IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,014

ARROW AIR, INC.,

Petitioner,

vs.

MICHAEL WALSH,

Respondent.
_____/

On Discretionary Review from the District Court of Appeal of Florida, Third District

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PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

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CASES (CONTINUED) **PAGE**

OTHER AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

Plaintiff below, Michael Walsh ("Walsh"), a Florida resident, was employed by Arrow as a flight engineer. (App. 7). Arrow is a Florida corporation with its principal place of business in Florida. (App. 7). On May 15, 1989, Arrow terminated Walsh from his employment. (App. 8)

Walsh filed a complaint in Florida for "retaliatory termination," alleging that he was fired as a result of a report he made regarding alleged safety violations on one of Arrow's flights. (App. 8). Because Florida did not recognize a cause of action for retaliatory termination, Walsh attempted to have the trial court apply the New York Labor Code, which does allow such a claim in certain circumstances. (App. 2).

Arrow filed motions to dismiss and strike the complaint for failure to state a cause of action or allege grounds sufficient to invoke the jurisdiction of Florida's courts. The trial court dismissed Walsh's complaint. (App. 2)

On appeal, the District Court of Appeal, Third District, unanimously affirmed the dismissal of Walsh's complaint. Plaintiff moved for a rehearing on June 5, 1991, and Arrow replied. On June 7, 1991 the legislature enacted Section 448.102, Florida Statutes, the "Whistle Blower's Act" applicable to private employment. On November 23, 1992, approximately a year and a half after the motion for rehearing was filed, the Third District entered an order requiring Arrow to file a supplemental brief discussing, among other things, the applicability of newly enacted Section 448.102.

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The Act had never previously been raised during the appeal. On May 11, 1993, the Third District vacated its prior affirmance and filed a new opinion. In a 2-1 decision, the court reversed the judgment for Arrow and held that the trial court should decide whether Walsh's complaint stated, or could be amended to state, a cause of action under the Whistle Blower's Act. (App. 6-20) Arrow's motions for rehearing and rehearing en banc were subsequently denied. (App. 21-23)

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal conflicts with decisions from other district courts of appeal and this Court holding that: (1) a statute which creates new substantive rights or obligations may not be applied retroactively; (2) a statute may not be applied retroactively unless there is a clear and unequivocal expression of legislative intent for retroactive application; and (3) retroactive application of a statute creating new substantive rights and obligations violates a party's due process rights.

ARGUMENT

At the time Walsh was fired by Arrow, on May 15, 1991, Florida courts adhered to the rule that where a term of employment was for an indefinite period of time, either party could terminate the employment at any time, for any cause or no cause at all, without incurring liability. *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 182 (Fla. 1983); *Hartley v. Ocean Reef Club, Inc.*, 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985) ("creation of

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a cause of action for retaliatory firing of an at-will employee would abrogate the inherent right of contract between employer and employee . . . [and] overrule longstanding Florida law . . .").

Recognizing that the employment at will doctrine was well entrenched in the common law of Florida, Walsh sued Arrow for wrongful discharge pursuant to the New York Labor Code. The complaint was dismissed after the trial court concluded that Florida law applied and the Third District affirmed. While the case was pending for nearly two years on rehearing, the Florida Legislature enacted Section 448.102, Florida Statutes, the Whistle Blower's Act applicable to private sector employment. The Act is a drastic departure from the common law employment at will doctrine and provides, under certain circumstances, for a cause of action for retaliatory discharge and also provides for the recovery of attorney's fees. The Third District, on its own initiative, held in a 2-1 decision that the new Florida statute could be applied retroactively to provide Walsh with a cause of action for a termination that occurred more than two years prior to the statute's effective date.

The impact of the Third District's decision reaches far beyond application of Section 448.102. The holding below provides authority for retroactive application of other statutes which create entirely new causes of action or create entirely new rights to recover attorney's fees. The decision below creates chaos in a heretofore well settled area of case law, as it expressly and directly conflicts with decisions from other District Courts of

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Appeal and this Court holding that: (1) a statute which creates new substantive rights or obligations may not be applied retroactively; (2) a statute may not be applied retroactively unless there is a clear and unequivocal expression of legislative intent for retroactive application; and (3) retroactive application of a statute creating new substantive rights and obligations violates a party's due process rights. Based on that express and direct conflict, this Court has jurisdiction pursuant to the Florida Constitution, Article V, § 3(b)(3).

A. The decision of the District Court of Appeal conflicts with cases holding that a statute which creates new substantive rights or obligations may not be applied retroactively.

