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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 78,768

MARTIN COUNTY, FLORIDA,
etc.,

Petitioner,

-vs-

WILLIE EDENFIELD, SR.,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

This case is before the Court as a result of the Fourth District's certification that the subject matter of its Opinion is a matter of great public importance. The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(R) - Record-on-Appeal

(Dep.) - Deposition of Plaintiff[1]

(A) - Petitioner's Appendix

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[1]/Excerpts in record (R190-228).

STATEMENT OF THE CASE

The Plaintiff filed a one count Complaint against Martin County, alleging that he had been subject to adverse personnel action as a result of his participation in an investigation conducted by a County commissioner regarding the misappropriation of County property (R1-2). It was alleged that as a result of voluntary disclosures made in that investigation the Plaintiff was demoted and his salary and benefits were reduced substantially (R1). The Plaintiff sought, inter alia, reinstatement with full fringe benefits, and lost remuneration caused by the adverse personnel action (R2). An Amended Complaint, which was sworn to by the Plaintiff, was filed containing substantially similar allegations (R3-4).

The Defendant filed an Answer denying the material allegations of the Complaint, and raising various affirmative defenses (R5-6). The fifth affirmative defense raised was that the adverse employment action taken against the Plaintiff was predicated on grounds other than Plaintiff's exercise of his rights as protected by Fla. Stat. §112.3187 (R6). The Plaintiff filed a reply denying the affirmative defenses, including the fifth affirmative defense (R7).

The Defendant filed a Motion for Summary Judgment which only argued that the Plaintiff's actions did not come within the scope of Fla. Stat. 8112.3187, because he had been involved in the wrongful conduct under investigation (R8-13). The only evidence presented in conjunction with that motion was excerpts from the

deposition of the Plaintiff (R190-228). Additionally, the Defendant attached an unverified memorandum from a Kathryn Bradley to a Jack Overstreet, which addressed House Bill 75, which was part of the legislative history of **Fla.** Stat. §112.3187. **Also,** a transcript of the meeting of the House Committee on Government Operations dated October 5, 1985, was submitted.

In response to the Motion for Summary Judgment, the Plaintiff filed various affidavits and a Motion for an Extension of Time to respond to it (R17-18, 74-81, 82, 84-87). There was a dispute regarding the timeliness of the filing of certain of the affidavits, which is not germane to this proceeding since it is not an issue being raised by the County.

A hearing was held on the Defendant's motion (R131-49). Thereafter, memoranda were submitted by the parties (R88-93, 94-130). The court then entered an order denying the Plaintiff's Motion for Extension of Time and granting the Motion for Summary Judgment, concluding that because the Plaintiff was in pari delicto with his superior, Clifford Raulerson, in the wrongful conduct at issue, he was not entitled to any protection under the statute (R229-34).

The Plaintiff filed a Notice of Appeal (R235). After briefing and oral argument, the Fourth District entered an Order reversing the summary judgment, noting that the affidavit of witness Bolt, which was indisputably timely served, created a material factual dispute as to whether the Plaintiff suffered adverse personnel

action after he had voluntarily disclosed what he believed to be wrongdoing by a supervisor (A1-2). The court then stated (A1-2):

> We also do not believe that the Whistle-blowers Act, properly read, contains any exclusion for those "in pari delicto" as argued by the County. Quite the contrary, we construe the statute to include even those who previously participated in the wrongdoing, so long as they are employees or persons
>
> > who disclose information on their own initiative in a sworn complaint; [or] who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity; * * *.
>
> §112.3187(7), Fla. Stat. (1989).
>
> We certainly think that plaintiff's affidavits also showed the existence of evidence that a jury might accept as establishing that plaintiff himself had done nothing wrong and that he had voluntarily disclosed conduct of the supervisor which constituted malfeasance by an official of the county. It was not for the trial judge considering a motion for summary judgment to sort out the factual contentions and apply the law to them. We remand so that a jury can do so.

The court's opinion did not address the defense provided in subsection (10) of the statute, because that issue was never raised as a basis for the summary judgment in the trial court, nor was it the basis for the trial court's ruling. Moreover, it is clear that the Fourth District's decision did not eliminate the fifth affirmative defense asserted by the County, which remained a part of the pleadings.

