

SC90032

IN THE SUPREME COURT OF MISSOURI

MICHELLE FLESHNER,

Plaintiff-Respondent,

v.

PEPOSE VISION INSTITUTE, P.C.,

Defendant-Appellant.

**Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Mark D. Seigel**

**SUBSTITUTE REPLY BRIEF OF APPELLANT
PEPOSE VISION INSTITUTE**

Thomas B. Weaver (No. 29176)

Robert A. Kaiser (No. 31410)

Jeffery T. McPherson (No. 42825)

ARMSTRONG TEASDALE LLP

One Metropolitan Square

Suite 2600

St. Louis, MO 63102

(314) 621-5070/Fax: (314) 621-5065

ATTORNEYS FOR APPELLANT

PEPOSE VISION INSTITUTE, P.C.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	3
ARGUMENT.....	6
I. The trial court erred in denying defendant’s motion for new trial because defendant was deprived of its due process rights in that jury misconduct in the form of anti-semitic remarks impaired defendant’s ability to have its case heard by an impartial jury.....	6
II. The trial court erred in denying defendant’s motions for directed verdict and for jnov on plaintiff’s claim for wrongful termination because her public policy argument is preempted by the fair labor standards act.....	11
III. The trial court erred in denying defendant’s motions for directed verdict and for jnov on plaintiff’s claim for wrongful termination because plaintiff did not offer substantial evidence to support the elements necessary to recover for wrongful termination for activity protected by missouri public policy in that plaintiff’s underlying actions were not covered by the missouri minimum wage law.....	15

IV. The trial court erred in denying defendant’s motion for new trial because the trial court rejected defendant’s verdict director, in that defendant’s verdict director properly stated the law of missouri that plaintiff must prove that her allegedly protected activity was the exclusive cause of her termination.	18
V. The trial court erred in denying defendant’s motion for new trial because the trial court allowed evidence regarding defendant’s enforcement of the non-competition agreement with plaintiff and rejected defendant’s limiting instruction in that such evidence was not relevant, nor legally relevant, at least with regard to the issue of liability.	27
CONCLUSION	30
CERTIFICATE OF COMPLIANCE	31
CERTIFICATE OF SERVICE.....	31

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>After Hour Welding, Inc. v. Laneil Management Co.</i> , 324 N.W.2d 686 (Wis. 1992)	10
<i>Altenhofen v. Fabricor, Inc.</i> , 81 S.W.3d 578 (Mo. App. 2002)	13
<i>Avitia v. Metro. Club of Chicago, Inc.</i> , 49 F.3d 1219 (7th Cir. 1995)	12
<i>Baumle v. Brown</i> , 420 S.W.2d 341 (Mo. 1967)	8
<i>Bogacki v. Buccaneers Ltd. Partnership</i> , 370 F. Supp.2d 1201 (M.D. Fla. 2005)	12
<i>Brenneke v. Department of Missouri, Veterans of Foreign Wars</i> , 984 S.W.2d 134 (Mo. App. 1998)	25
<i>Broadus v. O.K. Indus., Inc.</i> , 238 F.3d 990 (8th Cir. 2001)	12
<i>Brown v. Brown</i> , 152 S.W.3d 911 (Mo. App. 2005)	6
<i>Buckner v. General Motors Corp.</i> , 760 P.2d 803 (Okla. 1988)	20
<i>Callahan v. Cardinal Glennon Hospital</i> , 863 S.W.2d 852 (Mo. banc 1993)	21, 25
<i>Catlett v. Illinois Central Gulf Railroad</i> , 793 S.W.2d 351 (Mo. banc 1990)	7
<i>Crabtree v. Bugby</i> , 967 S.W.2d 66 (Mo. banc 1998)	18, 19, 20, 24
<i>Daugherty v. City of Maryland Heights</i> , 231 S.W.3d 814 (Mo. banc 2007)	23, 26
<i>Dick v. Children’s Mercy Hosp.</i> , 140 S.W.3d 131 (Mo. App. 2004)	7
<i>Diehl v. O’Malley</i> , 95 S.W.3d 82 (Mo. 2003)	24, 25
<i>Eltiste v. Ford Motor Co.</i> , 167 S.W.3d 742 (Mo. App. E.D. 2005)	28