The majority below stated that:

> Although the general rule is that statutes creating new rights operate prospectively, *Florida Dep't of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977), the rule is not absolute. 2 Sutherland, Statutory Construction, § 41.01 (4th ed. 1986); 49 Fla. Jur. 2d. Statutes, § 107 (1984).

The majority misstated Florida law in regard to statutes which affect substantive rights and liabilities. A correct statement of Florida law is that: Although the general rule is that statutes operate prospectively, the rule is not absolute. In regard, however, to *statutes creating new substantive rights and liabilities,* the rule against retroactive application is rigidly enforced. *L. Ross, Inc. v. R.W. Roberts Construction Co., Inc.*, 481 So. 2d 484 (Fla. 1986) (statute which increases substantive obligations cannot be applied to a cause of action in existence on the date of enactment); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla.

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1985) (statute which creates "a new obligation or duty" is substantive in nature and can be applied prospectively only); *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) (statutes which affect existing rights are presumed to apply prospectively); *Larson v. Independent Life & Accident Ins. Co.*, 29 So. 2d 448 (Fla. 1947) (statutes which create new obligations and impose new penalties are "rigidly construed" as being prospective); *Recon Paving, Inc. v. Cook*, 439 So. 2d 1019 (Fla. 1st DCA 1983) (substantive statutes are prospective only). The retroactive application of Section 448.102 by the majority below expressly and directly conflicts with each of the cited decisions.

The majority below attempted to avoid application of the well established rule in the cited decisions by holding that Section 448.102 is "remedial" and must, therefore, be given retroactive application. For that proposition, the majority relied upon this Court's decision in *Martin County v. Edenfield*, 609 So. 2d at 29 (Fla. 1992), holding that Section 112.3187, Florida Statutes, which created a civil cause of action for wrongful discharge of public employees was a "remedial statute designed to encourage the elimination of public corruption . . . ." In *Edenfield* this Court held that Section 112.3187 was remedial solely in the context of determining whether the statute, which was clearly in derogation of common law, should be broadly or narrowly construed. In *Edenfield*, however, this Court also held that substantive amendments to the Whistle Blower's Act which took effect during the pendency of the case *could not be applied retroactively*. 609 So.

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2d 27, 29, n. 2. The majority's decision below, therefore, conflicts with this Court's decision in *Edenfield*, denying retroactive application of substantive amendments to the Whistle Blower's Act.

While Section 448.102 may be remedial in some senses, it is also substantive because it creates a new cause of action for wrongful discharge in the private sector that was never before recognized under Florida law.[1] This is because the rule that remedial statutes will be applied retroactively does not apply where the remedial act also creates a new cause of action. In *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961), this Court held that remedial statutes relate to remedies or modes of procedure and do not create new or take away vested rights. *Id.* at 136.

The majority's reliance upon the decision of this Court in *City of Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986), was also misplaced. In *Desjardins,* this Court gave retroactive application to an amendment to the Public Records Act, noting that the statute was addressed to "[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights." *Id.* at 1028. Unlike Section 448.102, the statute did not create a substantive right.

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[1] *Haven Federal Savings & Loan Association v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) ("[s]ubstantive law has been defined as that part of the law which creates, defines, and regulates rights . . ."); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) (statute which creates a new obligation or duty is substantive); *Recon Paving, Inc. v. Cook*, 439 So. 2d 1019 (Fla. 1st DCA 1983) (by any standard, statute increasing benefits payable under Worker's Compensation Act is substantive legislation).

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Although Section 448.102 is remedial in some senses, it also creates an entirely new cause of action and right to attorneys' fees, thereby imposing entirely new liabilities on private sector employers. Consequently, and the statute cannot be applied retroactively to a cause of action that accrued more than two years prior to its effective date.[2]

The majority below also was of the opinion that Section 448.102 did not actually subject Arrow to any new obligations, because a common carrier always had a duty to use care in the conduct and management of its conveyances. (App. 22) That observation would have merit if the statute in question simply codified a passenger's pre-existing common law right to sue for injuries sustained as a result of safety violations. In regard to wrongful discharge, however, as the Third District correctly noted in its original affirmance below, there was no pre-existing common law right to sue an employer. (App. 2) Section 448.102 is a drastic departure from the common law and its retroactive application conflicts with the decisions cited above holding that a statute creating new substantive rights and liabilities may not be applied retroactively.

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[2] The rule against retroactive application should apply with particular force in the case at bar which arises from termination of an "at will" employee. This case is unlike the typical "accident" case where it cannot reasonably said that any of the parties relied upon existing law.

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B. The decision of the District Court of Appeal conflicts with cases holding that a statute may not be applied retroactively unless there is a clear and unequivocal expression of legislative intent for retroactive application.

