SUPREME COURT OF FLORIDA

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

ANSWER BRIEF OF RESPONDENT, MARTIN JENKINS

KEITH R. MITNIK, Esq.
Florida Bar No.: 436127
Morgan, Colling & Gilbert, P.A.
20 N. Orange Avenue, Suite 1600
P.O. Box 4979
Orlando, FL 32801-4979
(407) 420-1414

Attorney for Appellant.

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I. SUMMARY OF ARGUMENT

The Whistle Blower Act creates three categories of whistle blowing activity which are protected from retaliatory discharge by the employer.

The first category involves an employee filing or threatening to file a complaint against the employer with a government agency. Specifically, that category requires the employee to give prior written notice to the employer before reporting the matter to a State or Federal Agency.

The second category involves an employee who is called to testify or provide information to a government agency that is already investigating the employer. The written notice requirement does not appear in this subsection. The reason for its absence seems obvious, since it deals with the situation where an employee is being drawn into an ongoing investigation rather than instigating one.

The third category involves an employee objecting directly to the employer about violations of law or simply refusing to participate in the unlawful activity. Again, the subsection does not contain any written notice requirement, since the employee is not turning the employer into an outside agency, but rather is handling the internally.

The plain language of §448.102 (1-3) of the Act, clearly limits the written notice requirement to subsection (1) whistle blowing activity. The suit at bar was brought solely under subsection (3).

Regretfully, a subsequent section of the act, §448.103(c), was poorly drafted, thereby opening the door for shrewd employers to argue the existence of a blanket written notice

requirement. In an effort to escape accountability, the guilty employer is trying to use this subsequent ambiguity to rewrite section §448.102 in an expansive manner inconsistent with its clear meaning and contrary to common sense.

The stated purpose for requiring written notice under the first category of §448.102 is to allow the employer an opportunity to remedy the problem before the employee turns his employer in to the authorities. It is a pre-whistle blowing notice, not a presuit notice. Under category two, where an employee becomes a witness in an ongoing governmental investigation, pre-whistle blowing notice makes no sense. An employee may be asked by the authorities to not notify the employer under investigation. Likewise, under category three, where an employee who is fired because he or she dared to voice an objection internally about unlawful activities or who refused to participate in the violations of law, it makes no sense to require pre-whistle blowing notice. An employer may not want the objection in writing, as was the case here. The employee should not be deprived of the right to seek redress for retaliatory discharge simply because the concerns voiced to superiors were not initially put in writing.

The opportunity to remedy, which is at the heart of the written notice requirement, plays no part in the latter two situations. If the defined purpose of giving written notice is to give the employer the opportunity to remedy the unlawful activity before the whistle is blown, then how would that purpose be served with a category three whistle blower, since the extent of the whistle blowing was the employee informing his boss that he would not participate in the illegal activity, such as dumping toxic waste or falsifying income records? In that circumstance, what purpose would written notice serve? No purpose, especially since it is the notification itself which results in retaliation.

Respondent urges the court to follow the well-reasoned opinion of the Fifth District Court of Appeals below in the case at bar, and that of the Third District Court of Appeals, in *Baiton vs. Carnival Cruise Lines, Inc.*, 661 So. 2d 313 (Fla. 3d DCA 1995), which held the written notice requirement of subsection §448.102(1) does not apply to actions brought pursuant to subsection §448.102(3)[category three whistle blowers].

Even if written notice were required, it should not bar Mr. Jenkins from seeking protection under The Whistle Blower Act as to his reporting of the sexual misconduct, since he attempted to make a written report of these objections and his boss thwarted those efforts. Certainly an employer should not be able to escape accountability under The Whistle Blower Act by raising lack of written notice, if the employer specifically instructed the employee not to give written notice.

Finally, the Fifth District Court of Appeals correctly rejected the Petitioner's public policy argument, which is nothing more than a plea for injustice.

II ARGUMENT

A. The Fifth District Court of Appeals correctly concluded the intent of the Legislature was to not require written notice of category three Whistle Blowers, relying on the clear language found in section §488.102(1-3) of the Florida Private Whistle Blower Act to resolve the ambiguity found in section §448.103(1)(c) of the act.

