SUPREME COURT OF FLORIDA

The GOLF CHANNEL, a/k/a
TGC, INC.,
Petitioner,

v.

MARTIN JENKINS,

Respondent.
_____/

CASE NO.: 93,426

District Court of Appeal,
5th District-No. 97-2049

THE FLORIDA CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AMICUS CURIAE BRIEF

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On Behalf of the National Employment
Lawyers Association-Florida Chapter

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SUMMARY OF ARGUMENT

The whistleblower laws were "designed to encourage the elimination of public [and private] corruption by protecting public and [private] employees who 'blow the whistle.'" *Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).* The central purpose of the private whistleblower act is "to protect private employees who...refuse to assist employers who violate laws enacted to protect the public." *Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994).* Florida's whistleblower laws are remedial laws, designed to give private remedies to persons injured by acts declared wrongful under these laws. *Id. at 423.* As such, the Act should be interpreted "so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences." *Hamilton v. State, 645 So. 2d 555, 561 (Fla. 2d DCA 1994).*

The only logical, plain read of the statute which gives effect to all the express statutory terms requires written notice to the employer in DISCLOSURE whistleblowing situations *only*. The express statutory delineation of different instances of protected whistleblowing conduct in light of the purpose of the Act speaks against application of a written notice requirement to all protected whistleblowing activity.

A common sense approach and practical application of the law's protections to the typical facts inherent in an employment relationship, coupled with the striking of a fair balance between the purpose behind the Act in general and the purpose behind the notice requirement, support the application of the written notice requirement to DISCLOSURE whistleblowing situations *only*.

Written notice in DISCLOSURE types of situations only, protects the private employer from unwarranted degradation of its business by giving it an opportunity to cure its illegality when such opportunity to cure has not passed. Similarly, it protects the employee with a good reason to whistle from a loss of job protection in situations which render written notice absurd, futile, or impossible.

Interpreting the Act to require written notice under any and all whisteblowing situations, would deprive most employees of claims for their wrongful terminations if they fail to provide written notice to their employers. Such deprivation was unintended by the Legislature and is in derogation of the Act's plain language. Employees who engage in ASSISTANCE AND OBJECTION whistleblowing were intended to be protected and, their claims must not face obstacles with illusory purpose and fatal consequences.

ARGUMENT

A. WHO BLOWS A WHISTLE?

Sales clerks, waitstaff, accountants, farm-hands, amusement park workers, corporate officers, hotel staff, lawyers, veterinary assistants, mechanics, truck drivers, flight engineers, butchers, doctors, and many other Florida workers working an all types of Florida private industry may very well find themselves one day in an untenable situation where their jobs are at risk if they disclose their employers' illegal conduct, or assist with an investigation of or testify truthfully in a hearing on their employers' illegal conduct, or object to or refuse to carry out their employers' instructions to commit illegal acts. Whistleblowers fit no common personality description. Whistleblowers are everyday citizens who encounter a wrong or harm against the public and refuse to perpetuate that harm or who simply tell the truth about an illegal act of their employer. By whistleblowing, these citizens risk their employment standing and the welfare of their families. For many years, Florida employees of private businesses operating in this state were without protection in their jobs if they blew the whistle on their bosses' illegal acts.

By virtue of Florida's common law employment-at-will doctrine, employers had and continue to have unfettered discretion in many of their employment decisions. Pursuant to the at-will doctrine, an employer can fire an employee for any reason or no reason at all, without incurring liability. *DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980).* Florida courts have not recognized common law wrongful discharge claims based on

contract theory where "the term of employment is discretionary with either party or indefinite." *Id.(citations omitted); see also Wynne v. Ludman Corp., 79 So. 2d 690 (Fla. 1955); Savannah, F. & W. Ry. Co. v. Willett, 31 So. 246 (Fla. 1901).* Florida has also not recognized common law wrongful discharge claims based on intentional tort theory. *Scott v. Otis Elevator Co., 572 So. 2d 902, 903 (Fla. 1990); Smith v. Piezo Tech. and Prof. Admin., 427 So. 2d 182, 184 (Fla. 1983).*

The common law employment at-will doctrine in Florida casts a large net of protection over many employment decisions.[1] Before the enactment of the private Whistleblower Act, an employee could be legally fired for complying with the law against his or her employer's wishes, or refusing to comply with the employer's directive to break the law. The results in these cases were harsh and detrimental not only to the interests of the involved employee but to the interests of society.