Section 448.102, Florida Statutes (1991) was enacted by the legislature in Chapter 91-285, Laws of Florida 1991. As to an effective date, Section 8 of Chapter 91-285 simply provided that, "This act shall take effect upon becoming a law." The Act was approved by the Governor and filed with the Secretary of State on June 7, 1991, more than two years after Walsh's discharge by Arrow.

The retroactive application of Section 448.102 by the majority below conflicts with decisions of this Court holding that in order for a statute to be applied retrospectively, there must be a clear and unequivocal expression of legislative intent for retroactive application. *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239 (Fla. 1977); *Larson v. Independent Life & Accident Insurance Co.*, 29 So. 2d 448 (Fla. 1947).

The decision below conflicts with those cases holding that in the absence of a clear legislative expression to the contrary, a law is presumed to operate prospectively, *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983), and with cases holding that the legislature's specification of an effective date in a statute rebuts any argument that retroactive application of the law was intended, *State Department of Revenue v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).

As aptly pointed out by Judge Gersten in his dissenting opinion below:

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> Retroactive application of the statute at this stage of the case turns the rule of statutory construction on its head. "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239 (Fla. 1977); *Keystone Water Company, Inc. v. Bevis*, 278 So.2d 606 (Fla. 1973); *Larson v. Independent Life and Accident Insurance Co.*, 158 Fla. 623, 29 So. 2d 448 (1947).

C. The decision of the District Court of Appeal conflicts with cases holding that retroactive application of a statute creating new substantive rights and obligations violates a party's due process rights.

The decision of the majority below conflicts with numerous cases from other district courts of appeal and this Court holding that retroactive application of a statute which creates new rights or obligations would violate a party's due process rights. *Florida Patient's Compensation Fund v. Scherer*, 558 So. 2d 411, 414 (Fla. 1990) ("Due process considerations preclude retroactive application of a law that creates a substantive right"); *Cantor v. Davis*, 489 So. 2d 18 (Fla. 1986) (statute which provided for award of attorney's fees in medical malpractice action was unconstitutional as applied to an action which accrued prior to statute's effective date); *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985) (statute which created new obligation or duty could not constitutionally be applied retroactively); *McCord v. Smith*, 43 So. 2d 704 (Fla. 1949) (retroactive application of statute is invalid where a new obligation or duty is created or imposed); *L. Ross, Inc. v. R. W. Roberts Construction Co.*, 466 So. 2d 1096 (Fla. 5th DCA), *aff'd.*, 481 So. 2d 484 (Fla. 1986) (legislature cannot constitutionally increase an existing obligation, burden or penalty as to a set of facts after those facts have occurred); *Stone v. Town of Mexico*

Beach, 348 So. 2d 40, 43 (Fla. 1st DCA), *cert. denied*, 355 So. 2d 517 (Fla. 1978) (retrospective statute is invalid if a new obligation or duty is imposed or an additional disability is established in connection with previous transaction).

CONCLUSION

Based on the foregoing Petitioner respectfully requests that the Court accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was duly mailed to Walter G. Campbell, Jr., Esquire, Krupnick, Campbell, Malone & Roselli, P.A., 700 Southeast 3rd Avenue, Suite 100, Ft. Lauderdale, FL 33316, on this 18th day of January, 1993.

THORNTON, DAVID, MURRAY, DAVIS, THORNTON & SREENAN, P.A.
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BY: Kathleen M. O'Connor
KATHLEEN M. O'CONNOR
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INDEX TO APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1991

MICHAEL WALSH, **

Appellant, **

vs. ** CASE NO. 90-1846

ARROW AIR, INC., **

Appellee. **

Opinion filed May 21, 1991.

An Appeal from the Circuit Court for Dade County, Jon Gordon, Judge.

Krupnick, Campbell, Malone and Roselli, and Walter G. Campbell, Jr., and Kelley B. Gelb, for appellant.

Thornton, David, Murray, Richard & Davis, and Barry L. Davis, and Andrew L. Ellenberg, for appellee.

Before FERGUSON, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

Appellant, Michael Walsh, appeals the dismissal of his complaint for failure to state a cause of action against appellee, Arrow Air, Inc. We affirm.

Appellant is a citizen of Florida and was employed by appellee, a Florida corporation, as a flight engineer. Appellant contends that his employment with appellee was wrongfully terminated as a result of his reporting mechanical difficulties during a pre-flight inspection. The mechanical difficulties occurred while the plane and appellant were in New York.