<i>Grimes v. City of Tarkio</i> , 246 S.W.3d 533 (Mo. App. 2008).....	25
<i>Hansome v. Northwestern Cooperage Co.</i> , 679 S.W.2d 273 (Mo. banc 1984)....	18, 19, 20
<i>Huang v. Gateway Hotel Holdings</i> , 520 F. Supp. 2d 1137 (E.D. Mo. 2007)	13
<i>Hubbard v. United Press Int’l.</i> , 330 N.W.2d 428 (Minn. 1983)	20
<i>Kendall v. Prudential Ins. Co. of America</i> , 327 S.W.2d 174 (Mo. banc 1959)	7
<i>Kirk v. Mercy Hospital Tri-County</i> , 851 S.W.2d 617 (Mo. App. S.D. 1993).....	12, 16
<i>Lambert v. Ackerley</i> , 180 F.3d 997 (9th Cir. 1999).....	12
<i>Lifritz v. Sears, Roebuck & Co.</i> , 472 S.W.2d 28 (Mo. App. 1971).....	7
<i>Lucht v. Encompass Corp.</i> , 491 F. Supp. 856 (S.D. Iowa 2007)	13
<i>Luethans v. Washington University</i> , 894 S.W.2d 169 (Mo. banc 1995).....	18
<i>Marrow v. Allstate Sec. & Inv. Serv., Inc.</i> , 167 F.Supp.2d 838 (E.D. Pa. 2001).....	12
<i>Marshall v. State</i> , 854 So. 2d 1235 (Fla. 2003).....	10
<i>Means v. Sears, Roebuck & Co.</i> , 550 S.W.2d 780 (Mo.1977).....	19
<i>Moore v. Freeman</i> , 355 F.3d 558 (6th Cir. 2004)	12
<i>Murrell v. State</i> , 215 S.W.3d 96 (Mo. banc 2007)	6
<i>Neighbors v. Wolfson</i> , 926 S.W.2d 35 (Mo. App. 1996)	8
<i>O’Brien v. Dekalb-Clinton Counties Ambulance Dist.</i> , 1996 WL 565817 (W.D. Mo. 1996)	12
<i>Osborn v. Prof’l Serv. Indus., Inc.</i> , 872 F. Supp. 679 (W.D. Mo. 1994)	17
<i>Porter v. Reardon Mach. Co.</i> , 962 S.W.2d 932 (Mo. App. 1998).....	15, 17
<i>Powell v. Allstate Insurance Company</i> , 652 So.2d 354 (Fla. 1995).....	10

<i>Prewitt v. Factory Motor Parts, Inc.</i> , 747 F. Supp. 560 (W.D. Mo. 1990).....	12, 13
<i>Schoor v. Wilson</i> , 731 S.W.2d 308 (Mo. App. 1987).....	19, 26
<i>Shawcross v. Pyro Products, Inc.</i> , 916 S.W.2d 342 (Mo. App. E.D. 1995)	12, 13
<i>State v. Couch</i> , 256 S.W.3d 64 (Mo. 2008).....	28
<i>State v. Shain</i> , 134 S.W.2d 58 (Mo. 1939).....	28
<i>State v. Stephens</i> , 88 S.W.3d 876 (Mo. App. 2002).....	8
<i>Trapp v. Von Hoffmann Press, Inc.</i> , 2002 WL 1969650 (W.D. Mo. 2002).....	12, 17
<i>Travis v. Gary Community Mental Health Ctr., Inc.</i> , 921 F.2d 108 (7th Cir. 1990).....	12
<i>Travis v. Stone</i> , 66 S.W.3d 1 (Mo. banc 2002)	8
<i>Ward v. Kan. City S. Ry. Co.</i> , 157 S.W.3d 696 (Mo. App. W.D. 2004)	29
<i>Williams v. Barnes Hosp.</i> , 736 S.W. 2d 33 (Mo. banc 1987)	9

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE DEFENDANT WAS DEPRIVED OF ITS DUE PROCESS RIGHTS IN THAT JURY MISCONDUCT IN THE FORM OF ANTI-SEMITIC REMARKS IMPAIRED DEFENDANT’S ABILITY TO HAVE ITS CASE HEARD BY AN IMPARTIAL JURY.

A. Standard of review.

The trial court denied PVI’s motion for new trial based on juror misconduct because the court concluded that “as a matter of law, even if true,” the allegations of anti-Semitic statements did not constitute juror misconduct justifying a new trial pursuant to Rules 78.04 and 78.05. L.F. 0625. Because the trial court denied PVI’s motion on this issue as a matter of law, not as a matter of discretion, the standard of review is *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007); *Brown v. Brown*, 152 S.W.3d 911, 914 (Mo. App. 2005).

If the trial court had considered the evidence of the anti-semitic statements during deliberations and decided that the conduct did not occur or did not affect the verdict, then that review might be for abuse of discretion. But that is not what happened here. The trial court did not exercise any discretion. Instead the trial judge expressly held as a matter of law that he could not even consider evidence that jurors openly expressed religious bias. Dec. 14, 2007 Tr. at 5; L.F. 0625. Review for abuse of discretion does not apply when the trial court does not exercise its discretion.

Even if the Court concludes that the trial judge exercised discretion in declining to hold an evidentiary hearing, the judge did so based on a misunderstanding of law about his authority to do so. A trial court abuses its discretion if its decision rests on a misunderstanding of law. *Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 137 (Mo. App. 2004).

B. Cases involving juror misconduct in voir dire support reversal.

Cases involving issues of juror misconduct during voir dire are instructive here because they emphasize the litigants' fundamental right to a fair and impartial jury and a verdict untainted by impermissible bias. *Kendall v. Prudential Ins. Co.*, 327 S.W.2d 174, 177 (Mo. banc 1959); *Catlett v. Illinois Central Gulf R.R.*, 793 S.W.2d 351, 353-354 (Mo. banc 1990). The procedural differences that plaintiff highlights are irrelevant to the protection of that right.

PVI is not, as plaintiff claims, leaping from "expressed prejudices to unexpressed prejudices" during voir dire or complaining about hidden bias. Resp. Br. at 28. Here the anti-Semitism was not hidden, but openly and repeatedly expressed. L.F. 0539-0540, 0541-0542. In order to insure a party's right to an impartial jury, the trial court should be permitted to consider the impact of openly expressed impermissible bias that occurs during deliberations, just as the court does with like expressions of bias during voir dire. Allowing a trial court to consider evidence that a juror openly advocated an impermissible religious bias during deliberations will not open a Pandora's box or "allow every jury verdict to be questioned on the possible biases of every juror." Resp. Br. at 29. The only verdict subject to question would be those tainted by openly expressed bias.

