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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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RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In the summer of 1989, Michael Walsh, a flight engineer, refused to allow one of Arrow Air's aircraft to take off from John F. Kennedy Airport in New York with a dangerous hydraulic leak (R.2-3). Walsh insisted that the leak be repaired and properly written up in the log book. He delayed the flight for five hours while the repairs were made and documented in compliance with safety regulations.(R.2-3)[1]

Arrow air fired him.

Walsh brought suit against Arrow under the New York wrongful discharge law, New York Labor Law §740 (McKinney, 1989). Walsh alleged that New York law should apply because of New York's interest in protecting the lives and property of its public from airplane crashes. (R.3). The trial court dismissed the case on the ground that Florida law applied and that Florida did not recognize a cause of action for wrongful discharge (R.27,28).

Walsh appealed the dismissal. At first, the Third District affirmed, holding that his claim was barred by the Florida doctrine of employment at will. However, in 1991, the Florida Legislature

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[1] The Third District was painfully aware of Arrow's unsafe maintenance practices. A few years earlier, an Arrow Air aircraft had crashed, killing all 250 people on board. Arrow had allowed the aircraft to fly in a dangerous condition, including a leaking hydraulic system, similar to the problem that later motivated Walsh to delay Arrow's flight from New York. The Third District held that Arrow's conduct leading up to the crash, as testified to by numerous Arrow employees, was sufficiently egregious to allow the pilot's wife to sue Arrow, despite the immunity of the worker's compensation statute. Connelly v. Arrow Air, 568 So.2d 448 (Fla. 3d DCA 1990), rev. denied, 581 So.2d 1307 (Fla. 1991). The court noted the Connelly decision in its opinion below.

enacted the Florida Whistle-blower Act, §§448.101-448.105, Florida Statutes (1991). Section 448.102 provides, in pertinent part:

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

Section 448.103 provides a civil action for an employee who has been "the object of a retaliatory personnel action in violation of this act". Remedies available under the act include injunctive relief, reinstatement and lost wages, compensatory damages, and attorney's fees.

On rehearing, the Third District held that the statute was remedial and could afford a remedy to Walsh. Applying the test enunciated in State Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981), the court held that the statute could be applied to Walsh's firing. The court reversed the dismissal and remanded the case to give Walsh an opportunity to plead a claim for relief under the Florida Whistle-blower Act.

Arrow invoked the discretionary jurisdiction of this Court.

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QUESTIONS PRESENTED

A. DID THE THIRD DISTRICT CORRECTLY APPLY THE WHISTLE-BLOWER ACT TO THE FACTS OF THIS CASE?

I. Is any presumption of prospective application overcome by the remedial nature of the statute?

II. May the statute be applied to this case because it is remedial and does not create entirely new substantive rights and obligations?

III. Does retroactive application violate due process in this case in light of Arrow's pre-existing duties and the due process analysis of State Dept. of Transp. v. Knowles?

IV. Did the District Court properly allow leave to amend on remand where all elements of the cause of action are fully supported by the record and amendment amounts to a mere change in the label given to it?

B. SHOULD THE REVERSAL OF THE DISMISSAL BE AFFIRMED BASED ON THE EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE RECOGNIZED IN SMITH V. PIEZO AND SCOTT V. OTIS ELEVATOR?

C. SHOULD THE REVERSAL OF THE DISMISSAL BE AFFIRMED BECAUSE THE TRIAL COURT ERRED IN DECIDING, ON A MOTION TO DISMISS, THAT FLORIDA LAW, RATHER THAN NEW YORK LAW, APPLIED?

SUMMARY OF THE ARGUMENT

Michael Walsh was fired for doing the only thing he lawfully could have done under Florida law and federal regulations. He grounded an unsafe aircraft until the dangerous leak was corrected. He may have saved hundreds of lives. The Third District correctly applied the Whistle-blower Act to provide him a remedy and protect employees who follow the law and protect the public safety.

The Whistle-blower Act is remedial. Therefore, there is no presumption against retrospective application. In fact, retrospective application is required to serve the intended purpose of the statute.

The statute does not create an entirely new cause of action. Florida has recognized some form of wrongful discharge cause of action since 1983, when it recognized a cause of action for firing an employee in violation of a specific statute. The cause of action has already been expanded to include tort damages for emotional distress.