Appellant contends that Florida's choice of law principles allow him to maintain a cause of action not recognized in Florida but recognized under New York law. Appellee asserts that Florida is the correct forum for this cause of action, and that since Florida does not recognize a cause of action for wrongful discharge, appellant's case was properly dismissed.

Florida law does not recognize a cause of action for wrongful discharge:

> In the absence of a specific statute granting a property interest, a contract of employment (implied or expressed) which is indefinite as to term of employment is terminable at the will of either party without cause and an action for wrongful discharge will not lie.

Kelly v. Gill, 544 So.2d 1162 (Fla. 5th DCA), rev. denied, 553 So.2d 1165 (Fla. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 1477, 108 L.Ed.2d 614 (1990).

In his complaint, appellant sought to apply New York law, alleging that his discharge was proscribed by New York law. See § 740 New York Labor Laws (McKinney 1989). At issue is whether appellant's complaint sets forth sufficient allegations to allow the application of New York law under Florida's choice of law principles.

In order to apply New York law in a cause of action brought in Florida, appellant must meet a choice of law test, either under a breach of contract, or a tort analysis. Goodman v. Olsen, 305 So.2d 753 (Fla. 1974), cert. denied, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975); Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980).

According to Florida law, a breach of contract action is determined:

> Where the place of making and of performance of a contract are the same, the law of that state determines and controls the validity, interpretation, and rights and obligations under the contract.

Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp., 364 So.2d 15 (Fla. 4th DCA 1978).

In determining the choice of law under tort principles, a "significant relationships" test is applied by analyzing the following contacts:

> (a) The place where the injury occurred,
> (b) The place where the conduct causing the injury occurred,
> (c) The domicil, residence, nationality, place of incorporation and place of business of the parties, and
> (d) The place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their respective importance with respect to the particular issue.

Bishop v. Florida Specialty Paint Company, 389 So.2d at 1001.

Although in considering a motion to dismiss, all well pleaded allegations of the complaint are considered as true, Clark v. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981), appellant's complaint fails to meet the choice of law test under tort or

contract law. At issue is appellant's employment and termination; yet, the complaint is devoid of any facts regarding the locus of such employment or termination.

Therefore, under a breach of contract analysis, the complaint is deficient because it does not state facts regarding where the contract was made or performed. Under a tort analysis, i.e., the wrongful discharge, the complaint is deficient because the facts indicate more significant contacts with Florida than with New York.

Accordingly, we affirm.

JORGENSON, Judge, specially concurring.

The established law of this district does not provide a cause of action for retaliatory discharge to a "whistle-blowing" employee. See Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. 3d DCA 1985).

I would affirm on that authority.

NOT FINAL UNTIL TIME EXPIRES
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IN THE DISTRICT COURT OF APPEAL

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JANUARY TERM, A.D. 1993

MICHAEL WALSH,	**	
Appellant,	**	
vs.	**	CASE NO. 90-1846
ARROW AIR, INC.,	**	
Appellee.	**	

Opinion filed May 11, 1993.

An Appeal from the Circuit Court for Dade County, Jon Gordon, Judge.

Krupnick, Campbell, Malone and Roselli, and Walter G. Campbell, Jr., and Kelley B. Gelb, for Appellant.

Thornton, David, Murray, Richard & Davis, and Barry L. Davis and Andrew L. Ellenberg, for Appellee.

Before FERGUSON, JORGENSON and GERSTEN, JJ.

ON MOTION FOR REHEARING

FERGUSON, J.

The main issue in this appeal, from an order dismissing a complaint, is whether Walsh has a cause of action for wrongful discharge based on a public policy which protects employees who

object to, or refuse to participate in, employment activities which violate a law, rule, or regulation. There is also a threshold choice of law issue, i.e., whether the "significant relationship" test compels the application of Florida law.

We affirm the trial court's finding that the case is governed by Florida law, but reverse the finding that no viable cause of action is alleged under Florida law.[1]

Facts of this Case

Michael Walsh, a Florida resident, was employed as a flight engineer by Arrow Air, a Florida corporation with its principal place of business in Dade County, Florida. On April 25, 1989, Walsh discovered a hydraulic leak in connection with Flight 506 scheduled for departure from John F. Kennedy Airport in New York.[2] He reported the leak to the flight's maintenance crew.

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1 In response to the first point in the dissent we note that although Walsh contended in the trial court that New York law governed, Arrow Air argued, correctly, that Florida law applied. As the case was postured the trial court was obligated to choose between the law of New York and the law of Florida.

