SUPREME COURT OF FLORIDA

THE GOLF CHANNEL, a/k/a TGC, INC.	)	
Petitioner,	)	**CASE NO. 93-426**
v.	)	**District Court of Appeal, 5th District - No. 97-2049**
MARTIN JENKINS,	)	
Respondent.	)	

BRIEF OF PETITIONER THE GOLF CHANNEL a/k/a TGC, INC.

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

STATUTES

OTHER AUTHORITY

STATEMENT OF THE CASE AND THE FACTS

On or about September 30, 1996, Respondent MARTIN JENKINS (hereinafter "Jenkins" or "Respondent") filed his Complaint in the instant action against Petitioner THE GOLF CHANNEL, a/k/a TGC, INC. (hereinafter "TGC" or "Petitioner"). R1-1-8. Therein, Respondent purported to assert a claim against TGC for alleged violations of Florida's Whistleblower Protection Act, Section 448.101, *Florida Statutes*, *et seq.* (hereinafter the "Whistleblower Act" or the "Act"). R1-1-6. TGC voluntarily accepted service of Respondent's Complaint, and its Motion to Dismiss was filed on November 8, 1996. R1-2-12.

On January 22, 1997, the Honorable Walter Komanski issued an Order granting without prejudice, TGC's Motion to Dismiss Respondent's Complaint. R1-6-40. Therein, Respondent was given ten days from the date of the Order to specifically plead, *inter alia,* "all acts which Plaintiff in writing brought to the attention of a supervisor under *Fla. Stat.* Section 448.102(1) and 448.102(2)." R1-6-39. Pursuant to that Order, Respondent filed his Amended Complaint on or about February 3, 1997. R1-8-49. Therein, Respondent alleged he reported and objected to alleged acts of plagiarism, alleged falsification of manpower reports, alleged improper receipt of goods, and alleged acts of sexual harassment. R1-8-43-44. However, contrary to the mandate of Judge Komanski's Order, Respondent's Amended Complaint did not plead "all acts which Plaintiff brought in writing." R1-8-44. Instead, the Amended Complaint stated only that Respondent "wanted to make a written report of the [alleged sexual harassment], but he was prohibited by his supervisor, PAUL FARNSWORTH, who instructed him not to make such a written report." *Id.* With regard to the other acts of alleged illegal activity outlined

in the Amended Complaint, Respondent failed to allege even an attempt to put his complaints regarding same in writing. R1-8-45-47.

TGC filed its Motion to Dismiss the Amended Complaint on or about February 10, 1997. R1-9-52. TGC's Motion was granted on June 30, 1997. R1-22-141. Therein, the Court stated the following:

> The Court finds Plaintiff failed to allege he provided the employer with written notice of the alleged violations of law, rule or regulations required by the Florida Whistleblower Act § 448.101, *et seq., Florida Statutes.* Plaintiff's allegation that he wanted to file a written report about alleged improper conduct towards two female employees, but was instructed by his supervisor not to does not excuse the requirement for written notice under § 448.101. *See Potomac Systems Engineering, Inc. v. Deering,* 683 So.2d 180, 181-182 (Fla. 2d DCA 1996); and *Martin v. Honeywell, Inc.,* 1995 WL 868604 (M.D. Fla. July 18, 1995).
>
> Accordingly, it is hereby
>
> ORDERED and ADJUDGED that Defendant's Motion to Dismiss is hereby granted and Plaintiff's Amended Complaint is dismissed with prejudice . . . Judgment shall be entered in favor of the Defendant THE GOLF CHANNEL and against MARTIN JENKINS. Plaintiff MARTIN JENKINS shall take nothing.

R1-22-140. On July 24, 1997, Respondent filed his Notice of Appeal with the Fifth District Court of Appeal. R1-23-145.

