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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANNE MARIE HADDOCK, Plaintiff and Respondent, v. READY PAC FOODS, INC., Defendant and Appellant.	B230776 (Los Angeles County Super. Ct. No. BC392915)

APPEAL from an order of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Jones Day, Elwood Lui, Philip E. Cook and Peter E. Davids for Defendant and Appellant.

Michael J. Faber for Plaintiff and Respondent.

Following a six-week trial, the jury returned a verdict in favor of Ready Pac Foods, Inc., rejecting Anne Marie Haddock's claim she had been wrongfully terminated from her position as Ready Pac's vice president of human resources. The trial court granted Haddock's motion for a new trial on the ground the jury had considered "extraneous improper law" on at-will employment. Applying, as we must, the deferential abuse-of-discretion standard of review applicable to an order granting a new trial, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Second Amended Complaint*

In August 2008 Haddock filed a second amended complaint alleging a cause of action for wrongful termination in violation of public policy.[1] According to her pleading, Haddock was terminated as Ready Pac's vice president of human resources on June 16, 2008 after sending a letter to Ready Pac's board chairperson, Tiffany Kosch, insisting Michael Solomon, the company's president and chief operating officer, was misclassified as an independent contractor to avoid limits on his pension contributions. The complaint further alleged Haddock, who was responsible for properly classifying workers, had repeatedly raised her concerns with in-house and outside counsel, but no one had taken any action to remedy the situation.

2. *The Evidence at Trial*

In December 2006 Ready Pac, one of the largest fresh produce companies in the country, was on the verge of bankruptcy. Ready Pac retained M. Solomon & Associates to restore it to financial health. Solomon, the company's president and chief executive officer, was a "turnaround expert." M. Solomon & Associates paid Solomon's salary and employment taxes.

In August 2007 Solomon became the acting president and chief operating officer of Ready Pac pursuant to an amended consulting agreement. The agreement provided

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1 An additional cause of action for retaliation in violation of Labor Code sections 1102.5 and 285.6 was dismissed by Haddock before closing argument.

M. Solomon & Associates would continue to pay Solomon, as well as all applicable taxes on his compensation, and would indemnify Ready Pac with respect to any claims or proceedings regarding taxation of his compensation. Solomon was not elected an officer of the company.

a. *Haddock's testimony*

Haddock testified she began expressing concern Solomon was improperly classified as an independent contractor in October 2007 and continued to do so until she was terminated. When Haddock first raised the issue with Solomon, he sternly told her to "drop it." He also pointed out his contract included an indemnity clause, protecting Ready Pac from any potential liability. When Haddock relayed her conversation with Solomon to Karen Shotting, Ready Pac's general counsel, however, Shotting appeared to share Haddock's concern; she told Haddock she could end up "wearing prison orange" if she did not "fix this problem." Haddock then contacted the company's outside counsel, Michele Beilke, who said she was "very concerned" and advised Solomon "must be an employee as president." Beilke subsequently had an associate at her law firm investigate the matter and told Haddock "their preliminary analysis showed some major changes need to happen in the manner in which [Solomon] held himself out in order for the independent contractor status to be acceptable."

In November 2007 Jay McFadyen replaced Shotting as general counsel; Haddock raised her concern about Solomon's classification with him the day he started. After discussing the issue for several months, Haddock and McFadyen agreed to discuss the issue with Kosch. Haddock testified they spoke with Kosch on April 8, 2008, and Kosch said, "[T]his has been going on way too long. Michael knows he needs to be an employee. We know he needs to be an employee." Kosch instructed McFadyen to pursue the issue with outside counsel. However, because no one took any action to ensure Solomon became an employee, Haddock sent a letter to Kosch on June 8, 2008

seeking assistance in resolving the issue.[2] On June 10, 2008 Haddock was told she would be terminated. On June 12, 2008 Solomon became an employee of Ready Pac. On June 16, 2008 Haddock was terminated.

