructions. While *Blair* and *Cicero* do provide some guidance in addressing the primary issue raised in the present case, only *Blair* directly supports the ultimate rule Norton asks us to adopt. Moreover, because this Court, unlike the United States Supreme Court, has established that burden-shifting frameworks are not to be included in Kentucky bare-bones jury instructions, the *Blair* case is distinguishable from the present case.

With these preliminary thoughts in mind, we now turn to how the *McDonnell Douglas* framework has been applied in Kentucky Civil Rights Act cases because these cases and Kentucky's evidentiary rules and rule regarding jury instructions will ultimately determine whether the elements of the *McDonnell Douglas* framework may properly be included in Kentucky jury instructions.

c. The *McDonnell Douglas* Framework in Kentucky Courts

In *Williams v. Wal-Mart Stores, Inc.*, this Court applied an adapted version of the *McDonnell Douglas* prima facie case framework to an age-

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context, *Aikens* makes clear that the ultimate issue to be determined in discrimination cases is simply whether discrimination occurred. *See id.* ("A more accurate definition of the phrase as frequently used in American legal writing is 'or the lack of them (or of it).' Usually the phrase is pretentious surplusage, since it can either be deleted or translated into simpler words—e.g.: . . . 'The ultimate issue, that of discrimination vel non [omit], is to be treated by district and appellate courts in the same manner as any other issue of fact.' *Williams v. Southwestern Bell Tel. Co.*, 718 F.2d 715, 717 (5th Cir. 1983).").

discrimination claim.[56] In *Williams*, a former employee of Wal-Mart, Linda Williams, filed a discrimination suit against the corporation, alleging violation of several provisions of the Kentucky Civil Rights Act.[57] Williams resigned from the corporation after it accused her of stealing bottled water from the store, but she testified that Wal-Mart forced her to resign by threatening her with jail

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[56] *Williams*, 184 S.W.3d at 495. It is necessary here to clarify the continue validity of *Williams*. In *Williams v. Wal-Mart Stores, Inc.*, this Court explained that Kentucky "interpret[s] the civil rights provisions of KRS Chapter 344 consistent with the applicable federal anti-discrimination laws." *Id.* (citing *Brooks v. Lexington–Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 802 (Ky. 2004*), Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky. 2003), *Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 544 (Ky. 2001), and *Ammerman v. Bd. of Educ.*, 30 S.W.3d 793, 797–98 (Ky. 2000)). The *Williams* court further explained that "[a]ge discrimination cases under the Federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–634, are analyzed under the same framework as employment discrimination cases under Title VII." *Id.* While the parties in this case do not dispute this proposition, we find it necessary to note that the case relied on by the *Williams* court in supporting this proposition, *Grosjean v. First Energy Corp.*, 349 F.3d 332, 335 (6th Cir. 2003), has since been called into question by the United States Supreme Court's decisions in *O'Connor v. Consol. Coin Caterers Corp.,* 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), and *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 129 S. Ct. 2343, 2349, 174 L. Ed. 2d 119 (2009). In *O'Connor*, the Supreme Court stated that it has not "had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it." 517 U.S. at 311, 116 S. Ct. at 1310, 134 L. Ed. 2d 433. Similarly, the Supreme Court in *Gross* stated that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, . . . utilized in Title VII cases is appropriate in the ADEA context." 557 U.S. at 175 n.2., 129 S. Ct. at 2349, 174 L. Ed. 2d 119 (citations omitted). Despite these statements, other federal courts have continued to apply the *McDonnell Douglas* paradigm in analyzing age-discrimination claims brought under the ADEA. *See, e.g., Scheick v. Tecumseh Pub. School*, 766 F.3d 523, 529 (6th Cir. 2014) ("[A]pplication of the *McDonnell Douglas* evidentiary framework to prove ADEA claims based on circumstantial evidence remains consistent with *Gross*."). In absence of a final word by the United States Supreme Court on this issue, and since the parties in this case do not dispute whether the *McDonnell Douglas* framework applies to Disselkamp's age-discrimination case at some stage, we mirror the United States Supreme Court and assume for the purposes of this case that it does.

[57] *Williams*, 184 S.W.3d at 494. As the *Williams* court explained, "[b]ecause of a medical condition, it was necessary for Williams to take medicine at various times throughout her workday. Her doctor also recommended that her prescription be taken with sodium-free water. Initially, Williams brought sodium-free water from home and left it in the employee's lounge. However, because other employees sometimes drank the water or threw it away, Williams decided it would be simpler to purchase water at the store as she needed it." *Id.*

time.[58] Williams was 56 years old when she resigned.[59] Following a jury trial on Williams's age-discrimination claim, judgment was entered in her favor.[60] The Court of Appeals reversed the trial court, finding that Williams failed to present sufficient evidence to satisfy the elements of an age-discrimination claim.[61] This Court ultimately affirmed the Court of Appeals, holding that Williams failed to prove she was the victim of age discrimination.[62]

In applying KRS 344.010(1) consistently "with the applicable federal anti-discrimination laws," including Title VII and the ADEA,[63] this Court established in *Williams*:

> There are two paths for a plaintiff seeking to establish an age discrimination case. One path consists of direct evidence of discriminatory animus. Absent direct evidence of discrimination, Plaintiff must satisfy the burden-shifting test of *McDonnell Douglas*[]. . . . The reasoning behind the *McDonnell Douglas* burden shifting approach is to allow a victim of discrimination to establish a case through inferential and circumstantial proof. As Justice O'Connor has noted, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." If a plaintiff attempts to prove its case using the *McDonnell Douglas* framework, then the plaintiff is not required to introduce direct evidence of discrimination. Under the *McDonnell Douglas* framework a plaintiff can establish a prima facie case of age discrimination by proving that he or she: (1) was a member of a protected class, (2) was discharged, (3) was qualified for the position from which they were discharged, and (4) was replaced by a person outside the protected class. In age discrimination cases the fourth element is modified to require replacement not by a person outside the protected class, but replacement by a significantly younger person. . . . Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a "legitimate nondiscriminatory reason"

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[58] *Id.* at 495 n.2.

[59] *Id.* at 494.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 495.

