In the Missouri Court of Appeals
Eastern District
DIVISION FOUR

MICHELLE FLESHNER,	)	
	)	No. ED90853
Plaintiff/Respondent,	)	
	)	Appeal from the Circuit Court
v.	)	of St. Louis County
	)	
PEPOSE VISION INSTITUTE, P.C.,	)	Honorable Mark D. Seigel
	)	
Defendant/Appellant.	)	Date: January 20, 2009

Defendant employer appeals from a judgment entered on a jury verdict in favor of plaintiff, a former at-will employee, in her lawsuit to recover damages for wrongful termination based on her claim that she was terminated in retaliation for communicating with United States Department of Labor investigators. We reverse and remand because the trial court failed to instruct the jury that it had to find that plaintiff's communication was the exclusive cause of her termination.

FACTUAL AND PROCEDURAL BACKGROUND

We view the evidence in the light most favorable to the verdict. Plaintiff, Michelle Fleshner, was employed by defendant, Pepose Vision Institute, P.C., from September 2000 until May 2003. The record does not indicate that she had an employment contract. Defendant's founder and sole owner is Jay Pepose, M.D., Ph.D., an ophthalmologist. Dr. Pepose's wife, Susan Feigenbaum, served as a consultant to defendant as well as its executive secretary, and she participated in the decisions to hire plaintiff and to terminate her employment.

In March 2003, the United States Department of Labor (DOL) began an investigation into whether defendant failed to pay its employees overtime in violation of federal wage law. In mid-April, a DOL investigator interviewed employees, including plaintiff, at defendant's place of business. Plaintiff consented to being contacted at home. Jacob Cedergreen, plaintiff's direct supervisor, asked plaintiff what transpired during the interview and told plaintiff to contact him immediately if the investigator telephoned her. On May 21, 2003, the DOL investigator contacted plaintiff at her home by telephone. Plaintiff cooperated with the investigator, who sought general information about defendant's business, and specific information about time studies plaintiff had done for defendant. The next day, May 22, 2003, plaintiff described this conversation to Mr. Cedergreen. Mr. Cedergreen, who appeared agitated and unhappy, questioned why plaintiff had read the time studies to the DOL. That afternoon, Mr. Cedergreen emailed Ms. Feigenbaum, expressing his wish to terminate plaintiff immediately. Ms. Feigenbaum agreed by return email. The following day, May 23, 2003, Mr. Cedergreen terminated plaintiff and escorted her out of the building.

Plaintiff thereafter filed a lawsuit against defendant to recover damages for wrongful termination in violation of public policy.[1] Plaintiff alleged that she was terminated because she provided information to DOL officials investigating overtime pay violations, which was contrary to public policy as expressed in Missouri's Minimum Wage Law (MWL), sections 290.505, 290.510, 290.525 RSMo (2000). The jury entered a verdict against defendant, and awarded plaintiff $30,000 in compensatory damages and $95,000 in punitive damages. The trial court entered judgment on the verdict.

[1] Approximately two weeks before trial, plaintiff voluntarily withdrew a second count that sought damages for failure to pay overtime in violation of section 290.505 RSMo (2000).

DISCUSSION

On appeal, defendant asserts that the trial court erred in (1) denying its motion for new trial based on juror misconduct (Point I); (2) denying its motions for directed verdict and JNOV (a) because plaintiff's state law claim was subject to federal preemption (Point II), and (b) because plaintiff failed to adduce substantial evidence that defendant's conduct violated Missouri public policy (Point III); (3) refusing to give a verdict director that required exclusive causation (Point IV); (4) admitting evidence of the parties' disagreement over the parties' non-compete agreement (Point V); and (5) in refusing to give an instruction limiting the use of that evidence (Point V).

The trial court erred in refusing to give a verdict director that required exclusive causation, which requires this case to be reversed and remanded for a new trial. The trial court did not err in denying the motions for directed verdict and JNOV, so we do not reverse without remand. Because it is unlikely to come up on retrial, we do not reach the question of juror misconduct. In addition, we do not reach the merits of the claim of error relating to the admission of the non-compete evidence because it was not preserved for appeal. Finally, we do not reach the failure to give a limiting instruction with respect to the non-compete evidence because the necessity of a limiting instruction in a future trial would depend on whether, in what form, and in what context this evidence would be admitted in another trial.

I. Verdict Director - Exclusive Causation

We begin our discussion with point four, which challenges the trial court's failure to require exclusive causation in the verdict director. Defendant asserts that the trial court erred in refusing to give defendant's proposed verdict director to the jury because it properly submitted that plaintiff was required to prove that her protected activity was the exclusive cause of her

termination, whereas the verdict director given by the court erroneously required plaintiff to prove only that she was terminated "because of" her protected activity. We agree.