b. *The defense case*

Ready Pac's employees and outside counsel disputed Haddock's account of the classification issue, and several testified she had been terminated because of poor performance. Shotting testified she had initially questioned Solomon's classification in October 2007 and asked Haddock to consult with outside counsel. Shotting said Haddock "seemed reluctant to pursue the matter" and thought Solomon's classification "was fine the way it was." Shotting also denied telling Haddock she could be liable for any misclassification or might end up "wearing prison orange." Beilke's testimony was consistent with Shotting's. Beilke testified she never concluded Solomon was

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[2] The letter in part states, "As Jay and I discussed with you during the teleconference on April 8th, it is imperative that we address Michael's current status as President and Consultant. The IRS regulations clearly state that an Officer of the company must be an employee. I am extremely uncomfortable that Ready Pac is in violation of State and Federal Laws as it is my responsibility to classify employees correctly. We are providing Michael the vehicle to commit tax fraud by helping him 'fund his personal pension.' [¶] I first raised this issue in October 2007 when Michael officially became the President of Ready Pac. . . . He told me that he did not want to become an employee because he would then be subjected to the IRS limit for 401(k). He wanted to continue to put hundreds of thousands of dollars in his personal pension. I told him I was not comfortable with this arrangement and he stressed that companies 'do this all the time.' [¶] Karen Shotting, the former General Counsel, threatened me on October 25th stating that I could go to jail if I didn't make Michael a Ready Pac employee. On November 8th, I discussed the matter with Ready Pac's outside legal counsel, Michele Beilke of Reed Smith. She and her team agreed that Michael would not pass the 'test' as a contractor due to his position and other key factors. . . . [¶] Based on our conversation with you, I understand that you do not wish to offer Michael additional compensation to make the transition a neutral event for him. . . . I was hoping to share executive compensation data that could aid you in making a decision to increase Michael's salary and, in effect, cover the loss he would experience with his pension being subjected to 401(k) regulations. . . . [¶] Tiffany, I hope you understand that I only wish to abide by the law and protect the company. . . . I may be held personally liable for not following State and Federal regulations. . . . [¶] Tiffany, I am uncertain how best to proceed in view of Michael's hostility and his unwillingness to become a Ready Pac employee."

misclassified, never told Haddock he was misclassified and never told Haddock she could face personal liability for any misclassification.

Kosch testified she told Haddock during their April 8, 2008 telephone conversation she did not believe Solomon's classification was improper, explaining it was common for turnaround specialists to be consultants. However, she suggested Haddock speak with outside counsel, Mitch Cohen. Cohen testified he reviewed the matter with a tax partner and an executive compensation partner at his firm, who advised him Solomon's classification as an independent contractor was defensible. Cohen said he provided this information to Kosch and McFadyen, and McFadyen testified he communicated it to Haddock.

For his part, Solomon testified Haddock never insisted he become an employee and never expressed concern about his independent contractor status. Solomon also said in January 2008 he and Kosch had begun discussing an agreement for him to become an employee, but his conditions for doing so were not resolved for several months.

With respect to Haddock's job performance, a number of Ready Pac witnesses testified she had recruited unqualified candidates, improperly completed payroll forms, misunderstood disability law, failed to follow up on insurance benefits, was generally not responsive and had made unauthorized changes to a personnel action form to increase her own benefits. However, the performance-related issue that resulted in her termination was her failure to ensure Ready Pac was in compliance with United States Immigrations and Customs Enforcement (ICE) regulations regarding employment eligibility verification.

In June 2007 ICE agents had cited Ready Pac for numerous violations of immigration laws at one of its plants. Solomon told Haddock several times that compliance with ICE regulations should be her top priority and authorized the hiring of additional employees to complete the assignment if necessary. Outside counsel advised Haddock what she needed to do to comply and offered to conduct an audit, which Haddock declined.