> for the termination decision. . . . After a defendant has provided a legitimate, nondiscriminatory reason for the termination, the *McDonnell Douglas* framework disappears. At this point, the plaintiff must persuade the trier of fact, by a preponderance of the evidence, that the defendant unlawfully discriminated against her.[64]

In analyzing first whether Williams satisfied her burden of proving a prima facie case of age discrimination, the *Williams* court only focused on the final element because it was undisputed that Williams provided sufficient proof of the first three elements.[65] The Court found that the element was satisfied because Williams provided evidence that she was replaced "by an individual who is *significantly* younger than" she was at the time she separated from Walmart because all sixteen people who were hired after Williams left were at least eight years younger than she, and all but three were under age 40.[66] But the Court declined to settle the precise issue as to "how many years younger a replacement has to be in order to satisfy the significantly-younger requirement" because "[q]uite simply, when the evidence at trial is viewed in the light most favorable to Williams, it establishes that she was replaced by at least one of these substantially younger individuals."[67] The *Williams* court further found that Wal-Mart had satisfied its rebuttal burden of production by showing that it had a legitimate, nondiscriminatory reason for forcing Williams to resign, by showing that it had "strict polic[ies]" against "employees taking merchandise without first paying for it and that a violation of the policy resulted in

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[64] *Williams*, 184 S.W.3d at 495–97 (citations omitted).

[65] *Id.* at 496.

[66] *Id.* (emphasis added).

[67] *Id.* at 496–97.

immediate termination," and against allowing employees to "purchase merchandise while 'on the clock.'"[68]

Since the *McDonnell Douglas* framework had disappeared at this point, the *Williams* court discussed the evidence presented by Williams to show that "the employer's stated reason for the termination was merely a pretext, masking the discriminatory motive."[69] While the *Williams* court disagreed with the Court of Appeals and found that Williams provided enough evidence, admittedly "weak," to satisfy at least one of the "three methods for establishing pretext,"[70] the Court made clear that a plaintiff's success in establishing a prima facie case and providing evidence of a pretext does not always mean the plaintiff has presented evidence sufficient to survive a motion for a directed verdict if it is clear that the evidence would still not be enough to sustain a jury's finding of liability.[71] The *Williams* court ultimately held that even though the parties had satisfied their respective evidentiary burdens, Wal-Mart's motion for a directed verdict should have been granted because no "rational trier of fact [could] conclude that Wal-Mart had unlawfully discriminated against Williams because of her age" based on the complete absence of

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[68] *Id.* at 497.

[69] *Id.*

[70] *Id.* ("In *Manzer v. Diamond Shamrock Chems., Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994)], the court listed three methods for establishing pretext: (1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision.").

[71] *Id.* at 499 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148–49, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000)).

evidence that the person solely responsible for Williams's termination actually knew of her age.[72]

This Court has discussed *Williams* in three cases since rendering it.[73] The parties in the case at hand rely only on one these decisions, *Childers Oil v. Adkins*,[74] in their arguments for or against the propriety of the jury instruction under discussion.[75] Norton also directs us to the unpublished Court of Appeals' decision in *Stauble v. Montgomery Imports, LLC*[76] in support of its

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[72] *Id*. at 498–99 (explaining Supreme Court's decisions in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), wherein "the Supreme Court rejected the 'pretext plus' and 'pretext only' approaches in favor of the 'permissive pretext only' standard and held that it was permissible, but not mandatory, for the trier of fact to make an ultimate finding of intentional discrimination once the plaintiff has established pretext.) The *Williams* court explained, however, that these cases are not always required to be submitted to the jury based on the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148-49, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000), wherein the Court stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. There will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id*. at 499–500.

[73] *See Charalambakis v. Asbury Univ.*, 488 S.W.3d 568 (Ky. 2016); *Childers Oil Co. v. Adkins*, 256 S.W.3d 19 (Ky. 2008); *Commonwealth v. Solly*, 253 S.W.3d 537 (Ky. 2008).

[74] 256 S.W.3d 19.

[75] It is likely that the parties in this case did not rely on the other two cases because they are not age-discrimination cases and thus do not discuss the substantially-younger requirement of *McDonnell Douglas* that is at issue in this case. *See Charalambakis*, 488 S.W.3d at 580 (affirming the circuit court's grant of summary judgment in favor of the defendant based on the finding that the plaintiff "failed to demonstrate under the *McDonnell Douglas* burden shifting analysis that his circumstantial evidence of discriminatory treatment is sufficient to disprove [defendant's] proffered reasons for its disciplinary decisions[]"); *Solly*, 253 S.W.3d at 540 (affirming the Franklin Circuit Court's finding that the administrative hearing office correctly found that the plaintiff's sex-discrimination claim "did not state a prima facie case of discrimination and that the reasons given for the nonrenewal were not pretextual[]").

[76] No. 2005–CA–001967, 2011 WL 2119364, at *1 (Ky. App. May 27, 2011).

argument that jury instructions for age-discrimination claims commonly include elements of the *McDonnell Douglas* framework for establishing a prima facie case. We agree with Norton that this Court's decision in *Childers Oil* and the Court of Appeals' unreported decision in *Stauble* merit discussion, but we do note that both cases are distinguishable from the present case. There is no evidence that the trial court in *Childers Oil* submitted jury instructions that included the *McDonnell Douglas* elements, and the only discussion of the jury instructions concerns the propriety of the instruction on punitive damages.[77] Similarly, jury instructions were not at issue in *Stauble* because that case was dismissed before trial.

In *Childers Oil Co.,* a former employee, 47-year-old Bertha Adkins, of Defendant Childers Oil filed an age-discrimination claim after she was terminated from her job.[78] On discretionary review in this Court, we considered, in part, whether the trial court erred when it declined to grant Childers Oil's motion for a directed verdict. The primary claim made by Childers Oil was that the trial court erred in denying its motion for a directed verdict because Adkins failed to provide proof that she was replaced by a "significantly younger" employee.[79]

In *Childers Oil* we agreed with the Court of Appeals that the trial court did not err in denying Childers Oil's motion for a directed verdict based on the evidence presented at trial that management "had made a deliberate decision

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[77] *Childers Oil Co.*, 256 S.W.3d at 22.

[78] *Id.*

[79] *Id.* at 26–27.

to seek to place young females at the cash registers."[80] Testimony presented to the jury at trial showed that the manager told another employee that "the company wanted pretty, young girls up front to draw in truck drivers and the 'young ones' went 'up there.'"[81] Furthermore, trial evidence showed that one young female was hired only eleven days before Adkins was terminated, and five other people, all of whom were more than ten years younger than Adkins, were hired shortly after Adkins was discharged.[82]

In *Stauble,* the Court of Appeals affirmed the trial court's grant of Defendant Montgomery Imports's motion for summary judgment in Plaintiff Gary Stauble's age-discrimination claim.[83] Stauble filed the age-discrimination claim after he, at age 49, was first demoted from his position as service manager to parts manager and replaced by an individual who was in his late 20s or early 30s, and then terminated and replaced by an individual who was 40 years old.[84] On appeal, the parties disputed whether Stauble provided sufficient evidence to establish several of the elements.[85] In its discussion of the substantially-younger element, the Court of Appeals found that both the 20-year age difference between Stauble and the employee who replaced him when he was demoted, and the nine year age difference between Stauble and

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[80] *Id.*

[81] *Id.*

[82] *Id.* The *Childers Oil* court also found that Adkins presented sufficient evidence to allow the jury to conclude that that Childers stated reason for termination, that the store was closing soon and no longer needed Adkins's services, was a mere pretext. *Id.* at 26.