The Defendant filed a Motion for Rehearing, Motion for Rehearing En Banc, and for certification of the decision as a

matter of great public importance. The Fourth District denied all the relief except for the certification of the opinion, as a matter of great public importance.

STATEMENT OF THE FACTS

The Plaintiff began working for Martin County in 1974, and was promoted from the position of labor foreman to that of assistant road superintendent (Dep. 12-14). His direct superior was Clifford Raulerson. Raulerson told Edenfield to,get a purchase order for sod that **Raulerson** wanted to use at his own personal property at the J&S Fish Camp (Dep. 41). The Plaintiff believed that he did not have any choice regarding the matter because in the Road Department, "you did what you were told" (R58, 72).

The Plaintiff then spoke to the secretary for the road department saying, "Give me a P.O. [purchase order] number for sod for Clifford **[Raulerson]"** (Dep. 39). He then picked up Timmy Fuller, another County employee, to help load and unload the **sod,** and proceeded to Stuart Sod and obtained three-quarters of a pallet of sod (Dep. 47, 50). They then drove to Raulerson's property and unloaded the sod (Dep. 52-53). The Plaintiff took the invoice from Stuart Sod and brought it back to the road department so only Raulerson, the road department secretary, and he would know about it (Dep. 40). Approximately two weeks later, the Plaintiff requested and received another copy of the invoice from Stuart Sod to protect himself (Dep. 57). In explaining why he got the copy of the invoice, Edenfield stated (Dep. 58):

Well, for the simple reason I -- like I said before, I'm not a thief and I **don't** appreciate being put in a thief's position.

* * *

And that's what this was putting me in. And this man here [Raulerson], I seen him -- like I said, I seen him **work** before just like trailers and other things that **was** at that place there.

He also intended to get a notarized statement from Fuller regarding the delivery of the sod and explained (Dep. **66-67):**

"I need to get Timmy [Fuller] to sign this because I **know** Clifford Raulerson." And if he got to the **man,** then that would have been it. And you're hanging out on the limb.

However, the Plaintiff never did get the notarized statement from Fuller.

Approximately four months after the incident, the Plaintiff called County Commissioner John Holt regarding some work to be done in his district (Dep. 73). In that conversation, Holt asked him if he knew anything about delivery of sod to Raulerson's property (Dep. 74-75). Holt's affidavit stated **(R17):**

5. When I first approached Mr. **Edenfield** about the delivery of sod to a private residence, I did not know for a fact that Mr. Edenfield participated in any wrong doing. I had merely been advised by two of **my** constituents that **a** "tall gentleman with a loud voice" in a county truck had delivered **sod** to a private home in J&S Park in Martin County.

6. Furthermore, I told Mr. Edenfield he **did not** have **to answer** any **of** my questions regarding the incident if he chose not to do so. Mr. Edenfield volunteered that he had been the person delivering the sod along with another County employee and that they had

delivered the sod to Clifford Raulerson's home.

In addition to admitting his involvement in the delivery of the sod, Edenfield also told Holt that Fuller helped him and told him he would pick Fuller up and come out to Holt's house immediately (Dep. 75). He did so and they met with Holt, at which time Edenfield provided further information, including about a mower that had been delivered to Raulerson's house (Dep. 76).

Subsequently, Commissioner Holt turned the investigation over to County Administrator Rob Alcott (R75). Thereafter, the Plaintiff was demoted to the position of inspector in the County's Engineering Department, with a salary of $460 per week, whereas previously he had been paid $660 per week (Dep. 13-14). He lost certain benefits as well. Surprisingly, not a single other employee was punished even though the misappropriation of sod had been Raulerson's idea, he was the only one to benefit from it and he had engaged in other wrongful conduct as well (R18). Additionally, Fuller and the secretary in the road department who both participated in the activity were also not punished in any manner (R18).

