

**Summary of SC90032, *Michelle Fleshner v. Pepose Vision Institute, P.C.***

Appeal from St. Louis County, Judge Mark D. Seigel

Argued and submitted Nov. 4, 2009; opinion issued Feb. 9, 2010

**Attorneys:** Pepose was represented by Robert A. Kaiser, Thomas B. Weaver and Jeffrey T. McPherson of Armstrong Teasdale LLP in St. Louis, (314) 621-5070; and Fleshner was represented by Jerome J. Dobson, Michelle Dye Neumann, Jonathan C. Burns and Gregory A. Rich of Dobson, Goldberg, Berns & Rich LLP in St. Louis, (314) 621-8363.

Friend of the Court briefs were filed by the Anti-Defamation League, which was represented by J. Bennett Clark, Emma Harty and James M. Weiss of Bryan Cave LLP in St. Louis, (314) 259-2000; and the St. Louis and Kansas City chapters of the National Employment Lawyers Association was represented by John D. Lynn of Sedey Harper PC in St. Louis, (314) 773-3566, and Marie L. Gockel of Bratcher Gockel & Kingston LC in Kansas City, (816) 221-1614.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A woman fired by a surgical institute after talking with a federal investigator sued for wrongful termination of employment in violation of public policy and failure to pay overtime compensation. The jury returned a verdict in the woman's favor, and the institute sought a new trial in part because of alleged anti-Semitic statements made by a juror during deliberations. The trial court overruled the institute's motion without a hearing. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case for further proceedings. Juror statements evincing ethnic or religious bias or prejudice deprive the parties of their right to 12 fair and impartial jurors and equal protection of the law. Although the trial court used the wrong standard of causation in its directions to the jury – "because" rather than "contributing factor" – no prejudice resulted to the surgical institute. The federal fair labor standards act does not preclude recovery for wrongful termination under the public-policy exception, and there was no requirement that the woman speak with state, rather than federal, labor investigators for her to claim wrongful discharge for the institute's alleged violation of the state minimum-wage law. Further, it was not improper for the jury to consider the institute's enforcement of a non-competition agreement against the woman.

**Facts:** While Michelle Fleshner was working for Pepose Vision Institute P.C., a refractive surgery practice, the U.S. Department of Labor investigated Pepose to determine whether it failed to pay its employees overtime compensation when they worked more than 40 hours per week. A department investigator called Fleshner at home seeking background information about Pepose. Fleshner told the investigator about the hours worked by Pepose's employees and, the next morning, reported the telephone conversation to her supervisor. The next day, Pepose terminated Fleshner's employment. Fleshner sued Pepose, asserting claims for wrongful termination of employment in violation of public policy and failure to pay overtime compensation in violation of section 290.505, RSMo Supp. 2003. The jury found Pepose liable on Fleshner's claim and awarded her \$30,000 in actual damages and \$95,000 in punitive damages. After the jury was dismissed, a juror approached Pepose's attorneys and reported that,

during jury deliberations, another juror made anti-Semitic statements directed at a witness for Pepose. Another juror also approached Pepose's attorneys and said several anti-Semitic statements were made during deliberations but did not specify what was said. Pepose filed motions for a new trial on several bases, including juror misconduct. The trial court overruled Pepose's motions, concluding that jury deliberations are sacrosanct and that the juror's alleged comments did not constitute jury misconduct necessitating a new trial. The court entered judgment in accordance with the jury's verdict. Pepose appeals.

## **REVERSED AND REMANDED.**

**Court en banc holds:** (1) The trial court abused its discretion in overruling, without holding an evidentiary hearing, Pepose's motion for a new trial based on Pepose's allegation that a juror made anti-Semitic statements about one of Pepose's witnesses. The constitutional right to trial by jury requires each of the 12 jurors to be fair and impartial and approach their duty with an open mind, free from bias or prejudice. Generally, a juror's testimony about jury misconduct allegedly affecting deliberations – alleging that jurors acted on improper motives, reasoning, beliefs or mental operations – may not be used to impeach the jury verdict. One exception to the rule prohibiting juror testimony permits jurors to testify about juror misconduct occurring outside the courtroom, for example, where a juror obtains evidence extrinsic to that presented at trial, in which case the trial court conducts a hearing to determine whether the extrinsic evidence prejudiced the verdict. Here, however, Pepose alleges juror misconduct occurring inside the jury room. Although this Court never has considered whether the trial court may hear testimony about juror statements during deliberations that evince ethnic or religious bias or prejudice, other states analyzing similar situations have decided that juror testimony is admissible. When a juror makes statements evincing ethnic or religious bias or prejudice, the juror exposes his mental processes and innermost thoughts, revealing that he is not fair and impartial. It is not necessary to determine whether the statements may have had a prejudicial effect on other jurors; statements evincing ethnic or religious bias or prejudice deprive the parties of their right to 12 fair and impartial jurors and equal protection of the law. This is not a matter of “political correctness;” stereotyping has no place in jury deliberations, and the ethnicity or religion of any party or witness unrelated to the evidence should have no bearing on the outcome of a trial. Accordingly, the trial court here should have held a hearing to determine whether the alleged anti-Semitic comments were made. If, after conducting a hearing on remand, the trial court finds that such biased or prejudicial statements were made during deliberations, then the court should grant the motion for a new trial.