Mr. Jenkins went to one of his bosses and said the vice president of production is masturbating in front of female employees and I object. Mr. Jenkins went to one of his bosses and said two officers of the company were defrauding vendors at a convention in order to receive free valuable merchandise, and I object and refuse to participate. Mr. Jenkins went to one of his

bosses and said an officer is falsifying manpower reports in order to deceive lenders or buyers of the corporation and I object and refuse to participate. Mr. Jenkins went to one of his bosses and said your friend plagiarized an entire television series out of a copyrighted book, and I object and refuse to participate. As a direct result of Mr. Jenkins verbalizing these serious concerns, he was fired.

Mr. Jenkins did not turn his superiors or co-workers into an outside governmental agency, therefore, he does not fall under the first category of The Whistle Blower Act. Mr. Jenkins did not get called into an ongoing investigation by a governmental agency as a witness, therefore, he does not fall under the second category of The Whistle Blower Act. Mr. Jenkins did object to and refuse to participate in the activities which he believed to constitute violations of law, and, therefore, falls under the third category of The Whistle Blower Act.

The three categories found at 448.102(1-3) are defined as follows:

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

> (1) disclosed or threatened to disclose to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. **However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice**; (emphasis added)
>
> (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; and
>
> (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.

The legislature saw fit to include a written notice requirement under subsection (1) and not to include such a requirement under subsections (2) & (3). The legislature decided that an employee, who chooses not to give his employer the chance to self-remedy the problem at-hand, before blowing the whistle externally to a state or federal agency, should not be granted the protection of §448.101 *et. seq*. One reason may have been to protect against a situation where the employee was less interested in remedying the problem and more interested in causing trouble. In such a situation it is understandable that legislature would choose not to provide a remedy on a clean hands type of rational. However, when the whistle blowing activity which results in retaliatory discharge falls under category two or three, there is no justification for requiring the employee to give written notice before providing him the protections of The Whistle Blower Act. Under the second category the employee is an innocent bystander drawn into a pre-existing investigation by an outside government agency. Not only would it be unfair to require him or her to give written notice before cooperating with the government, it might very well result in a charge of obstructing the investigation.

Under the third category, where the employee chooses to quietly address the unlawful activity internally by informing his bosses, the employee should not be stripped of his whistle blower rights for respecting the confidentiality of the employer. The employer may very well wish not to have written documentation generated by the employee who reports concerns about potential unlawful activities that may have occurred at the workplace. An employee would likely be concerned about retaliation for making written complaints of these observed unlawful

activities without first verbally discussing the matter with his bosses. By trying to correct a sensitive and serious problem in the least painful manner to the employer, an employee should not be punished. Here the employer wants to twice punish the employee. First, it fired Mr. Jenkins for opening his mouth. Now it wants to rob him of his remedy. If Mr. Jenkins was fired for verbally reporting these serious matters, can you imagine what would have occurred had he done so in writing? In fact, with the incident involving sexual misconduct, Mr. Jenkins tried to make a written record of his objections and his employer prohibited him from doing so. That same employer now wishes to duck responsibility by taking advantage of its efforts to silence the matter. Surely the legislature did not intend such an unjust result when it drafted the Whistle Blower Act. In fact, it was probably this very type of circumstance which the legislature intended to avoid when it chose to exclude the written notice provision from section (3).

There would be no debate on the issue of written notice had the legislature been as careful in drafting §448.103 as it had been in drafting §448.102. Regretfully, it used awkward language to reiterate the written notice requirement of subsection (1) actions, in the remedy section of the statute.

The remedy section, §448.103(1)(c) states:

> 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 §448.102 (1) . . .