In his affidavit, Commissioner Holt stated (R17-18):

> In my capacity as a County Commissioner for ...12 years I came to know Willie Edenfield, Sr. quite well. I found him to be an extremely honest and capable County employee on whom I had learned to trust.
>
> * * *
>
> 4. In my opinion, the disciplinary actions taken against Willie Edenfield for mis-use of company property were not fair and were based

> in part on Mr. Edenfield's voluntary participation in an investigation that I was conducting into the circumstances surrounding mis-use of county owned property.
>
> As set forth above, I do not believe the actions of the County were justified. Of the four County employees who participated in the delivery of the sod or who knew about the incident, the only one who was punished was Mr. Edenfield, who was the person who volunteered the information in the first place.

The Plaintiff also submitted the affidavit of Roosevelt Jones, who had been employed with the County for **25** years, **23** of which involved working directly with Raulerson **(R75-76).**[2] Jones stated (R75-76):

> 3. As an employee in the Public Works Department I have had an opportunity to know Willie Edenfield since he came to Martin County Public Works Department over 12 years ago and I have found him to be an extremely honest and hard working individual. In my opinion, his demotion to Construction Inspector II was motivated, at least in part because Mr. Edenfield reported improprieties on the part of his supervisor Clifford Raulerson.
>
> 4. This opinion is based in part on a conversation that I had with Clifford Raulerson shortly after the investigation began into the incident with the sod being delivered to Clifford Raulerson's home. At the time, Mr. Edenfield **was** on vacation and 1 had mentioned something to Mr. Raulerson about

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[2]/**Jones'** affidavit, **as** with all the others submitted by the Plaintiff, was **ruled** untimely by the trial court. However, the Fourth District noted that Holt's affidavit was indisputably timely. The Fourth District's decision also referred to "Plaintiff's affidavits" as demonstrating that there was evidence that the Plaintiff did nothing wrong and had voluntarily disclosed malfeasance by his supervisor (A2). The County has not challenged the Fourth District's reliance on the Plaintiff's affidavits.

Mr. Edenfield's return to work. Mr. Raulerson told me that he had personally seen to it that Willie Edenfield never worked in his department again. He explained to me that "Willie told on me about the sod" and that to the extent that Mr. Edenfield thought he was going to take Mr. Raulerson's job as supervisor, that "Frank Walker (County Commissioner and friend of Raulerson's) will not allow it" or words to that effect.

5. In my 23 years of working for Clifford Raulerson, I came to know him very well. Mr. Raulerson made it quite clear through threats and intimidation that any efforts on any employee's part to report any wrong doing on Mr. Raulerson's part would be dealt with severely.

SUMMARY OF ARGUMENT

The Fourth District properly concluded that the Plaintiff was not precluded from asserting the protection of the "whistleblower" statute, Fla. Stat. §112.3187, as a matter of law, simply because he had participated in the underlying conduct at issue. The statute specifically defines its scope in subsection (7), and includes, inter alia, any employee who is requested to participate in an investigation or other inquiry conducted by an appropriate entity. The evidence presented demonstrates that the Plaintiff voluntarily cooperated in an investigation conducted by Commissioner Holt and, thus, he falls within the explicit terms of the statute. There is no provision in the statute excluding protection to any employee who has any involvement in the underlying conduct, and extending protection to such employees is not inconsistent with the legislative intent as expressed in subsection (2) of the statute.

The County's reliance on the legislative history is inappropriate because it has never claimed that the statute is ambiguous, nor that it contains any inconsistencies. This Court has held on numerous occasions that the language of a statute is the primary determinative of legislative intent, and that reliance on legislative history is inappropriate in the absence of ambiguity or inconsistency. Moreover, the legislative history relied upon by the County does not conflict with the Fourth District's decision, since it simply emphasizes the defense provided in subsection (10), i.e., that an employer can assert that the adverse personnel action

was predicated upon grounds other than the exercise of rights protected by the whistleblower statute. The Fourth District's decision did not abrogate or limit that defense. The court simply ruled on the issue before it, that is, whether because he had some participation in the underlying conduct, the Plaintiff could not assert protection of the statute. Since the Fourth District's decision is supported by the unambiguous language of the statute and is not inconsistent with its expressed intent, the decision should be affirmed.

