

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,014

FILED

SID J. WHITE

FEB 14 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ARROW AIR, INC.,

Petitioner,

vs.

MICHAEL WALSH,

Respondent.

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

RESPONDENT'S BRIEF ON JURISDICTION

Kelly B. Gelb, Esq.
Krupnick, Campbell, Malone
Roselli, Buser & Slama
700 Southeast Third Avenue
Suite 100

Ft. Lauderdale, FL 33316
Telephone: (305) 944-4472

and

Barbara Green, Esq.
Fla. Bar. No. 264628
Co-Counsel for Appellants
2964 Aviation Avenue, 3rd Floor
Coconut Grove, FL 33133
Telephone: (305) 448-8337

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
A. No conflict with cases holding substantive statutes are not retroactive	3
B. No conflict with cases regarding legislative intent	7
C. No conflict with due process cases	7
D. Discretionary reasons to deny review	9
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Arrow Air v. Connelly,</u> 568 So.2d 448 (3d DCA 1990) rev. denied, 581 So.2d 1307 (Fla. 1991)	1, 10
<u>Cantor v. Davis,</u> 489 So.2d 18 (Fla. 1986)	8
<u>Cebrian v. Klein,</u> 614 So.2d 1209 (Fla. 4th DCA 1993)	3
<u>City of Hallandale v. Chatlos,</u> 236 So.2d 761 (Fla. 1970)	2
<u>City of Lakeland v. Catinella,</u> 129 So.2d 133 (Fla. 1961)	3
<u>City of Orlando v. Desjardins,</u> 493 So.2d 1027 (Fla. 1986)	3
<u>Florida Freight Terminals v. Cabanas,</u> 354 So.2d 1222 (Fla. 3d DCA 1978)	6
<u>Florida Patient's Compensation Fund v. Scherer,</u> 558 So. 2d 411 (Fla. 1990)	8
<u>Hoffman v. Jones,</u> 260 So.2d 431 (Fla. 1973)	5
<u>L. Ross, Inc. v. R.W. Roberts Constr. Co.,</u> 481 So.2d 484 (Fla. 1986)	4
<u>Larson v. Independent Life & Acc. Ins. Co.,</u> 29 So.2d 448 (Fla. 1947)	4, 7
<u>McCord v. Smith,</u> 43 So.2d 704 (Fla. 1950)	9
<u>Mancini v. State,</u> 312 So.2d 732 (Fla. 1975)	2
<u>Martin County v. Edenfield,</u> 609 So.2d 27 (Fla. 1992)	3
<u>Scott v. Otis Elevator Co.,</u> 572 So.2d 902 (Fla. 1991)	5
<u>Smith v. Piezo,</u> 427 So.2d 182 (Fla. 1983)	5

<u>State v. Lavazzoli,</u> 434 So.2d 321 (Fla. 1983)	4,7
<u>State v. Zuckerman-Vernon Corp.,</u> 354 So.2d 353 (Fla. 1978)	7
<u>Times Publishing Co. v. Russell,</u> 615 So.2d 158 (Fla. 1993)	2
<u>West v. Caterpillar Tractor,</u> 336 So.2d 80 (Fla. 1976)	5
<u>Young v. Altenhaus,</u> 472 So.2d 1152 (Fla. 1984)	4,9
<u>Walker & LaBerge, Inc. v. Halligan,</u> 344 So.2d 239 (Fla. 1977)	7

OTHER AUTHORITIES:

§112.3187, Florida Statutes (1986)	<u>passim</u>
§448.102, Florida Statutes (1991)	<u>passim</u>
§772.102(1)(a)(22), Florida Statutes	6
§772.103, Florida Statutes	6
§772.104, Florida Statutes	6,8
§836.05, Florida Statutes	6
§860.02, Florida Statutes	6
§860.13, Florida Statutes	6
14 C.F.R. §43.5	6
14 C.F.R. §43.12	6
14 C.F.R. §125.241	6
14 C.F.R. §125.243	6
Sutherland, <u>Statutory Construction</u> , §41.05 at 368 (1992)	9
Sutherland, <u>Statutory Construction</u> , §41.05 at 370 (1992)	5

STATEMENT OF THE CASE AND FACTS

In May, 1989, Michael Walsh, a flight engineer, was fired by Arrow Air, Inc. (Arrow) because he refused to allow one of Arrow's airplanes to fly with a dangerous hydraulic leak. He had reported the leak to the maintenance crew (A.2). The crew later told him they had fixed the leak. But when Walsh reinspected the plane, he saw that the crew had not fixed the leak and it was still dangerous. Against Arrow's wishes, Walsh grounded the flight for five hours (A.3).