In a vacuum, the language is open to two interpretations. It could mean an employee may not recover in any action brought under §448.102 (1) [reporting an employer to a governmental agency] unless the written notice requirement provided for in that subsection has been met. In other words, reiterating the written notice requirement for category one whistle blowers in the

remedy section. Alternatively, it could mean an employee may not recover in any action brought under §448.102, including subsection (1), (2) or (3) unless written notice is given in the form described in Subsection (1). For the latter interpretation to make sense, the written notice provided for in Subsection (1) would have to provide instructions and details as to the type or form of notice required. Otherwise, the reference would be meaningless confusing surplus. Since there is absolutely no description in §448.102(1) as to the type or form of notice to be given, such a strained construction of the statute should not be applied. Hornbook statutory interpretation rules requires a plain meaning reasonable interpretation. 49 Fla. Jur. 2d §185. The sensible interpretation is that 448.103(1)(c) is a reiteration or reminder that written notice is a prerequisite to any action brought under Subsection (1). Ironically, the legislature's efforts at clarity created confusion. Now, the employer is trying to slither through the crawl-space created by this inadvertent ambiguity.

The Court in *Baiton v. Carnival Cruise Lines Inc.*, *supra*, reached the same logical conclusion reached at bar by the Fifth District Court of Appeals, that actions brought under subsection §448.102(3) do not require written notice. In *Baiton*, the plaintiff was a seaman employed by Carnival. Another seaman filed suit against Carnival under the Jones Act. Baiton simply testified as a witness in the Jones Act proceeding brought by his fellow seaman. Baiton claims Carnival attempted to compel him to give an untrue statement in the Jones Act case. Baiton refused. Baiton was subsequently fired. He alleges his discharge was in retaliation for agreeing to testify for his fellow seaman and for refusing to give a false statement. Baiton brought a subsection (3) Florida Whistle Blower Act suit which was dismissed by the Trial Court with prejudice. Also, he brought an action under federal maritime law which is irrelevant to the

issues here. One of the grounds for dismissal was the failure to give written notice. The Appellate Court rejected this argument finding the written notice requirement does not apply to actions brought under §448.102(3). In reaching this conclusion the Court stated:

> Under subsection 448.102(1), Florida Statutes, an employer may not take a retaliatory personnel action against an employee who has disclosed or threatened to disclose "an activity, policy, or practice of the employer that is in violation of a law, rule or regulation." The statute goes on to say, "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." Id. (Emphasis added).
>
> The reference to "this subsection" mean subsection 448.102(1). <FN 5> 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)." Id. §448.103(1)(c) (emphasis added).
>
> This written notice requirement only applies to subsection 448.102(1). There is no comparable written notice requirement for a claim made by an employee under subsection 448.102.(2), relating to governmental investigations, or subsection 448.102(3), relating to an employee objection to, or refusal to participate in, "any activity, policy, or practice of the employer which is in violation of a law, rule or regulation." Id. §448.102(3). In the present case Baiton is proceeding under subsection 448.102(3). As there is not written notice requirement for subsection 448.102(3), Carnival's objection on this point is not well taken". Id. At 316.

Further support for the interpretation proposed by the Respondent is provided by the court in *Potomac Systems Engineering, Inc., vs. Deering*, 683 So. 2d 180, (Fla. 2d DCA1986), which case is relied upon by the Petitioner for its conclusion that written notice is required. While the Respondent disagrees with the conclusion reached in *Potomac*, part of the rationale is supportive of his position. In *Potomac*, the Court explained the reason for requiring written notice is that it

brings, "the activity, policy or practice to the attention of a supervisor or the employer and affords the employer a reasonable opportunity to correct the activity, policy or practice." *Id.* at 182. Here, there is no issue of affording the employer the reasonable opportunity to correct the activity before further action is taken by the employee. There was no further action to be done by Mr. Jenkins, such as reporting the matter to a government agency, prior to which the employer needed time to take corrective action. The notice itself got Mr. Jenkins fired, not some subsequent reporting done when the employer did not remedy the situation. He reported the activity in hopes it would be corrected and left the matter in the hands of his employer. The next thing he knew, he was fired. What does the Petitioner claim it would have done differently had the notice of unlawful activity been given in writing? What additional investigation would have been done? What additional remedy of the problem would have occurred? What adverse consequence to the company would have been avoided? The answer to all of the above is none. The Golf Channel is not complaining of any prejudice or unfairness. It is simply relying on a strained construction of the statute hoping to find a technical loophole to avoid the statutory remedy provided to Mr. Jenkins for being terminated in retaliation for embarrassing his superiors by reporting internally their unlawful activity. The problem is the reports fell on the deaf ears of old cronies too close to the perpetrators to do anything other than bury the truth along with the whistle blower's career.