Consider Mr. Hartley's situation. Mr. Hartley was the Executive Director of Utilities in charge of a water plant and several sewage treatment facilities owned and operated by Ocean Reef, his employer. *Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. 3d DCA 1985).* In his job, he saw company activities which violated state and federal environmental

[1]As of 1988, of the courts in forty-four states which addressed whether a retaliatory discharge claim would lie at common law under tort or contract theories, eight courts, including Florida, refused to recognize such cause of action under any circumstances whatsoever. *See Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134, 137 (D. R.I. 1988), citing DeMarco*. As of 1995, forty-three states now recognize a common law public-policy exception to at-will employment. *See generally, Armour, J., Who's Afraid of the Big, Bad Whistle? Minnesota's Recent Trend Toward Limiting Employer Liability Under the Whistleblower Statute, 19 Hamline L. Rev. 107,114 (Fall, 1995).*

statutes. *Id.* He "consistently reported these violations to his supervisors and urged their correction." *Id.* Mr. Hartley's discharge was threatened in response to his complaints. *Id.* Thereafter, Mr. Hartley refused to participate in his employer's illegal activities, and was fired. *Id.*

Consider Mr. Ochab's situation. Mr. Ochab worked as a bartender for a popular Florida restaurant chain. *Ochab v. Morrison, Inc., 517 So. 2d 763 (Fla. 2d DCA* 1987). A patron of the restaurant in which he worked was "intoxicated and belligerent." *Id.* Mr. Ochab refused his employer's instructions to continue serving the drunk patron. *Id.* Mr. Ochab was fired. *Id.*

Consider Ms. Jarvinen's situation. Ms. Jarvinen was one day subpoenaed to testify in a case brought by a doctor against her then current employer. *Jarvinen v. HCA Allied Clinical Laboratories, Inc., 552 So. 2d 241 (Fla. 4th DCA 1989).* She testified truthfully in the case. *Id.* Her employer was unhappy with her truthful testimony, having perceived it as detrimental to its defense. *Id.* Ms. Jarvinen was fired. *Id.*

Wrongful, retaliatory discharge situations like that of Mr. Hartley, Mr. Ochab, and Ms. Jarvinen were outside the protection of the courts given the harsh and unyielding at-will doctrine. In the interests of furthering and enforcing the public policy of this State, the Florida Legislature enacted several laws which provide causes of action to private-sector employees to redress retaliatory employment actions under defined circumstances.

Some of the circumstances defined by the Legislature include retaliatory job action

against employees predicated on employees': opposition to discriminatory acts and/or assistance with an investigation of or testimony in any hearing on the employers' discriminatory acts, *Fla. Stat. §760.10(7)(Florida Civil Rights Act of 1991)*; filing of workers' compensation claims, *Fla. Stat. §440.205*; service on a jury, *Fla. Stat. §40.271*; membership in a labor union, *Fla. Stat. §447.09*; exercise of their rights under Florida's Occupational Safety and Health Act, *Fla. Stat. §442.116*; voting or non-voting, *Fla. Stat. §104.081;* testimony given or absence from employment due to testimony being given, under subpoena, in a judicial proceeding, *Fla. Stat. §92*.57.[2]

In keeping with its intent to protect Florida workers' jobs from unfair, retaliatory acts in situations which impact the public's interest, the Florida Legislature, in 1986, enacted sections 112.3187 through 112.31895, the public sector "Whistleblower's Act." And, on June 7, 1991, whistleblowing protection was extended to private-sector employees.[3] *Fla. Stat.*

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[2]None of these laws impose a pre-suit written notice requirement on the employee. It is illogical to think that the Legislature intended to impose more obstacles in the path of an employee attempting to obtain a remedy under the Whistleblower Act for blowing the whistle on the employer who harms the public with its criminal acts in violation of Florida's Air and Water Pollution Control Act than the employer who harms its employees' health under Florida's Occupational Safety and Health Act. *Compare Hartley, 476 So. 2d at 1327 with Fla. Stat. §§ 448.102 and 448.103, and 442.116.*