In our original panel opinion we observed, unanimously, that "[a]t issue is whether appellant's complaint sets forth sufficient allegations to allow the application of New York law under Florida's choice of law principles." We held, in affirming a dismissal of the complaint, that "the facts indicate more significant contacts with Florida than with New York", and that "Florida law does not recognize a cause of action for wrongful discharge."

Arrow Air filed a supplemental brief in response to our request which, again, makes no suggestion that the trial court went beyond the question presented in deciding that Florida law applied. Instead it is conceded by Arrow Air that "this court was correct in affirming" the trial court's determination that Florida law applied. The appellee agrees that the issues on rehearing are whether the new Florida statute should be given retroactive application, and if so, whether a cause of action is stated under the new statute.

2 We chronicled a history of faulty maintenance practices by Arrow Air, including flying an aircraft with a leaking hydraulic system, in reversing a summary judgment for the airline on a wrongful death claim brought by the

Subsequently the crew reported that the leak had been checked and repaired. On a visual re-examination, Walsh saw that proper repairs had not been made and that a dangerous leak still existed in the system. He reported the incident and, against the wishes of the employer, grounded the flight for approximately five hours while necessary repairs were performed.

Arrow Air, by and through its employees, threatened Walsh for his actions in reporting the incident and grounding the flight. Approximately three weeks later, Walsh was terminated from his employment with Arrow Air.[3] He commenced this action for wrongful termination.

Choice of Law

"The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties," Bishop v. Florida Specialty Paint, Co., 389 So. 2d 999, 1001 (Fla. 1980), (citing Restatement (Second) of Conflict of Laws §§ 145-146 (1971)). Further, the court noted, the contacts to be taken into account in determining the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence,

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widow of a copilot. Connelly v. Arrow Air, 568 So. 2d 448 (Fla. 3d DCA 1990), rev. denied, 581 So. 2d 1307 (Fla. 1991).

[3] The material facts are taken from the complaint and must be accepted as true for the purpose of a motion to dismiss for failure to state a cause of action. Singer v. Florida Paving Co., 459 So. 2d 1146 (Fla. 3d DCA 1984).

nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. Id. Both parties are Florida residents and the alleged tortious act occurred in Florida. We agree with the appellee that applying the factors from Bishop to the facts as alleged in the complaint, Florida has a more significant relationship to the case than New York, and that the law of this state should determine the outcome.

Common-Law Rule on Termination of At-Will Employees

Under the common-law rule, when a term of employment is for an indefinite period of time, either party may terminate the employment at any time, for any cause or no cause at all, without incurring liability. DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253, 1254 (Fla. 1980). This employment-at-will doctrine harmonized with the laissez faire political and economic philosophy of the nineteenth century which was based on the belief that employers should be free to run their businesses without government interference. The rule was also consistent with the freedom of contract ideology prevalent during the nineteenth century. According to that doctrine, the freedom to make contracts included the freedom to terminate them unless the parties were bound for a specific period of time. Mark A. Redmiles, Shelter from the Storm: The Need for Wrongful Discharge Legislation in Alaska, 6 Alaska L. Rev. 321 (1989).

Although the rule gained wide acceptance in this country during that period, courts and lawmakers learned over the years that the mutuality of obligations rationale is based on a false

premise of equal bargaining power between employees at-will and employers, and that the rule is inadequate to protect employees' interests. Andre D. Bouffard, Emerging Protection Against Retaliatory Discharge, 38 Me. L. Rev. 67 (1986); John E. Gardner, Federal Labor Law Preemption of State Wrongful Discharge Claims, 58 U. Cin. L. Rev. 491 (1989). Changed social values, as well as changes in modern employment relationships, have led to an erosion of the traditional rule. "A veritable avalanche of scholarly opinion has, with near unaniminity, come down in favor of abolishing the at will rule." Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931 (1983). See generally Michael A. DiSabatino, Annotation, Modern Status of Rule that Employer May Discharge At Will Employee for any Reason, 12 A.L.R. 4th 544 (1982).

Modern Trend

One commentator, in a 1986 law-review article, noted that all but nine states had abandoned the traditional rule regarding the termination of at-will employees--Florida, Colorado, Georgia, Iowa, Louisiana, Mississippi, Rhode Island, Utah and Vermont. Michael G. Whelen, Unsuccessful Employee Arbitrants Bring Wrongful Discharge Claims, 35 Buff. L. Rev. 295 (Winter 1986)(citing H. Perritt, Employee Dismissal Law and Practice (1985)). Since publication of the 1986 study, several of the remaining nine states, including Florida, no longer adhere strictly to the common-law rule. Expressing disenchantment with the common-law rule, the Mississippi supreme court wrote in Shaw v. Burchfield, 481 So. 2d 247 (1985) that under the appropriate

factual situation, it would be inclined to re-address the at-will termination rule.