Ultimately, the case boils down to the question, what did the lawmakers intend to say when they drafted the legislation. There are many rules of statutory interpretation, all of which are designed to answer that question. The first step in answering that question is to establish a foundation based on certain truths that can not be disputed. Those undisputable truths are as

follows.

It is undisputable that when the legislature passed the Florida Private Whistle Blower Act, it meant to create an effective remedy for employees who were fired because they dared to stand up against unlawful activity at the work place.

It is undisputable that the legislature carved out three separate categories of behavior that could be characterized as standing up to lawlessness and that it intended to protect all three from retaliatory discharge. The three categories being as follows: the employee who actually instigates an investigation by authorities against his or her employer; the employee who does not instigate an investigation, but rather is summoned to testify in a ongoing government investigation; and the employee who voices an objection internally to unlawful activity or simply refuses to participate in it, under circumstances where governmental authorities are not involved at all.

It is undisputable that, the section of the statute which defines the three protected classification, section 448.102(1-3), unequivocally and unambiguously makes a distinction between the first category and the other two, as to whether or not written notice is required to qualify for the statute's protection. Under category one, written notice is required. Under category two and three it is not required, according to §448.102(1-3).

It is undisputable that the only stated reason for requiring written notice is to give the employer a chance to remedy the unlawful activity, on its own, before the employee enlists the help of law enforcement or government.

With these truths established as a foundation, let us now return to the question at hand. What did the legislature mean to say? Did it intend for the written notice requirement to apply to category three type conduct where all the employee did was quietly tell his boss, "I object to

this unlawful activity and will not participate in it," and then returned to his duties. If so, then why did it distinguish so clearly in §448.102(1-3) between category one and category three, in regard to the written notice requirement? Why was category one singled out for the written notice requirement? If the Act was to be interpreted to require written notice under category three, how would the distinction found in section 448.102(1-3) be reconciled? Would not the Court have to either ignore that obvious distinction in section 448.102(1-3) or distort the clear meaning contained in that section to impose a written notice requirement on a category three whistle blower? How would the stated purpose of written notice (giving the employer the opportunity to self remedy the law breaking activity before the whistle is blown) be served if it were applied to category three? Remember, it is not a pre-suit written notice requirement, such as those in medical negligence or sovereign immunity suits, it is a pre-whistle blowing notice. Thus, if the category one written notice requirement were to be applied to the third category, then the scenario would be as follows. The whistle blowing activity, which the written notice would have to precede, would be walking in to a superior's office to say, "I object to the unlawful activity I just discovered." By giving written notice, what action on the part of the employee would the employer be given the opportunity to avoid by self remedying the unlawful activity? Keep in mind, the employee never intended to take any action other than to object internally. Would the employee have to give written notice that he was coming later in the day to verbally object? Such a scenario is absurd.

Section 448.102 (1-3) is unambiguous. It requires written notice for category one whistle blowers and does not require written notice for category two and three whistle blowers. On the other hand, section 448.103(1)(c) is ambiguous. It could be read as a restatement of the written

notice requirement under category one or, arguably, as an expansion of the written requirement to include the other two categories. The former would be consistent with the plain language of §448.102(1-3), the later would be wholly inconsistent. In choosing between the two possible meanings, it only makes sense to chose the one that is consistent with, rather than the one that is inconsistent with, the clear meaning demonstrated elsewhere in the statute. In searching for legislative intent, it makes sense to look to the unambiguous section 448.102 (1-3) for guidance interpreting the ambiguous section 448.103(1)(c). Section 448.103(1)(c) creates the mystery, while section 448.102(1-3) solves it.

Intellectual honesty dictates that Petitioner acknowledges section 448.102(1-3) clearly distinguished between category one and category three whistle blowers regarding the written notice requirement and that an ambiguity was created by section 448.103 (1)(c). Rather than acknowledge this truth, the petitioner insists on claiming there is no ambiguity in the Act.[1] If there was no ambiguity then we would not be here before this Court on a certified conflict between the District Courts of Appeals who have struggled with the different possible interpretations.