[3]Today, at least 18 other states have private-sector whistleblower laws. *Cal. Labor Code §1102.5(a) (West 1989); Conn. Gen. Stat. Ann. §§31-51m(a), et seq. (West 1996 Supp.); Haw. Rev. Stat. §§378-61 et seq. (1994); La. Rev. Stat. Ann. §30.2027 (West 1989 and Supp. 1996); Me. Rev. Stat. Ann., tit. 26,§ 832 et seq. (West 1988); Mich. Comp. Laws Ann.§ 15.361 et seq. (1994); Minn. Stat. Ann § 181.931 et seq. (1993); Mont. Code Ann.§ 39-2-901 et seq. (1995); N.H. Rev. Stat. Ann.§ 275-E:1 et. seq. (Supp. 1995*); *N.J. Stat. Ann.§§ 34:19-1 et. seq. (West 1988 and Supp. 1996)*; *N.C. Gen. Stat.§ 95-240 et seq. (1985); N. D. Cent. Code § 34-01-20 (Supp. 1995); N.Y. Labor Law § 740(McKinney 1988); Ohio Rev. Code Ann.§ 4113.51 et seq. (Baldwin 1994); Oregon Rev. Stat. § 654.062(1993); R..I. Gen. Laws 28-50-1 et seq. (1995); Tenn. Code Ann § 50-1-304 (1991); Wis.*

§§ 448.101-448.105. The whistleblower laws were "designed to encourage the elimination of public [and private] corruption by protecting public and [private] employees who 'blow the whistle.'" *Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).* Florida's whistleblower laws are remedial laws, designed to give private remedies to persons injured by acts declared wrongful under these laws. *Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 423 (Fla. 1994).* As remedial laws, Florida's whistleblower laws must be construed liberally in favor of granting access to the statutorily prescribed remedies. *Martin County , 609 So. 2d at 29.*

B. THE PRIVATE WHISTLEBLOWER'S ACT (§§448.101-448.105)

1. The Act's "Prohibitions" and the Employee's Protected Conduct: §§448.102(1), (2), and (3), Florida Statutes.

Pursuant to section 448.102, an employer violates the Act and is liable to the employee for "retaliatory personnel action" (discharge, suspension or demotion" or "any other adverse action...in the terms and conditions of employment") taken against an employee based on the employee's participation in any one of three types of protected conduct. *Fla. Stat. §§448.101(5), 448.102.* The three types of protected employee conduct pursuant to subsections (1), (2), and (3) of section 448.102, are:

(DISCLOSURE)[4]: An employee who "(1) Disclosed or threatened to disclose to any

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Stat. Ann.§§ 230.80-89 (West 1987).

[4]For ease of discussion, the three sources of protected whistleblowing are identified as DISCLOSURE, ASSISTANCE, and OBJECTION.

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"*** §448.102(1)(emphasis added);

(ASSISTANCE): An employee who "(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" §448.102(2);

(OBJECTION): An employee who "(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" §448.102(3).

2. **The *WRITTEN NOTICE* Provision.**

Section 448.102 governs the types of claims which the Act recognizes. Section 448.103 governs the procedural process and remedies applicable to those claims. Subsection (1), 448.103 contains a limitations provision, a venue provision, and the debated *written notice requirement* as specified in the DISCLOSURE claim provision.[5]

Paragraph (1)(c), 448.103 provides:

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[5]The only other states having notice requirements in their private whistleblower laws are Maine, New Hampshire, New Jersey, New York, and Ohio. These states have a different statutory scheme than Florida and all of these states, with the exception of New York, have exceptions to their notice requirements. *See generally, Kane, M., Comment, Whistleblowers: Are They Protected? 20 Ohio Northern Univ. Law Rev.* 1007 (1994).

"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 **Sec. 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." §448.103(1)(c)(emphasis added).

There is no disputing that the purpose behind the notice requirement is to afford an employer an opportunity to cure its wrong internally and avoid unreasonable impairment to its reputation and, to preserve the employment relationship between the employer and employee. *Potomac Systems Engineering Inc. v. Deering*, 683 So.2d 180, 182 (Fla. 2d DCA 1996). There is also no disputing that the purpose behind the Act is to prevent retaliatory job action against an employee who reports his or her employer's illegal acts to an investigative agency, or assists with an ongoing investigation of his or her employer's illegal acts, or objects to or refuses to participate in his or her employer's illegal acts. *Fla. Stat. §§* 448.101-448.105; *Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 423 (Fla. 1994).*

The pivotal question before this Court is whether the private Whistleblower Act confers upon an employer the right to be presented written notice of its illegal conduct under all whistleblowing circumstances. In other words, is an employer entitled to written notice from the employee , *under all circumstances* regardless of whether the employee's complaint is predicated on DISCLOSURE, § 448.102 (1), ASSISTANCE, § 448.102 (2), or OBJECTION, § 448.102(3), whistleblowing, in order for the employee to have a cause of action against his or her employer for retaliatory job action?