Retroactive application of the statute does not violate due process. Determination of whether retroactive application of a statute violates dues process depends on a weighing of [1] the strength of the public interest served by the statute, [2] the extent to which the right affected is abrogated, and [3] the nature of the right affected. All of these factors weight against Arrow here and in favor of Walsh.

Arrow's obligations with respect to passenger safety were well established, by statute, regulation an common law, before it fired Walsh. Arrow had no vested right to violate these established laws. Arrow was already subject to tort liability for violation of them. Its rights were not abrogated to any great extent by imposition of liability under the Whistle-blower Act.

Arrow's firing of Walsh was in furtherance of its violation of these established rules. All the Third District did was expand the cause of action for wrongful discharge to a new set of facts.

This is how the common law usually develops. There is really no difference to the defendant whether it is done by the legislature or by the courts. If the legislature cannot constitutionally do it, this Court should.

Finally, the law of New York should have been applied because New York had the most significant interest in providing Walsh a remedy. New York was the place where Arrow's mechanics failed to properly repair the airplane, where they incorrectly recorded the repairs, and where Walsh grounded the flight. New York would have been most affected if the aircraft had crashed.

The purpose of whistle-blower laws is not just to protect the employee, but to prevent the kind of underlying wrong that the employee was trying to prevent. Consequently, the place where the wrongful activities and the whistle-blowing occurred has the most significant interest in the case. The trial court should have applied New York law.

Both Florida and New York have an interest in seeing that Michael Walsh is afforded a remedy. This interest will best be served by applying New York law.

ARGUMENT[2]

A. THE THIRD DISTRICT CORRECTLY APPLIED THE WHISTLE-BLOWER ACT TO THE FACTS OF THIS CASE.

I. The statute is remedial and therefore there is no presumption of prospective application.

Arrow first argues that §448.102 cannot be applied retroactively because it does not expressly state that it is to be applied retroactively. However, the "presumption " of prospective application of statutes is not a conclusive one. An intent to apply the statute retroactively may be implied when the statute, like the Whistle-blower Act, is remedial. If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes. City of Orlando v. Desjardins, 493 So.2d 1027, 1028 (Fla. 1986).

Section 448.102, the statute at issue here, gives to private sector employees the same remedy that was given to public employees in §112.3187, Florida Statutes. This Court has already found that statute to be remedial. Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992). It is indisputable that this private

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[2] In part A of this Argument, we address the four issues raised by Arrow Air in its brief. In parts B and C, we make additional arguments in support of the District Court's reversal of the trial court. We rely on this Court's jurisdiction, once conflict jurisdiction is granted, to consider the entire case on the merits. See, e.g., Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977).

sector whistle-blower statute, like the public sector whistle-blower statute at issue in Edenfield, is remedial.

The presumption of prospective application is rebutted when the statute is remedial. Since this statute is remedial, there is no presumption against its retroactive application. It must be given retroactive application to serve its remedial purpose.

II. The statute may be applied to this case because it is remedial and does not create entirely new substantive rights and obligations.

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.

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 is original); accord, Desjardins, 493 So.2d at 1028.

The Whistle-blower'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 Whistle-blower's Act of 1986, §112.3187, Florida Statutes, is a remedial statute. Section 112.3187 does in the public sector what §448.102, the Whistle-blower's Act of 1991, does in the private

sector: it prohibits employers from firing employees for specified reasons contrary to important public policies, and protects employee efforts to stop or report employer wrongdoing and violation of the law.

Arrow cannot seriously argue that this statute is not remedial.

"Remedial statutes are excepted from the general rule against retrospective application of statutes." L. Ross, Inc. v. R.W. Roberts Constr. Co.., 481 So.2d 484 (Fla. 1986).

In fact, this Court seems to have acknowledged in Edenfield that it may be appropriate to retroactively apply a statute like this. In Edenfield 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 §448.102. Therefore, it may be retroactively applied in this case.

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 Technology, 427 So.2d 182 (Fla. 1983). In Smith, this Court recognized a cause of action for wrongful discharge in violation of the worker's compensation statute. The cause of action was expanded to include tort damages for emotional distress. 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, 280 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).

As this Court pointed out in State Dept. of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1991), there is really no difference to the defendant whether it is the court or the legislature recognizing the cause of action. "The question, then, boils down to whether the legislature can do what courts so often do -- that is, make a prospective determination of law applicable to persons who are 'in the pipeline' because they are already litigating in that very subject area". 402 So.2d at 1157.

