FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Oregon Supreme Court Shifts Burden of Proof for Eyewitness Testimony

*by Daniel C. Re**

On November 29, 2012, the Oregon Supreme Court filed its unanimous decision in the consolidated cases of *State v. Lawson* and *State v. James*.[1] The landmark ruling fundamentally altered the standard for eyewitness testimony at trial, and garnered national media attention.[2]

In both cases, the defendants were convicted in large part due to eyewitness identification testimony. The trial courts and the courts of appeal had allowed admission of the eyewitness testimony under the test established in *State v. Classen*.[3] The Oregon Supreme Court's review of *Lawson* and *Jame*s was to determine whether the *Classen* test was consistent with current scientific research and understanding of eyewitness identification. After an extensive review of the current scientific data, the Supreme Court concluded that the *Classen* test was inadequate. The court established a new procedure that shifts the burden of proof to prosecutors to show that an eyewitness's identification is sufficiently reliable, a standard more consistent with the Oregon Evidence Code.

I. Facts in *Lawson*

In *Lawson,* the defendant was convicted of aggravated murder, aggravated attempted murder, and robbery. The victims, a husband and wife, were shot at night in their camp trailer. Earlier that day, the victims had talked to defendant at their campsite. The wife was transported to the hospital by ambulance and helicopter. She was delirious and said she did not know who shot her and had not seen the shooter's face.

The defendant's trial took place more than two years after the shooting. During that time, police interviewed the wife many times and her belief that defendant was the shooter changed from not knowing who shot her to being positive she was shot by the defendant. Initially, the wife could not identify the defendant from a photo lineup. In the next interview, the wife said the shooter put a pillow over her face and she could not see him. In a later interview, she said that despite the pillow, she did see the shooter but she again failed to pick the defendant from a photo lineup. Subsequently, she stated that she believed the defendant was the shooter, but she was not sure. During one interview, the wife said that the shooter wore a dark shirt and baseball cap. One month before trial, police showed her a single photo of the defendant wearing a dark shirt and a baseball cap. Just before trial, police had her observe the defendant at a pretrial conference. Only after those events occurred did the wife pick the defendant out of the same photo lineup that she had been unable to identify him from earlier. At trial, the wife testified that she was positive the defendant was the shooter.

II. Facts in *James*

In *James*, the defendant was convicted of robbing a grocery store and other associated crimes. The conviction was based primarily on eyewitness identification testimony of two store employees who confronted the defendant as he was leaving the store. Prior to that confrontation, the store employees observed the defendant and an accomplice stuffing forty ounce bottles of beer into a backpack. The defendant physically assaulted the employees and then left the store and drove off with his accomplice. The theft was immediately reported to the police. The witnesses described the defendant as a Native American, approximately six feet tall, weighing about 220 pounds and wearing a white shirt and baggy blue jeans. During the confrontation with the defendant in the store, the eyewitnesses had a very good look at the defendant from close range.

Later that day, a police officer spotted the defendant based on the description given by the witnesses. The officer questioned the defendant but he denied being at the store. The officer, with consent, searched the accomplice's backpack and found an unopened forty ounce bottle of malt liquor. The defendant then consented to return to the store where he was immediately identified by the witnesses.

III. The *Classen* Test

Classen established a two-step test to determine admissibility of eyewitness identification testimony when a defendant files a motion to suppress that testimony. In *Classen*, the court recognized that suggestive circumstances affect the reliability and, therefore, the admissibility of eyewitness identification. The *Classen* test was designed to protect the reliability of the testimony. *Classen* first required the court to decide if the process leading to the identification by the eyewitness was suggestive or needlessly departed from procedures to avoid suggestiveness. If the court found that the procedure was suggestive, the state was then required to show that the identification testimony had a source independent of the suggestive procedure or that other aspects of the identification substantially excluded the risk that the identification result from the suggestive procedure.[4]

A. Scientific Data

In its opinion, the court noted that since 1979, when *Classen* was decided, there have been more than 2,000 scientific studies on the reliability of eyewitness identification.[5] Those studies have identified factors known to affect the reliability of such identifications.