At the instruction conference, defendant proffered the following verdict director:

> Your verdict must be for Plaintiff if you believe:
>
> First, Plaintiff was employed by Defendant, and
>
> Second, Plaintiff communicated with a U.S. Department of Labor investigator; and
>
> Third, Defendant discharged Plaintiff, and
>
> Fourth, the exclusive cause of such discharge was Plaintiff's communication with a U.S. Department of Labor investigator, and
>
> Fifth, as a direct result of such discharge Plaintiff sustained damage.

The court rejected that instruction, and gave the verdict director proposed by plaintiff:

> Your verdict must be for the Plaintiff Michelle Fleshner on her wrongful termination claim if you believe
>
> First, Plaintiff Michelle Fleshner communicated with the United States Department of Labor, and
>
> Second, Defendant Pepose Vision Institute terminated Plaintiff Michelle Fleshner's employment because she communicated with the United States Department of Labor, and
>
> Third, Plaintiff Michelle Fleshner was thereby damaged.

Rule 70.02(a) provides that jury instructions "shall be given or refused by the court according to the law and the evidence in the case." "The giving of an instruction in violation of this Rule 70.02 shall constitute error its prejudicial effect to be judicially determined." Rule 70.02(c).

We review a trial court's refusal to give a proffered instruction *de novo*. Marion v. Marcus, 199 S.W.3d 887, 893 (Mo.App. 2006). See also Ploch v. Hamai, 213 S.W.3d 135, 139

(Mo.App. 2006). We reverse only if the error resulted in prejudice and materially affected the merits of the action. Marion, 199 S.W.3d at 894; Ploch, 213 S.W.3d at 139. See also Rules 70.02(a), 84.13(b). Prejudice results when the jury is directed to make a finding on an essential element under a lesser standard than the law requires. See Schoor v. Wilson, 731 S.W.2d 308, 313-14 (Mo.App. 1987).

Missouri considers employees whose term of employment is not protected by contract to be employees at will. See Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 663 (Mo. banc 1988); Dake v. Tuell, 687 S.W.2d 191, 192-93 (Mo. banc 1985). Under the employment at will doctrine "an employer can discharge—for cause or without cause—an at-will employee . . . and still not be subject to liability for wrongful discharge." Dake, 687 S.W.2d at 193.

In 1985, the Western District of the Missouri Court of Appeals held that a public policy exception to the employment at will doctrine recognized by other jurisdictions would be recognized in Missouri. Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo.App. 1985). Boyle identified four kinds of discharges that fall within the public policy exception, categorizing them according to the reason for the discharge: (1) because an employee refused to perform an illegal act; (2) because an employee reported violations of law or public policy to superiors or public authorities; (3) because an employee participated in acts that public policy would encourage; and (4) because an employee filed a workers' compensation claim. Boyle, 700 S.W.3d at 873-75. All three Missouri appellate court districts have recognized and continue to recognize a public policy exception in these limited instances. See, e.g., Drury v. Missouri Youth Soccer Ass'n, Inc., 259 S.W.3d 558, 566 (Mo.App. 2008); Sivigliano v. Harrah's, 188 S.W.3d 46, 48 (Mo.App. 2006); Bell v. Dynamite Foods, 969 S.W.2d 847, 852 (Mo.App. 1998); Williams v. Thomas, 961 S.W.2d 869, 873 (Mo.App. 1998); Porter v. Reardon Mach. Co., 962 S.W.2d 932, 936-37

(Mo.App. 1998); Adoch v. Newtec, Inc., 939 S.W.2d 426, 428 (Mo.App. 1996); Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 150 (Mo.App. 1995).[2]

Although the public policy exception is available, it is narrow. Lynch, 901 S.W.2d at 151-52; Boyle, 700 S.W.2d at 871. As stated in Faust v. Ryder Commercial Leasing & Serv., 954 S.W.2d 383, 392 (Mo.App. 1997):

> [I]t must be remembered that the Missouri Supreme Court has emphatically declared Missouri to be an employment-at-will doctrine state, *Dake, supra,* and *Johnson, supra,* and that the public policy exception to the doctrine, which was fashioned by the Missouri Court of Appeals and never expressly approved and adopted by the Missouri Supreme Court, is a narrow and limited exception, *Adolphsen,* 907 S.W.2d at 336; *Cole,* 884 S.W.2d at 21; *Boyle,* 700 S.W.2d at 878, which should not be expanded without clear justification.