Moreover, this Court pointed out in Smith v. Piezo, supra., 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

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acts violate requirements of the common law, statutes and regulations for which Florida law should imply a cause of action for Walsh.

As the Third District pointed out, Arrow had an obligation to safely carry its passengers. §§860.02, 860.13, Florida Statutes.[3] And, of course, these acts violated Federal Aviation Regulations. Connelly at 450; see also, e.g., 14 C.F.R. §§43.5, 43.9, 43.12, 125.241, 125.243, 125.247 (1989)[4]; Cf. Florida Freight Terminals v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978) (violation of Federal Aviation Regulations is negligence per se).

Firing Walsh furthered Arrow's continuing pattern of conducting its business by violating safety requirements, flying unsafe airplanes and covering up the violations. The Third District detailed evidence describing these practices in Connelly. It took note of Connelly in its decision below. Since Arrow's actions were already forbidden by law before the statute was

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[3] Section 860.02 makes it a first degree misdemeanor to use "gross carelessness or neglect in or in relation to the conduct, management and control of [a public] conveyance." Section 860.13(1)(b) makes it a first degree misdemeanor to "operate an aircraft in the air or on the ground or water in a careless or reckless manner so as to endanger the life or property of another." Copies of these statutes are in the appendix.

[4] 14 C.F.R. §§43.5 and 43.7 prohibit approving an aircraft for return to service unless the repairs have been recorded on the appropriate forms. These regulations required that the work be recorded accurately and approved by the appropriate person, such as Mr. Walsh. Section 43.9 specifically prohibits falsifying such records. Section 125.241, 125.243 and 125.247 prohibit operation of an aircraft unless the aircraft has been properly maintained and defects have been corrected. Copies of these regulations are included in the appendix.

enacted, it is no great change in the law to hold Arrow accountable to Michael Walsh in this case.

III. Retroactive application does not violate due process in this case.

Because, as we have explained, the statute is remedial and does not impose any new duties or obligations on Arrow, the Third District's decision is consistent with the due process clause of the Florida Constitution, Article I §9.

a. Arrow's Pre-existing Duties

Arrow already had the duty to safely carry passengers; to safely maintain its airplanes; to keep records correctly reflecting that maintenance; and to obey FAA regulations.

The penalties for Arrow's breach of those duties ranged from civil tort liability to loss of its FAA license. Additionally, Walsh contended below that Arrow Air threatened him when he refused to overlook the leak, and that it "discouraged its employees from reporting leaks, such as the one in this case, by verbal threats...". [5] A pattern of such threats might constitute violation of §836.05, Florida Statutes, which could subject Arrow to liability for treble damages and attorneys fees under the Civil Rico Act. 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). The Whistle-blower's Act

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[5] While threats are not explicitly alleged in the complaint, Walsh elaborated on them in his motion for rehearing before the Third District. Arrow Air has brought that fact to this court by including the motion in the appendix to its brief at App.7.

of 1991 did not change any of that. Therefore, imposition of civil tort liability under the Whistle-blower's Act of 1991 does not impose a new duty or obligation upon Arrow.

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.

b. Due Process Analysis

The due process analysis for retroactive application of a statute is not nearly so cut and dried as Arrow contends. Due process is fundamentally a question of what is fair. This Court, like the courts of many other states, has attempted to explain its due process decisions by classifying certain rights as "procedural", "substantive", "remedial", or "vested". See Sutherland, Statutory Construction, §41.05. But these classifications have not always been helpful. True, this Court has been fairly consistent in holding that "vested" or "accrued" rights may not be retroactively abrogated. See, e.g., Wiley v. Roof, 19 Fla.L.Wkly. S334 (Fla. 1994) (vested property right in bar of statute of limitations). But the determination of what rights are vested or accrued has never been such a simple one. Rights do not come equipped with neon signs that announce that they are "vested".

As this Court pointed out in City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), "While the procedural/substantive analysis often sheds light on the propriety of retroactively applying a statute... the dichotomy does not in every case answer the question." 493 So.2d at 1028 (citations omitted).

