IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM McEOWEN,

Petitioner, CASE NO.: 96,676

vs.

JONES CHEMICALS, INC.

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

Case No. 98-04392

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner, William McEowen ("McEowen"), is a former employee of Respondent, Jones Chemicals, Inc. ("Jones"). (R.2)[1] Jones brought this action against McEowen, alleging that McEowen had violated Florida Statutes Chapter 688, the Uniform Trade Secrets Act. (R.2) The trial court granted Jones' Motion for Temporary Injunction and enjoined McEowen from certain conduct in violation of the Act. (R.9)

Thereafter, McEowen filed a Counterclaim against Jones, alleging that Jones had terminated his employment in violation of the Florida Whistleblower's Act, §448.101-448.105, Fla. Stat. (R.15) Specifically, McEowen alleged that Jones had been engaged in illegal price fixing activities, and that he had "in writing brought the illegal activity, policy or practice to the attention of a supervisor and objected to participation in the illegal activity, policy or practice of Jones." (R.16). In response to an interrogatory, McEowen identified two memoranda dated March 9, 1998 and March 10, 1998, as the documents in which he gave the written notice referred to in his counterclaim. (R.28).

Jones filed a Motion for Summary Judgment on the grounds that the memoranda identified by McEowen were insufficient written notice as required by

[1]References to the record on appeal will be referred to as (R.), followed by the appropriate citation to the page number of the index to the record on appeal.

§448.103(1)(c), Fla. Stat. (R.26). The trial court granted Jones' Motion for Summary Judgment. (R.41). McEowen appealed to the Second District Court of Appeal, which affirmed the trial court's ruling. McEowen v. Jones Chemicals, Inc., 24 Fla.L.Weekly D2081 (Fla. 2d DCA Sept. 8, 1999). (App.A)

McEowen now appeals to this Court.

SUMMARY OF ARGUMENT

McEowen raises two points on appeal. First, he contends that prior written notice to the employer is not a prerequisite to a cause of action pursuant to § 448.102(3), Fla. Stat. Second, he contends that if written notice is required, his memoranda are legally sufficient as a matter of law. McEowen is incorrect on both points.

The plain language of the Whistleblower Act indicates that written notice is required for all claims brought under Section 448.102. Even if this Court were to find this act ambiguous, however, it is obligated to construe the act in its entirety and give effect to each of the act's parts. In order to do so, it must conclude that the written notice requirement contained in Section 448.103(1)(c) applies to actions brought under any subsection of 448.102. Additionally, the purpose of the Whistleblower Act is best accomplished by requiring written notice.

Furthermore, the memoranda upon which McEowen relies do not provide written notice of any illegal activity, policy or practice; nor do they provide Jones the opportunity to correct such activity, policy, or practice.

Accordingly, the trial court correctly granted summary judgment in favor of Jones and the Second District's opinion should be affirmed.

ARGUMENT

I. IN ORDER TO MAINTAIN A CLAIM UNDER THE FLORIDA WHISTLEBLOWER ACT, THE FORMER EMPLOYEE MUST HAVE PROVIDED THE EMPLOYER WITH WRITTEN NOTICE OF THE ALLEGED ILLEGAL ACTIVITY AND AN OPPORTUNITY TO CURE.

The Florida Whistleblower Act provides a remedy to an employee who has suffered retaliatory personnel action as a result of, among other things, having 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), Fla. Stat. In order to be entitled to any such remedy, however, the employee must have, in writing, brought the activity, policy or practice to the attention of a supervisor or the employer, and afforded the employer a reasonable opportunity to correct the activity, policy or practice. Sections 448.103(1)(c) and 448.102(1), Fla. Stat.

Three Florida district courts of appeal have considered whether claims brought under § 448.102(3) are subject to the written notice requirement set forth in § 448.103(1)(c). The courts are divided in their resolution of this question. For the reasons that follow, this Court should adopt the reasoning of the Second District Court of Appeal in concluding that written notice is required for claims brought under § 448.102(3).