To prevail on a claim of wrongful discharge under the public policy exception, a plaintiff must prove that the plaintiff engaged in one of the protected actions, that the plaintiff was discharged, and that the plaintiff's protected action was the exclusive cause of the discharge. Lynch, 901 S.W.2d at 150; Grimes v. City of Tarkio, 246 S.W.3d 533, 536 (Mo.App. 2008); Bell, 969 S.W.2d at 852. "For a plaintiff to meet his or her prima facie burden for wrongful discharge under the public policy exception, the plaintiff must establish an *exclusive* causal relationship between the discharge and the allegation of violation of public policy." Lynch, 901 S.W.2d at 152 (emphasis added). See also Faust, 954 S.W.2d at 391.

In Lynch, we expressly rejected the plaintiff's contention that a claim of wrongful discharge brought under Missouri's public policy exception required only that the plaintiff show a "direct" causal connection, not an "exclusive" one. 901 S.W.2d at 151-52. We approved a

[2] The Missouri Supreme Court has acknowledged that the three districts of the court of appeals have recognized this narrow exception. Luethans v. Washington University, 894 S.W.2d 169, 171 n.2 (Mo. banc 1995). See also Sivigliano, 188 S.W.3d at 48; Porter, 962 S.W.2d at 937. While the Supreme Court has not specifically adopted this exception, the court has not condemned or overturned it. See Faust v. Ryder Commercial Leasing & Serv., 954 S.W.2d at 383, 389 (Mo.App. 1991).

verdict director submitted to the jury that required it to find the plaintiff was discharged "as a direct and exclusive result" of plaintiff's allegedly protected activity. Id.

We reached this conclusion based on Loomstein v. Medicare Pharmacies, Inc., 750 S.W.2d 106, 112 (Mo.App. 1988). Lynch, 901 S.W.2d at 151. In Loomstein, the plaintiff sought damages for retaliatory discharge based on his claims that he was fired for refusing to violate the law. We held that evidence of a conversation with the plaintiff's supervisor suggesting that the plaintiff might be fired for his refusal "still leaves unresolved the question whether [the plaintiff] was ultimately fired *exclusively* because of that incident. It is also reasonable for one to conclude that other intervening events precipitated [the plaintiff's] discharge." Loomstein, 750 S.W.2d at 113 (emphasis added). We concluded:

> We find that plaintiff's evidence is as consistent with an inference that the reason for plaintiff's discharge was his rudeness to customers, to employees, and to the state inspector. Because the plaintiff fails to cite substantial evidence that he was in fact discharged because of his alleged refusal to violate the law, he has failed to make a submissible case on his retaliatory discharge claim.

Id. at 114.

In Lynch, we rejected the appellant's argument that the "exclusivity" requirement in Loomstein was an overstatement. Lynch, 901 S.W.2d at 151-52. We cited Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273, 275 (Mo. banc 1984), a retaliation case under section 287.780 RSMo (1978), which explained why courts had required exclusive causation as an element in workers' compensation retaliation cases.[3] Lynch, 901 S.W.2d at 152. Hansome, a pre-Boyle case, noted:

> The Worker's Compensation Act provides a limited exception to the "at will" doctrine. Absent a statutorily prohibited reason for discharge, in this case an exclusive causal relationship between the discharge and employee's exercise of

[3] We also cited Clark v. Beverly Enterprises-Missouri, 872 S.W.2d 522, 524 (Mo.App. 1994), in which both parties had submitted verdict directors requiring exclusive causation in a wrongful discharge case under the public policy exception. Lynch, 901 S.W.2d at 152.

> rights granted by Chapter 287, RSMo 1978, employer is free to fire any employee at will.

Hansome, 679 S.W.2d at 275 n.2.

Plaintiff argues that Lynch was wrongly decided because it derives the "exclusive cause" standard from Hansome, a workers' compensation case.[4] We disagree.

In recognizing a cause of action based on the public policy exception to the employment at will doctrine, the Boyle court compared that cause of action to the existing cause of action in workers' compensation retaliation cases, citing Hansome. Boyle, 700 S.W.2d at 875. We have specifically elected to adopt the elements of a retaliation action for causes of action based on the public policy exception, including the requirement to prove exclusive causation. Lynch, 901 S.W.2d at 152. In Crabtree v. Bugby, 967 S.W.2d 66, 72 (Mo. banc 1998), the Missouri Supreme Court reaffirmed that exclusive causation was required in retaliation cases brought under the workers' compensation law. After Crabtree was decided, the Missouri Supreme Court approved MAI 23.13, a pattern instruction that requires exclusive causation to be proven as an element of a retaliation case under the workers' compensation law.