A public policy exception is frequently relied on by courts to circumvent the at-will rule where the results would be unconscionable. Redmiles, supra, at 322 (thirty-two states have adopted the public policy exception). It is premised on the rationale that while an at-will employee may be terminated for no reason, or for an arbitrary reason, an employee may not be terminated for an unlawful reason or one that is contrary to a clear mandate of public policy. Nina G. Stillman, Workplace Claims: Wrongful Discharge Public Policy Actions and Other Common Law Torts, 375 PLI/Lit 745 (June 1, 1989). The public policy exception does not displace the traditional at-will rule; it merely provides a mechanism for identifying certain legally recognized improper grounds for dismissal. Redmiles, supra, at 326.

Status of the Rule in Florida

Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327, 1329 (Fla. 3d DCA 1985), involved an employee who was discharged for allegedly refusing to participate in his employer's violation of federal and state environmental statutes and regulations. He complained of a wrongful discharge. Dismissal of the complaint for failure to state a cause of action was affirmed. We resisted urgings to follow the modern trend on grounds that the public policy exception "is too vague a concept to justify the judicial creation of such a tort." Hartley, 476 So. 2d at 1329. According to Hartley, choosing between competing public policies is a function best left to the legislature. Id.

A year after Hartley, the legislature enacted section 112.3187, the Whistle-blower's Act of 1986 which, among other things, prohibits the discharge of public employees or employees of independent contractors doing business with state agencies, in retaliation for reporting employer violations of laws that create a danger to the public's health, safety, or welfare.

In 1991, the Whistle-blower protection was expanded to cover private-sector employees who disclose, or threaten to disclose, employer violations of law, rule or regulation, or who object to, or refuse to participate in any activity, policy, or practice of the employer which is in violation of a law, rule or regulation. § 448.102, Fla. Stat. (1991).[4] Without question sections 112.321

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[4] Section 448.102 provides:

> Prohibitions.—An employer may not take any retaliatory personnel action against an employee because the employee has:
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> (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.
>
> (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer.
>
> (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

In defining terms used in the chapter, section 448.101(4), provides that any law, rule, or regulation under section 448.102 "includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business." Among other statutes or regulations, Arrow Air's actions may have violated is chapter 860, which governs offenses concerning aircraft and other public conveyances, and provides a criminal penalty for "whoever, having

and 448.102 have modified the common law in Florida which permitted private employers to terminate an at-will employee at any time, for any cause, or for no cause at all. Arrow Air argues, however, that section 448.102 is not applicable to this case because it post-dates the operative facts. As the final point we consider whether the statute, which was enacted while the case was pending on appeal, should be given retroactive application.

Retroactive Application

Although the general rule is that statutes creating new rights operate prospectively, Florida Dep't of Revenue v. Zuckerman-Vernon Corp., 354 So. 2d 353 (Fla. 1977), the rule is not absolute. 2 Sutherland, Statutory Construction, § 41.01 (4th ed. 1986); 49 Fla.Jur.2d, Statutes, § 107 (1984). Whether the new statute controls the outcome of this case depends on legislative intent as clearly expressed or implied. Under Florida law an intent that a statute have application to cases pending will be presumed if the statute is remedial in nature. City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986). This final discussion examines the statute in light of the above principles.

A remedial statute is a legislative enactment that intends to afford a private remedy to a person injured by a wrongful act.

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management or control over ... [a] public conveyance used for the common carriage of passengers is guilty of gross carelessness or neglect in or in relation to the conduct, management and control of such conveyance." § 60.02, Fla. Stat. (1991).

It is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. Black's Law Dictionary 1292-93 (6th ed. 1990)(citing Application of City of New York, 71 Misc.2d 1019, 337 N.Y.S.2d 753 (N.Y. Sup. Ct. 1972); In re Estate of McCracken, 9 Ohio Misc. 195, 224 N.E.2d 181, 182 (Ohio Prob. 1967)). An examination of a statute in historical context is essential to a determination that it is remedial.

Several significant occurrences, mentioned earlier in this opinion, preceded passage of section 448.102. Workplace realities showed the at-will doctrine to be harshly unequal; an avalanche of criticism was heaped on the rule in treatises and case law from other jurisdictions; Florida laws which chipped away at the doctrine came close on the heels of cases which dismissed wrongful-termination cases as a matter for legislative intervention. Undoubtedly, the statute was enacted in response to those developments and with the intent to give a private remedy to employees who suffer discharge where their only transgression is disobedience to employer practices which violate laws enacted to protect the public safety and health.