For example, the Court has often stated that "procedural" rights may be abrogated retroactively, but that "substantive" rights may not. See, e.g., Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985). But in Wiley v. Roof, 19 Fla.L.Wkly. S334 (Fla. 1994), this Court held that the right to the bar of an expired statute of limitations was an "accrued" right and could not be abrogated retroactively, even though it appears to be procedural, rather than substantive. Compare Foley v. Morris, 339 So.2d 215 (Fla. 1976) (statute of limitations may be retroactively shortened). And in Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978), this Court held that the Uniform Contribution among Tortfeasors Act could be applied retroactively, even though the right to contribution appears to be substantive. See also Crane v. Dept. of State, 547 So.2d 266, 267 (Fla. 3d DCA 1989 (statute requiring revocation of the concealed weapon license of convicted felons could be applied retroactively because license to carry a concealed weapon is not a vested right).

In sum, what really has been going on in these cases has never been as simple as Arrow contends. Rather, as the Court frankly acknowledged in State Dept. of Transportation v. Knowles, 402 So.2d 1155 (Fla. 1981):

> Despite formulations hinging on categories such as "vested rights" or "remedies", it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: [1] the strength of the public interest served by the statute, [2] the extent to which the right affected is abrogated, and [3] the nature of the right affected. That analysis is helpful here.

402 So.2d at 1158.

The Third District applied the Knowles analysis below. A careful weighing of the factors enunciated in Knowles shows that it is not unconstitutionally unfair to Arrow to apply the whistle-blower statute in this case.

[1] the strength of the public interest served by the statute

The public interest served by the statute is a strong one. The statute was enacted not only to give a remedy to fired employees, but to protect the public from the acts of their employers that the employees were fired for trying to prevent. See Edenfield, 609 So.2d at 296. Protecting the whistle-blower is a necessary mechanism to protect the public.

In this case, the acts of the employer endangered the lives of hundreds of members of the public, in the air and on the ground. In fact, similar acts by Arrow -- including allowing a plane to fly with a faulty hydraulic system -- already may have cost hundreds of lives. Connelly v. Arrow Air, 568 So.2d 448 (Fla. 3d DCA 1990),

rev. denied, 581 So.2d 1307 (Fla. 1991). The public interest in this case was to encourage employees of Arrow to prevent any more loss of life due to the egregious practices documented in Connelly. The public interest served by the statute in this case could not be more important.

[2] the extent to which the right affected is abrogated

The extent to which the "right" affected is abrogated depends, in this case, on how that right is defined. As the Third District pointed out below, Arrow had no "right" to fly an airplane in an unsafe condition. Arrow has long had the obligation under both common law and criminal statutes to safely carry its passengers. §§860.02, 860.13, Florida Statutes. And Arrow has always had the obligation to comply with federal aviation regulations. See, e.g., 14 C.F.R. §§43.5 et seq., 125.241 et seq.(1989)[6] Cf. Florida Freight Terminals v. Cabanas, 354 So.2d 1222 (Fla. 3d DCA 1978) (violation of Federal Aviation Regulations is negligence per se).

Firing Walsh was just part of Arrow's continuing pattern of conducting its business by violating safety requirements and covering up the violations. See Connelly at 450. Arrow was already subject to potential criminal penalties for gross carelessness or neglect in the conduct, management and control of its aircraft (§860.02) and for operation of its aircraft in a reckless or careless manner (§860.13). In light of the criminal

[6] Copies of these regulations are set out in the Appendix to this brief.

penalties and civil tort liability, the enunciation of a statutory cause of action affected Arrow's "rights" only minimally.

[3] the nature of the right affected.

If the right affected was Arrow's right to maintain and manage its airline as it saw fit, the answer here is a simple one. Arrow simply had no right, under the common law, the criminal law, or the federal regulations, to operate its airline in an unsafe manner.

Even if the right at issue is Arrow's right to fire its employees at will, that right had already been significantly limited by this Court in Smith v. Piezo Technology, 427 So.2d 182 (Fla. 1983). In Smith, this Court recognized a cause of action for wrongful discharge in violation of a statute.

Arrow wrongfully discharged Walsh in violation of its statutory duty to safely maintain and operate its aircraft under §860.02 and §860.13, as well as the federal regulations. Thus, the addition of the statutory remedy did not significantly abrogate any rights that Arrow had at the time.

Under the analysis adopted by this Court in Knowles, application of §448.102 to the facts of this case is not a denial of Arrow's due process rights. It is not unfair.

IV. The District Court properly allowed leave to amend on remand.

The Court did not err in allowing leave to amend on remand. Leave to amend is to be liberally granted, particularly in a case of first impression where an appellate court first sets the parameters for a cause of action.