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Virginia Supreme Court Expands Wrongful Discharge Cause of Action

*by Michael I. Krauss**

In *Van Buren v. Grubb*,[1] the Virginia Supreme Court ruled for the first time that a non-employer may be sued for wrongful discharge if he violated Virginia public policy.

I. Background on At-Will Employment

In all fifty states, in theory, employment is at-will as a general default rule. This means that employers can fire employees for any reason, or for no reason at all, unless employers have provided to the contrary in the employment contract. This is the case, for example, for tenured employees, who can be discharged only "for cause." In practice it is very hard to dismiss a tenured employee without proof of gross misconduct.

Most employees, though, are not tenured. Non-tenured employees can only prevail on a wrongful discharge suit if they fall into certain exceptions to at-will employment. Among those exceptions, in decreasing order of breadth, are:

1. The "covenant of good faith exception" (recognized in eleven, mostly Western states).[2] This sweeping exception almost swallows up the at-will employment rule. It reads a promise of good faith and fair dealing into every employment relationship, and has been interpreted to mean either that employer personnel decisions are subject to a "just cause" standard or that terminations made in bad faith or motivated by malice are prohibited.[3]

2. The "implied contract exception" (recognized in thirty-seven states and the District of Columbia to a greater or lesser extent). Although employment is often not governed by a contract, an employer may make oral or written representations to employees regarding job security or procedures that will be followed before adverse employment actions are taken. If such representations are made explicitly or even impliedly, these representations may create a contract for employment and limit the right to discharge the employee. In fourteen states such

explicit or implied representations may be oral or written (though in every case the discharged person bears the burden of proving their existence), while in twenty-three states only written representations may satisfy this exception.[4] Thus, "employee handbook" provisions describing termination for "just cause" or under other specified circumstances, or indicating that an employer will follow specific procedures before disciplining or terminating an employee, may waive an employer's at-will rights. So might (in fourteen states) a hiring official's oral representations to employees that employment will continue during good performance. Only Florida, Georgia, Indiana, Louisiana, Missouri, North Carolina, Pennsylvania, Rhode Island, Texas and Virginia have neither the good faith nor the implied contract exceptions in their employment laws.[5]

3. The "public policy exception" (recognized in the great majority of states) prohibits discharge in violation of the state's public policy doctrine or (typically) of a state or federal statute. For example, in most states an employer cannot terminate an employee for filing a valid workers' compensation disability claim, or for refusing to break the law at the employer's request or command.[6]

Virginia recognizes the public policy exception to at-will employment, but does not recognize implied contract or good-faith dealing exceptions. This means that Virginia employers can fire employees for any reason, or for no reason at all, unless the employment contract stipulates otherwise or there is the "public policy" exception, whereby an employee fired for reasons that shock Virginia public policy

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Oklahoma Supreme Court Strikes Down Informed Consent Law

*by Christine Pratt**

On December 4, 2012, in *Nova Health Systems v. Pruitt*, 2012 OK 103 (Okla. 2012), the Oklahoma Supreme Court summarily struck down—on federal constitutional grounds—an Oklahoma informed consent law that required abortion doctors to perform an ultrasound and make certain disclosures regarding fetal development before proceeding with an abortion.[1]

In its short, unanimous memorandum opinion, the Oklahoma Supreme Court affirmed the trial court's judgment *per curium*,[2] but it did not adopt the trial court's reasons for overturning the informed consent law (HB 2780, codified at Okla. Stat. tit. 63, §§ 1-738.1A *et seq.*). Rather than declare HB 2780 violative of the Oklahoma Constitution, as the trial court had done, the Oklahoma Supreme Court charted a different path and invalidated the law solely on federal constitutional grounds under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In doing so, the Oklahoma Supreme Court created an apparent split with the U.S. Court of Appeals for the Fifth Circuit and broke from a growing trend in state and federal courts toward invalidating informed consent laws on First Amendment or state constitutional grounds rather than under *Casey*.[3] This article summarizes HB 2780's provisions and legislative history, analyzes the Oklahoma Supreme Court's opinion and places it within the broader context of other recent informed consent cases, and concludes with an assessment of *Pruitt*'s significance in the national landscape of abortion litigation.