The trial court erred and misdirected the jury in failing to submit exclusive causation as a required element in the verdict director. See Lynch, 901 S.W.2d at 152. This error was prejudicial because it allowed the jury to find in plaintiff's favor without finding exclusive causation. See Crabtree, 967 S.W.3d at 71. This instructional error requires the case to be reversed and remanded for a new trial. Point four is granted.

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[4] To support this argument, plaintiff cites *dicta* in Brenneke v. Dept., Veterans of Foreign Wars, 984 S.W.2d 134, 140 (Mo.App. 1998). The Western District has emphasized that its Brenneke decision did not approve an instruction that omitted the exclusive causation language, "but only quotes it before declining to review a complaint about the causation language that was not made to the trial court and, therefore, not preserved." Mehrer v. Diagnostic Imaging Center, P.C., 157 S.W.3d 315, 324 (Mo.App. 2005).

II. Denial of Motions for Directed Verdict and JNOV

The standard of review for a denial of a motion for JNOV and the denial of a motion for directed verdict are essentially the same. Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588, 590 (Mo. banc 2007). To defeat either motion, a plaintiff must make a submissible case by offering substantial evidence supporting every fact essential to a finding of liability. Id. In determining whether the evidence was sufficient to support the jury's verdict, we view the evidence in the light most favorable to verdict, we give the plaintiff the benefit of all reasonable inferences, and we disregard conflicting evidence and inferences. Id. We will reverse the jury's verdict for insufficient evidence only if there is a complete absence of probative facts to support the jury's conclusion. Id.

A. FLSA Preemption

For its second point, defendant asserts that the trial court erred in denying its motions for directed verdict and for JNOV because plaintiff's wrongful termination claim is preempted by the Fair Labor Standards Act (FLSA), 29 U.S.C. section 201 *et seq.* (2006), in that the FLSA provides plaintiff with a complete range of remedies. If defendant is correct on this claim of error, we would be required to reverse without remand. Accordingly, we consider the merits of this point.

Because the claim of error on appeal is the failure to direct a verdict on the basis of an affirmative defense, we review under a different standard than for the denial of a motion for directed verdict on the plaintiff's case. Damon Pursell Const. v. MHTC, 192 S.W.3d 461, 475 (Mo.App. 2006). A moving party is only entitled to a directed verdict on its affirmative defense if it proves that defense as a matter of law. Id. A trial court may not direct a verdict on an affirmative defense unless no factual issues with respect to the affirmative defense remain for the

jury to decide. Id. See also Townsend v. Eastern Chemical Waste Systems, 234 S.W.3d 452, 462 (Mo.App. 2007). Because this is a question of law, we review *de novo*. Townsend, 234 S.W.2d at 462.

Defendant does not argue that language in the FLSA expressly or impliedly preempts state law under the principles of federal preemption. Rather, it argues, as a matter of Missouri law, that the statutory remedy in the FLSA displaces the Missouri common law remedy. In Missouri, a statute will not displace common law remedies "'in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes [sic] the remedies provided by common law.'" Dierkes v. Blue Cross and Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. banc 1999) (quoting Detling v. Edelbrock, 671 S.W.2d 265, 271-72 (Mo. banc 1984)).[5] See also Shawcross v. Pyro Products, Inc., 916 S.W.2d 342, 345 (Mo.App. 1995). A statutory remedy does not comprehend and envelop the common law if it does not include punitive damages and the corresponding common law action does allow punitive damages. Dierkes, 991 S.W.2d at 668; St. Louis County v. Moore, 818 S.W.2d 309, 310 (Mo.App. 1991).

Punitive damages are available for a wrongful discharge claim brought under the public policy exception. See Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841, 849-51 (Mo.App. 2007). Accordingly, the FLSA will only comprehend and envelop a wrongful discharge claim under the common law public policy exception if it also allows punitive damages. Defendant argues that it does. We disagree.

For violation of its anti-retaliation provision, the FLSA provides:

[5] In light of this clear statement by the Missouri Supreme Court, we reject defendant's argument under this point that a common law action under the public policy exception may not proceed unless there is "no other remedy" available. This argument is based on language in Prewitt v. Factory Motor Parts, Inc., 747 F.Supp. 560, 565-66 (W.D. Mo. 1990), and federal district court cases in other jurisdictions. No Missouri state court has adopted the "no other remedy" standard for determining when the public policy exception can be used or has held, as did Prewitt, that the FLSA provides a complete range of remedies.

> Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. section 216(b).

