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

nothing in the amendments prohibited public employees from collectively bargaining on the issue of retirement pensions or benefits.[30]

IV. Separately Concurring and Dissenting

Justice Pariente wrote a concurring opinion in which she emphasized that the court's decision does not express an opinion as to the amendments' wisdom or fairness, or even the necessity of the Legislature's actions.[31] Justice Pariente's concurrence then went on to respond to Justice Lewis' dissent.[32] In their dissents, Justices Lewis and Perry claimed that the majority's reading of the preservation of rights provision rendered the contract created by the provision "wholly illusory."[33] Both Justice Lewis and Justice Perry quoted large portions of the trial court's analysis, stating that they agreed with the trial court, and furthermore, that they would overturn *Florida Sheriffs* as having been incorrectly decided.[34] Justice Lewis in particular emphasized how the 2011 amendments changed the fundamental nature of the FRS and therefore violated the protection of rights provision.[35] Justice Perry focused on the rights provision's plain meaning and argued that the provision plainly gives state employees a contractual right to a noncontributory retirement system.[36]

V. Conclusion

Williams makes very plain the Florida Legislature's authority to make prospective changes to its retirement system's benefits, as Florida lawmakers gear up for more pension reform in the coming months. Indeed, only one week after *Williams* was decided, Governor Rick Scott and several legislators announced plans to implement further changes to the FRS that would include shifting new state employees to a 401(k)-style plan.[37] Politicians and voters may of course disagree on whether this is good public policy, but proponents of Governor Scott's pension amendments point to the $1 billion saved by the state and $600 million saved by local governments.[38] Time will tell whether the Florida Legislature's cost shifting measures will pay dividends in the long run towards the state's financial health.

**Christine Pratt graduated from the University of Florida Levin College of Law in 2011 and practices law in Florida. While in law school, she was secretary of her law school's chapter of the Federalist Society.*

Endnotes

1 Scott v. Williams, No. SC12-520 (Fla. 2013), *available at* http://www.floridasupremecourt.org/decisions/2013/sc12-520.pdf.

2 *Florida Supreme Court upholds law requiring state workers to contribute 3 percent of pay to state pension plan*, The Miami Herald, Jan. 17, 2013, http://www.miamiherald.com/2013/01/17/3187217/florida-supreme-court-upholds.html.

3 *Id.* at 2.

4 *Id.* at 3.

5 *Id.* at 18.

6 Jef Feeley & Christine Jordan Sexton, *Florida High Court to Weigh $1 Billion State Pension Case*, Bloomberg, Sept. 7, 2012, *available at* http://www.bloomberg.com/news/2012-09-07/florida-high-court-to-weigh-1-billion-state-pension-case.html (last visited Mar. 6, 2013).

7 Scott v. Williams, No. SC12-520, slip op. at 3 (Fla. 2013); *see also id.* at 28–29 (Lewis, J., dissenting).

8 *Id.* at 37 (Lewis, J., dissenting) (quoting Fla. Dep't of State, H.R. Comm. on Retirement, Personnel and Claims, Legislative Program Overview, June 24, 1974).

9 State ex rel. Holston v. City of Tampa, 159 So. 292, 293 (Fla. 1934).

10 Scott v. Williams, No. SC12-520, slip op. at 6 (Fla. 2013).

11 *See* Fla. Stat. §§ 121.011(3)(d) (1974), 121.011(3)(d) (2012).

12 Scott v. Williams, No. SC12-520, slip op. at 16 (Fla. 2013).

13 Order on Motions for Summary Judgment, Williams v. Scott, Case No. 2011 CA 1584 (Fl. Cir. Ct. Mar. 6, 2012), *available at* http://www.afscme1542.org/FRS_2nd_Circuit_Ct_Ruling_030612.pdf.

14 *Id.* at 6.

15 *Id.* at 7.