QUESTION PRESENTED

THE FOURTH DISTRICT PROPERLY CONCLUDED THAT THE LANGUAGE OF FLA. STAT. §112.3187 INCLUDES WITHIN ITS SCOPE THOSE WHO PREVIOUSLY PARTICIPATED IN WRONGDOING IF THEY SATISFY THE REQUIREMENTS OF THE STATUTE.

ARGUMENT

The Fourth District properly reversed the summary judgment in favor of the Defendant County in this case and concluded that Fla. Stat. §112.3187 does not contain any exclusion for those "in pari delicto," as argued by the County. The Fourth District properly relied on the unambiguous language of the statute, which describes the scope of conduct protected in subsection (7). The County has failed to cite any statutory language supporting its position, and has failed to even allege that there is any ambiguity in the statute that would justify reliance on legislative history. Moreover, the legislative history is not conclusive or even persuasive.

While arguing an issue of statutory construction, the County fails to quote or even refer to any language of the statute at issue. Instead, it relies on one memorandum (of uncertain origin), contained in the legislative history, which does not explicitly support its position, nor indicate that the result in this case is inconsistent with legislative intent. More importantly, the County has not alleged any ambiguity or inconsistency in the legislation which would justify reliance on legislative history.

The County criticizes the Fourth District for failing to address the portions of the legislative history presented by the County. However, in SHELBY MUTUAL INSURANCE COMPANY OF SHELBY, OHIO v. SMITH, 556 So.2d 393 (Fla. 1990), this Court determined that the Fourth District had erred in relying on the legislative history where there was no showing of an ambiguity or inconsistency in the statute. In SHELBY MUTUAL, the legislative history explicitly supported the plaintiff's position and consisted of the legislative staff analyses of both the Senate and House of Representatives. This Court stated (556 So.2d at 395):

> From examples given within the text of these analyses, it is clear that the authors intended that the 1984 amendment would create the result urged by [the plaintiff] in this case.

Nonetheless, this Court ruled against the plaintiff, and relied solely on the language of the statute at issue. This Court stated (Ibid):

> The plain meaning of statutory language is the first consideration of statutory construction. ST. PETERSBURG BANK & TRUST CO. v. HAMM, 414 So.2d 1071 (Fla. 1982). Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. FLORIDA STATE RACING COMM'N v. McLAUGHLIN, 102 So.2d 574 (Fla. 1958). Courts may look to legislative history only to resolve ambiguity in a statute. DEPARTMENT OF LEGAL AFFAIRS v. SANFORD-ORLANDO KENNEL CLUB, INC., 434 So.2d 879 (Fla. 1983).

This Court also quoted with approval from HEREDIA v. ALLSTATE INSURANCE CO., 358 So.2d 1353, 1354-55 (Fla. 1978):

> In matters requiring statutory construction, courts always seek to effectuate

legislative intent. Where the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not appropriate to displace the expressed intent. **FOLEY** v. STATE **EX** REL. GORDON, 50 So.2d **179, 184 (Fla. 1951); PLATT v.** LANIER, 127 So.2d 912, 913 **(Fla.** 2d DCA **1961).** It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

In the case sub judice, the Fourth District properly relied on the language of the statute to determine its scope. Fla. Stat. §112.3187(7) was quoted by the court and provides[3]:

> Employees and persons protected. -- This section shall protect employees and persons who disclose information an their own initiative in a sworn complaint; who are requested to participate in an investigation, hearinq, or other inquiry conducted by any aqency **or** federal qovernment entity; or who refuse to participate in any action prohibited by this section. [Emphasis supplied.]

That provision does not exclude a person who had some involvement in the underlying wrongdoing.

The County misconstrues the Fourth District's holding, as well **as** the language **of** the statute, in arguing that this construction "provides virtual absolute immunity to wrong-doers" (Petitioner's Brief p.7). Subsection (10) of the statute provides:

> It shall be a defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than the employee's or person's exercise of rights protected by this section.

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[3]/It should be noted that the term "agency" for purposes of the statute is defined in Fla. Stat. §112.3187(3)(a) to include any government entity or official, officer, etc., and, thus, would include Commissioner Holt in this case.