Two federal circuit courts have addressed whether this language allows punitive damages and have reached different conclusions. In Travis v. Gary Community Mental Health Center, 921 F.2d 108, 111-12 (7th Cir. 1990), cert. denied, 502 U.S. 812 (1991), on which defendant relies, the Seventh Circuit affirmed an award of punitive damages under 29 U.S.C. section 216(b). It based its holding on two conclusions, that an amendment to section 216(b) "authorizes 'legal relief', a term commonly understood to include compensatory and punitive damages," id. at 111, and that "[c]ompensation for emotional distress, and punitive damages, are appropriate for intentional torts, such as retaliatory discharge." Id. at 112.

Subsequently, in Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000), cert. denied, 532 U.S. 975 (2001), on which plaintiff relies, the Eleventh Circuit held that punitive damages are not available for retaliatory discharge under this section of the FLSA. In Snapp, the plaintiff appealed from the trial court's dismissal of his punitive damages claim brought under the FLSA. The plaintiff argued that the 1977 amendments to section 216(b) authorized courts to award punitive damages. The court considered and disagreed with Travis. It construed the statute under three different principles of statutory construction and concluded that section 216(b) did not allow punitive damages.

The court first considered whether the term "legal relief" was broad enough to include punitive damages. Id. at 934. It said that when "such an expansive term" is used, courts look

for clues within the statute to help decipher the exact nature of "legal relief" Congress intended. Id. It found:

> When an employer violates the minimum wage or overtime wage provisions of sections 206 and 207, Congress has provided that the employer is liable for "unpaid minimum wages, or . . . unpaid overtime compensation, as the case may be, and . . . an additional equal amount as liquidated damages." 29 U.S.C. section 216(b). And for violations of section 215(a)(3)'s anti-retaliation provision, Congress has not abandoned all specificity. Although the statute says that these forms of relief may be included in a judgment "without limitation," Congress has specifically empowered a court to order "employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." *Id.*

Id. (ellipses in original). It further observed that, although Congress did not limit a court to the enumerated forms of relief, section 216(b) specifically enumerates only forms of *compensatory* relief, including the liquidated damages provision. Id. It concluded: "Given that the evident purpose of section 216(b) is compensation, we reject plaintiff's argument that 'legal relief' includes punitive damages." Id.

Next, it considered the statute under the principle of *ejusdem generis*. Under this principle, a general statutory term is interpreted according to the specific terms surrounding it. Id. Snapp concluded that the FLSA was intended to compensate victims, not punish violators, and punitive damages "would be out of place in a statutory provision aimed at making the plaintiff whole". Id.

Finally, the court interpreted the damage provision by considering the statute as a whole. It looked at the entire remedial scheme of section 216 and observed that the FLSA specifically mentioned punitive damages, but only in the context of criminal enforcement. Id. at 934-35 (citing 29 U.S.C. section 216(a)). It concluded that the specific inclusion of punitive damages in the criminal sanctions section of the statute indicated that Congress did not intend for punitive

damages to be an available remedy in civil litigation under the FLSA. Id. at 935. The court also carefully explained its disagreement with the conclusions in Travis. Id. at 935-36.

The Snapp opinion is based on thorough analysis supported by extensive U.S. Supreme Court case law. Its method of statutory construction is consistent with the analysis that would be taken by Missouri courts. See, e.g. St. Louis Police Officers' Ass'n v. Board, 259 S.W.3d 526, 528 (Mo. banc 2008); State Bd. of Account. v. Integrated Fin., 256 S.W.3d 48, 54 (Mo. banc 2008); State ex rel. BP Products v. Ross, 163 S.W.3d 922, 927 (Mo. banc 2005); State v. Lancaster, 506 S.W.2d 403, 404 (Mo. 1974); State v. William, 100 S.W.3d 828, 833 (Mo.App. 2003). We find the analysis and conclusions in Snapp persuasive on this issue.

In addition, the federal district court for the Eastern District of Missouri has published an opinion, agreeing with Snapp, that the FLSA does not provide for punitive damages. Huang v. Gateway Hotel Holdings, 520 F. Supp. 2d 1137 (E.D. Mo. 2007). In Huang, the plaintiff filed an action seeking compensatory relief for a violation of the pay provisions of the FLSA, compensatory and injunctive relief for retaliatory discharge in violation of the FLSA, and for compensatory and punitive damages for a wrongful discharge under the Missouri common law public policy exception. The district court denied the motion to dismiss the common law count. It found that the FLSA did not, under federal law, preempt a common law action under the Missouri public policy exception. Id. at 1141-42. It then determined that the "no other remedy" standard used in Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560 (W.D. Mo. 1990), was not supported by Missouri law. Huang, 520 F. Supp. 2d at 1142. Rather, it used the "fully comprehend and envelop" standard from the Missouri Supreme Court opinion in Dierkes, 991 S.W.2d at 668, to determine when a statutory remedy would displace a common law remedy under Missouri law. Huang, 520 F. Supp. 2d at 1142. It compared the Travis and Snapp

opinions and concluded that the FLSA did not provide for punitive damages. Id. at 1143. It then concluded that the public policy exception was not enveloped by the FLSA because the FLSA did not allow punitive damages. Id. at 1143-44. Although this opinion is not precedent in this court, we agree with the analysis and conclusions therein.