For example, in Gabriel v. Tripp, 576 So.2d 404 (2d DCA 1991), the Second District recognized for the first time a cause of action in negligence for violation of a statute making it a misdemeanor to transmit a sexually transmissible disease. The court held that, because it was stating the requirements for the cause of action for the first time, the plaintiff would be granted leave to amend on remand.

Moreover, there is substantial authority for allowing leave to amend at the appellate stage where all of the elements of the cause of action are fully supported by the record and the defendant is not prejudiced by the mere change in the "label" given to the cause of action. Kala Investments, Inc. v. Sklar, 538 So.2d 909, 918 n.8 (3d DCA 1989), rev. denied, 551 So.2d 460, 461 (Fla. 1989); West American Ins. Co. v. Yellow Cab Co., 495 So.2d 204 (5th DCA 1986), rev. denied 504 So.2d 769 (Fla. 1987).

The ultimate facts asserted by Walsh in his complaint would not significantly change, whether he asserted his claim under the Florida statute or the New York statute. Walsh asserted that he was wrongfully fired for refusing to allow an unsafe aircraft to fly. Arrow Air knows exactly what Walsh is asserting, and what relief he is seeking. The recognition of the cause of action in this case would vindicate important public policy. There would be no prejudice to Arrow Air in allowing Walsh to amend his complaint to assert the Florida statute as a legal basis for relief.

B. THE REVERSAL OF THE DISMISSAL SHOULD BE AFFIRMED BASED ON THE EXCEPTION TO THE EMPLOYMENT AT WILL DOCTRINE RECOGNIZED IN SMITH V. PIEZO AND SCOTT V. OTIS ELEVATOR.

In recognizing Mr. Walsh's cause of action, the Third District did no more than expand the cause of action, already recognized by this Court, for violation of an important, clearly stated public policy set out in a statute. Smith v. Piezo Technology, 427 So.2d 182 (Fla. 1983).

In Smith, this Court recognized the existence of a cause of action for violation of §440.205, Florida Statutes. That statute prohibited an employer from discharging an employee for filing a worker's compensation claim. The court held that, "because the legislature enacted a statute that clearly imposes a duty and because the intent of the section is to preclude retaliatory discharge, the statue confers by implication every particular power necessary to insure the performance of that duty". 427 So.2d at 184. Consequently, the court held that the statute "does create a cause of action for retaliatory discharge". 427 So.2d at 185.

In Smith, this court was careful to couch its decision in terms of a "statutory" cause of action, rather than a "tort". Nevertheless, this Court in Smith took a major step toward recognizing a public policy exception to the employment at will doctrine. Justices Overton and Adkins, concurring, advocated the frank recognition of a common law tort of retaliatory discharge. 427 So.2d at 185.

The Court took a further step toward acknowledging the common law tort of retaliatory discharge in Scott v. Otis Elevator Co., 572 So.2d 902 (Fla. 1990). There the Court held that the cause of action created by §440.205 was an intentional tort for which an employer could be held liable for emotional distress damages. In

so doing the Court adopted the reasoning of the common law cases from other states recognizing the public policy exception to the employment at will doctrine. 572 So.2d at 903.

The public policy exception to the employment at will doctrine has found growing acceptance throughout the nation. At least one court has suggested that the exception is not the majority rule. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985).[7]

This Court in Smith and Scott took a major step toward joining those jurisdictions. In fact, tort law analysis so pervades Scott that this Court may have intended to recognize the tort of wrongful