Haddock informed Solomon weekly through April 2008 the immigration-related work was going very well. Nevertheless, when ICE agents returned to Ready Pac in April 2008, many of the required employee forms were expired, inaccurate or missing. Ready Pac retained outside counsel Irene Recio to assist. Recio advised Ready Pac it could face substantial fines, criminal penalties and a shutdown of one of its plants as a result of the significant number of missing, inaccurate and erroneous forms. When Solomon asked Haddock why the documentation was so grossly inadequate, she explained she had delegated responsibility for completing the forms to Carmen Schmidt, a 20-year employee Solomon described as "the weakest link." Haddock terminated Schmidt on April 18, 2008.

Solomon testified Kosch had called him in April 2008 and demanded Haddock be terminated immediately. Solomon replied there was no one else who could run the human resources department or continue work on ICE compliance at that time. In May 2008 Solomon instructed a consultant to look for a replacement for Haddock. Haddock was terminated a few days after Solomon identified her replacement.

Haddock disputed her performance was deficient, testifying she had received a generous salary, incentive plans, stock options and benefits. She also contended she had never received any progressive discipline. Haddock, however, conceded she was an at-will employee and understood that to mean she could be terminated at any time. She also understood Ready Pac had a policy that use of progressive discipline as a precondition to termination was discretionary.

3. *The Jury Instructions and Verdict*

The jury was instructed Haddock "claims she was discharged from employment for reasons that violate public policy." Although the term "violate public policy" was not defined, the jury was instructed Haddock had to prove she "had a reasonable and good faith belief that Michael Solomon was unlawfully classified as an independent contractor, regardless of whether or not his classification was, in fact, unlawful"; she had complained to Ready Pac regarding Solomon's classification prior to her termination; and her complaint "was a motivating reason for her discharge." The jury was further instructed

"[a] 'motivating reason' is a reason that contributed to the decision to take certain action, even though other reasons may have also contributed to that decision."[3] The jury was not instructed on at-will employment.[4]

The special verdict form submitted to the jury directed the jury to initially determine whether Haddock had "proved that she was wrongfully discharged in violation of public policy." The second question on the form, to be answered only if the response to the initial question was "yes," was, "Has Ready Pac proved that Mrs. Haddock would have been terminated by Ready Pac for poor performance as of the date of her actual termination notwithstanding the complaint that Mr. Solomon's classification as an independent contractor for Ready Pac was unlawful?" After deliberating for approximately 45 minutes, the jury voted 10-to-2 that Haddock had not been wrongfully discharged.

4. *The Trial Court Order Granting a New Trial*

a. *Haddock's motion*

In November 2010 Haddock moved for a new trial on the grounds of juror misconduct and irregularities in the proceedings. Haddock presented several arguments including that the jurors had improperly discussed California law regarding at-will employment and at least two jurors had formed and expressed opinions before deliberations began.

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3 A special jury instruction on mixed motive was given providing, "If you find that [Haddock's] discharged was motivated by both unlawful retaliatory reasons and legitimate performance reasons, but that Mrs. Haddock would have been discharged for the legitimate performance reasons anyway, then [Ready Pac] is not liable for Mrs. Haddock's discharge."

4 CACI No. 2400 is the standard civil jury instruction on "breach of employment contract—unspecified term—'at-will' presumption." It provides, "An employment relationship may be ended by either the employer or the employee, at any time, for any [lawful] reason, or for no reason at all. This is called 'at-will employment.' [¶] An employment relationship is not 'at will' if the employee proves that the parties, by words or conduct, agreed that the employee would be discharged for good cause only."

In support of her motion Haddock filed declarations from Jurors 6 and 14, alternates who had observed deliberations, and Juror 7. With respect to discussion of at-will employment, Juror 6 declared several jurors were confused by the phrase "in violation of public policy" because the court had not defined it, but that confusion was resolved when Juror 7 said "unequivocally that the law in California is that employees are 'at will' and that employers can fire anyone, for any reason, at any time. Most other jurors expressed their agreement with that statement, and some said a few words but there was no discussion. Immediately after that, [Juror 8], the foreperson, called for a voice vote on Question No. 1, which was answered 'no' by a vote of ten to two."