Arrow threatened Walsh for reporting the incident and grounding the flight. Three weeks later, Arrow fired Walsh (A.3).¹

Walsh sued Arrow for wrongful termination. The trial court dismissed his complaint. The Third District, on rehearing, held that Walsh had a cause of action under the Whistleblower's Act, §448.102, Florida Statutes (1991). The court held that §448.102, together with §112.3187, Florida Statutes (1986), modified the common law to allow a limited cause of action for wrongful discharge (A.7-8). The court also held that §448.102 was remedial, and controlled this case (A.10-11).

Arrow now seeks review of that decision in this court.

¹ As the District Court noted, Arrow has a history of bad maintenance practices. (A.2-3, at n.2). The last time the court focused its attention on Arrow, Arrow had flown an airplane in a dangerous condition, including a leaking hydraulic system (Id.). The resulting crash killed 250 people. Arrow Air v. Connelly, 568 So.2d 448 (3d DCA 1990), rev. denied, 581 So.2d 1307 (Fla. 1991).

SUMMARY OF THE ARGUMENT

Review should be denied, because the decision of the Third District does not expressly and directly conflict with any of the decisions cited by Arrow and because the Third District's decision upholds important public policies of this State.

Every case cited by Arrow is markedly different from this case. Not one of them involves §448.102. Not one of them involves a statute so similar to one which this Court has already held is remedial. Not one of them even involves a statute that is remedial.

The substance/procedure analysis in the cases cited by Arrow is inapplicable here because the statute is remedial. None of the cases cited by Arrow holds that a remedial statute cannot be applied retroactively.

ARGUMENT

This Court's jurisdiction to resolve conflicts in the law is limited to review of decisions which either (1) announce a rule of law which conflicts with a rule previously announced by this Court or another district, or (2) apply a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So.2d 732 (Fla. 1975); see also City of Hallandale v. Chatlos, 236 So.2d 761 (Fla. 1970) (no conflict if statutes are different); Times Publishing Co. v. Russell, 615 So.2d 158 (Fla. 1993) (no conflict if facts are different). This decision does neither.

None of the cases cited by Arrow for conflict involves either the statute at issue here or facts even remotely similar to the facts of this case.

A. No conflict with cases holding substantive statutes are not retroactive.

Arrow asserts conflict with cases which hold that a substantive statute or constitutional amendment cannot be applied retroactively. But whether a statute is substantive or procedural does not always determine whether it can be retroactive. This court has recognized a third category of statutes, those that are remedial. City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986). A statute may be both substantive and remedial. "[R]egardless of whether the statute is procedural or substantive in nature, if the statute is remedial it must be applied retrospectively to serve its intended purpose". Cebrian v. Klein, 614 So.2d 1209, 1212 (Fla. 4th DCA 1993) (emphasis in original); accord, Desjardins, 493 So.2d at 1028.²

The Whistleblower's Act of 1991 is most definitely remedial. It is similar in all material respects to a statute which this Court has already held to be remedial. In Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992), this Court held that the Whistleblower's Act of 1986, §112.3187, Florida Statutes, is a remedial statute. Section 112.3187 does in the public sector what §448.102, the Whistleblower's Act of 1991, does in the private sector: it prohibits employers from firing employees for specified

² Arrow has misstated what the Court held in City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961). The Court actually said: "Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes" (emphasis added). The Court did not say that remedial statutes are never substantive.

reasons contrary to important public policies, and protects employee efforts to stop or report employer wrongdoing.

Thus, Arrow cannot seriously argue that this statute is not remedial. Consequently, every case which Arrow has cited for conflict on this point is distinguishable, because none of them involves a remedial statute.

L. Ross, Inc. v. R.W. Roberts Constr. Co., 481 So.2d 484 (Fla. 1986) involved an attorney's fees statute that was held to be substantive, not remedial. In fact, the Court expressly acknowledged the rule applied by the Third District in this case: "Remedial statutes are excepted from the general rule against retrospective application of statutes". 481 So.2d 484.

Young v. Altenhaus, 472 So.2d 1152 (Fla. 1984) also involved a substantive statute, not a remedial one. Moreover, unlike the Whistleblower's Act at issue here, the statute in Young included an express indication of legislative intent that it not be retroactive. 472 So.2d at 1154.

State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) was also quite different from this case. It involved a criminal prosecution, not civil litigation. The issue in Lavazzoli was retroactive application of a constitutional amendment, not a remedial statute.