C. THE ACT'S PURPOSE AND INTENT

To answer this question, it is helpful to consider the Act's purpose while giving effect to all express written terms contained in the Act. Legislative history of the private Whistleblower Act is silent as to the scope of §448.103(1)(c). Legislative history does not discuss application of the written notice requirement to ASSISTANCE and OBJECTION whistleblowing activities, and is therefore unhelpful in interpreting the Act.

The express statutory delineation of different instances of protected whistle-blowing conduct in light of the purpose of the Act speaks against application of a written notice requirement to all protected whistleblowing activity. The Act should be interpreted liberally in favor of granting access to the remedy intended by this legislation, and "so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences." *Hamilton v. State, 645 So. 2d 555, 561 (Fla. 2d DCA 1994).*

A common sense approach and practical application of the law's protections to the typical facts inherent in an employment relationship, coupled with the striking of a fair balance between the purpose behind the Act in general and the purpose behind the notice requirement, support the application of the written notice requirement to DISCLOSURE whistleblowing situations *only*.

Written notice in DISCLOSURE types of situations only, protects the private employer from unwarranted degradation of its business by giving it an opportunity to cure its illegality when such opportunity to cure has not passed. Similarly, it protects the

employee with a good reason to whistle from a loss of job protection in situations which render written notice absurd, futile, or impossible.

Three types of whistleblowing conduct are protected under the Act. Written notice to the employer in only one type of whistleblowing instance, DISCLOSURE, is required. Why? This first type of protected conduct implies that time is on the employee's side. It contemplates a deliberate, written statement to be provided to an investigative agency by the employee. It contemplates illegal conduct of the employer which is not yet under investigative review. It balances the rights of the employer with the rights of the employee by granting the employer the opportunity in this situation to cure its illegal conduct, save face, and preserve the employment relationship with the employee, by not taking away or harming the employee's job.

The second type of conduct, ASSISTANCE, requires no notice. Why? In such instance, an investigation by an appropriate entity, outside the control of the employer or employee, is already underway. This subsection prohibits retaliatory job action against an employee who "[p]rovided 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." *Fla. Stat. § 448.102(2).*

The employer's alleged illegal conduct is already under scrutiny by an outside third-party governmental entity and, therefore the employer's opportunity to cure and save face has passed. Further, the employee who is called in by the investigating agency to provide

information or participate in the ongoing investigation is in no position to avoid testifying nor anticipate what is asked of him or her. Written notice to the employer as to what information the employee will give to the outside investigating body will not serve as an opportunity to cure. By then the outside investigation is already underway. When the FBI shows up at the employee's home or worksite with questions about what happened at work, she can not be expected to stop the questioning long enough to send the boss a warning letter.

Consider Ms. Jarvinen's situation. She could not anticipate what would be asked of her in the doctor's case. She testified truthfully, and her employer fired her because of her truthful testimony and participation in a hearing on her employer's allegedly illegal acts. What notice should she have given? The Legislature enacted section 92.57, Florida Statues, in 1990 to provide persons like Ms. Jarvinen with a remedy for her wrongful discharge as there is an undeniable "public policy interest to secure truthful testimony in all judicial proceedings." *Wiggins v. Southern Management Corp., 629 So. 2d 1022, 1024 n. 2 (Fla. 4th DCA 1993).* Because Ms. Jarvinen was subpoenaed to testify, she would have had a claim under section 92.57 had her case arisen after that law's enactment. Similarly, the Legislature intended to give someone like Ms. Jarvinen a remedy for her discharge, had she testified voluntarily and truthfully instead of being subpoenaed in the doctor's case, under the Whistleblower Act had her case arisen after that law's enactment in 1991.

The Whisleblower Act expressly provides that it "does not diminish the rights, privileges, or remedies of an employee or employer under any other law or rule...."*Florida*

Statutes §448.105. The Act was designed to give remedies to whistleblowing employees, and supplement existing legislation which was also designed to further Florida public policy. *See Zombori v. Digital Equipment Corp., 878 F. Supp. 207, 208 (M.D. Fla. 1995)(Former employee brought wrongful discharge action under the Whistleblower Act, despite giving no pre-suit written notice to her employer, based upon her assistance with and testimony in her husband's discrimination lawsuit against her employer).*

And, what purpose would notice serve in Ms. Jarvinen's fact situation? Her employer knew what she said in court as that knowledge served as the impetus for its decision to fire her.