Juror 14's declaration on this point was substantially the same. Similarly, Juror 7 declared, "[T]here was no discussion of what 'public policy' meant because we were not told what it was. Thus, there was also no discussion of whether [Haddock] was subject to some undefined public policy. Instead, several jurors expressed the view that under the law Mrs. Haddock was an 'at will' employee who could be fired for any reason whatsoever. The vote on Question No. 1 on the verdict form was taken once we agreed that she was an 'at will' employee, and that was the basis for it."

Regarding Haddock's claim two jurors had prejudged the case, Juror 6 declared Juror 8, the foreperson, had told her before closing argument, "Haddock had no business being in the position of a VP because she was too inexperienced and was being paid too much money. [Juror 8] said that Mrs. Haddock deserved to be fired just as she had fired Carmen [Schmidt] for not doing the job. She also told me that [Haddock's son's] health problems were very minor, that she had encountered the condition before at Kaiser Permanente, and that [Haddock] was exaggerating the seriousness to get sympathy." Additionally, according to Juror 6, Juror 7, "expressed her 'professional opinion' to me that all of Mrs. Haddock's complaints about lack of sleep, nightmares, and inability to eat were to play on the emotions of the jury. She said that Mrs. Haddock only saw her psychiatrist one time, and had an ulterior motive to get a doctor's certificate so she could claim disability."

b. *Ready Pac's opposition*

In opposition Ready Pac argued Haddock's evidence the jurors had considered extraneous at-will employment concepts was inadmissible under Evidence Code section 1150 because it described the jurors' deliberative process. Ready Pac separately objected to, and moved to strike, the key portions of the declarations supporting Haddock's motion. Ready Pac also argued, even if admissible, the evidence was disputed by the juror declarations it had submitted. Finally, Ready Pac contended it was not misconduct to discuss at-will employment because Haddock had testified she understood she was an at-will employee and understood that meant she could be terminated at any time for any reason.

Regarding whether Jurors 7 and 8 had prejudged the case, Ready Pac argued Juror 6 was not credible. Alternatively, Ready Pac argued, even if misconduct had occurred, it was not prejudicial because the comments at issue were directed toward Haddock's damages claim, not liability.

Ready Pac filed the supporting declarations of five jurors. Juror 8 disputed Juror 7 had said "'at will' employment is the 'law' in California" and contended at-will employment was only discussed after the jurors who indicated Haddock had demonstrated she was terminated in violation of public policy explained their votes. Juror 8 also denied making any statements about the case prior to commencement of deliberations and denied ever stating Haddock was too inexperienced for her position, was being paid too much, "deserved to be fired just as she had fired Carmen Schmidt" and she was exaggerating her son's health problems to garner the jury's sympathy. In other declarations, jurors contended they did not recall at-will employment being discussed or corroborated Juror 8's assertion at-will employment was not discussed until after the initial vote.

c. *The court's tentative and final rulings*

In its tentative ruling the court found, "[T]here was misconduct by jurors that [led] the jury to decide that it was a defense to the cause of action alleging that [Haddock] was [w]rongfully [t]erminate[d] due to a violation of [p]ublic [p]olicy that [Haddock] was an

employee at will and could be fired for any reason. This was an incorrect interpretation of the law by the jury which was affected by the misconduct of the jurors. [¶] . . . [¶] As a matter of law, it is not a defense for [Ready Pac] to contend that it fired [Haddock] because she was an at will employee and that is a defense to [w]rongful [t]ermination in violation of [p]ublic [p]olicy. Ready Pac's defense in this case was that they terminated [Haddock's] employment for a legitimate reason, that is, for cause for failure to perform her job at an acceptable level to them. This was a[n] appropriate legal defense." The court further found the declarations submitted by Jurors 6, 7 and 14 were credible.