Nothing in the Fourth District's decision eliminated or diminished that defense. That defense was not addressed in the opinion because it was not raised by the County in its Motion for Summary Judgment, nor was any evidence presented in support of it. The sole basis for the summary judgment asserted, and the grounds on which it was granted, was that the Plaintiff was automatically excluded from coverage of the Act because he was involved in the wrongdoing. The Fourth District's rejection of that argument does not create any immunity. The Plaintiff still has the burden of proving that he was the subject of adverse personnel action because of exercising his rights under: the statute, i.e., as a result of disclosing information or participating in the investigation. He is not granted any immunity by the Act or by the Fourth District's decision.

Under the facts of this case, the Fourth District properly determined that there was a genuine issue of fact regarding whether the Plaintiff was entitled to the statutory protection. The court noted the affidavit of Commissioner Holt, which stated that the Plaintiff was the only employee who suffered any adverse personnel action as a result of the incident at issue. Despite its self-righteous indignation, the County fails to note that fact, nor provide any explanation why the Plaintiff's superior, who initiated the wrongful conduct, ensured that it was done, solely benefited from it, and had been engaged in other abuses as well, was not punished in any way. In fact, the only one of the four employees

involved who was punished was the Plaintiff, who **was** the only one who volunteered information regarding the incident.

The County presents its interpretation of the facts, and fails to note that this case was before the trial court on summary judgment and, thus, it had the burden of eliminating any genuine issues of fact in order to be entitled to judgment. The County fails to even mention the affidavit of Commissioner Holt, which stated that he had told Edenfield that he did not have to provide any information and that at the time he made the inquiry he did not know that the Plaintiff was involved. Edenfield immediately provided the information requested, arranged to meet with the commissioner and brought one of the other participants with him. Additionally, the Plaintiff disclosed other misconduct as well. Clearly, that evidence supports the conclusion that Edenfield was "requested to participate in an investigation...or other inquiry" **as** defined in Fla. Stat. §112.3187(7)

The fact that the Plaintiff was the only employee involved who suffered any discipline and was the only employee who voluntarily disclosed information, clearly creates a seasonable inference that he was the abject of adverse personnel action because he made the disclosures. The existence of reasonable inferences supporting a party's case, of course, precludes summary judgment, MOORE v. MORRIS, 475 So.2d 667, 668 (Fla. 1985). There is also the direct evidence presented in the affidavit of Jones that the Plaintiff was demoted and transferred because he disclosed Raulerson's misconduct.

The Fourth District's legal conclusion and its application in this case does not violate the legislative intent. Subsection (2) of the statute states the legislative intent as follows:

> It is the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or neglect of duty on the part of an agency, public officer, or employee.

The Plaintiff's conduct in this case obviously involved the reporting to an appropriate agency, i.e., official, the wrongful conduct involved and, thus, is consistent with the legislative intent.

Based on the authorities cited supra, there is no need to resort to legislative history, since the statute is unambiguous and its scope is specifically stated therein. However, even considering the legislative history, the conclusion asserted by the County is not meritorious. The County relies on one memorandum from a Kathryn Bradley to a Jack Overstreet. No evidence is presented as to who Kathryn Bradley or Jack Overstreet are. Moreover, the only section relied upon indicates a concern by the Attorney General regarding whether the bill would offer immunity to a wrongdoer **and** their response that "one could be fired or disciplined for participation in an act warranting whistleblowing"

(R42-43). The statement from the meeting of the Florida House Committee on Government Operations is to the same effect (R58). There is no inconsistency between those statements and the Fourth District's decision.

Certainly one can be fired or disciplined for participating in wrongful conduct, as that defense is specifically provided in subsection (10) of the statute, quoted supra. However, that does not eliminate the factual issue regarding whether the adverse action was, in fact, predicated upon that participation. In view of the fact that Raulerson, who was obviously extremely more culpable than the Plaintiff, suffered no adverse personnel action must be considered as creating a factual issue regarding this matter. In WOLCOTT v. CHAMPION INTERNATIONAL CORP., 691 F.Supp. 1052, 1058 (W.D. Mich. 1987), relied upon by the County, it is specifically noted that a plaintiff in a whistleblower case is entitled to show that the purported basis for the adverse personnel action is merely a pretext. The Plaintiff should be entitled to do so here. This record clearly does not support the conclusion that, as a matter of law, the Plaintiff was punished for the underlying conduct. As noted previously, the County never presented that affirmative defense in its Motion for Summary Judgment, but argued solely that because the Plaintiff was involved in the underlying conduct he was not within the scope of the statute. However, the County ignores the scope of the statute as provided in subsection (7) and it is clear that based on the affidavit of Commissioner Holt, the Plaintiff falls within the scope of the Act.