[83] 2011 WL 2119364, at *1

[84] *Id.*

[85] *Id.*, at *3–4.

the employee who replaced him when he was terminated were sufficient to present a "fact question for the jury."[86] Ultimately, the Court of Appeals found that Stauble presented sufficient evidence to make out a prima facie case of age discrimination, but summary judgment in favor of Montgomery Imports was still proper because Stauble failed to present sufficient evidence that Montgomery Imports's proffered reason for demoting and terminating Stauble was merely a pretext.[87]

Based on these Kentucky cases, we draw some further conclusions. First, Kentucky courts have embraced and affirmed the United States Supreme Court's assertions that *McDonnell Douglas* established a burden-shifting framework, and that in all discrimination cases the ultimate question is whether the defendant unlawfully discriminated against the plaintiff. Second, neither the United States Supreme Court, this Court, nor any other Kentucky court has considered whether the *McDonnell Douglas* framework, an admittedly factual inquiry, is to be decided by the judge or the jury in Kentucky Civil Rights Act cases. In fact, and unlike the Supreme Court of the United States, it seems that this Court has never had the occasion to express an opinion about the *potential* propriety of including the elements of the framework in jury-instructions in these cases. With these additional preliminary thoughts in mind, we now turn to Kentucky's rule regarding jury instructions because this

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[86] *Id.*, at *4. ("In *Cicero v. Borg–Warner Automotive, Inc.*, 280 F.3d 579, 588 (6th Cir. 2002), the United States Sixth Circuit Court of Appeals held that deciding whether an age difference of seven and one-half years is significant is a question of fact for the jury. . . . *See* [*also*] *Grosjean v. First Energy Corp.*, 349 F.3d 332, 336 (6th Cir. 2003) (noting that "[a]ge differences of ten or more years have generally been held to be sufficiently substantial . . . ").").

[87] *Id.*, at *4–5, 7.

issue is critical in determining whether the elements of the *McDonnell Douglas* framework may properly be included in Kentucky jury instructions.

d. Kentucky's "Bare Bones" Approach to Jury Instructions

As the Court of Appeals in this case correctly noted, Kentucky long-ago adopted a bare-bones approach to jury instructions. This Court has explained this approach as demanding that jury instructions "provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire."[88] As this Court established in *Meyers v. Chapman Printing Co.*, bare-bones instructions means those that simply frame "what the jury must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof."[89] This interpretation of bare-bones was reaffirmed in *Olfice, Inc. v. Wilkey,* wherein this Court stated that "'[t]he basic function of instructions in Kentucky is to tell the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who bears the burden of proof on that issue.'"[90] In an effort to clarify further the bare-bones standard for jury instructions, this Court established in *Mason v. Commonwealth* established that bare-bones instructions do not include unnecessary detail such as evidentiary presumptions.[91] As the *Mason* case

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[88] *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974).

[89] 840 S.W.2d at 824.

[90] 173 S.W.3d 226, 229 (Ky. 2005) (quoting Justice Charles M. Leibson, "Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony," 75 Ky. L.J. 1, 40 (1986) (quoting John S. Palmore, Kentucky Instructions to Juries, § 13.01 (1977))).

[91] 565 S.W.2d 140, 141 (Ky. 1978). *See also Meyers*, 840 S.W.2d at 824 ("In Kentucky jury instructions do not include evidentiary presumptions. Such presumptions alter the burden of going forward with the evidence, and thus may result in a directed verdict in the absence of countervailing evidence.").

explained, evidentiary presumptions should not be included in Kentucky jury instructions because presumptions, by their nature, are "guides to be followed by the trial judge in determining whether there is sufficient evidence to warrant the submission of an issue to the jury[.]"[92] The *Mason* court went on to state that the instructions must still include "[a]ll essential aspects of the law necessary to decide the case . . . ."[93] These cases essentially mean that trial courts are called upon to engage in a balancing effort to ensure that jury instructions in Kentucky provide only the bare minimum necessary to ensure that the jury understands the ultimate issue of fact to be decided in any case, but still provide enough law and background knowledge so that the jury comes to a decision that is supported by law.

Merely failing to adhere to the bare-bones approach, however, is generally not enough to justify a new trial under our jurisprudence. When a Kentucky appellate court is confronted with a challenge to a jury instruction based on the content of the instruction, the appellate court must consider whether the instruction "misstated the law by failing to sufficiently advise the jury 'what it [had to] believe from the evidence in order to return a verdict in favor of the party who [had] the burden of proof.'"[94] If the appellate court finds that the challenged jury instruction did misstate the law, a presumption of

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[92] *Id*. Recall that the United States Supreme Court in *Vance* noted that other courts have expressed similar disfavor in including some presumptions in jury instructions. The *Vance* court stated that "[c]ourts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases. And the danger of juror confusion is particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof." 570 U.S. at 444–45 (citations omitted).

[93] *Mason*, 565 S.W.2d at 141.

[94] *Wilkey*, 173 S.W.3d at 230 (quoting *Meyers*, 840 S.W.2d at 823).

prejudice arises and the challenging party is entitled to a new trial unless the responding party is able to show affirmatively that the error did not affect the verdict.[95] In contrast, if the appellate court finds that the jury instructions did not misstate the law, no presumption of prejudice arises and the complaining party is only entitled to a new trial if she is able affirmatively to show prejudice, meaning that the error affected the verdict.

e. Rule and Application of these Principles to Disselkamp's case

Upon careful review, we hold that the substantially-younger requirement issue must be decided by the trial court after considering the parties' evidence. In other words, it is a misstatement of law to include the substantially-younger element of the *McDonnell Douglas* framework into jury instructions submitted in age-discrimination cases that are based on circumstantial evidence. As explained in more detail below, this holding furthers the purpose of the Kentucky Civil Rights Act, is supported by the case law discussed above, and avoids illogical and unjust results that could arise were we to adopt the position advanced by Nortons.