On June 26, 1998, the Fifth District Court of Appeal filed an opinion vacating the trial court's Order and remanded same for further proceedings. *Jenkins v. The Golf Channel,* Case No. 97-2049 (Fla. 5th DCA, June 26, 1998). In said opinion, the Fifth District Court of Appeal **certified** that it's decision was in direct **conflict** with the Second District Court of Appeal decision in *Potomac Systems Engineering, Inc. v. Deering*, 683 So. 2d 180 (Fla. 2d DCA 1996), on the

same question of law. *Id.* at pg. 12. On July 9, 1998, TGC filed its Notice to Invoke Discretionary Jurisdiction of the Supreme Court. On that same date, TGC filed its Motion to Stay Mandate Pending Review, with the Fifth District Court of Appeal. On July 15, 1998, the Fifth District Court of Appeal issued an Order granting TGC's Motion to Stay Mandate. On July 20, 1998, this Honorable Court issued an Order Postponing Decision on Jurisdiction and Briefing Schedule. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred in vacating the trial court's Order dismissing Respondent's Amended Complaint, and remanding for further proceedings. The Fifth District Court of Appeal aligned itself with the Third District Court of Appeal in *Baiton v. Carnival Cruise Lines, Inc.,* 661 So. 2d 313 (Fla. 3d DCA 1995), in holding the Whistleblower Act did not require written notice when proceeding under *Florida Statutes* Sections 448.102(2) and 448.102(3). The Fifth District Court of Appeal's decision in the instant case and the *Baiton* case, are in direct conflict with The Second District Court of Appeal's decision in *Potomac Systems Engineering, Inc. v. Deering,* 683 So. 2d 180 (Fla. 2d DCA 1996). The *Potomac* court in following the *Martin v. Honeywell, Inc.*, 1995 WL 868604 (M.D. Fla. July 18, 1995) decision, held that the presuit notice requirement applied in all cases brought under the Whistleblower Act based on the plain language in Section 448.103(1)(c).

This Honorable Court should reject *Baiton* and reverse the Fifth District Court of Appeal decision in the instant case. The Fifth District Court of Appeal's decision and the *Baiton* opinion run afoul of the rules of statutory construction by rendering Section 448.103(1)(c) as having no meaning. Section 448.102 should be read **in tandem** with Section 448.103. Sections 448.102(1), 448.102(2), and 448.102(3) sets forth the **"Prohibitions"** under the Whistleblower Act. Section 448.103(1) affords the **"remedy and relief"** available to employees who have been retaliated against for actions they have taken pursuant to either Sections 448.102(1), 448.102(2), or 448.102(3) and incorporates by reference, the written notice requirement contained in Section 448.102(1). Section 448.102(1) requires the employee to have given the employer written

notice and an opportunity to cure. Thus, when read together, Section 448.103(1)(c) clearly requires written notice in all cases brought under the Whistleblower Act.

The Fifth District Court of Appeal here, and the court in *Baiton,* followed readings that render Section 448.103(1)(c) meaningless. Such a reading of Section 448.103(1)(c) is contrary to the rule of statutory construction. The language of the Whistleblower Act is clear and unambiguous. Consequently, this Honorable Court should follow the rationale of the Second District Court of Appeal in its decision in *Potomac* and hold that Section 448.102 must be read in tandem with Section 448.103, therefore, requiring written notice in all cases brought under the Whistleblower Act.

ARGUMENT AND CITATIONS OF LEGAL AUTHORITY

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S ORDER DISMISSING RESPONDENT'S AMENDED COMPLAINT FOR FAILURE TO PROVIDE WRITTEN NOTICE TO TGC PRIOR TO FILING SUIT.

A. The "At-Will" Employment Doctrine.

It should be noted from the outset that Florida has long adhered to the "at-will" employment doctrine. Consequently, a Florida employer retains the absolute and unbridled right to discharge its employees for good reason, bad reason, or no reason at all. *See Golden v. Complete Holdings, Inc.,* 818 F. Supp. 1495 (M.D. Fla. 1993); *Catania v. Eastern Airlines, Inc.*, 381 So. 2d 265 (Fla. 3rd DCA 1980); and *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980) (affirming and adopting district court's decision that where "the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained"). "Florida's at-will employment doctrine may be cold-hearted, draconian and out-dated, but it is the law of Florida." *Zombori v. Digital Equipment Corp.*, 878 F. Supp. 207 (N.D. Fla. 1995), *aff'd*, 103 F.3d 147 (11th Cir. Nov. 26, 1996). As a natural concomitant to the "at-will" doctrine, Florida courts have uniformly rejected a cause of action based in common law for wrongful dismissal or wrongful retaliation. *See Kelly v. Gill*, 544 So. 2d 1162 (Fla. 5th DCA 1989), *rev. denied*, 553 So. 2d 1165 (Fla. 1989), *cert. denied*, 494 U.S. 1029 (1990); *Zombori*, 878 F. Supp. at 209; *Vernon v. Medical Management Assocs. of Margate, Inc.*, 912 F. Supp. 1549, 1563 (S.D. Fla. 1996) (Florida law does not recognize a common law cause of action for negligent failure to maintain a workplace free of discrimination or sexual harassment). Notably, Florida's Legislature has created very