Plaintiff's common law cause of action under the Missouri public policy exception to the employment at will doctrine is not displaced by the FLSA because the FLSA remedy does not "fully comprehend and envelop" the common law remedies in that punitive damages are available under the common law but not under the FLSA. The absence of punitive damages under a statutory scheme is sufficient to establish that the statute does not displace related common law causes of action that do allow for punitive damages. See Dierkes, 991 S.W.2d at 668; Moore, 818 S.W.2d at 310. The trial court did not err in denying defendant's motions for directed verdict and JNOV on the ground that the common law claim was preempted by the FLSA. Point two is denied.

B. Public Policy Violation

For its third point, defendant contends the trial court erred in denying its motions for a directed verdict and for JNOV because plaintiff failed to make a submissible case in that she did not adduce substantial evidence showing that she engaged in activity protected by Missouri public policy in that plaintiff’s underlying actions were not covered by the MWL, sections 290.500-290.530 RSMo (2000). Defendant argues that plaintiff pleaded a state statute as the source of public policy, that that statute covered only communications with state labor officials, that plaintiff only alleged and proved communications with federal labor officials, and that, therefore, plaintiff did not make a submissible case.

In her petition, plaintiff alleged that she met with and provided information about the work activities of defendant's employees to a DOL investigator who was investigating possible violations of the FLSA by defendant. She alleged that defendant terminated her because she provided information about defendant's failure to fully compensate its employees for overtime, in violation of federal and state laws. She further alleged that her termination violated the public policy of Missouri "as expressed in section 290.500 including but not limited to sections 290.505, 290.510 and 290.525 RSMo."

Section 290.525 of the MWL makes certain employer acts misdemeanors, including

> (7) Discharging or in any other manner discriminating against any employee who has notified the director that he has not been paid wages in accordance with the provisions of sections 290.500 to 290.530, or who has caused to be instituted any proceeding under or related to sections 290.500 to 290.530, or who has testified or is about to testify in any such proceeding[.]

Section 290.505 regulates overtime compensation, and section 290.510 gives the director the authority to investigate.

Defendant does not argue that section 290.525 does not express Missouri public policy with respect to communications with state officials or that this public policy could not be the basis for a wrongful discharge claim under the third category of discharges identified as exceptions to the employment at will doctrine, if communications with state labor officials were alleged and proved. We will assume, without deciding, that these assumptions are true for the purposes of this discussion.

Plaintiff's theory is that her discharge fell within the third category identified in Boyle, which covers those discharges of an at-will employee "whose acts are those that sound public policy would encourage." 700 S.W.2d at 875. Defendant argues that plaintiff's claim fails because she pleaded the MWL as the source of public policy that was violated and the MWL

does not express a policy protecting communications with *federal* authorities. We disagree with defendant's conclusions.

Kirk v. Mercy Hosp. Tri-County, 851 S.W.2d 617 (Mo.App. 1993), on which plaintiff relies, is instructive on the issue raised by defendant. In Kirk, the plaintiff, a registered nurse, filed a lawsuit against the defendant hospital to recover damages for wrongful termination under the public policy exception, alleging that she was discharged in violation of public policy reflected in The Nursing Practice Act (NPA), sections 335.011-335.096 RSMo (1986), because she had questioned a physician's improper care of a patient. The defendant hospital argued that the plaintiff had no cause of action because she did not plead a specific law or regulation that prohibited the hospital from firing her. The court of appeals held: "A finding that no such law or regulation existed does not preclude Plaintiff from asserting her claim for wrongful discharge based on the public policy exception to the employment-at-will doctrine." Kirk, 851 S.W.2d at 620. It explained that while the public policy must be "reflected" in a statute, a plaintiff is not required to rely on any direct violation of a statute by the employer. Id. at 621-22.

Kirk clarifies that if an employee is discharged either for refusing to perform an act that would violate a clear mandate of public policy or for engaging in an act that a clear mandate of public policy would encourage, the employee may rely on a statute that reflects that public policy, and it is not necessary that the statute relied on prohibit an employer from engaging in the specific conduct at issue or sanction it for doing so.[6] Accordingly, the fact that the MWL does not sanction an employer for retaliation against an employee for communicating with federal employees is not determinative.