First, by holding that the trial court, and not the jury, must make the determination about whether age-discrimination plaintiffs satisfy their initial burden under the *McDonnell Douglas* framework, this Court ensures that the statutory purposes of the Kentucky Civil Rights Act are not undermined by

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[95] *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997). *See also Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) ("But a party claiming that an erroneous jury instruction, or an erroneous failure to give a necessary jury instruction, bears a steep burden because we have held that '[i]n this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error.'") (quoting *McKinney*, 947 S.W.2d at 35).

incorporating additional elements the jury is required to believe to find in favor of the plaintiff. To be entitled to relief under KRS 344.040(1)(a), a plaintiff is required to convince the jury that the plaintiff's employer terminated or otherwise discriminated against the plaintiff because of the plaintiff's age and that the plaintiff was age 40 or over. Recall the General Assembly's articulated reasons for making it unlawful to discriminate against an individual based on age under the Kentucky Civil Rights Act: to incorporate and uphold the anti-discrimination policies of the Federal Civil Rights Act;[96] and "[t]o safeguard all individuals within the state from discrimination because of . . . age forty (40) and over, [and] thereby to protect their interest in personal dignity and freedom from humiliation."[97] KRS Chapter 344 also provides that the chapter "shall be construed to further the general purposes stated in this section and the special purposes of the particular provision involved."[98]

The substantially-younger requirement is not codified in any part of KRS Chapter 344; it is simply an element that a plaintiff is required to provide evidence in support of, *before the case is submitted to the jury*, in cases in which the plaintiff is attempting to prove unlawful discrimination with circumstantial evidence. Furthermore, it is undisputed that this Court has found that the substantially-younger requirement was satisfied in cases where the age gap between the plaintiff and the individual who replaced the plaintiff upon termination was narrower than the age gap between Disselkamp and the

[96] KRS 344.020(1)(a).

[97] KRS 344.020(1)(b).

[98] KRS 344.020(2).

individual she argued replaced her.[99] Disselkamp's claimed replacement, Meyers, was twelve years younger than she, and Norton points this Court to no evidence that disputes Disselkamp's arguments that she was replaced by Meyers. By submitting the substantially-younger element to the jury in Disselkamp's case, the trial court essentially incorporated an additional element the jury was required to find as true to find for Disselkamp.

Our holding today also follows the United States Supreme Court's, this Court's, and other federal courts' established principle that that the ultimate issue to be determined by the jury in civil rights cases is whether the defendant engaged in unlawful discrimination.[100] Recall the *Aikens* court's explanation that the *McDonnell Douglas* framework was never meant to be applied "ritualistically;" rather it was simply meant to establish "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[101] As this Court stated in *Williams*, the framework drops from the case after it has been decided that the plaintiff has established a prima facie case of age discrimination and the defendant

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[99] Disselkamp was 60 years old at the time Norton terminated her employment, and she was replaced by 48-year-old Michele Meyers. In *Williams*, this Court found that the plaintiff had provided sufficient evidence to prove the substantially younger requirement because Plaintiff Williams was 56-years-old when she resigned and all sixteen people who were hired after Williams left were at least eight years younger than her. In *Childers Oil Co.*, this Court found that the plaintiff had provided sufficient proof that she was replaced by a substantially younger employee when she was terminated at age 47 and was replaced by individuals who were all more than ten years younger.

[100] *See, e.g., Aikens*, 460 U.S. at 713-14 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non.").

[101] *Id.* at 715.

responds by offering a legitimate, non-discriminatory reason for the adverse action against the employee. It would be inconsistent to now hold that while the framework "drops out" after the parties meet their respective burdens, the fourth element of the prima facie case can nonetheless be submitted once more to the jury to determine if it agrees with the trial court's determination.

Finally, today's holding comports with our bare-bones approach to jury instructions. So, instructing the jury on the substantially-younger element of the *McDonnell Douglas* prima facie case is not necessary to instruct the jury as to "[a]ll essential aspects of the law necessary to decide the case . . . ."[102] If we were to allow such inclusion, we would be moving past simply establishing a gatekeeping function to ensure only meritorious age discrimination claims that are based on circumstantial evidence are submitted to the jury; instead, we would be reading into KRS 344.040 additional elements of age discrimination that the statute does not require.

f. Harmlessness of the Instructional Error

Our determination that the jury instruction in the present case misstates the law does not end our analysis. Even though we conclude that jury instructions in the present case misstated the law, giving rise to a presumption that this error prejudiced Disselkamp by affecting the verdict, we must determine if Norton is correct that the misstatement of the law was harmless because it was a mere redundancy, as neither party disputes that Disselkamp was required to present evidence tending to prove the substantially-younger requirement to survive directed verdict. As explained in more detail below,

[102] *Mason*, 565 S.W.2d at 141.

however, when we consider the consequences of finding that the instructional error did not prejudice Disselkamp, it becomes clear that Norton has failed to prove that the instructional error did not prejudice Disselkamp.

Again, the substantially-younger element has been found to be satisfied in cases were the plaintiffs were replaced by an employee who was eight years and ten years younger than the plaintiffs. In reliance on this precedent, Disselkamp was justified in assuming that the 12-year age difference between herself and the employee who arguably replaced her was more than enough to satisfy the requirement.

As provided above, the age-discrimination jury instruction submitted in Disselkamp's case stated that the jury could find in favor of Disselkamp if it found all of the following to be true: "[1] Disselkamp's employment was terminated; [2] Disselkamp was age 40 or over on the date of termination; [3] [Disselkamp was otherwise qualified for her employment position;] [4] Disselkamp's age (60) was a substantial motivating factor in Norton's decision to terminate her employment; [5] AND Disselkamp was replaced by a substantially younger person." It would have been unreasonable for the jury to conclude, considering the evidence presented at trial, that Disselkamp failed to satisfy the first three requirements, which leaves disputed questions as to whether Disselkamp satisfied the final two elements. It is possible that the jury found that Disselkamp's age (60) **was not** a substantial motivating factor in Norton's decision to terminate her employment, and she **was not** replaced by a substantially younger person. It is also possible, that the jury found that Disselkamp's age (60) **was not** a substantial motivating factor in Norton's decision to terminate her employment, but she **was** replaced by a substantially

younger person. Moreover, it is possible that the jury could have found that Disselkamp's age (60) **was** a substantial motivating factor in Norton's decision to terminate her employment, but she **was not** replaced by a substantially younger person. Under any of the possible scenarios, Disselkamp's age-discrimination claim would fail, but there is no way to determine under which scenario the jury was operating in rendering the verdict in Norton's favor.