few exceptions to the "at-will" doctrine, allowing employees to assert wrongful discharge claims only in statutorily defined circumstances -- such as those provided by the Whistleblower Act. *Zombori*, 878 F. Supp. at 209. Unless an "at-will" employee can fit his or her case within the parameters of a statutory exception to the "at-will" doctrine, an employer cannot be held liable for wrongful or "retaliatory" discharge. *See Catania*, 381 So. 2d at 267.

B. Florida's Whistleblower Act's Plain Language Requires Written Notice As An Element of Proof.

Florida's private sector Whistleblower Act is codified at *Florida Statutes* Sections 448.101 - 448.105. Section 448.102 of the act, entitled **"Prohibitions"** provides:

> 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 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.

Section 448.103 sets forth the employee's **"remedy"** and **"relief"** under the Whistleblower's Act. More specifically, Section 448.103(1)(a) provides a civil cause of action to employees who have been the object of a retaliatory personnel action. Further, Section 448.103(1)(c) provides:

> An employee may not recover in **any** action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy, or practice **as required by s. 448.102(1)** or if the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by this act. (emphasis added).

The Whistleblower Act clearly requires employees in all cases brought under the Act, to first provide the employer with **written notice** and an opportunity to cure. *See Potomac Systems Engineering, Inc. v. Deering*, 683 So. 2d 180, 181-82 (Fla. 2d DCA 1996); *Martin v. Honeywell, Inc.*, 1995 WL 868604 (M.D. Fla. July 18, 1995) (holding "the plain language of the statute imposes a written notice and opportunity to cure requirement as an element of proof").

Unfortunately, in the case at bar, the Fifth District Court of Appeal in it's decision departed from this obvious and logical interpretation of the Whistleblower Act and held, "written notice and opportunity to cure as a precondition to bringing suit only applies to alleged violations of subsection 448.102(1)." In so ruling, the Fifth District Court of Appeal aligned itself with the Third District Court of Appeal's decision in *Baiton v. Carival Cruise Lines, Inc.,* 661 So. 2d 313 (Fla. 3d DCA 1995). In *Baiton*, the Third District Court of Appeal held that written notice is not required if the employee is proceeding under Sections 448.102(2) or 448.102(3). The court in *Baiton* reasoned:

> The reference to "this subsection" [§ 448.103(1)(c)] means subsection 448.102(1). Consequently, where an employee asserts a violation of subsection 448.102(1), the employee is required to give written notice to the supervisor or employer and an opportunity for the employer to correct the activity, policy, or practice. Similarly, if the employee brings a lawsuit against the employer alleging a violation of subsection 448.102(1), the employee may not recover "if he failed to notify the employer about the illegal activity, policy, or practice *as required by s. 448.102(1).*"

Baiton, 661 So.2d at 366.

In reaching this conclusion, the *Baiton* court interpreted Section 448.103(1)(c) as being superfluous or having no meaning. In other words, the Third District Court of Appeal in its interpretation, found Section 448.103(1)(c) was only a reminder that written notice is required if proceeding under Section 448.102(1). This reasoning and that of the Fifth District Court of Appeal in the instant case, run afoul of the rules of statutory construction.

C. The Decision Of The Fifth District Court Of Appeal Is Contrary to Established Rules of Statutory Construction

It is axiomatic that all parts of a statute must be **read together** in order to achieve a consistent whole. *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 455 (Fla. 1992); *Leon County v. State Dept. of Community Affairs*, 666 So. 2d 1003, 1005 (Fla. 1st DCA 1996) ("a specific section of an act comprehending an entire subject does not stand alone, rather, related provisions must be given full effect, and construed in harmony with one another when possible"). Where possible, courts must give full effect to **all** statutory provisions and construe related statutory provisions in harmony with one another. *Forsythe*, 604 So. 2d at 455.