As noted above, there is nothing inconsistent with the Fourth District's construction of the statute and the legislature's intent. As a practical matter, eliminating all employees who had any involvement in the wrongdoing at issue would unnecessarily preclude an important source of information of such conduct. The facts of this case illustrate the practical aspects of this consideration. The Plaintiff engaged in the conduct based on the direct orders of his superior (Raulerson), and obviously out of fear for his job and the threats and intimidation by Raulerson (as noted in Jones' affidavit). Edenfield did not initiate the conduct, nor benefit from it. However, immediately upon being requested by Commissioner Holt, he provided all the relevant information regarding the incident and assisted in the investigation (and apparently was the only participant to do so). Obviously, as a practical matter, a person who was involved is the best source of information. While the Plaintiff's participation in Raulerson's scheme was clearly not exemplary, the County's self-righteous posturing must be considered in light of the fact that it never punished Raulerson.

Moreover, if the legislature intended to eliminate participants from the protection of the statute, it could easily have inserted a provision to that effect in the statute. It did not do so. The scope of the statute, as drafted, does not create any immunity for a wrongdoer. The employee still has to prove that there was a causal connection between his "whistleblowing" and the

adverse personnel action and the employer is entitled to show that there were other valid reasons for the punishment.

The cases relied upon by the County do not support its position. In WOLCOTT v. CHAMPION INTERNATIONAL CORP., supra, the plaintiff brought an action under the Michigan Whistleblowers Protection Act. In that case, the plaintiff was a maintenance mechanic for the defendant corporation, and in the years prior to his discharge there was a reduction in the defendant's ownership of heavy equipment requiring mechanical attention. This was reflected in documentation and meetings held by the defendant which informed the employees of the possibility of cutbacks and reductions in operations.

In response to the possible reduction of employees, the plaintiff mailed what the trial court stated "can only be described as a 'threatening' letter to Champion," (691 F.Supp. at 1054). The letter basically stated that the plaintiff was going to report certain regulation violations of the corporation to various governmental agencies, unless grievances were addressed and job positions retained.

Upon receipt of the letter, Champion suspended the plaintiff for one week and a letter documenting the disciplinary action was placed in his file. Thereafter, consistent with the prior conduct and declarations, an official of the company recommended that the plaintiff's mechanical position be eliminated as a result of the cutbacks in the company's ownership of heavy equipment. The plaintiff then filed his complaints with various governmental

agencies, claiming inadequate ventilation on the job site, illegal pollution through dumping of oil insolvents, and discrimination in his employment. The court noted that as to the allegations of illegal pollution, the plaintiff admitted that he had dumped oil insolvents at the shop and that he "did so without being so instructed and without requesting proper disposal containers from Champion," 691 F.Supp. at 1057.

Subsequent to the filing of the various complaints, the recommendations regarding the elimination of the plaintiff's position were reiterated and approved by one of Champion's vice presidents. Thereafter, the plaintiff was notified that his position was terminated, and he brought the action under the "whistleblower" statute.

The defendant filed a motion for summary judgment in that case, and the plaintiff did not respond to it, 691 F.Supp. at 1054. The court reviewed the evidence and discussed it at length. It also noted that the elements of the prima facie case of retaliation under the Michigan whistleblower statute included three elements, 691 F.Supp. 1058:

> 1.) That the plaintiff engaged in protected activity as defined by the Act;
>
> 2.) That the plaintiff was subsequently discharged from employment; and
>
> 3.) That there is a causal connection between the protected activity and the discharge.