The fact is, the interpretation promoted by the petitioner would obliterate the distinction contained in §448.102(1-3) between the different categories of whistle blowers regarding the written notice requirement. Such obliteration would run afoul of the primary rule of a statutory construction relied on by Petitioner. On page 11 of Petitioner's brief, it states, "Moreover, it is a cardinal rule of statutory interpretation that courts should avoid readings that would render part

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[1] In its Brief filed with the District Court of Appeals below, The Golf Channel admitted at one point the statute was ambiguous, stating on page 14, "In fact, Jenkins, has already attempted to manipulate <u>the statute's ambiguity</u>..."

of a statute meaningless. *Forsythe*, 604 So. 2d at 456." The only way to preserve the meaning of §448.102(1-3) is to acknowledge the distinction contained therein.

B. AN EMPLOYER, WHO INSTRUCTS AN EMPLOYEE NOT TO MAKE A WRITTEN REPORT OF OBJECTIONS TO UNLAWFUL ACTIVITY, CANNOT THEN RAISE THE ABSENCE OF A WRITTEN REPORT AS GROUNDS FOR DISMISSAL OF THE EMPLOYEE'S SUBSEQUENT WHISTLE BLOWER ACTION.

The unfairness of the Petitioner's position is further highlighted by the fact it specifically instructed Mr. Jenkins not to give the written notification it now complains is lacking, in regard to the employee's objection to sexual misconduct by an executive of the company. Mr. Jenkins went to his boss and said, I am concerned one of our executives is masturbating repeatedly in front of female clerical staff. We need to do something, and I think I should make a written report of this serious situation. Mr. Jenkins' boss, and close friend of the masturbator, told Mr. Jenkins he was not to make a written report. The incident was brushed under the rug and the masturbator, still in power, proceeded to fire the whistle blower. Mr. Jenkins filed suit for having been terminated in retaliation for objecting to unlawful activity as provided for by Florida law. The employer then obtained a dismissal with prejudice on the grounds that Mr. Jenkins' objection regarding his supervisor masturbating in front of female employees was not made in writing. Mr. Jenkins cried foul since his boss instructed him not to make a written record of the events when he requested to do so. Regretfully, the Trial Court missed the call. Mr. Jenkins turned to the Fifth District Court of Appeal for relief and it overruled the Trial Court. He now requests this Court affirm that proper call.

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. The Trial Court stripped the Respondent of that chance. The District Court of Appeals restored his cause of action so that he could pursue his statutory remedy based on the merits. Now, he asks the Supreme Court to affirm that decision and allow him to proceed.

C. THE FIFTH DISTRICT COURT OF APPEALS CORRECTLY REJECTED THE RESPONDENTS "PUBLIC POLICY" ARGUMENT, AND CORRECTLY FOUND INSTEAD THAT THE PEOPLE OF THIS STATE ARE BEST SERVED BY ITS REASONABLE INTERPRETATION OF THE STATUTE.

The Petitioner claims that its suggested interpretation would promote public policy and that the interpretation of the Fifth District Court of Appeals violates public policy. In fact, the opposite is true. Take for example, the following scenario. An employee tells his boss he just learned other employees were dumping toxic waste in the river and informs his boss that he objects to the practice and will not participate. The boss responds by saying, "That's fine, because you're fired!" Is public policy served by a construction of the Act which results in the employee having no remedy simply because the conversation with his boss was not written down on paper?

Compare that unjust result to the concerns concocted by the Petitioner. Petitioner argues "whispering protestors," who never truly objected, will claim their subsequent termination was in retaliation for these unheard whispers. The only protection from such frivolous lawsuits, according to the Petitioner, is to make employees "blow the whistle loud." (pg.18 of Petitioner's brief). What Petitioner fails to point out, is the fact no one can file suit under the act, unless an "unlawful" act is involved. Unlawful, is narrowly defined by the statute. A specific adopted

federal, state or local statute, ordinance or regulation must be violated §448.102(4). Thus, the Whistle Blower Act will only apply to limited situations involving serious violations of law. It does not apply to idle gossip involving routine employee gripes. Does the Petitioner mean to suggest lawlessness is rampant in corporate America? If so, then who is more worthy of protection, the outlaw or the victim who tries to do the right thing!