I. Background

HB 2780 stated that it aimed to give women who seek abortions the benefit of an "informed decision."[4] Toward this goal of informed consent, HB 2780 required abortion doctors to perform an ultrasound at least one hour before proceeding with an abortion, display the ultrasound images to the pregnant woman,[5] and also provide a simultaneous medical description of the ultrasound images.[6] This medical description had to include the dimensions of the fetus, the presence of cardiac activity, and the presence of internal organs, if viewable.[7] The physician then was required to obtain from the woman her written certification that the physician complied with HB 2780.[8] If a woman faced a medical emergency in which her life or physical health were in danger because of the pregnancy, the physician could perform the abortion without adhering to HB 2780.[9] The law further specified that nothing in HB 2780's provisions may be construed to prevent the woman from averting her eyes from the ultrasound images.[10]

The Oklahoma House of Representatives passed HB 2780 on March 2, 2010.[11] After garnering the necessary votes in the Senate about a month later,[12] the bill reached the desk of Governor Brad Henry, who vetoed the bill.[13] On April 27, 2010, the House and Senate overrode the Governor's veto, exceeding the three-fourths vote in each house required by the Oklahoma Constitution.[14]

That same day, Nova Health Systems, a non-profit corporation that operates an abortion clinic in

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Those factors are divided into two categories:

1. System variables, which refer to the procedure used to obtain identifications, such as lineups, showups, and suggestive questioning, which can cause post-event memory contamination; and, suggestive feedback and recording confidence;[6]
2. Estimator variables, which refer to characteristics of the witness that cannot be manipulated by the state, like stress, witness attention, duration of exposure, environmental conditions, perpetrator characteristics, speed of identification, and memory decay.[7]

B. The Revised Procedure

The *Classen* test assumed the eyewitness identification testimony was admissible, and, if the defendant objected, it was incumbent on him to prove why the testimony should not be admissible. In the current case, the court reasoned that while this standard meets due process, it was not consistent with admissibility of evidence under the Oregon Evidence Code.[8] Another issue with *Classen* was that it resulted in trial courts relying heavily on the eyewitness's testimony to determine whether the identification had been influenced by suggestive procedures, an inherently problematic practice.[9] New research, however, established that suggestive procedures could inflate eyewitness testimony and such inflation detracted from the testimony's reliability. As a result, the *Classen* test had to be revised.

Based on the scientific research, the court established the following procedure under the Oregon Evidence Code to determine admissibility of eyewitness identification evidence:

1. The state, as proponent of that evidence, must establish that the witness had adequate opportunity to observe or personally perceive the facts the witness will testify to and that the witness did, in fact, observe or perceive them, thereby gaining personal knowledge of those facts;[10]

2. Since the state is using lay opinion testimony, it must establish that the testimony is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony or determination of the fact in issue;[11]

3. If the state succeeds in establishing that the evidence is admissible under parts 1 and 2, the defendant can have the testimony suppressed by proving that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay or needless cumulative evidence;[12]

4. If the defendant succeeds under part 3, the court can either exclude the eyewitness testimony or fashion a remedy that cures the unfair prejudice or other danger attendant to using that evidence.[13]

The court further noted that research regarding eyewitness identification is ongoing and that based on new research no party was precluded from establishing other factors or from challenging factors set out in the opinion.[14]

III. Court's Application of the Revised Procedure to Lawson and James

In *Lawson*, the court expressed concern over the reliability of the wife's identification testimony in light of its revised procedure for eyewitness testimony. The court's concern stemmed from the following facts: the wife's tremendous stress when she first observed the shooter; the poor viewing conditions; the two year time period between the shooting and the wife's court identification; and significant suggestive procedures used by the police.[15] Because of these circumstances, under the new standard, the court reversed defendant's conviction and remanded the case for a new trial.