In Potomac Systems Engineering, Inc. v. Deering, 683 So. 2d 180 (Fla. 2d DCA 1996), the Second District held that an employee has no remedy under the Whistleblower Act unless the employee notifies the employer, in writing, of the alleged illegal activity, policy or practice, as required by § 448.103(1)(c), Fla. Stat. In so holding, the Court stated that if it were to limit application of § 448.103(1)(c) to only subsection (1) of § 448.102, it would be interpreting the written notice requirement of § 448.103(1)(c) as redundant to § 448.102(1) and therefore without any independent meaning. Id. at 181.

The Potomac court also noted that the imposition of a written notice requirement is consistent with the purpose of the act:

> [W]e do not believe it is unduly burdensome to require employees to notify their employer of their conduct 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.

Id. at 182. The Second District has twice re-affirmed its holding in Potomac; once in Judd v. Englewood Community Hosp., 739 So. 2d 627 (Fla. 2d DCA 1999), and again in its opinion in the present case, McEowen v. Jones Chemical, Inc., supra.

The Third and Fifth Districts have disagreed with the Second District and have concluded that a plaintiff bringing an action under § 448.102(3) need not comply with the written notice requirement contained in § 448.103(1)(c). See Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313 (Fla. 3d DCA 1995); Jenkins v. The Golf Channel, 714 So. 2d 558 (Fla. 5th DCA 1998), rev. granted, 728 So. 2d 202 (Fla. 1998). The Baiton and Jenkins courts, however, improperly viewed Sections 448.102 and 448.103(1)(c) as independent from each other, wholly failing to acknowledge their duty to read *all* parts of a statute together to accord meaning and harmony to all of the statute's parts. See, e.g., T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996); Acosta v. Richter, 671 So. 2d 149, 153-54 (Fla. 1996). Accordingly, this Court should reject the reasoning of Baiton and Jenkins and should instead follow the Second District's reasoning in Potomac.

In Baiton, the Third District provided little analysis or support for its conclusion; it simply stated, without explanation, that the notice requirement referred to in Section 448.103(1)(c) applied only to lawsuits brought under Section 448.102(1). Baiton, 661 So. 2d at 316. Similarly, the Fifth District in Jenkins resolved the ambiguity created between Sections 448.102 and 448.103 by asserting that "each section operates in its own sphere." Jenkins, 714 So. 2d at 563. These decisions contrast sharply with the Second District's approach in Potomac, where the

court appropriately recognized its obligation to read the two sections in a way that gave meaning to both sections. In doing so, the Second District correctly concluded that Section 448.103(1)(c) imposes a written notice requirement on all subsections of 448.102. Potomac, 683 So. 2d at 181.

A commentator has analyzed the legislative history of the Whistle Blower's Act and determined that it supports imposition of a written notice requirement for all claims brought under Section 448.102:

> A close reading of the statute, coupled with an examination of the legislative history of the act, supports the view that an employee should be required to provide their employers written notice of the alleged violation of law, and a reasonable opportunity to correct the violation, in all suits brought under the act.

Tuschman, *"Another Look at the Notice Requirement of the Florida Private Sector Whistleblower's Act*," 71 Fla. B.J. 43 (Nov. 1997).

As the above analysis demonstrates, McEowen's failure to provide written notice of Jones' alleged violations of Section 448.102(3) is fatal to his claim and the trial court correctly granted summary judgment in favor of Jones. The Second District's decision in this case should be affirmed.

II. THE DOCUMENTS UPON WHICH McEOWEN RELIES ARE INSUFFICIENT NOTICE UNDER THE WHISTLEBLOWER ACT AS A MATTER OF LAW.

McEowen contends that he satisfied the notice requirements of the Whistleblower Act with his March 9, 1998 and March 10, 1998 memoranda. (R.29-31) (App.B,C) The Second District correctly determined that because those memoranda did not identify an activity, policy or practice of the employer which is in violation of law, rule or regulation, and did not afford the employer a reasonable opportunity to correct the activity, policy or practice, they were insufficient notice under the Whistleblower Act as a matter of law.

To be entitled to relief under §448.103, Fla. Stat., McEowen must have provided written notice to Jones which identified an activity, policy or practice of Jones which violated a law, rule or regulation, and which afforded Jones a reasonable opportunity to correct the activity, policy or practice.