Next, Petitioner asserts that one of the public policy purposes for the written notice requirement is to protect employees. It argues that by making a "paper-trail" employers will not be able to lie and deny about the occurrence of objections made by employees to unlawful activity. Consequently, employers will be less likely to concoct other grounds to fire the employee in retaliation for being a trouble-making whistle blower. Petitioner must have been standing in front of a mirror when it drafted this argument. The dastardly employer described by Petitioner seems to be lurking nearby. In its brief below, the Petitioner (Appellee in that proceeding) accused the employee of being a disgruntled mercenary, an employee motivated by obvious animosity (p.13), of being cowardly (p.15), of trying to take advantage of his employer (p.15) [The page citations are to the Appellee's brief filed with the 5th DCA]. Respondent/Appellee below inferred it fired Jenkins for reasons wholly unrelated to his complaints (pg. 15), that Jenkins never actually spoke up, (p.13), that he never blew the whistle (p. 15), that he has no proof he objected, may never have complained at all (p.15), that there is no guarantee that his remarks to his supervisor, if any, were passed on to officers of the company (p.15), and that it was denied the opportunity to cure any problem (p.15).

Elsewhere in its brief below, the truth raised its head from the vortex of denials and accusations. On page12 of that Brief Petitioner/Appellee stated:

> After learning of the alleged harassment, TGC took prompt remedial action and corrected the situation to the satisfaction of the women involved.

Further, it admitted on page 14:

> In his brief, Jenkins asks, "What does the appellee claim it would have done differently had the notice of objectionable activity been given in writing.... He apparently considers it a rhetorical question, but the answer is quite concrete: Nothing. TGC would have undertaken the same investigation.

An employer, who in one breath denies it received notice of objections to unlawful activity, then in the next breath admits it got notice and had an opportunity to investigate, should not be allowed to hide behind an argument that written notice will protect employees from unscrupulous employers who in the absence of written proof would deny receiving notice.

Furthermore, there is no case law nor legislative history which suggests written notice was meant to benefit the employee. There is but one stated purpose, and that is spelled out in the statute and restated in the *Potomac* case, upon which Respondent relies. The sole purpose of the written notice requirement is to "afford the employer a reasonable opportunity to correct the activity, policy or practice." Florida Statute §448.102(1). As stated in *Potomac*, "the requirement promotes the purpose of the act by affording the employer the <u>first</u> opportunity to correct a violation. *Id.* at 182. (Emphasis added).

The fact remains, public policy is served by the Fifth District Court of Appeals interpretation that written notice does not apply to category three whistle blowers. As a practical matter, expanding the written notice requirement to include category three whistle blowers would virtually eliminate that portion of the statutorily created cause of action. Most employees have never heard of the Florida Whistle Blower Act, let alone have a working knowledge of it. Since the Appellate Courts disagree on whether or not written notice is required, it is likely an

employee, who stumbled on the Act, would be confused. There is no requirement to post notices at the work place nor to inform employees of their rights and obligations under the Act.

How many employees would know to object in writing before voicing an internal objection? How many would think it wise to antagonize their boss by writing a letter about an embarrassing or sensitive matter? How many would opt instead to close the door and say, "Boss, I just thought you should know about the unlawful activity and know that I won't have any part of it."? How many sophisticated unscrupulous employers would fire an employee on the spot rather than give him a chance to make a written record or, as happened here, instruct the employee not to file a written report? With that in mind, the written notice requirement has the effect of severely limiting the Act's availability to victims of retaliatory discharge for standing up to unlawful activity.

Is it any wonder the employer here seeks an exaggerated, all inclusive application of the written notice requirement. Borrowing a term from the Petitioner's Brief filed below, such an interpretation of the Whistle Blower Act would render it "impotent".