Nor does Larson v. Independent Life & Acc. Ins. Co., 29 So.2d 448 (Fla. 1947) provide conflict. Larson involved a tax statute, not a remedial one. The Court stated no absolute rule against retroactivity. It merely stated that statutes creating new obligations were "more rigidly construed" to be prospective.

Arrow also asserts conflict with Edenfield, the case in which this Court held the Whistleblower's Act of 1986 to be remedial. Arrow incorrectly suggests that this Court held that the statute in that case could not be applied retroactively. But, in fact, the Court did hold amendments to the statute retroactive, but only to a date specified by the legislature. "These amendments, however, were retroactive only to July 1, 1992". 609 So.2d at 29 n.2.

The legislature has set no such limit on the retroactivity of this statute. Therefore, there is no conflict with Edenfield.

Moreover, the statute does not, as Arrow insists, create an entirely new cause of action. Florida has recognized some form of wrongful discharge cause of action for at least eleven years. Smith v. Piezo, 427 So.2d 182 (Fla. 1983); Scott v. Otis Elevator Co., 572 So.2d 902 (Fla. 1991). The Third District merely applied the cause of action to a new set of facts, never before considered by any Florida court.

This is how the common law usually develops. Even when this Court creates or recognizes a totally new cause of action without legislation, it applies the new common law to cases already pending. For example, in West v. Caterpillar Tractor, 336 So.2d 80 (Fla. 1976), this Court recognized a cause of action for strict product liability and applied it to a pending case. Similarly, in Hoffman v. Jones, 260 So.2d 431 (Fla. 1973), this Court applied the new rule of comparative negligence to pending cases in which it was raised. "The fundamental considerations of fairness are surely the same" for the common law as they are for statutory changes. Sutherland, Statutory Construction §41.05 at 370 (1992).

Moreover, the Smith decision pointed out that, when the legislature enacts a statute that requires an act to be done for the benefit of another, or forbids an act which may injure another, Florida law implies a cause of action for the violation of that statute. 427 So.2d at 184. Arrow's alleged acts violate requirements of the common law, statutes and regulations. Thus, Walsh's cause of action is nothing new. As the Third District pointed out (A.7-8,17) Arrow had an obligation to safely carry its passengers. §§860.02, 860.13, Florida Statutes. Moreover, Arrow's threats against Walsh may have constituted violation of §836.05, for which the Civil RICO act may have provided much the same remedy provided here, especially when viewed in light of the facts in Connelly. See §§772.102(1)(a)(22); 772.103; 772.104, Florida Statutes; See also Gough, Wrongful Discharge: Can Rico Come to the Rescue, 61 Fla.B.J. 91 (June, 1987). And, of course, these acts violated Federal Aviation Regulations. Connelly at 450; see also, e.g., 14 C.F.R. §43.5, 43.12, 125.241, 125.243.; Cf. Florida Freight Terminals v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978) (violation of Federal Aviation Regulations is negligence per se).³

Firing Walsh was just part of Arrow's continuing pattern of conducting its business by violating safety requirements and covering up the violations. Since Arrow's actions were already forbidden by law before the statute was enacted, it is no great change in the law to hold Arrow accountable in this case.

³ If the court had applied the law of New York, where Walsh grounded the flight, Walsh would have had a claim under §740 New York Labor Laws (McKinney 1989).

B. No conflict with cases regarding legislative intent.

The decision below does not conflict with cases holding that retroactivity requires an expression of legislative intent. None of the cases hold that the "presumption" of prospective application is a conclusive one, or that the legislative intent must always be express, or that it cannot be implied when the statute is remedial.

For example, Larson v. Independent Life & Acc. Ins. Co., 29 So.2d 448 (Fla. 1947) holds that such legislative intent may be found by implication. Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 242 (Fla. 1977) recognizes that remedial statutes can be applied retrospectively regardless of statutory language. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983) recognizes the presumption against retroactivity, but does not hold it irrebuttable. State v. Zuckerman-Vernon Corp., 354 So.2d 353 (Fla. 1978) merely holds that in that case the retroactivity argument was rebutted -- but it did not involve a remedial statute.

The statute at issue here gives to private sector employees a remedy that was given to public employees in §112.3187, which this Court has already found to be remedial. The presumption of prospective application is rebutted when the statute is remedial. Since this statute is remedial, and the statutes and constitutional amendment at issue in the cases cited by Arrow were not held remedial, the Third District's decision does not conflict with those cases.