In his Counterclaim, McEowen alleged that he had provided such written notice. (R.16) He was asked by Interrogatory to identify specifically the documents which satisfied the written notice requirement. (R.28) He identified the memoranda dated March 9, 1998 and March 10, 1998, which are attached to the Motion for Summary Judgment. (R.25-31) Thus, in order to have satisfied the notice requirement of the Act, these memoranda must have contained written notification to Jones of an activity, policy or practice of the company in violation of a law, rule or regulation, as well as a reasonable opportunity to correct the activity, policy or

practice. Because there was no such notification in either memoranda, the Second District's ruling should be affirmed.

McEowen's March 9, 1998 memorandum indicates that it is written "at the suggestion of Jeff Jones," the company President, "in an attempt to resolve our differences." (R.29) In the memorandum, McEowen acknowledges that he does not "see eye to eye" with Mr. Roberts. (R.29) After outlining what he believed were his contributions to the company, McEowen concludes the memorandum with the following:

> With that said, I would like to step to the plate and tell you that I am willing to bury the hatchet if you are willing to do the same. I don't think either of us would want to have our differences heard by Jeff. It is something Jeff does not need. I am a man and I want to be treated as such. If you do not concur with my feelings and you persist, it will eventually lead to running me off or termination. At that point, I will tell you it will be your's and Jones Chemicals, Inc.'s loss.

(R.30) This memorandum contains absolutely no reference to any illegal activity, policy or practice of Jones. While the memorandum clearly anticipates that McEowen may leave the company, or be terminated, the memorandum makes it clear that any such termination would be the result of a confrontation or personality dispute between he and Steve Roberts, rather than McEowen having identified any violation of the law.

Likewise, in his March 10, 1998 memorandum, McEowen states "I was sorry to hear of Steve Roberts still denying the statement 'heads will roll in Florida if the markets get disturbed and a price war breaks out.' Using 'heads will roll' is very very upsetting to me. Is it a threat or is it worse? I do not operate that way or will I allow someone to threaten me with this or physical harm." (R.31) While this memorandum certainly reflects McEowen's continuing problems with Mr. Roberts, there is still no reference to any illegal activity by the employer, and certainly nothing which could constitute written notice and an opportunity to cure as required by the Act.

According to the plain language of the statute, the Whistleblower Act contemplates an employee who discovers some illegal activity by his employer, notifies his supervisor, in writing, that the illegal activity is occurring, and provides the employer with an opportunity to cure the activity. If the employee is discharged as a result of having given such notification, the statute provides him with a civil remedy. As the First District Court of Appeal has noted, "We are confident that the legislature did not intend to create a cause of action for what essentially amounts to an internal and personal dispute between appellant and her employers." Forrester v. John H. Phipps, Inc., 643 So.2d 1109, 1111-1112 (Fla. 1st DCA 1994).

In Schultz v. Tampa Electric Company, 704 So. 2d 605 (Fla. 2d DCA 1997), the Second District affirmed the dismissal of a plaintiff's whistleblower action where

the plaintiff failed to give written notice that identified the illegal activity, policy or practice. In that case, the plaintiff had provided a memo to his supervisor complaining of the employer's conservation activities and suggesting the Public Service Commission should be notified of them. In affirming the dismissal with prejudice, the court held:

> None of these statements by Schultz are sufficient to state a cause of action under the Whistleblower Act. Schultz's disagreement with what he perceives to be TECO's lack of effort with regard to its conservation plans and programs does not disclose an activity, policy or practice of TECO that violates a law, rule or regulation.

Id. at 606. As in Schultz, there is no cause of action in the present case where an employee simply sends a memorandum complaining about the manner in which the company's business is conducted, but does not identify any rule, law or regulation which is being violated.

The McEowen memoranda simply do not notify Jones of any illegal activity. Because the memoranda fail on their face to identify any illegal activity and afford no opportunity to cure, no material issue of fact remains with respect to McEowen's Counterclaim. The Second District's ruling on this issue should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent, Jones Chemicals, Inc., requests that the decision of the Second District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by U.S. Mail this _____ day of December, 1999 to Roger L. Young, 1800 Second Street, Suite 710, Sarasota, Florida 34236.

_____
William C. Guerrant, Jr.