Certainly, the legislature did not go through the trouble of creating a new remedy in one subsection, only to take all of its teeth away in the next subsection. In *Martin County v. Edenfield*, 607 So. 2d 27 (Fla. 1992), which dealt with the public version of the Whistle Blower Act, this Court stated:

> ...we believe it clear that the Whistle-Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who "blow the whistle." As a remedial act, the statute should be construed liberally in favor of granting access to the remedy. *Amos v. Conkling*, 99 Fla. 206, 126 So. 283 (1930). We so construe it here.

The rational of that decision applies equally here.

In desperation, the Petitioner, and its amicus cohorts, roll out the age old defense battle cry of , "there will be a flood of litigation." In this situation, that argument is a sugar coated plea for the court to ignore the legislative intent. We are not here to judge the wisdom of the legislature in creating a new cause of action, but rather to judge the lawmakers intent. Surely, the legislature intended for there to be additional litigation or it would not have created a new cause of action. Sometimes our lawmakers decide that the need to protect individuals outweighs the unquenchable desire of big business to avoid accountability.

In *Zombori v. Digital Equipment Corp.*, 878 F. Supp. (N.D. Fla. 1995), the Court recognized the importance of legislation such as the Whistle Blower Act to the employees of this state, stating:

> Florida's at-will employment doctrine may be "cold-hearted, draconian and out-dated," but it is the law of Florida. Notably, Florida's legislature and courts have created exceptions to the at-will doctrine allowing employees to assert wrongful discharge claims in defined circumstances. By doing so, Florida's legislators and judges have attempted to conform the doctrine to current public policy.

Id. at 209.

Petitioner, in typical big business fashion, has used its entire arsenal in an effort to brush away this important advancement in employee rights. The Fifth District Court of Appeals stood its ground. Respondents urges this Court to follow suit.

III. CONCLUSION

Respectfully, Respondent requests that each member of the Court take a moment to recall the first time he or she read the statute at bar. Do you remember reading section

448.102(1-3), before reaching section 448.103? Was there any question in your mind as to the legislative intent to impose a written notice requirement on category one whistle blowers and not on category two and three whistle blowers? In fairness, how can that reaction to the clear intent found in section 448.102 (1-3) be ignored? Next, recall your reaction the first time you read beyond section 448.102 through section 448.103(1)(c). Do you remember the confusion created by that later section? Do you recall rereading section 448.103 trying to understand just what was meant by the poorly worded part which referred back to section 448.102(1) and the written notice requirement? Therein those memories and reactions lies the answer to the pivotal question of, what did the legislature mean to say about the written notice requirement in regard to a category three whistle blower.

The Fifth District Court of Appeals in this case and the Third District Court of Appeals in *Baiton* concluded the legislature did not intend for the written notice requirement to apply to category three whistle blowers. The foundation for those decisions is provided by the undisputable truths described on pages 9 and 10 above. Respondent urges this Court begin its analysis with those same truths and follow them to their logical and just conclusion, the same conclusion reached below by the Fifth District Court of Appeals.

Dated this _______ day of September, 1998.

Respectfully submitted,

Morgan, Colling & Gilbert, P.A.
20 N. Orange Avenue, Suite 1600
P.O. Box 4979
Orlando, FL 32801-4979
Telephone: (407) 420-1414
Facsimile: (407) 425-8171

By: ______________________

Keith R. Mitnik,
Florida Bar no.: 436127
Attorney for Respondent,
MARTIN JENKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Rule 9.210(A)(2) the Answer Brief of the Respondent, Martin Jenkins has been typed in Times New Roman 12pt. type and that a true and correct copy The Answer Brief of Respondent, Martin Jenkins has been furnished by U. S. Mail this ______ day of ________________, 1998 to: Donald C. Works, III, and Anthony J. Hall at Jackson, Lewis, Schnitzler & Krupman, 390 North Orange Avenue, Suite 1285, Post Office Box 3389, Orlando, Florida 32802-3389 and the original and seven copies have been forwarded via Federal Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927.

____

KEITH R. MITNIK, Esq.
Florida Bar No.: 436127
Morgan, Colling & Gilbert, P.A.
20 N. Orange Avenue, Suite 1600
P.O. Box 4979
Orlando, FL 32801-4979
(407) 420-1414
Attorney for Respondent.