Under the first two scenarios, the failure of Disselkamp's claim is not problematic, much less unjust. But under the third scenario, the prohibitions and purposes provided under the Kentucky Civil Rights Act would be frustrated. Under the third scenario, despite the jury's finding that Disselkamp's age was a motivating factor in Norton's decision to terminate her, which is exactly the conduct expressly prohibited under KRS 344.040, the jury would still be required to find in favor of Norton because they did not find, for whatever reason, that Disselkamp was not replaced by a substantially younger person. That result would undermine the Kentucky Civil Rights Act's purpose "[t]o safeguard all individuals within the state from discrimination because of . . . age forty (40) and over, [and] thereby to protect their interest in personal dignity and freedom from humiliation," and would be a miscarriage of justice. Because there is no way to tell which scenario occurred when the jury in the present case found in favor of Norton, the inclusion of the substantially-younger requirement in the age discrimination jury instructions prejudiced Disselkamp.

g. Direction on Remand

In sum, the Kentucky and Federal Civil Rights Acts, the Supreme Court's, and this Court's precedent concerning the Kentucky Civil Rights Act

and Kentucky's unique requirements regarding bare-bones jury instructions support holding that the substantially-younger requirement of the *McDonnell Douglas* prima facie case is an issue that must be decided by the trial court. In other words, it is a misstatement of law to submit the substantially-younger determination to the jury in discrimination cases based on circumstantial evidence. As such, the misstatement of law in Disselkamp's age-discrimination jury instructions, which was prejudicial, justifies vacating the jury's verdict with respect to this claim and remanding the claim back to the trial court to conduct further proceedings consistent with this opinion.

There is no question that Disselkamp satisfied the first three elements of the *McDonnell Douglas* prima facie case as it was articulated in *Williams*.[103] Disselkamp provided undisputed testimony that she was terminated by Norton when she was 60 years old and that she was qualified for the position from which she was discharged. Disselkamp also provided sufficient evidence to allow the trial court to find that her replacement, if the trial court believed it was Meyers who replaced Disselkamp, was substantially younger. There is also no question that Norton satisfied its burden of production to show that it had a legitimate, nondiscriminatory reason for terminating Disselkamp, given the documented evidence that Norton's stated reason for firing Disselkamp was based on its belief that Disselkamp falsified data used to support the conclusions made in the QMT report she submitted to her supervisor. At this point, the *McDonnell Douglas* framework "disappears," and Disselkamp must show that the stated reason was merely a pretext.

[103] 184 S.W.3d at 495–97 (citations omitted).

On remand, if the evidence presented by the parties is substantially the same, which includes relevant evidence discussed elsewhere in this opinion, the trial court would be justified in finding that both parties satisfied their respective burdens established under the *McDonnell Douglas* framework, and submitting the case to the jury. A proper jury instruction on remand would not include the substantially-younger element but could state something like: "You will find for the Plaintiff under this instruction if you are satisfied from the evidence that the Defendant's decision to terminate Plaintiff's employment was because of Plaintiff's age.[104] Otherwise you will find for Defendant under this instruction."

3. Jury Instructions for Disselkamp's Retaliation Claim.

Disselkamp argues on her cross-appeal for discretionary review that the Court of Appeals' opinion should be reversed insofar as it finds that the retaliation instruction did not misstate the law by including Tracy Patton's name among the list of potential retaliators. As explained above, Disselkamp properly preserved this issue for appeal and, as such, the standard of review is de novo. The retaliation instruction as submitted to the jury provided that the jury could return a verdict in Disselkamp's favor if it found that:

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[104] Based on the United States Supreme Court's interpretation of the phrase "because of" in the ADEA to mean "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action," it is questionable whether the jury instruction submitted for Disselkamp's age was a proper statement of Kentucky law based solely on its requirement that the jury find that "Disselkamp's age (60) was a substantial motivating factor in Norton's decision to terminate her employment." *See Gross*, 557 U.S. at 176. KRS 344.040(1)(a) states, like the ADEA, that it is unlawful for an employer "to discharge any individual . . . **because of** the individual's . . . age forty (40) and over . . . ." (emphasis added). However, we are without authority to determine this issue because the parties do not dispute this part of the jury instruction.

- Disselkamp engaged in a protected activity, i.e., complained to Norton in good faith, about harassment and gender discrimination by Kevin Hendrickson;
- Richard Shilling, Lori Bischoff, or Tracy Patton, the individuals responsible for terminating Disselkamp's employment, were aware of Disselkamp's complaints of harassment and gender discrimination by Kevin Hendrickson at the time the decision was made to terminate Disselkamp's employment;

  AND

- There was a causal connection between Disselkamp's termination and her complaints about Kevin Hendrickson.

Disselkamp argues that by including Patton's name among the list of potential retaliators the trial court impermissibly "commented on the evidence and inserted another potential retaliator that the jury well knew had no motive to terminate Ms. Disselkamp," and Norton was then allowed to take "full advantage" of this alleged error by making statements during closing arguments that, as Disselkamp puts it, Patton had no motivation to retaliate against Disselkamp, "so there was no possibility that retaliation occurred."

Norton responds that the instruction correctly stated the law by including all the elements required to be successful in a retaliation claim brought under KRS 344.280(1), and any error in including Patton's name in the retaliation jury instruction was harmless because the instruction merely listed Patton as one of three individuals the jury could find retaliated against Disselkamp. The Court of Appeals agreed with Norton, and so do we. As Norton points out, and Disselkamp does not dispute, the retaliation jury instructions clearly did not misstate any of the law explained above, and based on the language of the jury instructions, this assertion is correct. In fact, Disselkamp failed to direct our attention to any authority, binding or persuasive, that would support an alternate holding.

KRS 344.280(1) governs Disselkamp's retaliation claim. The statute provides that "[i]t shall be an unlawful practice for a person . . . :(1) To retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter[.]" Disselkamp's theory at trial was that Bischoff and Shilling fired her in retaliation for Disselkamp's formal complaints made against her former supervisor, Hendrickson, for gender discrimination and harassment.

As we explained in *Charalambaskis v. Asbury University*, "[a] claim for unlawful retaliation requires the plaintiff to first establish a prima facie case of retaliation, which consists of showing that (1) she engaged in a protected activity, (2) she was disadvantaged by an act of her employer, and (3) there was a causal connection between the activity engaged in and the [defendant] employer's act."[105] Furthermore, as the Court of Appeals noted, to prove the casual-connection element with circumstantial evidence, in most cases, this plaintiff is required to present proof that "(1) the decision-maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action."[106]

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[105] 488 S.W.3d 568, 583 (Ky. 2016) (internal quotations omitted). *See also Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 851–52 (Ky. 2016).

[106] *Kentucky Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2003), *as modified on denial of reh'g* (Jan. 22, 2004) (citing *Clark County School District v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509, 515 (2001)).

Even assuming for the present case that including Patton's name in the retaliation instruction was an error, Norton successfully proved that the error did not prejudice Disselkamp because the error was harmless. As the Court of Appeals correctly found, the retaliation jury instruction was harmless because use of the word "or" rendered it unnecessary for the jury to make any finding that Patton specifically knew of Disselkamp's protected conduct in complaining about her former supervisor's alleged harassment or gender discrimination, or that Patton made the decision to terminate Disselkamp in retaliation for this protected conduct. Furthermore, there was evidence in the record to support the trial court's inclusion of Patton's name in the retaliation jury instruction— Disselkamp testified that Patton was one of the three people who made the decision to terminate her and Disselkamp's Complaint named Patton as a retaliator— despite Disselkamp's later position that Patton was simply being used as a "rubber stamp" by Bischoff and Shilling to terminate Disselkamp.