> *"One of the merited glories of this country is the multitude of rights that its people have, rights that are enforced as a matter of course by our courts, and nothing could be more inimical to their enjoyment than the unbridled law defying actions of some and the false or incomplete testimony of others. If we are to have law, those who so act against the public interest must be held accountable for the harm inflicted thereby; to accord them civil immunity would incongruously reward their lawlessness at the unjust expense of their innocent victims."*
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> *Jarvinen v. HCA Allied Clinical Laboratories, 552 So. 2d 241, 243 (Fla. 4th DCA 1989)(Glickstein, J., concurring specially).*

Likewise, the third type of whistleblowing conduct, OBJECTION, requires no notice. Why? This protected conduct foresees the occasions when employees will be immediately dismissed or prevented from giving written notice. Additionally, the phrases appearing in the Act, i.e., "objected to or refused to participate" beget one logical read, that the employer already has notice of its illegal act, otherwise there is nothing to serve as the basis for an objection or refusal to participate.

It is a harsh, unintended, and absurd result to the employee and to the public if an employee is without a remedy under the Act because the employer preempted the employee's efforts to produce a written request of the employer to police itself. It is illogical to suggest that an employer who fires or otherwise strips an employee of the terms of his or her job in close proximity to the time that the employee objected to or refused to participate in the employer's illegal conduct is interested in curtailing or curing its illegal conduct.

Consider Mr. Hartley's situation. He "consistently reported" violations of federal and state environmental laws and regulations to his employer. In the face of his reports, his employer thereupon threatened his discharge. Faced with potential criminal penalties himself if he participated in his employer's illegalities, he refused to perform work without governmental approval. Soon thereafter, he was fired. If Mr. Hartley's reports and objections were not in writing, then his claims would fall through the written notice loophole which employers request the Court to create, and he would again be without a remedy under the Act, despite today's legislative mandate.

Importing a written notice requirement into §§448.102(2) and (3) does not balance the interests of the employer and employee. In these situations, the employer is not of a mind-set that is interested in ridding its workplace of its own illegal acts. Otherwise, the events serving as the predicate to the employee's claim would not have happened. The Whistleblower Act is designed to reach these acts based on the wrongful motive and intent of the employer. *See generally Scott v. Otis Elevator Co., 572 So. 2d 902 (Fla. 1990)(The*

tort of retaliatory discharge is grounded on intent rather than negligence.).

Instead, applying the written notice requirement to these situations affords the employer the opportunity to rid its workplace of the whistleblower and avoid liability by either developing reasons for the employee's discharge other than the employee's protected whistleblowing activities, or thwarting the employee's ability to provide written notice.

Moreover, what interest is truly being served with an employee providing written notice of a one-time illegal act of the employer which the employee objects to or refuses to participate in?

Consider Mr. Ochab's situation. He refused to serve more alcohol to a drunk and belligerent customer. His disobedience of his employer's instruction to serve the customer more liquor protected the customer, the public, and arguably himself from criminal prosecution under section 562.50 of the Florida Statutes. Mr. Ochab's refusal to serve more liquor to a drunk customer resulted in his firing. Requiring Mr. Ochab to provide on the spot written notice to his boss who requested that he serve the customer serves nothing more but to coerce the employee to risk personally committing a crime so he has time to scratch out a note, or to risk on the spot termination with no possibility of a claim for the unfair deprivation of his job.

And, consider Mr. Walsh's circumstances. His employer had a history of faulty maintenance practices. And, on one occasion, Mr. Walsh discovered a dangerous hydraulic leak in an aircraft, reported the situation to the maintenance crew, and grounded the aircraft,

fearing a fatal crash could occur. Three-weeks later, he was fired. What purpose would written notice have served in Mr. Walsh's situation. The employer had a practice of faulty maintenance practices, and had not changed its ways. The one episode of flight grounding by Walsh, which the employer took offense to, was past. Walsh's grounding of that flight could have preempted a fatal crash. Should Walsh or any other similarly situated employee be forced to choose between complying with the law and protecting other citizens' welfare or keeping their job? Requiring written notice in OBJECTION whistleblowing instances would necessitate this unfair and unintended choice by employees.