Without citation to any authority or claiming waiver, plaintiff suggests that religious bias could have been asked about during voir dire. Resp. Br. at 29. Even assuming a prospective juror would admit such a bias in open court, requiring a party to inquire during voir dire about the potential for racial, religious, ethnic, or gender bias in every case, regardless of the issues involved, would be far more disruptive to jury trials than allowing a trial court to consider a circumstance in which evidence shows that jurors openly advocated a verdict based on impermissible bias during deliberations.

C. The jury misconduct here falls outside the limitations of the Mansfield Rule.

The Mansfield Rule does not preclude all juror affidavits or testimony regarding any matter affecting juror deliberations or a jury verdict. Plaintiff concedes that the Mansfield Rule only applies to attempts to impeach a verdict based on matters inherent in the verdict. Resp. Br. at 26. Matters “inherent in the verdict” include that a juror did not understand the verdict, did not join the verdict, voted because he or she misunderstood the evidence, law, or witness testimony, or any other matters “resting alone in the juror’s breast.” *Baumle v. Brown*, 420 S.W.2d 341, 348 (Mo. 1967). As plaintiff acknowledges, Missouri courts have allowed parties to challenge verdicts based on juror misconduct, including when external or extraneous factors may have improperly affected the jury deliberations and verdict. Resp. Br. at 30; *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. banc 2002); *State v. Stephens*, 88 S.W.3d 876, 882 (Mo. App. 2002); *Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo. App. 1996). The anti-Semitic statements shown by the affidavits in this case related to factors wholly extraneous to the evidence and law applicable to the issues and contrary to the right to a fair and impartial jury.

PVI presented evidence that, during deliberations, certain jurors openly expressed anti-Semitic bias and advocated a verdict for plaintiff based on the religion of Dr. Pepose and Feigenbaum. This evidence does not relate to mental processes locked in a juror's breast, but establishes an impermissible bias openly expressed by the jurors. Recognition of a trial court's right to consider this evidence does not threaten to put a juror's "mental processes and innermost thoughts on a slide for examination under the judicial microscope" (Resp. Br. at 26), but would only allow the court to decide the fact and effect of open expressions of impermissible bias against protected classes.

Plaintiff suggests that the lack of evidence in the record that Pepose and Feigenbaum are Jewish somehow diminishes the significance of the anti-Semitic comments allegedly made by a juror. But the fact that there was no evidence that Pepose and Feigenbaum were Jewish, and the fact that their religious or ethnic backgrounds were completely irrelevant, are *precisely* why it should be treated like other cases in which jurors have improperly considered wholly extraneous or external factors in their deliberations. Indeed, open advocacy of bias is a far more insidious threat to impartial jury verdicts than other types of extraneous or external factors.

Remarkably, plaintiff argues that there is no public policy supporting a claim of juror misconduct based on evidence of bias openly expressed during deliberations. Resp. Br. at 30. Obviously, the fundamental right to a jury trial is the policy justification for allowing such a challenge. *See Williams v. Barnes Hosp.*, 736 S.W. 2d 33, 36 (Mo. banc 1987) (constitutional right to a fair and impartial jury is at the cornerstone of our judicial system). On the other hand, there is no policy reason for applying the Mansfield Rule to

protect judgments tainted by jurors who openly advocate a verdict based on an impermissible bias against a protected class.

Reversal in this case would not, as plaintiff claims, disrupt full and frank discussion during jury deliberations, undermine the finality of verdicts, or allow verdicts to be set aside with ease. This has not happened in Wisconsin and Florida, which allow verdicts to be challenged on these grounds. PVI only asks this Court to hold that a trial court has discretion to find that a juror's expression of bias against a protected class may constitute juror misconduct justifying a new trial. Juror arguments based on openly expressed, impermissible prejudice have no place in "full and frank" discussions in the jury room and should be subject to judicial review.

While this is a case of first impression in Missouri, other state and federal courts have confronted the precise issue presented here and have concluded that a trial court can and should consider evidence that a juror openly expressing impermissible bias during deliberations. See *After Hour Welding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686 (Wis. 1992); *Powell v. Allstate Insurance Company*, 652 So.2d 354 (Fla. 1995); *Marshall v. State*, 854 So. 2d 1235, 1240 (Fla. 2003). To the same effect are cases cited in the amicus brief filed on behalf of the Anti-Defamation League. These must be powerful authorities, because plaintiff fails to discuss them, much less distinguish them. Plaintiff makes no attempt to explain how they were decided wrongly or why they should not be followed. There is no indication that there have been widespread challenges to jury verdicts in these other jurisdictions. Based on the constitutional right to a fair and impartial jury, this Court should join these other states in holding that a trial court may

consider a motion for a new trial based on evidence that during deliberations one or more jurors openly advocated impermissible bias against a party. The alternative – ignoring evidence of anti-Semitism to protect the sanctity of the verdict – would irrationally sacrifice the right to a fair and impartial jury in the name of procedural finality.

As a matter of law, the trial court erred in holding that it had no authority to consider the jurors’ misconduct. The Court should reverse and remand for a new trial, or, in the alternative, for a hearing on PVI’s motion.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON PLAINTIFF’S CLAIM FOR WRONGFUL TERMINATION BECAUSE HER PUBLIC POLICY ARGUMENT IS PREEMPTED BY THE FAIR LABOR STANDARDS ACT.