In sum, the trial court did not err in including Patton's name in the list of potential individuals that the jury could find unlawfully retaliated against Disselkamp. As such, Disselkamp is entitled to no relief from the jury's verdict in favor of Norton on Disselkamp's retaliation claim.

B. Disselkamp's Requested Spoliation Instruction.

The final issue raised by Disselkamp is that the Court of Appeals erred by finding that the trial court did not abuse its discretion in denying Disselkamp's request for a missing-evidence, or spoliation, instruction. Disselkamp specifically argues that she was entitled to a spoliation instruction on "four key categories of evidence" because "spoliation was rampant in this case."

The "four key categories of evidence" that Disselkamp points to are: (1) the emails Norton referenced in its CAR report terminating Disselkamp; (2) the Ultrasound Observation Report Norton claimed that Disselkamp falsified as the stated reason for Disselkamp's termination; (3) Disselkamp's QMT binder; and (4) the handwritten piece of paper that Bischoff allegedly showed to a Norton technologist in the days following Disselkamp's termination.

Disselkamp made repeated pretrial requests, both formally and informally, that Norton produce all four categories of evidence, and the trial court ultimately entered an order compelling Norton to produce the evidence. But Norton did not produce any of the evidence, explaining after the trial court compelled disclosure that the items requested, including the QMT binder, could not be found or were destroyed due to "reasonably necessary information purge procedures." We agree with the Court of Appeals that the trial court did not abuse its discretion in declining to give a missing-evidence jury instruction based on any of the four categories of missing evidence relied on by Disselkamp.

"Trial courts are vested with discretion in deciding what admonitions and instructions to the jury are appropriate under the evidence and attendant circumstances."[107] Our standard of appellate review is for abuse of discretion.[108] A party is entitled to a missing evidence, or spoliation, instruction where "'significant evidence was forever lost'" to the prejudice of the party.[109] In

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[107] *Beglin,* 375 S.W.3d at 790 (citing *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010)).

[108] *Id.* at 790–91

[109] *Estep v. Commonwealth*, 64 S.W.3d 805, 809 (Ky. 2002) (quoting *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989)).

the realm of civil cases, this Court has not had many opportunities to explain when a party is entitled to a missing-evidence instruction. In fact, the only modern case this Court has decided that is relevant to a missing-evidence instruction is *University Medical Center v. Beglin*.

In *Beglin*, we first reaffirmed that the "approved" missing-evidence instruction is one that "sets forth the elements necessary to permit a jury to draw an adverse inference from missing evidence."[110] In establishing "the evidentiary prerequisite for giving the instruction when potentially relevant evidence is inexplicably unavailable," we rejected the assertion "that direct and conclusive evidence of intentional and bad faith destruction as pre-determined by the trial court are absolute prerequisites for obtaining the instruction."[111] While in *Beglin* we did not articulate an exact standard by which to determine when a party is entitled to a missing-evidence instruction,[112] we did provide examples of circumstances when a missing-evidence instruction is not authorized and provided some guidance as to when a trial court would be authorized to give a missing-evidence instruction. In *Beglin*, we established that a missing-evidence instruction should not be given "when the proof shows

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[110] *Beglin,* 375 S.W.3d at 788 (citing *Sanborn v. Commonwealth*, 754 S.W.2d 534, 540 n.3 (Ky. 1988) ("If you find from the evidence that there existed a tape recording. . . and that the state intentionally destroyed the tape recording, you may, but are not required to, infer that the information contained on the tape recording would be, if available, adverse to the state and favorable to the defendant." (citing *State v. Maniccia*, 355 N.W.2d 256, 259 (Iowa App. 1984))).

[111] *Id.* at 789.

[112] In fact, the *Beglin* court explicitly declined to adopt "a special rule for measuring the quantum or quality of evidence that will authorize a missing evidence instruction." *Id.* at 790. Instead, the *Beglin* court opted for a flexible standard that grants wide discretion to the trial court.

that the evidence was lost as a result of 'mere negligence[,]'"[113] nor where evidence was lost "as a result of fire, weather, natural disaster, other calamities, or destruction in the normal course of file maintenance, particularly in accordance with industry or regulatory standards."[114] We essentially explained that, apart from the above circumstances, the trial court is within its discretion to give a missing-evidence instruction when: (1) the evidence is material or relevant to an issue in the case; (2) the opponent had "absolute care, custody, and control over the evidence;" (3) the opponent was on notice that the evidence was relevant at the time he failed to produce or destroyed it; and (4) the opponent, "utterly without explanation," in fact failed to produce the disputed evidence when so requested or ordered.[115] In so finding, we relied in part on Justice, then Judge, Stephen Breyer's notation that "nonproduction alone 'is sufficient by itself to support an adverse inference even if no other evidence for the inference exists[.]'"[116]

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[113] *Id.* at 791 (quoting *Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009)).

[114] *Id.* (citing Lawson, The Kentucky Evidence Law Handbook, § 2.65[3] (4th ed. 2003) (An inference based on destruction (or loss) may not be drawn if the destroyer acted inadvertently (mere negligence) or if there is an adequate explanation for the destruction (or loss)) and *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971 (9th Cir. 2009) (No missing evidence inference is proper when evidence was destroyed long before litigation was anticipated)).

[115] *Id.* at 792.

[116] *Id.* at 789 (quoting *Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217 (1st Cir. 1982)). The *Beglin* court also quoted Justice Breyer's explanation of the rationale behind the missing evidence instruction. *Id.* ("Judge Breyer's analysis does not at all suggest the enhanced burden advocated by the hospital. His reasoning for a lesser standard becomes clearer when the reasons behind the adverse inference instruction are considered: 'The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document. . . . The other rationale for the inference has to do with its

The only case in which a Kentucky court has provided an in-depth discussion of the *Beglin* standard for a missing-evidence instruction is *Mitchell v. Baptist Healthcare System Inc.*, an unpublished Court of Appeals decision.[117] In *Mitchell*, the Court of Appeals found that the plaintiff was not entitled to a missing-evidence instruction based on missing medication and a corresponding report drafted by a nurse.[118] Based on the defense's witness testimony, Glimepiride was found on the decedent's person while he was in the ICU and was taken to the hospital pharmacy according to protocol.[119] The medication's discovery by the defense's witness and destruction by the pharmacy was documented according to hospital policy.[120] The plaintiff in *Mitchell* argued to the Court of Appeals that she was entitled to a missing-evidence instruction based on the defense's presentation of testimony that suggested that the actual cause of the plaintiff decedent's death was ingestion of Glimepiride because the Glimepiride that the defense witness claimed she found on the decedent could not be produced as evidence.[121] Relying on *Beglin* and *The Kentucky Evidence Law Handbook*, the Court of Appeals stated that it is "well-settled that a missing evidence instruction should not be utilized in cases where the evidence was lost as a result of negligence or destroyed in the normal course of business

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prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk.'" (quoting *Nation–Wide Check Corp.*, 692 F.2d at 217)).