[6] We note that distinct requirements have developed for pleading and proving different categories of discharge under the public policy exception. See Porter, 962 S.W.2d at 940. Cases under the whistleblower exception require that the plaintiff plead that it reported a statutory violation by the employer and plead the statute reported to have been violated. Id. at 938-940. This requirement does not extend beyond whistleblower cases.

This brings us to the issue of whether public policy that is "reflected" in a statute may be broader than the statute. We first consider the nature of public policy. "Public policy" is broadly defined as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society." BLACK'S LAW DICTIONARY 1245 (7th ed. 1999). "'Public policy' is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good." Boyle, 700 S.W.2d at 871. One of its sources is "the letter and purpose" of a statutory "provision or scheme." Id. See also Drury, 259 S.W.3d at 566.

The opinion in Kirk demonstrates how a court determines the scope or nature of a public policy reflected in a statute. The plaintiff in Kirk relied on the NPA, which governed nurses' professional responsibilities, as the source of the public policy governing her case. The court of appeals reviewed the provisions of the NPA and held that a nurse's duties, as listed in the statute, "reflect the public policy of this state that registered nurses licensed in this state have an obligation to faithfully serve the best interests of their patients." 851 S.W.2d at 622. It further held that the NPA reflected a clear mandate of public policy that a nurse not "stay out" of a dying patient's improper medical treatment. Id. Neither of these statements was explicitly set out in the NPA. Rather, the court studied the specific acts that were set out in the statute, distilled from those acts broad fundamental principles that the details in the statute reflected, and then announced those as the underlying public policies reflected in the statute.

As in Kirk, the issue here is whether there is a clear mandate of public policy "reflected" in the MWL with application to the facts of this case. Section 290.525(7) sanctions employers who discipline employees for communicating with Missouri labor officials. A fundamental principle on which such a sanction would rest is that employees who communicate with

government labor investigators should be protected from retaliation by their employers. This fundamental principle is the public policy reflected in the statute. Such a principle would not be fundamental if it turned on whether the communications are made to Missouri labor investigators or federal labor investigators.

In sum, the MWL reflects a public policy that is broad enough to protect an employee's communications with federal labor investigators even though the MWL only sanctions employers who retaliate against employees for communications to state labor officials.

The trial court did not err in denying defendant's motions for directed verdict and JNOV on the ground that public policy reflected in the MWL did not extend to communications with federal investigators. Point three is denied.

III. Juror Misconduct

In its first point, defendant contends that the trial court erred and deprived it of due process in denying its motion for a new trial based on alleged juror misconduct in the form of anti-Semitic comments made during jury deliberations. Both parties as well as the Amicus Curiae have extensively briefed whether the court erred. However, because this case is being reversed and remanded for a new trial on instructional error, and there is no likelihood that the incident giving rise to the claimed error will be repeated in the new trial, we do not reach the issue raised in this point in this opinion. See, e.g., McHaffie v. Bunch, 891 S.W.2d 822, 828 (Mo. banc 1995); Klaus v. Dean, 883 S.W.2d 904, 908 (Mo.App. en banc 1994). Point one is denied as moot.

IV. Admission of Evidence/Rejection of Limiting Instruction

In its final point, defendant asserts that the trial court erred in admitting evidence about defendant's enforcement of the parties' non-compete agreement and in refusing to give a limiting instruction on that evidence. These are two claims of error, and we address them separately.[7]

A. Exclusion of Evidence

On the day set for trial, defendant filed a written motion in limine to exclude evidence about the litigation of plaintiff's responsibilities and defendant's rights under the parties' non-compete agreement on the grounds that it was not relevant to the question of the cause of her termination. Defendant sought an order directing plaintiff and her counsel "not to mention, refer to or interrogate concerning, or voluntarily answer or attempt to convey before the jury, at any time during these proceedings in any manner, either directly or indirectly, the matter of the dispute and litigation over [plaintiff's] non-compete agreement with [defendant]." Defendant has not directed us to any place in the record that reflects that a hearing was sought or that the court ruled on this motion.