The judgment of the trial court should be reversed because the plaintiff’s claim is preempted. In reviewing plaintiff’s baseless arguments to the contrary, it is important to bear in mind a fact that she would have the Court ignore – plaintiff’s claim is based on a theory of retaliation for talking to a federal DOL investigator. *See* Tr. 239-256. As a result, her claim is preempted by the federal Fair Labor Standards Act (“FLSA”), which provides a complete range of remedies. In addition to the many federal courts finding preemption, Missouri courts have also held that the FLSA allows for complete relief and preempts state wrongful discharge claims.

A. The FLSA provides a complete range of remedies.

Plaintiff is incorrect in asserting punitive damages are not available under the FLSA. As noted in PVI’s opening brief, federal courts have clearly held that punitive

damages are available for FLSA retaliation claims. *See, e.g., Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999); *Trapp v. Von Hoffmann Press, Inc.*, 2002 WL 1969650, *2 (W.D. Mo. June 12, 2002); *Marrow v. Allstate Sec. & Inv. Serv., Inc.*, 167 F.Supp.2d 838, 842-843 (E.D. Pa. 2001); *O'Brien v. Dekalb-Clinton Counties Ambulance Dist.*, 1996 WL 565817, *6 (W.D. Mo. 1996); *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 565 (W.D. Mo. 1990). Missouri state courts have also found that punitive damages are available for such claims, as the FLSA provides a complete remedy for retaliation. *See, e.g., Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. App. E.D. 1995); *Kirk v. Mercy Hospital Tri-County*, 851 S.W.2d 617, 620 (Mo. App. S.D. 1993).

Damages for emotional distress are also available under the FLSA. *See, e.g., Moore v. Freeman*, 355 F.3d 558, 563-564 (6th Cir. 2004); *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1228-1229 (7th Cir. 1995); *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990); *Bogacki v. Buccaneers Ltd. Partnership*, 370 F. Supp.2d 1201, 1203 (M.D. Fla. 2005). In *Moore*, the Sixth Circuit held that “[a]lthough the provision does not explicitly allow damages for emotional injuries, a plain reading of the text of the provision indicates that it does not limit the type of damages that are available.” *Moore*, 355 F.3d at 563. The court in *Moore* also notes that other circuits, including the Eighth Circuit, “have allowed damages for emotional distress to stand.” *Id.* at 564 (citing *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 992 (8th Cir. 2001), and *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999)).

In *Altenhofen v. Fabricor, Inc.*, 81 S.W.3d 578 (Mo. App. 2002), the court held that emotional distress damages are recoverable under the FLSA's damages section. *Id.* at 587. The *Altenhofen* court cited the repeated holdings of the Seventh Circuit that damages for emotional distress are appropriate for intentional torts such as retaliatory discharge under the FLSA. *Id.* The holding regarding emotional distress damages in *Altenhofen* is consistent with a prior holding of the Missouri Court of Appeals. *See Shawcross*, 916 S.W.2d at 345 (agreeing that the FLSA provides a complete range of remedies).

Plaintiff argues that *Huang v. Gateway Hotel Holdings*, 520 F. Supp. 2d 1137 (E.D. Mo. 2007), is controlling case law regarding this issue. Plaintiff fails to note the split on this issue within the Eighth Circuit. In *Lucht v. Encompass Corp.*, 491 F. Supp. 856 (S.D. Iowa 2007), the district court was faced with the issue of whether the Family and Medical Leave Act (FMLA) preempted a claim for wrongful termination. The court held that a claim for wrongful termination in violation of public policy in Iowa is similar to a Missouri wrongful termination claim in that such a claim is preempted when the underlying statute provides a comprehensive remedy. *Id.* at 867. The court also held the FMLA's remedial provisions mirror those in the FLSA. *Id.* The court then cited *Prewitt*, 747 F. Supp. 560, to hold that the FMLA – just like the FLSA – preempted a plaintiff's common law wrongful termination claim. *Id.*

Because the Eighth Circuit itself has not addressed this issue, *Huang* is not controlling. Instead, this Court should adopt the well-reasoned federal and state court

opinions that declare common law claims, such as plaintiff's claim in this case, to be preempted by the FLSA.

B. Judge Stohr's remand order did not address preemption.

Plaintiff's claim about the ruling of the federal court misrepresents the facts. Judge Stohr's order on plaintiff's motion to remand simply addressed the issue of whether plaintiff's claim invoked and sought relief under state law. L.F. 0661. The order stated that while plaintiff's reliance on section 290.500, RSMo, might form the basis for dismissal of the claim on the merits, plaintiff was nevertheless "the master of her own claims, and is free to choose to assert only state law claims, even where there might exist federal causes of action based on the same factual allegations." L.F. 0661-0662. Thereafter, plaintiff voluntarily dismissed her claim based on the state minimum wage and overtime law and admitted that the statute did not apply. L.F. 0052-0053, 0082, 0109.

Judge Stohr's order does not address or even mention the issue of preemption. Judge Stohr merely held that, because plaintiff pled wrongful termination based on a public policy from a Missouri statute, her cause of action was under state law. *Id.* Indeed, Judge Stohr noted that PVI might have a good argument for dismissal of the claim. L.F. 0662. PVI agrees that plaintiff is attempting to bring a common law claim created by Missouri courts; however, that claim is preempted by the FLSA.