16 The trial court followed the United States Supreme Court's analysis in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

17 Order on Motions for Summary Judgment, Williams v. Scott, Case No. 2011 CA 1584, slip op. at 7–8 (Fl. Cir. Ct. Mar. 6, 2012), *available at* http://www.afscme1542.org/FRS_2nd_Circuit_Ct_Ruling_030612.pdf.

18 *Id.* at 5–6.

19 *Id.* at 2.

20 *Id.* at 8–9.

21 *Id.* at 9–10.

22 Scott v. Williams, No. SC12-520, slip op. at 1 (Fla. 2013).

23 *Id.* at 1, 3.

24 *Id.* at 16.

25 *Id.*

26 *Id.* at 11–12.

27 *Id.* at 18–21.

28 *Id.* at 18–19.

29 *Id.* at 19.

30 *Id.* at 20.

31 *Id.* at 23 (Pariente, J., concurring).

32 *Id.* at 26–27.

33 *Id.* at 31 (Lewis, J., dissenting); *id.* at 44 (Perry, J., dissenting) (quoting the circuit court opinion).

34 *Id.* at 36 (Lewis, J., dissenting); *id.* at 43 (Perry, J., dissenting).

35 *Id.* at 32 (Lewis, J., dissenting).

36 *Id.* at 39–42 (Perry, J., dissenting).

37 Kathleen Haughney, *Legislators Considering Pension System Overhaul*, Sun Sentinel, Jan. 24, 2013, *available at* http://articles.sun-sentinel.com/2013-01-24/news/fl-major-pension-changes-considered-20130124_1_pension-system-new-employees-florida-retirement-system (last visited March 6, 2013).

38 Feeley & Sexton, *supra* note 5.

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Tulsa, Oklahoma, brought suit in an Oklahoma trial court challenging HB 2780 under the Oklahoma Constitution.[15] The trial court granted summary judgment to Nova Health Systems and issued a permanent injunction restraining the state from enforcing the law.[16] Reasoning that the law qualified as a special law under the Oklahoma Constitution, the trial court invalidated HB 2780 because "it is improperly addressed only to patients, physicians, and sonographers concerning abortions and does not address all patients, physicians, and sonographers concerning other medical care where a general law could clearly be made applicable."[17]

The Oklahoma Supreme Court decided to retain the appeal directly from the trial court rather than wait for an intermediate appellate court to decide the case.[18] Rule 1.24 of the Oklahoma Supreme Court Rules dictates that the Oklahoma Supreme Court will retain a case upon consideration of three factors: (1) whether a case involves an area of law undecided in Oklahoma; (2) whether a split exists between the lower state appellate courts on the matter; and (3) whether the issue raised on appeal "concern[s] matters which will affect public policy" that, when decided by the Oklahoma Supreme Court, are "likely to have widespread impact."[19] Because no lower appellate courts had yet decided a challenge to HB 2780 and there had been no other abortion ultrasound laws before HB 2780, the Oklahoma Supreme Court must have retained the appeal either because HB 2780 involved an area of law undecided in Oklahoma, or because the issue concerned a matter that would affect public policy and have widespread impact.

II. *Pruitt*'s Analysis

The Oklahoma Supreme Court affirmed the judgment of the trial court *per curiam*, but overturned HB 2780 under the United States Constitution, not the Oklahoma Constitution.[20] The court cited as the sole basis for its decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a United States Supreme Court decision that invalidated a state spousal notification requirement but upheld a 24-hour waiting period and informed consent and parental consent requirements under a newly announced "undue burden" standard that represented a partial retreat from *Roe v. Wade*, 410 U.S. 113 (1973).[21] The entire relevant portion of the Oklahoma Supreme Court's analysis in *Pruitt* was as follows:

> Upon review of the record and the briefs of the parties, this Court determines this matter is controlled by the United States Supreme Court decision in [*Casey*], which was applied in this Court's recent decision of *In re Initiative No. 395, State Question No. 761*.
>
> Because the United States Supreme Court has previously determined the dispositive issue presented in this matter, this Court is not free to impose its own view of the law. . . . The challenged measure is facially unconstitutional pursuant to *Casey*. The mandate of *Casey* remains binding on this Court until and unless the United States Supreme Court holds to the contrary. The judgment of the trial court holding the enactment unconstitutional is affirmed and the measure is stricken in its entirety.[22]