Interpreting the Act to require written notice under any and all whisteblowing situations, would deprive today's Jarvinens, Ochabs, Hartleys, and Walshes of claims for their wrongful terminations if they fail to provide written notice to their employers. Such deprivation was unintended by the Legislature and is in derogation of the Act's plain language. Employees who engage in ASSISTANCE AND OBJECTION whistleblowing were intended to be protected and, their claims must not face obstacles with illusory purpose and fatal consequences.

Furthermore, Florida's Act contains no provision to guarantee that employees will be informed of their rights under the Act. There is no posting requirement, so it is a harsher requirement on an employee to expect that she or he provide written notice to the employer of the objectionable illegal acts in order to have job protection or a remedy for stripped job

protection.[6]

The central purpose of the Act must not be ignored. It is "to protect private employees who...refuse to assist employers who violate laws enacted to protect the public." *Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994).*

D. THE STATUTE MUST BE READ TO GIVE EFFECT TO ALL PARTS, NOT TO NULLIFY THE INTENDED PROTECTION OF TWO-TYPES OF WHISTLEBLOWING ACTIVITY.

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, 456 (Fla. 1992).* The plain meaning of a statute "is the first consideration of statutory construction." *Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990)(cited in Citizens Nat'l Bank & Trust Co. v. Stockwell, 675 So. 2d 584,587(Fla. 1996)).*

The Third District's interpretation of the Act in *Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313 (Fla. 3rd DCA 1995)* is a logical read of the plain meaning of the Act, and it gives effect to all parts of the statute. In *Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313 (Fla. 3rd DCA 1995)*, the employee verbally refused to abide by his former employer's request to give false testimony in a co-worker's action, and was fired. Carnival advanced the

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[6] Seventeen states have employer posting requirements incorporated in the language of their whisleblower statutes so that employees are aware of their rights. For a listing of these states and a general discussion of the obstacles *Comment, Whistleblowers: Are They Protected? 20 Ohio Northern Univ. Law Rev.* 1007 (1994). employees face in securing remedies for their whistleblowing activities, *see*

defense that Baiton failed to provide it with "pre-suit" notice[7] of its unlawful conduct, and therefore Baiton could not recover for the wrong done him under the Act. Baiton, *661 So. 2d at 316.*

The Baiton Court rejected Carnival's argument and held that the written notice requirement only applies to an action predicated upon an employee's DISCLOSURE whistleblowing, § 448.102(1). *Id. at 316-17.*

The Baiton court read the "Prohibitions" section (448.102) together with the "Employee's Remedy" section (448.103) *in pari materia* and in keeping with the rule, *ut res magis valeat quam pereat,* that the legislature presumably puts every provision in a statute for a purpose, i.e. "no superfluity rule." In doing so, the Baiton court importantly noted that section 448.102 provides the employee with the claim, and that each *subsection* therein defines the types of claims recognized under the Act. *Id. at 316 ("A claim has been stated under subsection 448.102(3).").* The Baiton court further importantly recognized the separate hierarchy of the parts of any statute. *Id. at 316 n.5("The subdivisions of the Florida Statutes are chapter, section, subsection, paragraph, and subparagraph. The subdivisions relevant here are: Chapter 448, Section 448.102, Subsection 448.102(1)[and Paragraph 448.103(1)(c)]").* In light of this established statutory hierarchy, the court noted that within

[7] Further illustrative of why written "pre-suit" notice is an absurd requirement of an employee in ASSISTANCE or OBJECTION whistleblowing situations, is the fact that the Act contains no mention whatsoever as to ***when*** notice is required. Is notice required pre-suit while the employee is still employed; or, after a demotion and pre-discharge; or, after discharge and pre-suit; or, at some other time?

the claim portion of the statute, only the statutory *subsection* pertaining to DISCLOSURE whistleblowing was excepted from the Act's protection if the employee did not first give written notice to the employer. *Id. at 316*.

The *Baiton* court went on to interpret the remedy portion of the Act, reading *paragraph (c.) of subsection 448.103(1)* as a consistent expression of the Act's intent that recovery is barred for claims which did not provide written notice *"as required by s. 448.102(1)"*, *id. (emphasis in original),* or which were based on non-whistleblowing activities.