Accordingly, Section 448.102 must be read **in tandem** with Section 448.103. Sections 448.102(1), 448.102(2), and 448.102(3) sets forth the **"Prohibitions"** under the

Whistleblower Act. Section 448.103(1) affords the **"remedy and relief"** available to employees who have been retaliated against for actions they have taken pursuant to either Sections 448.102(1), 448.102(2), or 448.102(3).

Section 448.103(1) is the subsection in the Whistleblower Act that specifies the sole procedure by which an employee may bring suit under the Whistleblower Act. Thus, even though Sections 448.102(2) and 448.102(3) do not specifically include a written notice requirement like that in Section 448.102(1), Section 448.103(1)(c) nevertheless mandates written notice in **all** actions brought pursuant to the Whistleblower Act. This is true regardless of which portion of Section 448.102 the employee claims applicable to his or her case. *See Potomac*, *supra* 683 So. 2d at 181-82; *Martin, supra* 1995 WL 868604; *see also, Another Look at the Notice Requirements of the Florida Private Sector Whistle Blower's Act,* 71 Nov. Fla. B. J. 43 (1997).

Section 448.103(1)(c) **unambiguously** states the "employee may not recover in **any** action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy, or practice **as required by s. 448.102(1)**." As previously mentioned, § 448.102 sets out the **"Prohibitions"** under the Whistleblower Act and Section 448.103 sets forth the **"remedy and relief"** available under the Whistleblower Act. Section 448.102 does not independently set forth any procedure by which an employee who has been the object of retaliatory personnel action may file suit. That Section merely outlines the various prohibitions under the Whistleblower Act. On the other hand, Section 448.103(1) specifies the exclusive procedure by which an employee who has been the victim of retaliation may file suit under the Whistleblower Act. Reading Sections 448.102 and 448.103 together, notice is clearly required

for all actions brought under the Act. This is the correct statutory interpretation of the Act and the only reading which harmonizes both sections of the statute.

Moreover, it is a cardinal rule of statutory interpretation that courts should avoid readings that would render part of a statute meaningless. *Forsythe,* 604 So. 2d at 456. The Fifth District Court of Appeal here, and the court in *Baiton,* followed readings that render Section 448.103(1)(c) meaningless. Such a reading of Section 448.103(1)(c) is therefore, contrary to this additional rule of statutory construction.

Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. *Florida State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 576 (Fla. 1958). The language of the Whistleblower Act is unambiguous. In the case at bar, the Fifth District Court of Appeal in making its decision, deemed the Whistleblower Act ambiguous. Then, the Court considered matters extrinsic to the statute in an effort to justify their decision. The Fifth District Court of Appeal noted:

> Requiring written notice and an opportunity to cure would seem to frustrate the intent of the Legislature in many circumstances. For example, under subsection 448.102(2), the employee may not be allowed to give notice if called to testify before a "closed door" investigation. Under subsection 448.102(3), the employee has already objected or refused to participate in alleged illegal activities so written notice to the employer to cure would be superfluous. Furthermore, consider an employee who is terminated on the spot by his supervisor for refusing to dump hazardous waste in a waterway. No opportunity is reasonably available to deliver the so-called required written notice in such a case. If the legislature, for some reason, meant to require the employee to protest the termination after the fact with a written notice addressed generally to the employer, it has missed the mark with the confusing language of this statute.

Jenkins v. The Golf Channel, at pg. 10-11. This reasoning was clearly erroneous. There is absolutely nothing "confusing" or ambiguous about the language in the Whistleblower Act. The Fifth District Court of Appeal went beyond the plain meaning of the statute and gave it a meaning contrary to its intent and in violation of the rules of statutory interpretation.