In *In re Initiative No. 395*, the Oklahoma Supreme Court invalidated a proposed constitutional amendment that would have granted personhood status and constitutional rights to fetuses at the earliest beginnings of their biological development in the womb—essentially a blanket abortion ban.[23] To explain why it was overturning the proposed amendment, the court simply said, "Initiative Petition No. 395 conflicts with *Casey* and is void on its face and is hereby ordered stricken,"[24] adding a brief citation to another case, *In re Initiative Petition No. 349, State Question No. 642*.[25] *In re Initiative No. 349* overturned, under *Casey*, a proposed constitutional amendment that would have banned all abortions except those that fell within one of four narrow exceptions.[26]

On the same day it released *Pruitt*, the Oklahoma Supreme Court released another memorandum opinion in which it overturned a law that would have prohibited the off-label use of chemotherapeutic and diagnostic drugs that are known to cause abortions.[27] The opinion

in *Oklahoma Coalition for Reproductive Justice v. Cline* is word-for-word, entirely identical to *Pruitt*, except when the court cites the name of the law, HB 1970.[28] Thus, the court likewise did not provide specifics as to why HB 1970 is facially unconstitutional under *Casey*, aside from the observation that near total abortion bans fail *Casey*'s "undue burden" test.

Pruitt marks the third abortion law case that the Oklahoma Supreme Court decided in 2012, and its treatment of the issue is similar to the court's treatment in *Cline* and *In re Initiative No. 395*.

III. Comparing *Pruitt* to Other High-Profile Ultrasound Law Challenges

In *Texas Medical Providers Performing Abortion Services v. Lakey*, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit unanimously upheld, under *Casey*, a Texas ultrasound law that was in some respects more intrusive than HB 2780.[29] The Texas law that *Lakey* reviewed is similar to HB 2780 in that it requires physicians to perform and display a sonogram of the fetus and exempts those women facing medical emergencies, but the Texas law goes further than HB 2780 by requiring physicians to make the heart auscultation of the fetus *audible* to women, and then wait at least *24 hours* before proceeding with an abortion.[30] Under the Texas law, women may decline to view the images or hear the heartbeat, but they may only decline to hear the explanation of the ultrasound images if their pregnancy meets one of three narrow exceptions.[31] As with HB 2780, under the Texas ultrasound law, pregnant women seeking an abortion have to certify their doctor's compliance with the requisite procedures.

In upholding the Texas ultrasound law, the Fifth Circuit rejected the district court's holding that the law violated physicians' and women's First Amendment right against compelled speech. In reaching its decision, the Fifth Circuit expressly relied on *Casey*'s holding that an informed-consent statute does not abrogate the First Amendment right against compelled speech when it requires the giving of "truthful, non-misleading information" that is "relevant" to the woman's decision regarding the abortion.[32] The Fifth Circuit found that the images and audio produced by an ultrasound are the "epitome of truthful, non-misleading information," and are not different in kind, though admittedly "more graphic and scientifically up-to-date," than the disclosure requirements upheld by the Supreme Court in *Casey*.[33]

It is also worth mentioning that the Fourth Circuit may weigh in on the matter shortly, as a federal district court in North Carolina issued a temporary injunction against North Carolina's ultrasound law on December 19, 2011, using reasoning similar to that employed by the Texas federal district court and rejected by the Fifth Circuit in *Lakey*.[34] In *Stuart v. Huff*, the North Carolina federal district court chose to avoid *Casey* entirely, issuing its injunction solely on First Amendment compelled speech grounds.[35] The district court's issuance of the temporary injunction has already been appealed to the Fourth Circuit.