(2) Although the trial court erred in using a verdict director instructing the jury that it should find for Fleshner if it believed she was fired “because” she spoke with a government investigator, Pepose cannot show prejudice resulted from the instruction given. Fleshner was an at-will employee. Generally, at-will employees may be terminated for any reason or no reason, leaving such employees with no cause of action for wrongful discharge. Since *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. 1985), however, the court of appeals has recognized a narrow public-policy exception for this general rule. This Court never explicitly has recognized the public-policy exception, as it has not found the need to reach the question of adopting or rejecting the exception for 25 years. Now, however, the Court expressly adopts the following as the public-policy exception to the at-will employment doctrine: An at-will employee may not be terminated either (a) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to

statute or rules created by a government body or (b) for reporting wrongdoing or violations of law to superiors or public authorities. If an employer terminates an at-will employee for either reason, then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception.

(3) As yet, there is no Missouri approved instruction for this cause of action. “Exclusive causation” is not the proper standard for wrongful discharge based on the public policy exception. To the extent that *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo. App. 1995); *Faust v. Ryder Commercial Leasing and Services*, 954 S.W.2d 383 (Mo. App. 1997); *Bell v. Dynamite Foods*, 969 S.W.2d 847 (Mo. App. 1998); and *Grimes v. City of Tarkio*, 246 S.W.3d 533 (Mo. App. 2008), suggest otherwise, they are incorrect. Recent employment discharge cases articulate the “contributing factor” causation standard – whether an illegitimate purpose was a contributing factor in the employment decision – which was adopted in 2005 through MAI 31.24. This standard is used for cases filed under the Missouri human rights act, which modifies the at-will employment doctrine similarly to the public-policy exception. Both types of cases turn on whether an illegal factor played a role in the employer’s decision to discharge the employee, and the evidence in both types directly relates to the employer’s intent or motivation. As such, the trial court should not have used the “because” standard of causation in the verdict director it used to instruct the jury. Pepose cannot show the prejudice necessary to reverse the verdict on this ground, however, because the instruction used did not mislead, misdirect or confuse the jury, nor did it prejudice the result. In the future, trial courts should use a modified MAI 31.24, applying the “contributing factor” analysis, until this Court adopts a specific instruction for wrongful discharge based on the public-policy exception.

(4) The trial court did not err in overruling Pepose’s motions for directed verdict and judgment notwithstanding the verdict on the ground that public policy reflected in the minimum wage law did not extend to communications with federal investigators. There is a split of authority among the federal courts as to whether the federal fair labor standards act provides punitive damages, and the United States Supreme Court has not resolved the contradiction. Until this issue is resolved by legislation or a court ruling, it cannot be assumed that the act provides punitive damages, and, therefore, the act does not preempt recovery for wrongful termination under the public-policy exception. Further, it was not necessary for Fleshner to talk with state investigators rather than federal investigators for her to claim wrongful termination based on the institute’s violation of the state minimum-wage law. The public policy reflected by this law, however, is that employees should be encouraged to communicate with government labor investigators about their employers’ overtime compensation without fear of retaliation and covers communications made to federal or state officials or to the employee’s superiors. Fleshner’s disclosure came well within these parameters.

(5) The trial court did not abuse its discretion in refusing to give Pepose’s proposed limiting instruction, which would have directed the jury not to consider evidence about Pepose’s enforcement of a non-competition agreement. The court decided the jury could use the non-competition agreement and Pepose’s enforcement of it to show Pepose’s motivation in discharging Fleshner.