The *Baiton* court emphasized the express language,*"as required by s. 448.102(1)*" in the remedy portion of the Act, because the only portion of the Act which requires anything of the employee is in the claim section under DISCLOSURE whistleblowing circumstances. Subsection 448.102(1) contains the only requirement in the Act. Stated another way, DISCLOSURE is one type of claim, and it alone is fettered with a notice requirement. *Fla. Stat. §448.102(1)(written notice applies to "this subsection.").* The statutorily subservient paragraph of 448.103(1)(c) does not fetter the employee's other whistleblowing claims, it simply fetters the employee's remedy consistent with the already fettered DISCLOSURE claim. The *Baiton* court recognized this, stating "[s]imilarly, 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).'" Id. at 316 (emphasis in original).*

This is the only logical, plain read of the statute which gives effect to all the express statutory terms. To interpret the Act as requiring written notice in all whistleblowing situations would put the cart before the horse. The horse or claim portion of the Act drives the action, not the cart or remedy portion of the Act. To say that the statutory *paragraph* in the remedy section of the Act blankets or qualifies every subsection in the claim section of the Act is in derogation of and effectively nullifies the express language limiting the notice provision to DISCLOSURE whistleblowing only. *See Fla. Stat. §448.102(1)(written notice applies to "this subsection.").* A "court has no power to read or construe the statute in a manner that extends, modifies, or limits its express terms." *Wiggins v. Southern Management Corp., 629 So. 2d 1022, 1024 (Fla. 4th DCA 1993)(citations omitted).* "'Inference and implication' cannot be substituted for 'clear expression.'" *Id., citing Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977).*

Moreover, the notice requirement of §448.102(1) as it appears in the remedy portion of the Act unmistakably operates as an exception to the statute's general protections, or "[p]rohibitions" as termed in the statute, found in subsections 448.102 (1), (2), and (3) . Accordingly, the *paragraph* in the remedy subsection which qualifies the rights otherwise granted to the employee in the Act's other *subsection*, must be strictly construed and limited to its narrowest application. *Samara Development Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990),citing Farley v. Collins, 146 So. 2d 366,368 (Fla. 1962)("By applying this rule we reduce to a minimum the restrictions on the broader remedial statute."); see also State*

v. Nourse, 340 So. 2d 966, 969 (Fla. 3d DCA 1976)(any statutory exception to a general prohibition "is normally construed strictly against the one who attempts to take advantage of the exception).

These rules of "strict construction" and "narrow application" are particularly applicable to the statutory proviso of *paragraph* 448.103(1)(c), given the remedial nature of the Whistleblower Act, which is entitled to liberal construction to effectuate its purpose. *See 49 Fla. Jur.2d Statutes § 199.* Had the legislature wanted to except ASSISTANCE and OBJECTION conduct from its "prohibitions" absent written notice, it would have qualified each type of whistle-blowing conduct with the notice requirement in that operative section. Applying settled principles of statutory construction, a court should construe the Legislature's omission of the notice requirement from ASSISTANCE, §448.102(2), and OBJECTION,§448.102 (3), whistleblowing claims as a rejection of a notice requirement in those situations. *See Citizens Nat'l Bank & Trust Co. v. Stockwell, 675 So. 2d 584,587(Fla. 1996)(Court's refusal to implicitly add language to the National Bank Act); Leisure Resorts, Inc. v. Frank J. Rooney,Inc., 654 So. 2d 911 (Fla. 1995).*

Like employee Baiton, employee Deering brought an OBJECTION whistleblowing action. Deering worked as Potomac Systems Engineering's deputy director of Florida operations for one month until he was fired. PSE was a contractor engaged in contracts with the federal government. Deering claimed that he was fired in violation of §448.102(3) for refusing to participate in mischarging, misreporting and the unauthorized use of government

equipment in violation of federal law. *Potomac Systems Engineering Inc. v. Deering*, 683 So.2d 180-181 (Fla. 2d DCA 1996). The Second District overturned a jury verdict in Deering's favor, holding that §448.103(1)(a) provides an employee with a civil cause of action for any one of the three types of whistle-blowing activity, "but only if proper notice is given." *Id.* at 182.