After hearing argument on December 14, 2010, the court adopted its tentative ruling as its final decision. The court overruled many of Ready Pac's objections to the declarations filed in support of Haddock's motion. It did, however, find some statements or portions of statements inadmissible. For example, the court struck Juror 6's statement, "In deliberations, there was no consideration of the evidence or the law as instructed by the court" and a similar statement by Juror 14. Of Juror 7's statement, "Specifically, there was no discussion of what 'public policy' meant because we were not told what it was," the court struck everything after "meant."

On December 21, 2010 the court issued a written ruling finding in part it was prejudicial misconduct for jurors to discuss at-will employment law concepts. Consistent with the tentative ruling, the written ruling states, "5. The Court concludes that extraneous improper law was introduced during jury deliberations, that is, that an [at-will] employee can be fired for any reason and at any time and this was a defense to [Haddock's] cause of action that she was wrongfully terminated in violation of public policy. No such instruction of law was ever given to the jury and [at-will] concepts are not a defense to this cause of action. The court finds the declarations of [Juror 6], and Jurors [14 and 7] were credible on the issue and this finding that [at-will] employee law

was used by the jury as a defense against [Haddock's] wrongful termination cause of action."[5]

DISCUSSION

1. *Law Generally Governing New Trial Motions Based on Juror Misconduct*

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633.) Code of Civil Procedure section 657 identifies seven grounds for a new trial motion, including irregularity in the proceedings and jury misconduct.

When a party seeks a new trial based on jury misconduct, the court undertakes a three-step inquiry. First, the court must determine whether the declarations offered in support of the motion are admissible under Evidence Code section 1150. If they are, the court must next consider whether the facts establish misconduct. Finally, assuming misconduct is found, the court must determine whether it was prejudicial. (*People v. Duran* (1996) 50 Cal.App.4th 103, 112-113; *People v. Hord* (1993) 15 Cal.App.4th 711, 724.) "Juror misconduct raises a rebuttal presumption of prejudice." (*People v. Dykes* (2009) 46 Cal.4th 731, 809; see *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 792; *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 626.) The presumption of prejudice "may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining

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5 The court also granted the motion for a new trial on the ground of juror prejudgment and bias, finding Juror 8's pre-deliberation statements showed prejudgment of the case and constituted misconduct and further finding this juror "was motivated to rush the deliberations since she had personal and business pressures to get back to work and she was mad at the plaintiff for causing her to miss a family vacation." Juror 7 was also "guilty of juror misconduct in that she showed prejudgment of the case and bias against the plaintiff's case by expressing her opinion against the credibility of the plaintiff's testimony and case in pre-deliberation statements . . . ." The court denied the motion on all other grounds advanced by Haddock. Because we affirm the order granting a new trial based on the jurors' improper discussion of at-will employment, we need not consider any of these alternative grounds.

party resulting from the misconduct." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417.)

Under Evidence Code section 1150, subdivision (a),[6] only evidence of "'objective facts'" is admissible to prove juror misconduct. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397 (*Stankewitz*).) Evidence regarding how such objective facts may have influenced jurors' subjective thought processes is inadmissible to impeach a verdict. (*Ibid.*) "Thus, jurors may testify to 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration'—but may not testify to 'the subjective reasoning processes of the individual juror . . . .'" (*Id.* at p. 398; accord, *People v. Lindberg* (2008) 45 Cal.4th 1, 53 ["'"verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror 'felt' or how he understood the trial court's instructions is not competent"'"].) "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent." (*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

2. *Standard of Review*

Ordinarily, a trial court's determination of a motion for new trial will not be disturbed "unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387; see *People v. Ault* (2004) 33 Cal.4th 1250, 1261 ["deference due orders *granting* new trials is commonly justified on grounds that '[t]he trial judge is familiar with the evidence, witnesses and proceedings, and is therefore in the best

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6 Evidence Code section 1150, subdivision (a), provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

position to determine whether, in view of all the circumstances, justice demands a retrial'"]; *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467 ["trial court has broad discretion in ruling on each" question of three-step inquiry].)[7] "'[A]ll intendments are in favor of the action taken by the lower court [and] the affidavits in behalf of the prevailing party are deemed not only to establish the facts directly stated therein, but all facts reasonably inferred from those stated.'" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 106.) The trial court is charged with assessing the credibility of declarants, "entitled to believe one over the other." (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160.)