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[7] The following is just a sample of the courts that have adopted the public policy exception in some form: Alaska, Eldridge v. Felec Services, Inc., 902 F.2d 1434 (9th Cir. 1990) (applying Alaska law); Arizona, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); California, Petermann v. International Brotherhood of Teamsters Local 396, 174 Cal. App. 2d. 184, 344 P.2d 25 (1959); Connecticut, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); Hawaii, Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982); Idaho, Jackson v. Minidoka Irrigation Disto., 98 Idaho 330, 563 P.2d 54 (1977); Illinois, Palmateer v. International Harvester, 85 Ill.2d 124, 421 N.E.2d 876 (1981); Michigan, Trombetta v. Detroit, Toledo & Ironton R.Co., 81 Mich. App. 489, 265 N.W. 2d 385 (1978); New Hampshire, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); New Jersey, Littman v. Firestone Tire & Rubber Co., 709 F. Supp. 461 (S.D.N.Y. 1989) (applying New Jersey law); Oklahoma, Davies v. American Airlines, Inc., 971 F.2d 463 (10th Cir. 1992), cert denied 124 L.Ed. 2d 657, 113 S.Ct. 2439 (1993) (applying Oklahoma law); Oregon, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Pennsylvania, Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978); Texas, Sabine Pilot Service, Inc. v. Hauck, 687 S.W. 2d 733 (Tex. 1985); and West Virginia, Harless v. First Nat'l Bank, 16 W.Va. 116, 246 S.E.2d 270 (W.Va. 1978). It has also been adopted for federal admiralty cases. Smith v. Atlas Off-Shore Boat Services, Inc., 653 F.2d 1057 (5th Cir. 1981).

Cases are collected in Annotation, Modern Status of Rule that Employer May Discharge At-Will Employee for any Reason, 12 ALR 4th 544, and in Annotation, Liability for Retaliation Against At-Will Employee for Public Complaints or Efforts Relating to Health or Safety, 75 ALR 4th 13.

discharge for violation of a clearly stated public policy. If so, we ask the Court to clarify its intention in this case.

This case is a compelling one for application of a clearly defined, narrow public policy exception to the employment at will doctrine. The attempt by Arrow Air to fly an aircraft with a dangerous hydraulic leak was clearly prohibited by state statutes, common law and federal regulations. Walsh was fired for trying to prevent these violations. Walsh probably saved lives. A narrow public policy exception to the employment at will doctrine, recognizing a cause of action when an employee tries to prevent a clearly illegal action by his employer, would protect Walsh and employees like him.

Moreover, the Legislature has now made it plain that it is the policy of the state of Florida to protect employees like Walsh who are fired for trying to prevent illegal acts by their employers. §448.102, Florida Statutes.

The employment-at-will doctrine is a creature of the courts, not the legislature. See, e.g., Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057, 1060-1061 (5th Cir. 1981) (detailing common law development of doctrine). It was not part of the common law of England, but was developed in the United States. 653 F.2d at 1060 n.3. Before the whistle-blower statute was passed, this Court was well on the road to recognizing Walsh's cause of action -- if not already there. As this court acknowledged in Knowles, a court-made rule can be retroactively applied. 402 So.2d at 1157.

In light of the development of the common law, we ask the Court to recognize that it would be a meaningless distinction to refuse to apply the statute in this case at least to the extent of the damages recognized in Scott. In the alternative, we ask the Court to take the next logical step in the development of the common law and recognize a cause of action for wrongful discharge, limited to employees who have been fired for reporting, refusing to participate in, or attempting to prevent, violations of clearly stated laws.

C. THE REVERSAL OF THE DISMISSAL SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT ERRED IN DECIDING, ON A MOTION TO DISMISS, THAT FLORIDA LAW, RATHER THAN NEW YORK LAW, APPLIED.

Over Walsh's objection that a motion to dismiss was not the appropriate place to decide the conflict of law issue, (R.23) the trial court held that Florida law, rather than New York law, applied. Although it reversed the judgment of the trial court, the Third District also held that Florida law applied in this case. This was erroneous as a matter of both procedural and substantive law.

I. Error to decide applicable law on motion to dismiss.

When two states have significant relationships with the parties and issues before the court, the question of which state has the more significant contacts is highly fact-sensitive. It cannot be determined on a motion to dismiss.

The only things the record shows that the trial court had before it when it ruled were the complaint, motion to dismiss, memoranda of law, and affidavits of two Arrow Air officers.

The complaint alleged that the plaintiff was a resident of Broward County and the defendant was a Florida corporation doing business in Broward County. It also alleged that Arrow Air decided to fire Walsh when Walsh delayed an unsafe flight "out of John F. Kennedy Airport in New York," refusing to let the plane take off from JFK until a dangerous hydraulic leak was fixed (R.2-5).

The affidavits had been filed in support of a motion for change of venue, and stated only that Arrow Air's principal place of business was in Miami and that it did no business in Broward (R.10, 14.).

These were <u>all</u> the facts that the trial court had before it when it dismissed the complaint.