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTIONS FOR DIRECTED VERDICT AND FOR JNOV ON PLAINTIFF’S CLAIM FOR WRONGFUL TERMINATION BECAUSE PLAINTIFF DID NOT OFFER SUBSTANTIAL EVIDENCE TO SUPPORT THE ELEMENTS NECESSARY TO RECOVER FOR WRONGFUL TERMINATION FOR ACTIVITY PROTECTED BY MISSOURI PUBLIC POLICY IN THAT PLAINTIFF’S UNDERLYING ACTIONS WERE NOT COVERED BY THE MISSOURI MINIMUM WAGE LAW.

Plaintiff bases her argument that she offered substantial evidence to support the elements of her claim on *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo. App. 1998), in which a plaintiff brought a wrongful-termination claim under the whistleblower category of the public policy exception. *Id.* at 937. At no time in this case has plaintiff claimed whistleblower activities, status, or protection. Thus, reliance on *Porter* is unfounded.

Further, even if *Porter* were relevant, plaintiff fails to detail the entire holding of the case. In *Porter*, it was held that the plaintiff “was required to show ‘the legal provision violated by the employer, and it must affirmatively appear from the face of the petition that the legal provision in question involves a clear mandate of public policy,’ and that he was fired for reporting a violation of that provision.” *Id.* at 939. The court specifically held that a plaintiff attempting to prove a wrongful termination claim must show which legal provision was violated. *Id.*

Here, plaintiff specifically relies on “290.500, RSMo., *et seq.*, including but not limited to 290.505, 290.520, and 290.525 RSMo. (2003),” as the source of public policy. L.F. 0011. The obvious problem for plaintiff is that this statute, at the time of plaintiff’s pleading, did not cover plaintiff, who was covered by the FLSA. *See* § 290.528, RSMo. Plaintiff’s counsel admitted this at plaintiff’s deposition, L.F. 0052-0053, 0082, and by voluntarily dismissing Count II of plaintiff’s petition. L.F. 0109.

Plaintiff also cites *Kirk*, 851 S.W.2d at 621, for the contention that she does not have to rely on any direct violation of law. The *Kirk* case simply held that, while the statute did not specifically make the employer’s underlying actions illegal, the statute and regulation to which the plaintiff pointed displayed that she would face discipline and prosecution by the state if she did not conduct herself in the fashion that caused her termination. *Id.* The difference between *Kirk* and this case is that the statute and regulations in *Kirk* embodied a public policy directly related to the plaintiff. *Id.* Here, by plaintiff’s own admission, there is no relationship whatsoever between plaintiff and § 290.500.

Plaintiff attempts to broaden a statute that specifies violations of the Missouri Minimum Wage Act to express a general public policy about employees who testify in *any* proceeding by *any* agency of *any* government to enforce *any* law regarding minimum wages and overtime. Plaintiff clearly testified that the investigator with whom she cooperated was from the federal USDOL. *See* Tr. 239-256. Plaintiff admitted that she did not talk to anybody from MODOL. Tr. 309. The Missouri statute only purports to address dealings with state authorities – not dealings with federal authorities.

The public policy exception to the Missouri's at-will employment doctrine is explicitly a narrow exception. *See Trapp v. Von Hoffmann Press, Inc.*, 2002 WL 1969650, *2-3 (W.D. Mo. 2002); *Porter v. Reardon*, 962 S.W.2d 932, 936-937 (Mo. App. 1998); *Osborn v. Prof'l Serv. Indus., Inc.*, 872 F. Supp. 679, 681 (W.D. Mo. 1994). Rather than allowing the Missouri legislature to expand the public policy of the state, if it sees fit to do so, plaintiff is asking the Court to broaden the law. The Court should reject the invitation.

Notably, plaintiff had a full and fair opportunity to plead that her termination was against the public policy created by the FLSA, 29 U.S.C. § 215(a)(3). Instead, she attempted to draft her petition artfully to avoid any reference to or reliance on the FLSA, pleading that her claim was based solely on Missouri law. She did so in order to escape removal to federal court, but she now wants to claim that the alleged actions of PVI -- which, even if proven, could only be violations of the FLSA -- are against the public policy of Missouri. In the exercise of litigation strategy, plaintiff simply brought a claim that does not apply to the parties in this case. The judgment in her favor should be reversed.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT REJECTED DEFENDANT’S VERDICT DIRECTOR, IN THAT DEFENDANT’S VERDICT DIRECTOR PROPERLY STATED THE LAW OF MISSOURI THAT PLAINTIFF MUST PROVE THAT HER ALLEGEDLY PROTECTED ACTIVITY WAS THE EXCLUSIVE CAUSE OF HER TERMINATION.

Plaintiff asks the Court to abandon two decades of Missouri law, including two decisions of this Court, applying an exclusive causation standard to wrongful discharge cases. The exclusive causation standard is based on this Court’s recognition that wrongful discharge cases are limited exceptions to the at-will employment doctrine, and that the exclusive causation standard is appropriate to minimize the risk that employees will unreasonably interfere with an employer’s legitimate and necessary personnel decisions. *Luethans v. Washington University*, 894 S.W.2d 169, 171 n.2 (Mo. banc 1995); *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984); *Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998).

If the Court decides to reject precedent and abandon the exclusive causation standard, plaintiff’s own analysis and argument would require adoption of the but-for test and use of M.A.I. 19.01, which requires that the jury find that plaintiff’s allegedly protected conduct “directly caused or directly contributed to cause” plaintiff’s discharge. M.A.I. 19.01. Even if exclusive causation were not required, plaintiff’s verdict director applying the because-of standard was error. Whether the Court maintains exclusive

causation standard or applies the but-for test, the case should be reversed and remanded for a new trial based on instructional error.