C. No conflict with due process cases.

The Third District's decision does not conflict with any of the due process cases cited by the defendants because this statute

is remedial, and because it does not really impose any new duty or obligation on Arrow which it did not already have.

Arrow already had the duty to safely carry passengers; to safely maintain its airplanes; to keep records correctly reflecting that maintenance; to obey FAA regulations; to refrain from threatening anyone with intent to compel him to do any act or refrain from doing any act; and to refrain from conducting its affairs through a pattern of such threats. See p.6, supra. The penalties for Arrow's breach of those duties ranged from civil tort liability to loss of its FAA license to liability for treble damages and attorneys fees under §772.104. The Whistleblower's Act of 1991 did not change any of that. Therefore, cases in which a new duty or obligation was imposed are inapposite and cannot provide the basis for conflict jurisdiction.

Arrow cannot contend that it had a vested right to violate these laws and regulations without legal consequence. It cannot seriously contend that it relied to its detriment on some supposed right to evade maintenance, record-keeping or safety requirements. It violates no concept of fundamental fairness to hold Arrow accountable in this action for activities it knew were prohibited, or to impose liabilities that were already provided by law.

None of the constitutional cases cited by Arrow involve a situation remotely resembling the facts of this case. Nor did this Court, in any of the cases, hold that a remedial statute like this one could not be applied retroactively.

In neither Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411 (Fla. 1990), nor Cantor v. Davis, 489 So.2d 18 (Fla.

1986), nor Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985) did the Court hold the statutes remedial. There is thus no conflict with these cases.

In McCord v. Smith, 43 So.2d 704, 708-09, (Fla. 1950) the Court held that the statute was remedial, and therefore could be applied retroactively, noting that "a retrospective provision of a legislative act is not necessarily invalid." That is exactly what the Third District did here. The Third District's decision does not conflict with McCord.

D. Discretionary reasons to deny review.

Strong policy reasons militate against review.

For most cases, the District Courts of Appeal are the courts of last resort. The District Courts have had little opportunity to consider this statute. Arrow cites no cases even discussing this statute. It would be premature for this Court to do so before the District Courts have had that opportunity.

Moreover, the decision vindicates important public policy, adopted by the legislature, to encourage employees to try to stop their employers' dangerous, illegal practices. What a court is really saying when it describes a statute as "remedial" is that the court has made a value judgment. It has decided that the policies behind the statute are significant enough to outweigh any possible unfairness in retroactive application. Sutherland, Statutory Construction §41.05 at 368 (1992). That is what the Third District did here. In Connelly, the court found evidence that Arrow "consciously pursued a course of conduct which subordinated passenger and crew safety to concerns for company profits" and of

"routine practices" constituting "flagrant violations" of FAA safety rules. 568 So.2d at 449, 450. Walsh was fired for trying to stop those practices. He should not be denied a remedy. He should be given a medal.

Finally, retroactive application of the statute now does not affect a large number of cases. The statute of limitations is at most four years. In a few months, any attempt to apply the 1991 Whistleblower's Act to a cause of action which accrued before 1991 will be barred by the statute of limitations. There have been no other appellate decisions on this issue since the Third District's decision nine months ago. Thus, there will be no great flood of lawsuits resulting from the Third District's decision.

Conclusion


Respondent respectfully requests this Court to deny review.

Certificate of Service

I hereby certify that a true copy hereof was mailed to Kathleen M. O'Connor, Esq., Thornton, David, Murray, Davis, Thornton & Sreenan, P.A., 2950 S.W. 27 Ave., Suite 100, Miami, FL 33133 on February 10, 1994.

KELLY B. GELB, ESQ.,
KRUPNICK, CAMPBELL, et al.
700 S.E. 3rd Ave., #100
Ft. Lauderdale, Florida 33316
Telephone: (305) 944-4472

BARBARA GREEN, ESQ.
Attorney at Law
2964 Aviation Ave., 3rd Floor
Coconut Grove, Florida 33133
Telephone: (305) 448-8337

BY: 
BARBARA GREEN
Florida Bar No. 264628

INDEX TO APPENDIX

	<u>Page</u>
Opinion of District Court on Motion for Rehearing, filed May 11, 1993	1-15
Opinion of District Court denying Motion for Rehearing, filed December 7, 1993	16-18

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. 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.

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,

widow of a copilot. Connally 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 unanimity, 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

⁴ Section 448.102 provides:

Prohibitions.—An employer may not take any retaliatory personnel action against an employee because the employee has:

(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.

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

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 Edward 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.