In *James*, the court held that application of the revised procedure could not have resulted in the exclusion of the

eyewitness identification. The court reasoned that since witnesses provided a detailed description of the defendant to the police within minutes of the robbery and the police identified the defendant as a suspect in the robbery based on their description of the witnesses within five hours, the eyewitness testimony would be allowed under the new standard. Additionally, the witnesses were face-to-face with the defendant and had the personal knowledge to identify him. Although some of the identification procedures were suggestive, the court found that the witnesses' identifications were based on their original observations and were not influenced by suggestive procedures. The court affirmed the defendant's conviction.

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Endnotes

1 State v. Lawson/James, 352 Or. 724, 291 P.3d 673 (2012).

2 Editorial, *A Check on Bad Eyewitness Identifications*, N.Y. Times, Dec. 5, 2012, http://www.nytimes.com/2012/12/06/opinion/a-check-on-bad-eyewitness-identifications.html?_r=0.

3 285 Or. 221, 590 P.2d 1198 (1979).

4 *Lawson/James*, 352 Or. at 737, 746, 749.

5 *Id.* at 739–740

6 *Id.* at 741–744, Appendix at 769–789.

7 *Id.* at 744–746, Appendix at 769–789.

8 *Id.* at 746–747.

9 *Id.* at 748.

10 *Id.* at 752–753.

11 *Id.* at 753–754.

12 *Id.* at 756–758.

13 *Id.* at 759.

14 *Id.* at 741.

15 During police interviews, the wife was asked leading questions that suggested defendant's guilt and, due to her condition, she was especially susceptible to memory contamination. The wife was twice unable to identify defendant from photo lineups and only identified him after seeing suggestive photographs of the defendant and after viewing him at a preliminary hearing.

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(e.g., race discrimination, resistance to the employer's sexual harassment, etc.) may sue for wrongful discharge notwithstanding the at-will rule. The public policy exception is quite restrictive, however. As the United States District Court for the Western District of Virginia recently held in *Shomo v. Junior Corp.*,[7] and based on the seminal case of *Bowman v. State Bank of Keysville*,[8] public policy exceptions are applied only in the following cases:

- Where an employer interferes with an employee's exercise of a statutorily created right;
- Where an employer violates a statutorily created public policy intended to protect a class of persons of which the employee is a member; or
- Where an employee is terminated because he refuses to engage in a criminal act.

In *Shomo v. Junior Corp.,* a federal court applying Virginia law held that a waitress who alleged she was fired for refusing to terminate her pregnancy by abortion cannot pursue a wrongful termination cause of action, since her complaint satisfied none of those three criteria. In *Shomo* the plaintiff had become romantically involved with "Junior," the son of the president of the restaurant corporation that had hired her. When the plaintiff disclosed that she was pregnant with Junior's child, Junior allegedly told her to undergo an abortion or face termination. Subsequent to her refusal and not long afterwards, Junior's father allegedly terminated plaintiff after telling her that customers preferred to be served by a slim waitress, not someone with a "belly." Granting a motion to dismiss, the federal court wrote, "Terminating an employee simply because she refuses to have an abortion offends the conscience of the Court," and noted that "there is substantial evidence that the public policy of the Commonwealth [of Virginia] seeks to limit abortion."[9] It nonetheless held for defendant in the absence of any of the Virginia exceptions stated above.[10] Such was the strength of the Virginia at-will rule.