Of course, on a motion to dismiss, the court should have considered only matters within the four corners of the complaint, and not the affidavits. E.g. <u>Bricker v. Kay</u>, 446 So.2d 1151 (Fla. 3d DCA 1984).[8] It was error for the trial court and the Third District to consider these affidavits in determining the motion to dismiss.

Even if it were proper for the court to consider the affidavits, however, this is hardly an adequate record on which to

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[8] Although the motion denominated the grounds for dismissal as jurisdictional, the essence of the argument was the failure to state a cause of action under New York law (R.6-7).

decide a complex conflict of law question, as Walsh pointed out below (R.21). The question of which state's law is applicable is a complex one that depends on weighing the unique facts of each case. Bishop v. Florida Specialty Paint Co., 389 So.2d 999 (Fla. 1980), adopting Restatement (Second) of Conflict of Laws §§145, 146 (1971). The weighing is concerned not with the number of connections to each state, but with their importance. E.g., Judge v. American Motors Corp., 908 F.2d 1565 (11th Cir. 1990) (applying Florida law). Rather than deciding the issue on a bare bones motion to dismiss, the courts should have allowed the full development of the facts, so that they could properly have been weighed.

II. Error to apply Florida law where New York had the more significant policy interest at stake.

If this Court deems the record before the trial court sufficient to decide which state's law is applicable, then a proper application of the weighing test of Bishop requires application of New York law to this case.

The record reveals the following contacts with New York:

(1) Walsh performed in New York the acts for which Arrow Air fired him: refusing to let an unsafe aircraft fly, and properly recording the maintenance incident in the log book.

(2) Arrow Air did business in New York, as evidenced by the Arrow Air flight out of New York, delayed by Walsh for safety reasons. Arrow Air flew passengers out of one of New York's airports.

(3) The employment contract between the parties was partially performed in New York.

The record reveals only the following contacts with Florida:

(1) The plaintiff was a Florida resident.

(2) The defendant was a Florida corporation doing business in Florida.

These were all of the factors that the court could have considered.

In the context of a cause of action for retaliatory discharge, the single most important factor is where the employee did the acts that led to his firing. That is because the principal reason for recognizing such a cause of action is not just to protect the employee, but to discourage or prevent the underlying act which the employee has tried to prevent, or in which he has refused to participate. See Martin County v. Edenfield, 609 So.2d 27, 29 (Fla. 1992) (purpose of public employees' whistle-blower act is "the elimination of public corruption"). The most important thing is protecting the public from illegal and dangerous acts of the employer.

In this case, Walsh was fired because he refused to let an unsafe airplane fly. He grounded the airplane in New York. The passengers he saved from possible injury or death were New York passengers. If the plane had crashed on takeoff, it would have crashed in New York. New York therefore had the most compelling interest in preventing the dangerous flight. New York has the

greatest interest in protecting Mr. Walsh from retaliation for his prevention of the unsafe flight.

Indeed, New York has a strong policy favoring employees like Mr. Walsh who try to prevent their employers from committing illegal acts dangerous to the public. New York Labor law §740(2) prohibits an employer from taking any retaliatory personnel action against an employee because the employee:

> (a) discloses... an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety;
>
> * * *
>
> (c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

The New York policy expressed in this statute is the same as the policy of the State of Florida now expressed in §§448.101-448.105. In fact, §740(2) of the New York law is very similar to §448.102, Florida Statutes. Application of New York law will allow Walsh a remedy, vindicating the policies of both Florida and New York. Refusal to apply New York law will leave him without a remedy. See Littman v. Firestone Tire and Rubber Co., 709 F.Supp. 461 (S.D.N.Y. 1989) (applying New Jersey law to whistle-blower case in part because failure to do so would deny plaintiff any remedy).

The most significant contacts were with New York. Application of New York law will further the public policy of both New York and Florida. If this Court cannot constitutionally afford Walsh a remedy under what is now the law of Florida, then it ought to apply the law of New York.

CONCLUSION

Michael Walsh is a hero. His refusal to participate in his employer's illegal and dangerous practices cost him his job, but very likely saved lives. There was no moral or legal decision he could have made other than to ground the aircraft until it was safe to fly. The law does and should afford him a remedy.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof was mailed to Kathleen M. O'Conner, Esq., Thorton, David, Murray, Davis, Thornton & Sreenan, P.A., 2950 S.W. 27th Avenue, Suite 100, Miami, FL 33133 this 3 day of August, 1994.

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APPENDIX