A. The standard of review is *de novo*.

Failure to give an applicable M.A.I. instruction is presumptively prejudicial error. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780, 786 (Mo. banc 1977). If the Court maintains the exclusive-causation standard currently applicable in wrongful discharge cases, the trial court erred in failing to give the instruction PVI tendered based on M.A.I. 23.13. If the Court abandons the exclusive-causation standard and applies the but-for standard, then the trial court still committed prejudicial error in giving Instruction 7 because it used the less demanding because-of standard. *Schoor v. Wilson*, 731 S.W.2d 308, 313-314 (Mo. App. 1987) (prejudicial error to direct jury to make a finding on a lesser standard than law requires.) Under the but-for test, the proper instruction would be based on M.A.I. 19.01.

Plaintiff's discussion of plain error is inapplicable to this case. Resp. Br. at 39. PVI properly objected to plaintiff's verdict director. Tr. 776. Plaintiff cannot and does not identify any basis for claiming that PVI waived its objection to Instruction 7, and plain error does not apply.

B. The exclusive-causation standard in *Hansome* and *Crabtree* should apply.

Plaintiff is incorrect in arguing that the exclusive causation standard adopted in *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275 (Mo. banc 1984), and confirmed in *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. banc 1998), was founded on and limited to the statutory language of section 287.780. Nothing in *Hansome* or *Bugby*

suggests that the application of those cases is so limited. This Court’s adoption of an exclusive-causation standard is based on the purpose behind the Workers’ Compensation Act, the balancing of policy considerations, and the limited scope of the exceptions to the at-will employment doctrine. The same policy rationale that *Crabtree* identifies as supporting exclusive causation in a workers’ compensation retaliatory discharge case applies equally to the other three wrongful discharge exceptions to the at-will employment doctrine.¹ *Crabtree*, 967 S.W.2d at 72.

Plaintiff argues that the Court in *Crabtree* strictly construed section 287.780 “because the central purpose of the Workers’ Compensation Act is to provide benefits for work-related injuries and not to provide job security.” Resp. Br. at 42. The same analysis applies here. The central purpose of the other three public policy exceptions is to encourage people to act lawfully, encourage the reporting of violation of public policy, and encourage participation in acts that public policy would encourage, and not to provide job security. For the same reason, these exceptions should be strictly construed, like the exception for workers’ compensation retaliatory discharge, and the same exclusive-causation standard should apply to all four of the exceptions to the at-will employment doctrine.

¹ The NELA amicus claims that other states do not require exclusive causation in retaliatory discharge cases. Amicus Br. at 20-21. Many of these cases involve statutes on which the courts must defer to the legislature. *E.g.*, *Buckner v. General Motors Corp.*, 760 P.2d 803 (Okla. 1988); *Hubbard v. United Press Int’l.*, 330 N.W.2d 428 (Minn. 1983). None of them consider the special nature of retaliatory discharge cases or their ready susceptibility to abuse. Thus, none offer a persuasive reason for abandoning the exclusive causation requirement that Missouri courts have historically required.

C. Reversal is still required even if the Court abandons exclusive causation.

If the Court concludes that exclusive causation does not apply because wrongful discharge claims are common law torts, as both plaintiff and the amicus urge, then the Court should adopt the but-for standard under *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. banc 1993), and require the use of M.A.I. 19.01. But-for causation and a requirement that the jury find that the protected conduct directly caused or directly contributed to cause the discharge is the lowest standard consistent with the recognition that these are narrow exceptions to the at-will employment doctrine and the need to allow employers to make responsible employment decision without granting employees unreasonable opportunity to take advantage of an often vaguely defined and evolving public policy.

Both plaintiff and NELA repeatedly emphasize that plaintiff's claim is a common law tort claim, and NELA acknowledges that M.A.I. 19.01 embodies the "contributing cause" standard applicable to tort claims. Resp. Br. at 43 ("whistleblower exception . . . arises under the common law of tort"); NELA Br. at 9 (M.A.I. 19.01 reflects the "contributing cause" standard applicable in tort cases); 10 ("obvious that a tort standard of causation . . . would apply to a tort cause of action"); 11 ("claim of retaliatory discharge arises under the common law of torts and . . . must be governed by common law tort standards"). Thus, under the analysis advocated by plaintiff and NELA, plaintiff's claim is a common law tort and the but-for causation standard and M.A.I. 19.01 would therefore apply.

Despite basing their entire challenge to exclusive causation on the argument that plaintiff's claim is a common law tort to which tort causation standards should apply, plaintiff and NELA then ask the Court to ignore the but-for causation standard and the MAI instruction applicable to those common law torts, and instead adopt the contributing-factor standard that is used in MHRA cases or the because-of test that is not used anywhere. NELA argues that M.A.I. 31.24 and its contributing-factor standard applicable to statutory claims under the MHRA would be a "useful" verdict director because "it is already conveniently worded in terms of an employment claim." NELA Br. at 9-10. The language of a verdict director should be based on what the law requires a plaintiff to prove, not on what might be useful or convenient to a plaintiff. As its own brief demonstrates, NELA misstates the law when it declares that the MHRA contributing factor standard "is fully consistent with tort principles." NELA Br. at 10. The common law tort principles on which plaintiff and NELA rely require at least but-for causation and the "directly caused or directly contributed to cause" language in M.A.I. 19.01, not the contributing factor language in M.A.I. 31.24 or the never-used because-of standard set forth in plaintiff's verdict director.