At trial, plaintiff was the first witness. After testifying to her termination, plaintiff testified about the parties' non-compete agreement. She identified the signed non-compete agreement between the parties and offered it into evidence. Defense counsel announced he had no objection. Plaintiff then testified to the terms of the agreement, her understanding of those terms, a job offer she received after termination, and her own conclusion and counsel's advice that her new employment did not violate the non-compete agreement. She next testified that a third person told her that defendant was going to sue her. She identified and testified to a letter defendant's attorney sent to her, which claimed she was in violation of the agreement; her

[7] Each action, order, or ruling of a trial court challenged on appeal is a separate error, which should be set out in a separate point. See Wheeler v. McDonnell Douglas Corp., 999 S.W.2d 279, 283 n.2 (Mo.App. 1999).

conversation with defendant's attorney; the attorney's threats to call the police on her; and the attorney's statement to her that she was in violation of the agreement. She also identified defendant's attorney's letter to her new employer informing it of the non-compete agreement. Defendant did not object during any of this testimony. When plaintiff offered defendant's attorney's letter into evidence, defense counsel responded, "No objection." Plaintiff then testified to the contents of that letter, which contained portions of plaintiff's non-compete agreement. When plaintiff sought to have her new employer's attorney's letter responding to that letter admitted into evidence, the court asked if there was any objection. The following transpired between the court and defendant's trial counsel, James M. Paul:

> MR. PAUL: Can we approach, your Honor?
>
> THE COURT: Sure.
>
> (The following was had at the bench):
>
> MR. PAUL: I just wanted to make sure for the record that we preserve the objection to the non-compete enforcement starting with this. Obviously we have got the motion in limine. Anyway, this is for purposes of preserving that, to make sure any more discussion about the non-compete and the non-compete enforcement, and the litigation that resulted from that, is irrelevant and unduly prejudicial.
>
> THE COURT: I understand. The rulings of the Court will remain the same.
>
> MR. PAUL: Thank you, your Honor.
>
> THE COURT: Okay.

The court thereafter admitted the letter, a copy of defendant's petition seeking enforcement of the non-compete agreement, and other documents relating to that dispute, over defendant's continuing objection.

In its brief, defendant argues that its "attempts to enforce the non-competition agreement more than two-and-a-half months after plaintiff's employment ended, cannot possibly be

probative evidence to the issue of whether the decision to terminate plaintiff's employment was caused by her purported cooperation with the DOL."

We do not reach the merits of this point because any error in the admission of evidence was not preserved by the motion in limine or by the untimely trial objections. In the first place, the motion in limine did not preserve any error in the admission of the challenged evidence. Because a motion in limine is interlocutory, a specific objection must be made at trial when the evidence identified in the motion in limine is offered to preserve an issue for appellate review. Derossett v. Alton and Southern Ry. Co., 850 S.W.2d 109, 111 (Mo.App. 1993). A motion in limine to exclude evidence preserves nothing for appellate review if no objection is made when the evidence is offered at trial. Hancock v. Shook, 100 S.W.3d 786, 802 (Mo. banc 2003); In re Care and Treatment of Pate, 137 S.W.3d 492, 496 (Mo.App. 2004).

Next, the trial objections that were made were untimely. Defendant did not object to evidence about the parties' dispute over the non-compete agreement until plaintiff had already testified to the non-compete agreement, the letters and communications containing the parties' positions in the dispute, the engagement of an attorney to press defendant's position, and the possibility of a lawsuit. All of the questions about the post-termination dispute over the non-compete agreement that were directed to plaintiff without objection were intended to and did lead into the area that defendant claims to be irrelevant and prejudicial. By not timely objecting to this line of questioning at the earliest opportunity, defendant preserved nothing for review. Pickett v. Stockard, 605 S.W.2d 196, 199 (Mo.App. 1980). See also State v. Kalagian, 833 S.W.2d 431, 433-34 (Mo.App. 1992). Defendant should have made its objection when the topic was introduced. Foster v. Catalina Indus., Inc., 55 S.W.3d 385, 393 (Mo.App. 2001). Defendant has not preserved for appeal its claim that the trial court erred in admitting the evidence.

Although this is an issue that may reoccur on retrial, it was not preserved, and we decline to review it under the standards for unpreserved error. See, e.g., Lopez v. Three Rivers Elec. Co-op Inc., 26 S.W.3d 151, 161 (Mo. banc 2008). This part of point five is denied.

B. Limiting Instruction

At the jury instruction conference, defendant offered an instruction, which the trial court refused, limiting the jury's consideration of the non-compete evidence to the issue of damages. This case is being remanded for a new trial. The necessity of a limiting instruction in a future trial would depend on whether, in what form, and in what context the evidence in question would be admitted in that trial. As a result, we do not reach the question of whether the failure to give a limiting instruction in this trial on evidence admitted after an untimely objection was error. See, e.g., Trimble v. Pracna, 51 S.W.3d 481, 503 (Mo.App. 2001). This part of point five is denied as moot.

Conclusion

The judgment of the trial court is reversed, and the cause remanded for new trial.

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Kathianne Knaup Crane, Judge

Booker T. Shaw, P.J. and Mary K. Hoff, J., concur.