In holding that a new Florida Public Records Act exemption was remedial and to be applied retroactively, the supreme court gave the statute a similar "contextual examination". City of Orlando v. Desjardins, 493 So. 2d at 1028. It noted that there was "little doubt as to [the exemption's] salutary and protective purpose of mitigating the harsh provisions of the [Act] as applied to public entities' litigation files in ongoing

litigation." Reasoning further, the court concluded that the legislature having now acted to correct the unbalanced posture and disadvantaged status of public entities, retroactive application of the law should not be denied on the technical ground that it is a substantive rather than a procedural law. Id. at 1029.

Applying similar reasoning, the Supreme Court of Florida recently held that section 112.3187, which created a civil cause of action for wrongful discharge of public employees, is a remedial statute. The court wrote in Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992), "we believe it clear that the Whistle Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.' As a remedial act, the statute should be construed liberally in favor of granting access to the remedy."[5] For the same reasons relied upon by the supreme court in construing the Florida Public Records Act and section 112.3187 as remedial statutes, we hold that section 448.102 applies to

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[5] Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1992), as the dissent notes, does not deal extensively with the subject of retroactive application of new statutes. The case does hold, however, that the government employees' whistle-blower's act is remedial. Six years earlier, in Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986), the court held that "[i]f a statute is found remedial in nature, it can and should be retroactively applied in order to serve its intended purpose. Id. at 1028.

The rule is otherwise, assuredly, where the legislature expressly limits the application of a new law. See Boynton v. Burglass, 590 So. 2d 446 (Fla. 3d DCA 1991)(en banc). That was the case with section 455.2415, Florida Statutes (1988), discussed in Boynton, which provides confidentiality in communications between a patient and a psychiatrist. In drafting the law the legislature added that it "does not apply to causes of action arising prior to the effective date of this act." Ch. 88-1, § 86, at 186, Laws of Fla.

this case which was pending on appeal when the law became effective.

We have decided only the broad question whether a private employee has a cause of action for wrongful termination from an at-will employment in Florida. Still to be decided by the trial court is whether the complaint states, or can be amended to state, a cause of action within the statutory framework.

Reversed and remanded for further consistent proceedings.

Jorgenson, J., concurs.

GERSTEN, Judge (dissenting).

The majority opinion determines that: (1) Florida law applies, notwithstanding the fact that appellant sought relief under New York law; (2) although Florida law did not provide a cause of action for wrongful discharge at the time the complaint was filed or at the time of the appeal, a new Florida statute should be applied retroactively to this case; and (3) the cause should be remanded so that appellant may amend his complaint to include this new retroactive cause of action. Because of these determinations, I respectfully dissent.

The record reveals that at all trial court proceedings, appellant, who instituted this action, only sought to apply New York, and not Florida law. After the trial court dismissed the complaint, appellant filed a motion for rehearing which again stated that New York law applied.

Similarly, even on appeal, appellant's only point as stated in his initial brief, is:

> The trial court erred in dismissing the plaintiff's complaint when on its face the complaint stated a cause of action under New York law.

Additionally, appellant's initial brief stated, "Appellant, MICHAEL WALSH, has never argued and does not argue now that such allegations state a cause of action for wrongful discharge under Florida law."

Yet, the majority reaches beyond appellant's issue. The majority concludes that the complaint, if amended, could now possibly state a cause of action under Florida law.

In considering a motion to dismiss for failure to state a cause of action, a trial court is limited to the four corners of the complaint. Edward L. Nezelek, Inc. v. Sunbeam Television Corporation, 413 So. 2d 51 (Fla. 3d DCA), review denied, 424 So. 2d 763 (Fla. 1982); Kaufman v. A-1 Bus Lines, Inc., 363 So. 2d 61 (Fla. 3d DCA 1978). The trial court, adhering to this rule, found that appellant's complaint did not state a cause of action.

It is not this court's function to theorize or speculate causes of action a plaintiff may plead in a complaint. See Raney v. Jimmie Diesel Corporation, 362 So. 2d 997, 998 (Fla. 3d DCA 1978); Thompson v. City of Jacksonville, 130 So. 2d 105, 108 (Fla. 1st DCA 1961), cert. denied, 147 So. 2d 530 (Fla. 1962). The burden of bringing a proper cause of action, alleging sufficient facts to overcome a motion to dismiss, lies with a plaintiff. Fla. R. Civ. P. 1.110(b). Neither the trial court, nor this court, can substitute its judgment for that of a plaintiff and his counsel, who decide how to frame a complaint. See Broward Marine, Inc. v. New England Marine Corporation of Delaware, 386 So. 2d 70, 73 (Fla. 2d DCA 1980).