IV. *Pruitt*'s Importance

Because the Oklahoma Supreme Court chose to strike down HB 2780 under the Federal rather than the Oklahoma Constitution, its ruling in *Pruitt* creates an apparent split with the Fifth Circuit and could plausibly be reviewed by the United States Supreme Court. Oklahoma Attorney General Scott Pruitt has filed a petition for *certiorari*.[36]

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Endnotes

1 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

2 *Id.*

3 Attorney General Pruitt announced on March 25, 2013 that his office had filed a petition for writ of certiorari in the case. Randy Krehbiel, *Pruitt asks U.S. Supreme Court to overturn state court's abortion ruling*, Tulsa World, Mar. 26, 2013, http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130326_16_A12_OKLAHO146921 (last visited April 23, 2013)

4 House Bill 2780 (2)(B), 2010 Okla Sess. Laws ch. 36. (codified at Okla. Stat. tit. 63, §§ 1-738.1A, 1-738.3e).

5 *Id.* (2)(B)(3).

6 *Id.* (2)(B)(2).

7 *Id.* (2)(B)(4).

8 *Id.* (2)(B)(5).

9 *Id.* (2)(D).

10 *Id.* (2)(C).

11 Message from the Okla. H. Reps., Enrolled House Bill No. 2780, April 27, 2010, *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf (last visited Feb. 6, 2013).

12 *Id.*

13 Veto Message from Governor Brad Henry for HB 2780, Okla. H. Journal, April 26, 2010, *available at* http://www.okhouse.gov/Journals/HJ2010/2010%20Hleg%20Day49.pdf.

14 Message from the Okla. H.R., April 27, 2010, *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf (last visited Feb. 6, 2013).

15 Plaintiffs' Motion for a Temporary Injunction and Temporary Restraining Order, Nova Health Sys. v. Edmondson, Case No. CV-2010-533 (Okla. Dist. Ct. April 27, 2010), *available at* http://msnbcmedia.msn.com/i/MSNBC/Sections/TVNews/MSNBC%20TV/Maddow/Blog/2010/04/Motion.pdf (last visited Feb. 6, 2013).

16 Order Granting Summary Judgment Declaring Ultrasound Act as an Unconstitutional Special Law and Permanent Injunction Preventing the Enforcement of the Ultrasound Act, Nova Health Sys. v. Pruitt, Case No. CV-2010-533 (Okla. Dist. Ct. Mar. 28, 2012), *available at* http://ocrj.org/sites/default/files/%5B150%5D%20Order%20Granting%20Summary%20Judgment%203-28-12.pdf (last visited Feb. 6, 2013).

17 *Id.* at 1.

18 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

19 Oklahoma Supreme Court Rules, Rule 1.24(c).

20 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

21 *Id.*

22 *Id.*

23 *In re* Initiative Petition, No. 395, State Question No. 761, 2012 Okla. 42, 286 P.3d 637 (Okla. 2012).

24 *Id.*

25 *Id.*

26 *Id.*

27 Okla. Coal. for Reproductive Justice v. Cline, 2012 OK 102, 292 P.3d 27 (Okla. 2012).

28 *Id.*

29 Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012).

30 *Id.* at 573.

31 *Id.* The Texas law provides that a woman may decline to hear a verbal explanation of the ultrasound if: (1) her pregnancy is the result of a rape, incest, or other sexual crime that she reported, or failed to report due to a reasonable belief that reporting the crime would put her at risk of serious bodily harm; (2) she is a minor and is obtaining her abortion through judicial bypass procedures; or (3) the fetus has a reliably diagnosed and documented irreversible medical condition or abnormality. Tex. Health Code Ann. § 171.0122(d) (West 2011). In contrast, HB 2780 allows women to decline to hear an explanation of the ultrasound images only when their health or lives are in danger.

32 *Id.* at 574–80.

33 *Id.* at 577–78.

34 Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

35 *Id.*

36 Randy Krehbiel, *Pruitt asks U.S. Supreme Court to overturn state court's abortion ruling*, Tulsa World, Mar. 26, 2013, http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130326_16_A12_OKLAHO146921 (last visited April 23, 2013)