The Second District concluded that written notice was a requirement for all whistleblowing activities because otherwise it would have to find "that portion of section 448.103(1)(c) which requires written notice has no meaning." *Id.* at 181. The Second District reasoned that requiring notice from an employee is not unduly burdensome, and it "promotes the purpose of the act by affording the employer the first opportunity to correct a violation." *Id.* at 182. The *Deering* Court's decision relies primarily on a judicial viewpoint from the federal Middle District Court found in the unpublished opinion of *Martin v. Honeywell, Inc.*, No. 95-234-CIV-T-24(A), 1995 WL 868604 (M.D. Fla. filed July 18, 1995). The *Martin* decision pre-dated the decision in *Baiton*,(decided August 23, 1995) and, thus that federal court was without guidance from Florida courts as to how to interpret the Act. *Martin* held that the "plain language" of the Act imposes a written notice and opportunity to cure requirement in *all types* of whistle-blowing actions, *id.* , and the *Deering* panel simply accepted that viewpoint. *Potomac Systems, 683 So. 2d* at 182.

In contrast to the *Deering* opinion, the *Baiton* court and the Fifth District below[8] gave full effect to the statutory language expressly included in the Act and to the Act's purpose. Furthermore, the fact that this Act is in derogation of common law does not require it to be strictly construed against the employee. In fact, the opposite is true. Florida's private Whistleblower Act was meant to carve out job protection for employees under a defined set of circumstances of interest to the citizens of Florida, i.e. disclosure of, assistance with investigations of or testimony provided in relation to, or objections and refusals to participate in private employers' illegal conduct. This is job protection which Florida citizens would otherwise not have. This Act is remedial legislation and, therefore, by its very nature, its liberal interpretation takes precedence over any argument which would suggest otherwise. *See Farley v. Collins, 146 So. 2d 366,368 (Fla. 1962); Klepper v. Breslin, 83 So. 2d 587, 592 (Fla 1955).*

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[8] The Fifth District below found that the claim and remedy sections of the Act led to an ambiguity in the statue, a resort to statutory construction principles, and the only reasonable conclusion that written notice is only required in §448.102(1), DISCLOSURE situations. A statute is unambiguous only if it is clear and unmistakable and is "[in]capable of being construed in two different ways by reasonably well-informed people." *2A Sutherland on Statutory Construction §46.04, p.99 (5th ed. 1992).*

Federal Chief Judge Kovachevich of the Middle District of Florida noted in footnote 3 of the court's opinion in *Park v. First Union Brokerage Servs. Co.*, 926 F. Supp. 1085 (M.D. Fla. 1996) that the private whistle-blower statute is "truly ambiguous. . . . The fact of the matter is that the 'plain language' of the statute may be readily interpreted as supporting either view [written notice is required of all types of whistle-blowing claims or only required of DISCLOSURE whistleblowing claims]." *Id.* at 1089 n.3. That federal court, however, did not make an independent legal conclusion about the Act.

Further, requiring written notice in DISCLOSURE whistleblowing instances only, consistent with the broad protections granted employees' whistleblowing conduct, will not result in a speculative opening of the flood-gates of employment litigation. The Act does not provide a quick remedy to an employee with any kind of gripe against his or her boss, nor vitiate the at-will employment doctrine currently intact in Florida. For example, the Act protects whistleblowing activities of the employee that are based on employer' violations of a "law, rule, or regulation." "'Law, rule, or regulation' is defined to include **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." *Fla. Stat. §§448.101(4), 448.102* (emphasis added). The phrase "in violation of a law, rule, or regulation" does not confer protection to an employee who complains about business practices which may be morally objectionable, but are not illegal. *See e.g., Schultz v. Tampa Elec. Co., 704 So. 2d 605 (Fla. 2d DCA 1997); Pamela Forrester v. John H. Phipps, Inc. d/b/a WCTV-Channel 6, 643 So. 2d 1109 (Fla. 1st DCA1994).*

The Act further requires that an employee's claimed "retaliatory personnel action" is causally related to his or her protected whistleblowing activity. *See Fla. Stat. §448.103(1)(c)("An employee may not recover in any action ...if the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by the act.").* Accordingly, the Act contains built-in safeguards against a flood of specious litigation, even a speculative flood.

E. CONCLUSION

In enacting the private Whistleblower Act, the Legislature intended in ASSISTANCE and OBJECTION whistleblowing instances for an employee's verbal whistle to be worth a thousand written words. Those whistles should not be silenced by the courts.

The decision below should be affirmed.

Respectfully submitted this ____ day of September, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. Mail to Donald C. Works, III, Jackson, Lewis, Schnitzler, et.al., P.O. Box 3389, Orlando, FL 32802-3389 and Keith R. Mitnik, Morgan, Colling & Gilbert, P.A., P.O. Box 4979, Orlando, FL 32802 this _8th_ day of September, 1998.

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Catherine A. Kyres