Even if the issue was properly presented and preserved for our review, the law is clear that appellant has not stated a cause of action under Florida law. Florida law holds that when the term of employment is discretionary with either party, then either party for any reason may terminate it at any time, without

incurring liability. DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980).

The majority now erroneously concludes that section 448.102, Florida Statutes (1991), which was enacted after the original panel decision in this case was released, should be applied retroactively. The complaint in this case was filed on November 17, 1989. The acts complained of occurred in April of 1989. The original opinion affirming the trial court's order was filed on May 21, 1991. The new whistle-blower's act did not take effect until June 7, 1991. Ch. 91-285, § 9, at 2750, Laws of Fla.

Retroactive application of the statute at this stage of the case turns the rule of statutory construction on its head. "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively." Walker & LaBerge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977); Keystone Water Company, Inc. v. Bevis, 278 So. 2d 606 (Fla. 1973); Larson v. Independent Life and Accident Insurance Co., 158 Fla. 623, 29 So. 2d 448 (1947). There is no clear legislative expression that section 448.102, Florida Statutes (1991), was intended to apply retroactively. See Ch. 91-285, Laws of Fla.

The cases cited by the majority in support of retroactive statutory application do not apply to this case. Though City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986), held that a new Florida Public Records Act exemption (section 119.07, Florida Statutes (1985)) was remedial and to be applied retroactively, Desjardins is a factually different case. It deals with a

different and wholly unrelated statute, and thus has no bearing on this case.

Similarly, the majority's reliance on Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1992), is also misplaced. Martin County dealt with section 112.3187, Florida Statutes, a government employee's whistle-blower's act. Most importantly, Martin County does not address the issue of retroactivity.

Acts which create new obligations and impose new penalties, are rigidly construed and operate prospectively only. Larson v. Independent Life & Accident Ins. Co., 29 So. 2d 448. Section 448.102, Florida Statutes (1991), creates new obligations on the part of employers, and should be rigidly construed as applying prospectively. Moreover, the legislature expressed its intent to prospectively apply section 448.102, Florida Statutes: "This act shall take effect upon becoming law." Ch. 91-285, § 9, at 2750, Laws of Fla.

In conclusion, appellant never sought to apply Florida law, and because Florida law did not provide a remedy for the acts complained of, and because the new whistle-blower's act is not to be applied retroactively, I respectfully dissent.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1993

MICHAEL WALSH,	**	
Appellant,	**	
vs.	**	CASE NO. 90-1846
ARROW AIR, INC.,	**	
Appellee.	**	

Opinion filed December 7, 1993.

An Appeal from the Circuit Court for Dade County, Jon I. Gordon, Judge.

Krupnick, Campbell, Malone and Roselli, and Walter G. Campbell, Jr., and Kelley B. Gelb, for Appellant.

Thornton, David, Murray, Richard & Davis, and Barry L. Davis and Andrew L. Ellenberg, for Appellee.

Before FERGUSON, JORGENSON and GERSTEN, JJ.

ON MOTION FOR REHEARING

PER CURIAM.

Arrow Air's principal contention in the motion for rehearing is that application of the new statute to give the plaintiff a

cause of action for wrongful termination violates the rule against the retroactive application of new statutes. Stated otherwise, it seems the employer's argument is that before the enactment of section 448.102, Arrow Air had a right to fire its employees for complying with the law against its wishes, without fear of civil liability, and in that sense the new statute impairs a substantive right while imposing a new duty on the employer.

First, the underlying obligation of a common carrier to use care in the conduct and management of its conveyances, which might include maintenance, is not new, but is codified in a twenty-two year old criminal statute, section 860.02 Florida Statutes. See original opinion, n.4 (May 11, 1993). Second, the power of an employer to terminate an employee for doing that which the law requires, or for any reason clearly contrary to a strong public policy, which may have existed prior to the enactment of section 448.102, is not a substantive right based on any concept of justice, ethical correctness, or principles of morals. See Black's Law Dictionary 1223 (6th ed. 1992). In the words of Justice Holmes:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); see also State Dep't of Transp. v. Knowles, 402 So. 2d 1155, 1158 (Fla. 1981)(the rule against retroactive application of statutes is not absolute; the test

requires a balancing of the public interest to be advanced by the legislation against the importance of any private right abrogated). We are not persuaded that there is a constitutional impediment to giving the remedial statute retroactive application.

Rehearing is denied.

FERGUSON and JORGENSON, JJ., concur.

GERSTEN, J., dissents.