Nevertheless, the great deference afforded the trial court must yield when the order is based in substantial part on inadmissible evidence. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1126 [court's reliance on inadmissible portions of juror declarations was not "insignificant or harmless" when exclusion of those portions compelled "conclusion special verdict form was not misleading and did not confuse the jury"].) Whether evidence is admissible under Evidence Code section 1150 is reviewed under an abuse of discretion standard. (See *People v. Bryant, supra*, 191 Cal.App.4th at p. 1467.)

3. *It Was Prejudicial Misconduct for the Jurors To Discuss At-will Employment Law*

a. *Admissibility of the juror declarations*

The trial court properly struck portions of the declarations by Jurors 7 and 14 as inadmissible statements about the jurors' subjective, deliberative process. The court, however, erroneously admitted other statements by Jurors 7 and 14, as well as by Juror 6, describing what some jurors "'felt' or how [they] understood the trial court's instructions." (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 53.) For example, the court

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7 A trial court's finding of no prejudice is reviewed independently as a mixed question of law and fact when the court *denies* a motion for new trial based on juror misconduct. (*People v. Ault*, *supra*, 33 Cal.4th at pp. 1261-1262.) However, we will still "'accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*Id.* at p. 1263.)

should have excluded paragraph 2 of Juror 6's declaration stating, "During the deliberations, almost all of the jurors expressed confusion over the wording of the Special Verdict Form. In particular, several jurors said they did not understand what was meant by the phrase 'in violation of public policy' because that was never defined by the court."

Disregarding the inadmissible evidence of the jurors' confusion and subjective thought process, however, there remains evidence of overt acts—that is, the making of statements about extraneous law and the timing of the vote after those statements were made—largely corroborated by other declarations that establish misconduct. Thus, Juror 6 declared, "Juror No. 7 . . . stated unequivocally that the law in California is that employees are 'at will' and that employers can fire anyone, for any reason, at any time. Most other jurors expressed their agreement with that statement, and some said a few words but there was no discussion. Immediately after that . . . the foreperson[] called for a voice vote on Question No. 1, which was answered 'no' by a vote of ten to two."

Although Juror 7 did not acknowledge responsibility for initiating the discussion of at-will employment law, she did corroborate Juror 6's statement at-will employment law was discussed immediately prior to voting on whether Haddock had proved she was terminated in violation of public policy: "[S]everal jurors expressed the view that under the law Mrs. Haddock was an 'at will' employee who could be fired for any reason whatsoever. The vote on Question No. 1 on the verdict form was taken once we agreed that she was an 'at will' employee[.]"

To be sure, "[c]ases where there was an overt act that in and of itself was improper, such as a juror reading a novel during the taking of testimony or a juror's consultation with an attorney for advice on the law applicable to the case" are easier to resolve from an evidentiary perspective than cases in which "it is not an overt act but a statement from a juror that is claimed to constitute misconduct." (*Grobeson, supra,* 190 Cal.App.4th at p. 787.) Indeed, there is a fine line between evidence of the making of a statement—an objective fact properly admitted—and inadmissible evidence of how that statement may have influenced a juror's subjective though process. (*See Stankewitz, supra*, 40 Cal.3d at p. 398 ["[s]tatements have a greater tendency than nonverbal acts to

implicate the reasoning process of jurors—e.g., what the juror making the statement meant and what the juror hearing it understood"]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 419 (*Hedgecock*) ["when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes"].)