II. *Van Buren v. Grubb*

In that light, it is highly interesting that in *Van Buren v. Grubb*, a decision rendered in November 2012 in response to a reference from the Fourth Circuit Court of Appeals, the Virginia Supreme Court expanded wrongful discharge liability. The Virginia Supreme Court held that a *non*-employer may be sued for wrongful discharge if that non-employer was in fact the individual violator of Virginia public policy.[11]

The original wrongful discharge suit was filed in United States District Court by a woman who claimed to have been both the victim of gender discrimination in violation of Title VII of the Civil Rights Act of 1964, and also to have been wrongfully discharged because she would not yield to her supervisor's repeated sexual advances. The suit was filed against Dr. Stephen Grubb, who was the owner of the Virginia limited liability corporation that employed her. The district court had dismissed the wrongful discharge suit against Dr. Grubb on the grounds that he was not plaintiff's employer and could therefore not be sued for wrongful discharge. On appeal, the Fourth Circuit referred to the Virginia Supreme Court the question of whether a suit for wrongful discharge could be filed against a non-employer.

By a 4-3 decision, the court answered in the affirmative, ruling that if a non-employer was in fact the violator of public policy he can be sued for wrongful discharge. The majority rejected Grubb's argument that by definition discharge can be performed only by an employer, and therefore that said employer can be liable for wrongful discharge. The majority emphasized the need to deter wrongful discharge, and that need would not be accomplished in cases such as this one without the liability of "fellow employee" Grubb. The upshot in the instant case, of course, is that the plaintiff can pursue the defendant's personal assets, not merely the assets of the corporation.

The Chief Justice's dissent (joined by Justices Goodwyn and McLanahan) emphasized the logical impossibility of a non-employer firing an employee. Though the supervisor's behavior was wrongful and likely tortious, and could possibly incur personal liability for battery, it was not and could not be in violation of his duty not to discharge an employee for reasons contrary to public policy. Citing Illinois, Oregon, and Texas decisions in support, the Chief Justice argued that the duty not to wrongfully fire can only be breached by an employer, and since a breach of duty (not mere wrongfulness) is necessary for tort liability, a supervisor, or even an owner, cannot be liable for the tort of wrongful discharge.

Therefore, in this very interesting Virginia Supreme Court decision, the majority seems to have waived the need for "breach of duty" for tort liability. In Virginia, wrongfulness is now enough to incur liability, at least for the tort of wrongful discharge.

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Endnotes

1 Virginia Supreme Court Record No. 120348, November 1, 2012.

2 Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah and Wyoming recognize this doctrine. See Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 Monthly Lab. Rev. 1 (Jan. 2001), at 10.

3 California appears to have been the first mover here. *See* Cleary v. American Airlines, Inc., 111 Cal.App.3d 443 (1980).

4 Muhl, *supra* note 2, at 7.

5 *Id.* at 7–10.

6 Again California innovated. In *Petermann v. International Brotherhood of Teamsters,* plaintiff business agent refused to lie to a state committee to which he had been subpoenaed to testify, and was fired as a result. The California Supreme Court held that recognizing a wrongful discharge suit would effectuate California's policy against perjury. Holding otherwise would encourage criminal conduct by both employer and employee, the court reasoned. Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 188 (1959).

7 Shomo v. Junior Corp., No. 7:11-cv-508 (W.D. Va. June 1, 2012).

8 Bowman v. State Bank of Keysville, 331 S.E.2d 797, 331 S.E.2d 797. (Va. 1985).

9 Shomo v. Junior Corp., No. 7:11-cv-508, slip. op. at 13 (W.D. Va. June 1, 2012).

10 The plaintiff had argued that she should be protected by Virginia's "conscience clause," Va. Code § 18.2-75, which prohibits denial of employment to any person based on his or her refusal to participate in an abortion. However, this approach failed because, as the federal court noted, the law was intended to protect medical workers who object to taking part in abortion procedures. The law also requires that those seeking its shelter must have previously "state[d] in writing an objection to any abortion or all abortions on personal, ethical, moral or religious grounds", something the plaintiff had failed to do.

11 Van Buren v. Grubb, Virginia Supreme Court Record, No. 120348 (November 1, 2012).