The law is well settled where the plain language of a statute is clear and unambiguous on its face, it must be given its plain and ordinary meaning. *Mayo Clinic Jacksonville v. Dept. of Professional Regulation, Bd. of Medicine,* 625 So. 2d 918 (Fla. 1st DCA 1993). Unambiguous language is not subject to judicial construction, however wise it may seem, to alter the plain language. *Corfan Banco Asuncion Paraguay v. Ocean Bank,* 1998 WL 299669 (Fla. 3d DCA 1998). As the then Chief Justice Rosemary Barkett explained:

> The reason for the rule that courts must give statutes their plain and ordinary meaning is that only one branch of government may write laws. Just as a governor who chooses to veto a bill may not substitute a preferable enactment in its place, courts may not twist the plain wording of statutes in order to achieve particular results. Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms. A legislature must be presumed to mean what it has plainly expressed, and if an error in interpretation is made, it is up to the legislature to rewrite the statute to accurately reflect legislative intent.

Id.; *See also, Weber v. Dobbins,* 616 So. 2d 956 (Fla. 1993)

In the case at bar, the Fifth DCA did exactly what Justice Barkett admonished courts not to do -- twist the plain wording of statutes in order to achieve particular results. Consider the following:

> Requiring written notice and an opportunity to cure would seem to frustrate the intent of the legislature in many circumstances.

Jenkins v. The Golf Channel, at pg. 11. The Fifth District Court of Appeal altered the plain meaning of the Whistleblower Act to reach what it considered to be the Legislature's "intent." However, even though the Fifth District Court of Appeal was concerned about certain results if notice was required under all three subsections of the Act, it was still obligated to enforce the statute according to its terms. It was apparent the Fifth District Court of Appeal was concerned with the bitter consequences of requiring written notice in a situation where an employee is terminated on the spot by his supervisor for refusing to dump hazardous waste in a waterway. *Id.* Obviously, that employee would not have an opportunity to provide written notice at the time of his termination.

Nonetheless, under the plain and unambiguous language of Section 448.103(1)(c), the employee in the Fifth District Court of Appeal's hypothetical would not have a cause of action under Section 448.102(3) because he failed to provide written notice.[1] No matter how troubling this scenario may sound, the Court could not depart -- which it did -- from the plain meaning of the language. The Court was convinced the Legislature could not have envisioned such a result. However, the fact that the Legislature may not have envisioned all of the consequences flowing from its enactment of the Whistleblower Act, does not make the statute ambiguous. *Forsythe, supra,* 604 So. 2d at 456. Also, the Court may not have envisioned all of the unintended consequences that would flow from its interpretation of the statute as discussed *infra* on pages 17-19. In any event, such envisioning should be left to the Legislature-

[1] However, this hypothetical is not analogous to the instant case because Respondent continued to work with Petitioner for at least one year following his alleged complaints. R1-42-49. Certainly, Respondent had ample opportunity to provide Petitioner with written notice of the alleged wrongdoing.

-who has infinitely greater resources to examine the pertinent considerations surrounding the enactment of a statute. Thus, even though the Fifth District Court of Appeal was convinced the legislature really meant and intended that notice not be required under Sections 448.102(2) and 448.102(3), it could not depart from the plain meaning of the statute as it did in the case at bar.[2]

As previously noted, Florida is an "at will" employment state. Unfortunately, on occasion, the "at will" employment doctrine may cause cold-hearted and even draconian results -- but it is the law of Florida. *See Zombori, supra.* While the Fifth District Court of Appeal made a conscientious effort in coming to its decision in this case, it nevertheless failed to enforce the statute according to its plain meaning. Respondent cannot evade the mandate of the statute merely by deeming it "poorly drafted." Rather, because the Act is an exception to Florida's common law employment "at-will" doctrine, Respondent must strictly comply with the literal requirements of the Act in order to invoke its protection. *See, e.g., Forrester v. John H. Phillips, Inc.,* 643 So.2d 1109 (Fla. DCA 1994) (holding that the Legislature's prohibition against retaliatory conduct for an employee reporting violations of "law, rule, or regulation" should not be interpreted to include matters of public policy). Indeed, the language of the Whistleblower Act reveals a clear legislative intent to carve only a small exception to the employment at-will doctrine.[3]

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[2] Petitioner acknowledges the Whistleblower Act is remedial in nature and should be liberally construed. *See Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994); *see also Schultz v. Tampa Electric Co.,* 704 So.2d 605 (Fla. 2d DCA 1997). However, the Fifth District Court of Appeal still could not depart from the plain meaning of the Act is it did here. *See Corfan Banco Asuncion Paraguay, supra.*