Even if plaintiff were right that the exclusive-causation standard is contrary to the public policy giving rise to these narrow exceptions to the at-will employment doctrine, a but-for causation standard of M.A.I. fully protects employees from being illegally discharged for engaging in protected conduct. A but-for causation standard is adequate to prevent an employer from "legally [firing] employees for refusing to engage in or reporting illegal conduct simply by showing that some other factor . . . played a role in

the employees discharge.” Resp. Br. at 46. And, particularly in light of the importance of protecting an employer’s right to make responsible day-to-day decisions without improper interference, plaintiff can offer no argument why a discharged employee bringing a claim under one of the narrow public policy exceptions to the at-will employment doctrine should not at least have to show that she or he would not have been discharged but for the protected conduct.

D. The MHRA “contributing factor” test does not apply.

PVI recognizes that in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007), this Court held that the plaintiff in an MHRA case needed only to show that an improper factor contributed to the adverse employment decision. But the holding rested entirely on statutory language not applicable to wrongful discharge claims based on public policy. *Id.* at 818. In interpreting a statute, this Court must follow the legislature’s policy choice. On the other hand, under plaintiff’s own analysis, the common law but-for standard would apply to plaintiff’s common law claim for wrongful discharge.

Fundamental policy concerns also support a stricter causation standard to wrongful-discharge claims than the contributing-factor standard applied to statutory claims under the MHRA. If an employer makes a decision based on age, race, gender, disability, or religion rather than on the individual’s qualifications or for other valid business reasons, the employer is properly subject to a discrimination suit. An employee cannot set up his or her employer in this type of claim.

Wrongful-discharge claims based on public policy are subject to abuse. An employee concerned about being disciplined or discharged for performance reasons, or exposed to termination due to personnel cutbacks, may attempt to set up the employer by claiming to engage in allegedly protected conduct and then claiming retaliation. This risk alone justifies a higher causation burden in wrongful discharges cases. See *Crabtree*, 967 S.W.3d at 72. In short, in discrimination claims, it is solely the intent of the employer that is under scrutiny; under a public policy exception, the motives of the employee are also part of the analysis. Employees, fearing good-faith adverse employment action, may act to cloud an otherwise routine personnel decision.

In addition, Missouri courts have consistently and emphatically recognized that public policy wrongful discharge claims are a narrow exception to the at-will employment doctrine. There are no countervailing policy considerations that must be weighed against claims under the MHRA. Finally, the protected conduct in common law wrongful discharge claims can be and are based on evolving and often vague public policy concerns, unlike the clearly prohibited conduct under this MHRA. All of these factors weigh against applying the MHRA contributing-factor standard to common law wrongful discharge claims.

E. *Diehl* and *Brenneke* do not support a contributing-factor standard.

Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003), does not support plaintiff's argument that the contributing factor test should apply to wrongful discharge claims sounding in tort. *Diehl* held only that claims under the MHRA were similar to claims

subject to jury trials prior to 1820. Nothing in *Diehl* suggests that the causation standard in a common law tort claim should be the same as the standard in an MHRA claim.

Citing dicta from *Brenneke v. Department of Missouri, Veterans of Foreign Wars*, 984 S.W.2d 134 (Mo. App. 1998), plaintiff suggests that the Western District has not embraced the exclusive causation standard. Plaintiff fails to cite or explain *Grimes v. City of Tarkio*, 246 S.W.3d 533, 536 (Mo. App. 2008), in which the Western District expressly held that the plaintiff in a wrongful discharge case must prove “an exclusive causal connection between his discharge and the violation that he reported.”

Plaintiff also mischaracterizes *Brenneke*, which does not, as plaintiff claims, suggest or endorse adoption of the contributing factor standard used in MHRA cases, but instead refers to causation under Missouri common law torts generally. *Brenneke*, 984 S.W.2d at 139-40. As noted, Missouri generally requires but-for causation for common law torts. *Callahan*, 863 S.W.2d at 862-63. Under but-for causation, the applicable M.A.I. instruction is 19.01. Thus, to the extent *Brenneke* suggests a standard other than exclusive causation, it suggests but-for causation and use of M.A.I. 19.01, not the contributing factor test in M.A.I. 23.13. *Brenneke* does not support affirmance of this judgment.

F. The because-of language in the verdict director is not consistent with a but-for standard.

Plaintiff cites no authority supporting the because-of standard used in her verdict director. None of the cases plaintiff presented to the trial court with instructions approve a verdict director containing the because-of standard used here. L.F. 0465. Even under

plaintiff's argument, a verdict director using a because-of standard is not appropriate in a common law tort case to which the but-for causation standard applies.

A because-of standard is not a but-for standard. Under M.A.I. 19.01, a but-for standard requires a jury to find that the protected conduct directly caused or directly contributed to cause the discharge. Under this Court's analysis in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007), a statutory because-of standard allows a lesser burden than but-for causation. In *Daugherty* this Court held that the "because of" statutory language of Section 213.055 was consistent with a contributing factor standard. If, as plaintiff claims, "because of" as used in the Section 213.055 does not require but-for causation, then plaintiff's verdict director using a because-of standard did not submit but-for causation. Thus, even under but-for causation, the Court must reverse and remand because Instruction 7 directed the jury to make a finding on causation under a lesser standard than the law requires. *Schoor v. Wilson*, 731 S.W.2d 308, 313-14 (Mo. App. 1987).