Nevertheless, misuse of such statements by counsel to improperly open the reasoning process to scrutiny is not "threatened when . . . the very making of the statement sought to be admitted would itself constitute misconduct. Such an act is as much an objective fact as a juror's reading of a novel during the taking of testimony [citation] or a juror's consultation with an outside attorney for advice on the law applicable to the case." (*Stankewitz, supra,* 40 Cal.3d at p. 398 [declarations that juror who had been a police officer for more than 20 years gave legal advice about case based on his purported familiarity with criminal law were admissible]; *Hedgecock, supra*, 51 Cal.3d at p. 419 ["[i]n rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible"].) The instant case, like *Stankewitz*, presents such a rare circumstance. Once the inadmissible statements about the jurors' thought process are disregarded, what is left are statements describing the objective, verifiable facts that Juror 7 opined on law on which the jury had not been instructed, that extraneous law was discussed and a vote was taken resulting in an adverse verdict for Haddock.

b. *The discussion of at-will employment law was misconduct*

As the *Stankewitz* Court held, a juror's injection of extraneous or erroneous legal principles into deliberations may constitute misconduct: "In our system of justice it is the trial court that determines the law to be applied to the facts of the case, and the jury is 'bound . . . to receive as law what is laid down as such by the court.' [Citation.] 'Of course, it is a fundamental and historic precept of our judicial system that jurors are restricted solely to the determination of *factual* questions and are bound by the law as given them by the court. They are not allowed either to determine what the law *is* or what the law *should be*.'" (*Stankewitz, supra,* 40 Cal.3d at p. 399.)

Ready Pac argues the jurors' discussion of at-will employment was not extraneous or improper because Haddock testified she knew she was an at-will employee, and understood the consequences of that status, including that progressive discipline was discretionary with Ready Pac. Ready Pac also argues three trial exhibits referred to Haddock's at-will employment status and Ready Pac discussed it during closing arguments.

The admission of this evidence—an issue vigorously contested by the parties—and the lack of any instruction explaining its significance may well have confused the jury. But neither the court's evidentiary rulings nor any challenge to its instructions is now before us. Rather, the only question is whether it was misconduct for the jurors to discuss a potentially (albeit erroneously) dispositive legal concept on which they had not been instructed. It was.[8] (*Stankewitz, supra,* 40 Cal.3d at p. 399; see *People v. Marshall* (1990) 50 Cal.3d 907, 950 ["the introduction of extraneous law, whether erroneous or not, constitutes misconduct"]; *Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1349-1350 [juror's statement during deliberations in personal injury action that driver could not have been negligent if no traffic citation was issued constituted prejudicial misconduct;

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8 Ready Pac has argued the trial court's order and specification of reasons for granting a new trial violates Code of Civil Procedure section 657, which prohibits the court from "direct[ing] the attorney for a party to prepare either or both said order and said specification of reasons" (*id.*, 11th par.), including incorporating by reference the arguments of the parties. (See *Devine v. Murrieta* (1975) 49 Cal.App.3d 855, 860.) However, as presented, Ready Pac's argument challenges only the court's ruling some jurors had prejudged the case or were biased, not that they had discussed extraneous law, the sole ground upon which we affirm the new trial order. Moreover, although the specification of reasons does indicate the court found the declaration of Juror 6 "completely credible" and the declaration of Juror 8 mostly "not to be credible based on the Plaintiff's papers," the court further found Juror 8 was credible on the essential point extraneous law had been discussed. Indeed, jurors who submitted declarations in support of Ready Pac also acknowledged at-will employment law had been discussed. Finally, read in its entirety, it is clear the court's specification of reasons was the "product of the judge's mental processes and not that of the attorney for the moving party." (*Oberstein v. Bisset* (1976) 55 Cal.App.3d 184, 190.)

"[c]ommunication to fellow jurors of information on an issue under litigation except in open court and in the manner provided by law constitutes misconduct"].)

Attempting to avoid this well-established principle, Ready Pac narrowly construes *Stankewitz* and contends it is distinguishable because it only holds it is misconduct for a juror to discuss the law if he or she purports to have specialized knowledge based on his or her background. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 161 ["[c]ertainly a juror commits misconduct by asserting a 'claim to expertise or specialized knowledge of a matter at issue'"].) Quoting from *People v. Marshall*, *supra*, 50 Cal.3d 907, Ready Pac argues it was not misconduct for the jurors to discuss their general understanding of at-will employment law sourced "in everyday life and experience." (See *id*. at p. 950 ["The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.'"].)