[117] No. 2014–CA–000125-MR, 2015 WL 6082806 (Ky. App. Oct. 16, 2015).

[118] *Id.*, at *9.

[119] *Id.*

[120] *Id.*

[121] *Id.*, at *8.

management."[122] Because the evidence presented at trial showed that the medication at issue was "destroyed by the pharmacy as part of its regular course of business . . . , as set forth in written policy[,] . . . . long before there was any indication that litigation would ensue," the Court of Appeals found that the testimony regarding the evidence was properly admitted without issuing a missing-evidence instruction.[123]

As explained above, the Court of Appeals in this case found that the trial court did not abuse its discretion in declining to give a missing-evidence instruction because there was no proof offered that the requested evidence was "unaccountably missing" or was lost because of conduct by Norton that went beyond "mere negligence." The Court of Appeals relied solely on *Beglin*[124] in reaching this conclusion. Disselkamp also argues the Court of Appeals' decision is wrong because it ignores Norton's ethical duty to preserve evidence once on notice of potential litigation and because the Court of Appeals misinterpreted *Beglin*. Disselkamp asserts that a missing-evidence instruction was necessary to uphold the integrity of the judicial system because Norton, being on notice of Disselkamp's claim as early as her pre-litigation demand letter, has a duty to preserve all potentially relevant evidence.

Disselkamp also argues that by failing to implement a corporate "litigation hold" and allowing the requested evidence to be misplaced or destroyed by normal purging procedures, Norton breached its ethical duty to preserve the evidence. Disselkamp requests us to clarify a party's duty to

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[122] *Id.*

[123] *Id.*, at *9–10.

[124] 375 S.W.3d 783 (Ky. 2011) *as modified on denial of reh'g* (Mar. 22, 2012).

preserve evidence that could be relevant to potential litigation, specifically pointing to a federal district court's decision in *Scalera v. Electrograph Systems, Inc.* as the appropriate standard for a party's duty to preserve such evidence.[125]

In response, Norton argues that the Court of Appeals did not err by finding that the trial court did not abuse its discretion in denying Disselkamp's request for a missing-evidence instruction. Norton dismisses that Disselkamp's argument because a missing-evidence instruction is: (1) must be supported by trial evidence and Disselkamp's argument is based mostly on pre-trial discovery evidence; (2) is only proper when the alleged missing evidence is material to the issues at trial, and the evidence to which Disselkamp points is not because "there was no dispute about the information in the missing documents;" (3) was irrelevant because Disselkamp was allowed to argue fully her spoliation theory to the jury, even if Disselkamp did not take full advantage of this.

While we acknowledge that parties in civil litigation must not destroy evidence the parties know is relevant to potential litigation,[126] we do not agree

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[125] 262 F.R.D. 162, 171, 177 (E.D.N.Y. 2009) ("The Second Circuit has held that '[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.' . . . The court in *Zubulake* set forth several steps that counsel should take 'to ensure compliance with the preservation obligation': (1) issue a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated, (2) clearly communicate the preservation duty to 'key players,' and (3) 'instruct all employees to produce electronic copies of their relevant active files' and 'separate relevant backup tapes from others.'") (internal citations omitted).

[126] *See, e.g.*, *Beglin*, 375 S.W.3d at 788–92 (discussing the remedy available to a party when an opposing party loses or destroys evidence the opposing party knew was relevant to potential litigation). Moreover, the Rules of Professional Conduct establish that lawyers who either destroy or aid another in destroying "a document or other material having potential evidentiary value[,]" are guilty of an ethical violation. Kentucky Rules of the Supreme Court (SCR) 3.130(3.4).

with the Disselkamp that a party is always entitled to a missing-evidence instruction, to uphold "judicial integrity," in all cases where evidence is not available after the party responsible for the evidence was put on notice of potential litigation. We also decline Disselkamp's request to further clarify the specifics of any ethical duty to preserve evidence in the electronic age because this case falls clearly within the established principles as articulated in *Beglin*. Under the principles articulated and explained in *Beglin*, the Court of Appeals was correct, and the trial court in this case did not abuse its discretion in declining to give Disselkamp a missing-evidence instruction because Disselkamp failed to explain how the missing categories of evidence were material to her case, or even if at least one piece of the alleged missing evidence even existed.

Again, the "four key categories" of missing evidence to which Disselkamp points are: (1) the emails Norton referenced in its CAR report terminating Disselkamp; (2) the Ultrasound Observation Report Norton claimed that Disselkamp falsified as the stated reason for Disselkamp's termination; (3) Disselkamp's QMT binder; and (4) the handwritten piece of paper that Bischoff allegedly showed to a Norton technologist in the days following Disselkamp's termination.

As to the first category of evidence, the emails Norton referenced in its CAR terminating Disselkamp, we find that this information, even if destroyed long after the time that Norton was aware of its duty to preserve, fails under the first element described in *Beglin* because Disselkamp failed to show that the emails were material to her case. Disselkamp explains that the CAR stated that Disselkamp "presented QMT results to manager on 10-21-2012, stating

that she had all monthly data via email[,]" and that "only part of the [QMT] documentation was sent via email." Disselkamp argues that these emails were material because the cited references implied that Disselkamp had not sent all the QMT data to Bischoff. But there seemed to be no dispute between the parties at trial that Disselkamp did not send all the supporting data to Bischoff along with her QMT report. Disselkamp's argument at trial was that she did not falsify the July data for the patient shielding report but had merely misplaced the data she used to create the report, and that Bischoff used the falsification allegation as a pretext to terminate her. This Court fails to see how the emails stating that Bischoff had received the QMT report but was missing the July data would have supported Disselkamp's assertions. While we do not necessarily agree with the Court of Appeals that Disselkamp was not entitled to a missing evidence-instruction for the missing emails because she failed to show that they were destroyed due to anything other than normal purging procedures,[127] we affirm the Court of Appeals insofar as it finds that the trial

[127] We are inclined to find that the time delay alone was enough to allow an adverse inference in favor of Disselkamp given that more than eighteen months elapsed between the first time Disselkamp formally requested the documents from Norton, March 4, 2014, and when Norton sent Disselkamp its Supplemental Response, October 23, 2015, stating that the relevant emails had been "purged." In *Beglin*, we relied on the Ninth Circuit's decision in *Millenkamp v. v. Davisco Food Intern., Inc.*, 562 F.3d 971 (9th Cir. 2009), as authority for its proposition that a missing-evidence instruction is not authorized in cases where evidence was lost "as a result of fire, weather, natural disaster, other calamities, or destruction in the normal course of file maintenance, particularly in accordance with industry or regulatory standards." *Beglin,* 375 S.W.3d at 791. But in *Millenkamp*, the Ninth Circuit found that a missing-evidence instruction was not warranted where the evidence presented showed that the alleged missing evidence was destroyed long before the opposing party was on notice of any potential litigation. We cannot say that Norton purged the relevant emails long before it was put on notice of the emails' relevancy to the present litigation because Norton did not claim that the emails were purged until more than a year after Disselkamp first formally requested that Norton produce the emails. The *Beglin* court also relied on § 2.65[3] of the Kentucky Evidence Law Handbook as support for this same proposition, which states that "[a]n inference based on

court did not abuse its discretion in denying Disselkamp's request for a spoliation instruction based on the missing evidence.