[3] Section 448.105, for example, provides the "act does not diminish the rights, privileges, or remedies of an employee ***or employer*** under any other law or rule." *Id.* (emphasis added). In addition, Section 448.103(1)(c) provides that an employee may not recover under the Act if

Consequently, this Honorable Court should follow the rationale of the Second District Court of Appeal in its decision in *Potomac Systems Engineering, Inc. v. Deering,* 683 So. 2d 180 (Fla. 2d DCA 1996). In *Potomac*, the court explicitly held:

> an employee **may not recover** in any action brought pursuant to section 448.103(1) **if he fails to notify the employer** about the illegal activity, policy, or practice as required by section 448.102(1), i.e. **in writing, bringing the activity, policy, or practice to the attention of a supervisor or the employer and affording the employer a reasonable opportunity to correct the activity, policy, or practice.**

Id. at 182 (emphasis added). The issue in *Potomac* is remarkably similar to the issue before this Honorable Court. In *Potomac*, the plaintiff alleged he had "discovered acts of mischarging, misreporting, and the unauthorized use of governmental equipment in violation of federal law" and refused to participate in such activities even taking affirmative steps to stop them. *Id.* at 181. The plaintiff alleged his employer discharged him for refusing to participate in the allegedly unlawful activities. *Id.*

The *Potomac* court rejected the argument that written notice was not required under Section 448.102(3). The court stated "[i]f we were to accept this position, because section 448.102(1) already requires written notice, we would be finding that portion of section 448.103(1)(c) which requires written notice has no meaning." *Id.* at 181. Thus, *Potomac*, in agreement with the court in *Martin v. Honeywell, Inc,* 1995 WL 868604 (M.D. Fla. July 18, 1995), holds Section 448.102 must be read **in tandem** with Section 448.103. *See Potomac,* 683 So.2d at 182.

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the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by the Act. Thus, it is clear that the Legislature intended application of the Act in limited circumstances only.

In *Martin*, the plaintiff also alleged a violation of Section 448.102(3), but did not provide written notice to the defendant. *Id*. The court in Martin held:

> [T]he Court finds that the plain language of the statute imposes a written notice and opportunity to cure requirement as an element of proof in every private sector whistleblower claim because 448.103(1)(c) **incorporates** the notice provision set forth in 448.102(1). (emphasis added).

Id.

The courts in *Potomac and Martin* obviously followed the legal maxim *ut res magis valeat quam pereat* -- significance and effect should be given to each provision of and to the whole statute. *See Leon County,* 666 So.2d at 1007. However, the Fifth District Court of Appeal in this case and the *Baiton* court, declined to give effect to the plain language of Section 448.103(1)(c), thereby running afoul of the rules of statutory interpretation. This Honorable Court should follow the decisions in *Potomac* and *Martin,* reject the *Baiton* decision and reverse the Fifth District Court of Appeal's opinion in the instant case.

As *Potomac* and *Martin* establish, before being entitled to invoke the protection of the Whistleblower Act, Respondent must have notified TGC of his complaints in writing. Further, the trial court admonished Respondent to specifically allege whether he had provided written notice of his objection and refusal to participate. He failed to do so. In fact, both his original and Amended Complaints unequivocally indicated Respondent never provided TGC written notice of his complaints. Respondent's allegation in his Amended Complaint that he "wanted to make a written report of the activity" does not change the fact that he **did not** make a written report as the Fifth District Court of Appeal noted. Accordingly, the Amended

Complaint was properly dismissed with prejudice by the trial court and the Fifth District Court of Appeal erred in vacating the trial court's order and remanding for further proceedings.

D. The Statutory Interpretation Followed By The Fifth District Court of Appeal And *Baiton* Is Also Contrary To Public Policy.