The court then noted that once the plaintiff established the prima facie case of retaliation, the burden would shift to the defendant to articulate a legitimate non-retaliatory reason for its actions

(Ibid). If the defendant satisfies that burden, the plaintiff then has the opportunity to demonstrate that the reasons stated were a mere pretext (Ibid).

The court's decision to grant summary judgment was not based on the conclusion that the plaintiff's participation in the wrongdoing precluded any protection under the statute. The court concluded, 691 F.Supp. at 1058-59:

> Plaintiff engaged in activity protected by the Act, albeit only after attempting what can only be termed an attempted act of extortion with the protected information. The Tact that plaintiff was discharged after engaging in the protected activity is also without question. However, the Court finds that there is no causal connection between plaintiff's protected conduct and his discharge. [Emphasis supplied.]

Obviously, the court's holding was that there was no causal connection between the plaintiff's protected conduct and his discharge. The only discussion regarding the plaintiff's wrongful conduct was in dicta, as follows, 691 F.Supp. at 1059:

> The Whistleblower Act was not intended to serve as a tool for extortion. Those availing themselves of its protection should be motivated, at least in part, by a desire to inform the public about violations of laws and statute, as a service to the public as a whole. Plaintiff clearly fails to meet these criteria. His lack of concern for the public safety is evidenced by his own participation in polluting the environment as well as his willingness to forego reporting these alleged violations of the law in exchange for jobs. This blatant lack of concern for the environment is appalling. Furthermore, plaintiff's subsequent attempt to legitimize his extortive actions via this lawsuit is scandalous and borders on abuse of process.

WOLCOTT obviously dealt with the Michigan Whistleblower Statute, which is not identical, albeit similar, to the Florida statute. However, even applying its principles to this case does not support the conclusion that the Fourth District erred, or that the County was entitled to summary judgment in this case. Clearly, the Plaintiff in this case satisfied the three elements of his prima facie cause of action, i.e., that he participated voluntarily in an investigation by an appropriate entity; that he was subsequently the subject of adverse personnel action, and that there was a causal connection between that activity and the discharge. While the County has pled, but not yet proven, the defense that there was a legitimate basis for its action, clearly there is evidence that that explanation is a mere pretext in view of the fact that Raulerson received absolutely no adverse personnel action, and he was clearly more culpable. The fact that of the four employees involved, the Plaintiff was the only one who was punished and was the only one who voluntarily provided information, also supports that conclusion.

The dicta in WOLCOTT does not suggest a different result would be appropriate in this case. Edenfield did not attempt to utilize the Whistleblower Act as a tool for extortion. Immediately upon being requested to participate voluntarily in an investigation, he did so, and was entirely candid thereafter. Also, unlike the plaintiff in WOLCOTT, his "misconduct" **was** the result of following direct orders of his superior in an employment situation involving threats and intimidation. The fact that he acted in order to

preserve his own job, while not exemplary, is no basis to preclude protection under the Act when he cooperated voluntarily immediately upon being requested to do so. He did not attempt to obtain any personal benefit for providing information, as did the plaintiff in WOLCOTT, and the record is clearly sufficient to support the conclusion that he was motivated, at least in part, by a desire to inform the public about malfeasance by his superior.

FIORILLO v. U.S. DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, 795 F.2d 1544 (Fed.Cir. 1986), also does not support the County's position. That case involved a petition for review of an arbitration decision which upheld the suspension and demotion of an employee. The employee challenged that decision, raising claims under the First Amendment and under the Federal "Whistleblower" statute, 5 U.S.C. §2302(b)(a). The arbitrator determined that the adverse personnel action taken by the agency was based on proper grounds and that the employee's press conferences regarding various allegations of misconduct were motivated by personal reasons and not to inform the public of matters of general concern, which would justify application of the "whistleblower" statute.

The appellate court specifically noted that its review of the arbitrator's decision was limited to determining whether it was supported by competent evidence or was not in accordance with the law, 795 F.2d at 1548. The court also noted that deference to the agency's judgment regarding the employment action was also appropriate, 795 F.2d at 1551. The court simply upheld the findings and conclusions of the arbitrator and noted that the

employee's press conferences simply reflected "one employee's dissatisfaction with [his supervisor] in an attempt to turn that displeasure into a cause celebre," quoting from CONNICK v. MYERS, 461 U.S. 138, at 148 (1983).