As to the second category of evidence, the ultrasound observation report, which Disselkamp claims that Norton accused Disselkamp of falsifying as the stated reason for Disselkamp's termination, we likewise find that this evidence, even if destroyed long after the time that Norton was aware of its duty to preserve, fails under the first element described in *Beglin* because Disselkamp failed to show that the report was material to her case. Disselkamp argues that this evidence was material to her case because if she had access to the document she could have proven that the QMT report was in fact not falsified, thereby bolstering her claim that Norton used this reason as a pretext to terminate her employment. But as Norton points out, it was undisputed at trial that the data contained in the QMT report Disselkamp allegedly falsified did not change when Norton compiled new data for the patient-shield and ultrasound reports. We fail to see how access to the actual report submitted by Disselkamp would have made any difference to her claim that she did not falsify data. We find that the trial court did not err in declining to grant a missing-evidence instruction in favor of Disselkamp based on the missing ultrasound observation report.[128]

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destruction (or loss) may not be drawn if the destroyer acted inadvertently (mere negligence) or if there is an adequate explanation for the destruction (or loss)[.]". *Beglin,* 375 S.W.3d at 791 (quoting Lawson, The Kentucky Evidence Law Handbook, § 2.65[3] (4th ed. 2003)). Again, while purging emails according to policies of ordinary business practice is generally considered an "adequate" explanation, Norton's explanation strains credulity when considering the time delay between the time Disselkamp first formally requested the emails and when Norton provided its explanation for the emails' unavailability.

[128] It seems that the Court of Appeals did not specifically analyze whether the trial court erred in failing to grant a missing-evidence instruction based solely on the

As to the third category of evidence, Disselkamp's QMT binder, we again find that this evidence, even if destroyed long after the time that Norton was aware of its duty to preserve, fails under the first element described in *Beglin* because Disselkamp failed to show that the report was material to her case. Disselkamp claims that this evidence was material because Norton accused Disselkamp of falsifying QMT data and used the allegation as the reason it terminated her employment. Disselkamp also relies on testimony presented at trial that both she and another Norton employee took steps to preserve the QMT binder even after Bischoff directed that it be destroyed after Disselkamp was terminated, and that Bischoff placed patient-shielding reports collected by another Norton employee in Disselkamp's QMT binder. Disselkamp claims that the patient-shielding report that Disselkamp was unable to find when Bischoff requested it could have been among the patient-shielding reports Bischoff placed in Disselkamp's binder. Not only is this theory based on nothing more than speculation, like the analysis of the ultrasound observation report evidence above, having access to the QMT binder would have done little to help Disselkamp's case. Again, Disselkamp's theory at trial was that Bischoff used the falsification allegation as a pretext for discrimination and retaliation, and it was undisputed that the data contained in the QMT report Disselkamp

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missing Ultrasound Observation report, but it did find that any error was harmless because the jury heard evidence that Disselkamp presented accurate data in compiling the QMT report but could simply not find some of the supporting documents when requested. So Disselkamp's theory that Bischoff misrepresented Disselkamp's actions to provide pretext for discrimination and retaliation was not prejudiced by Norton's failure to produce the requested evidence. Even if we did find that the missing Ultrasound Report was material to Disselkamp's case, we agree with the Court of Appeals that any error in not granting a missing-evidence instruction based on this evidence would have been harmless for the same reasons.

allegedly falsified did not change whenever Norton compiled new data for the patient shield and ultrasound reports. We agree with the Court of Appeals that the trial court did not abuse its discretion in declining to give Disselkamp a missing-evidence instruction.

Finally, as to the fourth category of evidence, the handwritten piece of paper that Bischoff allegedly showed to a Norton technologist in the days following Disselkamp's termination, we conclude that the Court of Appeals did not err in upholding the trial court's declining to give a missing-evidence instruction based on this evidence. Disselkamp's claim for materiality is based on speculation and is not supported by any evidence. Disselkamp claims that Bischoff showed a Norton technologist a handwritten piece of paper a short time after Disselkamp's termination, and the technologist identified the piece of paper as a monthly patient-shielding report. Disselkamp claims that this evidence was material and should have been produced by Norton because it could have been the very patient-shielding report that Norton claimed Disselkamp falsified. We do not find this argument for materiality compelling because it seems as least equally possible that this was not Disselkamp's missing patient-shielding report. Even if we were to find that this evidence is material, there is absolutely no evidence that this evidence was unavailable due to anything other than negligence or normal purging procedures. While we do not mean to suggest that the party requesting a missing-evidence instruction has a high burden to overcome in showing that an opposing party, who had exclusive custody and control over the requested evidence, committed some affirmative act to conceal the evidence, we do find that in this circumstance, where it is entirely speculative that this lone piece of paper could have been the

elusive patient-shielding report Disselkamp herself misplaced, the trial court did not abuse its discretion in declining to give a missing-evidence instruction for this evidence.

While the trial court could have granted Disselkamp's request for a missing evidence instruction based on one or more categories of missing evidence outlined above, we cannot find that the trial court abused its discretion in declining such request. We conclude that the Court of Appeals did not err when it upheld the trial court's rulings declining to give the missing-evidence, or spoliation, instruction.

VI. CONCLUSION.

For the reasons stated in this opinion, we affirm the opinion of the Court of Appeals. Because our holding with respect to the challenge to the age-discrimination jury instruction affirms the Court of Appeals' decision to vacate the judgment and remand the case to the trial court for further proceedings, we consider moot Disselkamp's arguments relating to the propriety of the trial court's refusal to allow her to recall McGinnis as a witness to rebut Bischoff's testimony and provide additional evidence of discrimination. Consequently, we do not address this argument further because the trial court may revisit the issue under different circumstances in the event of a new trial.

Minton, C.J.; Hughes, Keller, Lambert, VanMeter and Wright, JJ., concur. Nickell, J., not sitting.

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