The Courts' position that Section 448.103(1)(c) of the Whistleblower Act does not require the employee to provide written notice in all cases brought under the Act is also contrary to public policy. Respondent contended below, that the "Whistle Blower Statute was passed to give the little guy who speaks up about violations of law at the workplace a fighting chance against the corporate giant." Appellant's Brief at 12. However, the Whistleblower Act was **not** passed to provide gratuitous litigation opportunities for disgruntled and mercenary employees. In order to avoid litigation based on avarice or animosity, the Whistleblower Act requires an interpretation which insures that the "little guy" has actually spoken before he is permitted to bring suit. Written notice is clearly the means by which the Legislature intended to accomplish this end. Any other interpretation would eviscerate Florida's at-will employment doctrine.

The written notice requirement under the Whistleblower Act is in the best interest of the employee as well as the employer. In addition to bringing "the activity, policy, or practice to the attention of the employer and afford[ing] the employer a reasonable opportunity to correct the activity, policy, or practice" (*Potomac,* 683 So.2d at 182), the Act was also designed to protect objecting employees from retaliation. Written notice of one's complaints not only notifies the employer of the alleged illegal activity, it also serves as a warning **not** to

take action against the employee for having complained. Retaliation is a difficult undertaking in the face of a paper trail. Thus, simply put, if an employer wants to terminate an employee following a written complaint, it had better have a good and independent reason. The written notice provides the employee with ample evidence to support an action in the event of retaliation. Thus, written notice serves as both a shield to protect employees from retaliation following valid complaints and a sword to initiate litigation in the event of a discharge in violation of the Act.

While recognizing the protective purposes of the Act, the *Potomac* court also noted:

> we do not believe it is unduly burdensome to require employees to notify their employer of their complaint **in writing before being entitled to the civil remedies provided by the act**. The requirement promotes the purpose of the act by affording the employer the first opportunity to correct a violation. This allows the employer to avoid, among other things, unnecessary harm to its reputation, the burden of undergoing an investigation and preparation for a hearing or trial.

Potomac, supra, at 192. (emphasis added). Thus, as the *Potomac* court found, the written notice requirement is completely consistent with public policy.

Moreover, requiring written notice in all cases brought under the Whistleblower Act assures that "whispering protesters," employees who attach themselves to real or alleged wrongs or to another's misfortunes by mentioning a concern in passing to another employee, do not take advantage of the Whistleblower Act. A true whistleblower must blow loud enough in order to be heard. The Legislature was wise in concluding only written notice would make the requisite noise to be heard by the employer. Otherwise, an employee could claim to have

simply mentioned a concern to another worker and, to the later surprise of the employer, earn the right to file a lawsuit under the Whistleblower Act when the employee's career path does not evolve as he or she had hoped.

Finally, the statutory interpretation followed by the Fifth District Court of Appeal in this case and the *Baiton* Court, would allow for cases where, as here, the Plaintiff has no proof that he objected to his employer's actions, and may never have made a complaint at all. Such a reading of the Whistleblower Act would invite an onslaught of litigation from individuals with no real claim who seek only to manipulate the Whistleblower Act to their own advantage. Indeed, as the *Potomac* decision suggests, without requiring written notice of an employee's complaints, the Whistleblower Act becomes little more than a convenient means by which an opportunistic employee with an axe to grind, can take advantage of his employer. For this reason, the Whistleblower Act should be strictly interpreted as requiring written notice in all cases brought under the Act.

Obviously, Petitioner recognizes that the determination of what constitutes public policy, or which of competing public policies should be given precedence, is a function of the legislature. See *Hartley v. Ocean Reef Club, Inc.* 476 So.2d 1327, 1329 (Fla. 3d DCA 1985). If the legislature desires to change the plain meaning of the Whistleblower Act to provide for no written notice under Section 448.102(2) and 448.102(3) it certainly has the authority to do so. However, until such time, courts are obligated to give effect to the plain and unambiguous language of the Whistleblower Act.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this Honorable Court reverse the decision of the Fifth District Court of Appeal vacating the trial court's Order dismissing Respondent's Complaint, and remanding for further proceedings.

Dated this ___ day of August, 1998.

Respectfully submitted,

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THE GOLF CHANNEL, a/k/a TGC, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner The Golf Channel a/k/a TGC, Inc. has been furnished by U.S. Mail, postage pre-paid, to Keith R. Mitnik, Esq., Morgan, Colling & Gilbert, P.A., P.O. Box 4979, Orlando, FL 32802, this ____ day of August, 1998.

_____
Anthony J. Hall

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