The exclusive causation standard is appropriate because it reflects the necessary balance between the public policy concerns behind the narrow exceptions to the at-will employment doctrine and an employees' need to make responsible personnel decisions. If the Court abandons the exclusive causation, the minimum standard it should apply is the but-for standard consistent with plaintiff's characterization of her claim as a common law tort. In either case, Instruction 7, plaintiff's verdict director, submitted the wrong standard to the jury, and this Court should reverse and remand for a new trial.

V. THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION FOR NEW TRIAL BECAUSE THE TRIAL COURT ALLOWED EVIDENCE REGARDING DEFENDANT’S ENFORCEMENT OF THE NON-COMPETITION AGREEMENT WITH PLAINTIFF AND REJECTED DEFENDANT’S LIMITING INSTRUCTION IN THAT SUCH EVIDENCE WAS NOT RELEVANT, NOR LEGALLY RELEVANT, AT LEAST WITH REGARD TO THE ISSUE OF LIABILITY.

Plaintiff incorrectly asserts that PVI’s enforcement of the non-competition agreement with plaintiff was relevant because it “makes it more likely than not” that plaintiff was terminated due to her cooperation with the DOL’s investigation. There was no evidence at trial that even remotely linked, inferentially or otherwise, the decision to enforce a valid non-competition agreement with the decision to discharge plaintiff several months before. Indeed, rather than reflecting on PVI’s motive for the decision to terminate employment, it gave the jury a roving commission to punish PVI for any behavior it found objectionable, including the enforcement of a lawful non-competition agreement. Missouri law already provides a remedy for such claims under a malicious prosecution theory, with well-established standards that do not unreasonably punish a party for availing itself of the judicial system. In this case, there was no attempt – and certainly no evidence – to causally link the dispute over the non-competition agreement to the claim for wrongful discharge. Its admission allowed the jury to assess damages based on their assessment of a separate legal dispute that was not properly part of plaintiff’s claim in this action.

Even if the enforcement of the non-compete agreement were relevant to damages, the limiting instruction requested by PVI (L.F. 0457) should have been provided to the jury. *See State v. Shain*, 134 S.W.2d 58, 61 (Mo. 1939); *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 755 (Mo. App. 2005). Plaintiff fails to address this issue in her brief. Instead, she quotes case law regarding plain error review, applicable only when an appellant does not properly preserve an issue for appeal. Resp. Br. at 47-48. PVI reserved this issue for appeal (L.F. 0457, 0529), and plain error review is not relevant.

Plaintiff did not merely introduce evidence of the dates of her unemployment caused by the non-competition proceeding for purposes of demonstrating back-pay damages. The non-compete issue was not limited to back pay and ballooned into a “mini-trial” on the non-compete issue, consuming a significant portion of the trial. Plaintiff expressly argued to the jury that PVI’s enforcement of the non-competition agreement (for which PVI had a factual and legal basis) somehow demonstrated PVI’s evil intent several months earlier when it terminated plaintiff’s employment. This “trial within a trial” scenario is the exact situation that courts repeatedly seek to avoid. *See, e.g., State v. Couch*, 256 S.W.3d 64 (Mo. banc 2008).

Any argument for damages directly tied to the enforcement of the non-competition agreement is moot because plaintiff already settled that claim with PVI. Plaintiff is not only attempting to retry an earlier case, but is circumventing the restrictions that the law imposes on bringing a malicious prosecution case.

The Court should reject plaintiff’s argument that the error in admitting evidence of the non-compete litigation was harmless. An issue that takes up such a large portion of

the trial (20-30% of the main witnesses' testimony and one-third of the trial exhibits) cannot be categorized as "harmless." All of Dr. Pernoud's testimony pertained to the non-compete litigation, and he would not have even been called as a witness otherwise. Plaintiff (and then by necessity Dr. Pepose) spent a large amount of testimony on this irrelevant issue.

PVI and plaintiff entered into a settlement agreement regarding the non-compete litigation, pursuant to which plaintiff agreed not to work for Dr. Pernoud in any capacity relating to LASIK surgeries. L.F. 0420-0423. The repeated and sustained evidence regarding the non-compete agreement and plaintiff's arguments that PVI's enforcement somehow demonstrated PVI's retaliation and/or maliciousness cannot be harmless under the circumstances of this case. *See, e.g., Ward v. Kan. City S. Ry.*, 157 S.W.3d 696 (Mo. App. 2004) (holding that admission of irrelevant evidence was prejudicial and not harmless).

The combination of allowing evidence regarding the non-competition agreement and rejecting PVI's limiting instruction constitutes reversible error.

CONCLUSION

For any one or all of the reasons argued by Appellant, this Court should reverse the trial court and either dismiss the case (Points II and III), remand for a new trial (Points I, IV and V), or remand for an evidentiary hearing on the jury misconduct issue (Point I).

Respectfully submitted,

Thomas B. Weaver No. 29176
tweaver@armstrongteasdale.com
Robert A. Kaiser No. 31410
rkaiser@armstrongteasdale.com
Jeffery T. McPherson No. 42825
jmcpherson@armstrongteasdale.com
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102
(314) 621-5070/Fax: (314) 621-5065

ATTORNEYS FOR APPELLANT
PEPOSE VISION INSTITUTE, P.C.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,178, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the brief and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of this brief and a disk containing the brief were mailed to the undersigned attorneys of record this 3rd day of November, 2009, to:

Jerome J. Dobson
Michelle Dye Neumann
Dobson, Goldberg, Berns & Rich, LLP
5017 Washington Place
Third Floor
St. Louis, MO 63101