To be sure, the offending jurors in both *Stankewitz* and *Marshall* were law enforcement officers who had cited their background and experience as the basis for their statements on the law. (See *Stankewitz*, *supra*, 40 Cal.3d at p. 400; *People v. Marshall*, *supra*, 50 Cal.3d at p. 950.) But the self-professed expertise of the juror who made a statement of law not also given to the jury in the instructions by the court is simply one factor to be considered in determining whether misconduct has occurred and, if so, its nature and seriousness. (See *Hasson v. Ford Motor Co.*, *supra*, 32 Cal.3d at p. 417; *McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 265.) Here, although Juror 7 apparently had no professional background or specialized knowledge about employment law, she nevertheless "unequivocally" declared "the law in California is that employees are 'at will' and that employers can fire anyone, for any

reason, at any time"; she did not simply share her own experience or understanding. It was not an abuse of discretion for the trial court to conclude the introduction of this erroneous statement of law into the jury's deliberations was misconduct and not simply an "insignificant infraction" (see *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1446) or "a general statement about the law that finds its source in everyday life and experience." (See *Marshall*, at p. 950; cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1414 [juror's reliance "on his personal experience with firearms to form an opinion about the accuracy of the murder weapon" and "mention[ing] his experience to the other jurors when expressing his views during deliberations" was not misconduct].)

c. *Ready Pac failed to rebut the presumption of prejudice*

As discussed, juror misconduct raises a rebuttable presumption of prejudice. (*Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 417 ["[n]o principled distinction can be drawn between civil and criminal cases for purposes of the presumption of prejudice arising from juror misconduct"]; accord, *Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58.) Ready Pac contends, even if the discussion of at-will employment was misconduct, it was not prejudicial because the declarations submitted by both Haddock and Ready Pac established no juror changed his or her vote as a result of that discussion: A show of hands taken at the outset of deliberations was 10-2 against Haddock, and the final vote taken after the discussion of at-will employment was also 10-2. (See *Bandana Trading Co. v. Quality Infusion Care, Inc., supra*, 164 Cal.App.4th at p. 1445 ["[w]here the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside"].)

Ready Pac's argument falls far short of the "affirmative evidentiary showing that prejudice does not exist" (*Hasson v. Ford Motor Co., supra*, 32 Cal.3d at p. 417) required to rebut the presumption of prejudice, "a presumption [that] is even stronger when, as here, the misconduct goes to a key issue in the case." (*Stankewitz, supra*, 40 Cal.3d at p. 402.) First, the declarations do not establish no juror changed his or her vote as a

result of the discussion of at-will employment. Jurors 6, 7 and 14, all of whom the trial court found to be credible, stated a vote was only taken after the discussion of at-will employment; there is no indication a preliminary vote was taken at the outset of deliberations. (See *Grobeson*, *supra*, 190 Cal.App.4th at p. 795 ["[a]ll intendments favor the order granting the new trial [citation], and when, as here, the trial court has resolved factual conflicts, we will not disturb the trial court's decision"].) Second, even if a preliminary vote had been taken, the introduction of an erroneous legal principle that directly conflicted with the court's instructions by suggesting Haddock's status as an at-will employee was a complete defense to her wrongful termination claim undermined Haddock's "constitutionally protected right to the complete consideration of [her] case by an impartial panel of jurors." (*Hasson*, at p. 416; see also *Stankewitz*, at p. 399 [prejudicial impact of extraneous legal advice is "worse" when that advice is "totally wrong"].) The very purpose of the deliberative process is to allow the jurors to talk with one another and to consider the views of other jurors. (See CACI No. 5009 ["Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case."]; see also *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911.) The trial court's conclusion there was prejudicial juror misconduct warranting a new trial is fully supported by the record.

DISPOSITION

The order granting Haddock's motion for new trial is affirmed. Haddock is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J. JACKSON, J.