FIORILLO is inapposite because it did not involve a summary judgment, but rather findings of an arbitrator that were simply upheld by the appellate court.[4] In essence, the employer's defense that there was a legitimate basis for the adverse personnel action was upheld based on the evidence. All that Plaintiff is seeking here is the same opportunity to have a fact finder resolve his case. Moreover, this case does not involve disclosure to the press, but voluntary participation in an investigation:

The amicus' reliance on MELCHI v. BURNS INTERNATIONAL SECRETARIAL SERVICES, INC., 597 F.Supp. 575 (E.D.Mich. 1984), does not support the conclusion that the Fourth District erred. In MELCHI, one of the factual issues was whether the plaintiff had provided evidence of suspected violations of state or federal law, since there was a question whether the conduct disclosed constituted a violation of any law. In that context, the court stated (597 F.Supp. at 583):

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[4]/It should be noted that FIORILLO was a two to one decision, with Judge Davis concurring in the majority opinion because he believed the arbitrator properly found that the comments to the media were motivated by the employee's vindictiveness and concentrated on his own personal situation rather than reflecting any "whistleblower" activity. Judge Newman dissented, concluding that the employee was entitled to protection of the First Amendment as well as the federal whistleblower statute.

> The Court believes it is realistic to conclude that the Michigan legislature, by using the term "suspected violations," meant to bring within the Act's protections an employee's subjective good faith belief that he was reporting a violation of the law. This interpretation is supported by the language of the Act itself.

There was no dispute in the case **sub judice** regarding whether the information disclosed by Edenfield was accurate, and that it revealed malfeasance within the County's Road Department. Even generalizing the principle in MELCHI that the whistleblower statute should only be applied to people who pursue them in good faith, that would not justify summary judgment in favor of the County in this case. The existence of a subjective state such as good faith or bad faith is not properly resolved on summary judgment, see e.g., NOWIK v. **MAZDA MOTORS OF** AMERICA, 523 So.2d 769 (Fla. 1st DCA 1988). Additionally, there is an insufficient record to conclude that the Plaintiff did not act in good faith. Unlike in WOLCOTT, supra, he did not seek to extort anyone through the potential disclosure of information. Edenfield also did not impose any conditions upon his cooperating with Commissioner Holt, nor sought any benefit therefrom. Clearly, there is an insufficient record to conclude that the Plaintiff acted in bad faith.

Additionally, the Fourth District's decision is not inconsistent with MELCHI. The mere fact that an employee may have participated in misconduct, under pressure or direct orders, does not compel the conclusion that subsequent disclosure is in bad faith. Certainly, as in WOLCOTT and FIORILLO, there are situations in which a fact finder can properly determine that the employee's

disclosures are not entitled to protection under a whistleblower statute. But that is a far cry from saying that any employee who has participated in the underlying conduct is precluded, as a matter of law, from asserting the protection of a whistleblower statute.

The County criticizes the Fourth District's decision as not providing guidance or responding to its request for clarification. However, the scope of the Fourth District's opinion must be considered in light of the issue presented to it. The only basis argued for the summary judgment in the trial court, and the only basis on which it was granted, was that because the Plaintiff had some involvement in the underlying wrongful conduct he was not entitled, as a matter of law, to protection under the statute. That was the only issue directly presented, and the Fourth District properly resolved it by relying on the unambiguous statutory language which defined the scope of the Act's protection. While certainly the Fourth District could have expanded on its opinion and discussed the elements of the cause of action and the various defenses, it certainly had no obligation to do so when the sole issue presented before it was whether the Plaintiff was precluded from asserting the protection of the statute.

CONCLUSION

For the reasons stated above, the decision of the Fourth District should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to J. DAVID RICHESON, ESQ., and JOSEPH J. MANCINI, ESQ. , 317 S. Second St., Ft. Pierce, FL 34950; and JOHN J. COPELAN, JR., ESQ., 115 S. Andrews Ave., Ste. 423, Ft. Lauderdale, FL 33301, by mail, this 6th day of January, 1992.

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