SUPREME COURT OF FLORIDA

WILLIAM MCEOWEN,

Petitioner,

vs.

CASE NO. 96,676
2nd District Court of Appeal No. 98-04392

JONES CHEMICALS, INC.,

Respondent.
_____/

PETITIONER'S AMENDED INITIAL BRIEF

APPEAL FROM DECISION OF
SECOND DISTRICT COURT OF APPEAL
CASE NO. 98-04392

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STATEMENT OF THE FACTS AND CASE

Prior to March 19, 1998, Petitioner was a branch manager employed by the Respondent. During his employment, Petitioner learned that Respondent had previously been involved in and had committed violations of anti-trust and/or price fixing laws which caused it to become involved in litigation with customers and/or agency regulators. See, City of Tuscaloosa; et al, v. Jones Chemical; et al, 12 Fla. L. Weekly, Federal C217 (11th Cir November 13, 1998). Subsequently, during his employment, Petitioner learned that Harcros Chemicals, Inc., Allied Chemical, and Respondent were involved in an agreement to price fix the chlorine and bleach market by agreeing to high bid and/or no bid potential customers. This agreement was made so that Respondent could keep its customer market stable and/or so that each individual company would have its bid accepted on a rotating basis with high margins. In March, 1998, Petitioner, 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 Respondent. The employer had a reasonable opportunity to correct the activity, policy or practice, but instead, on or about March 19, 1998, Petitioner was terminated for opposing and/or objecting to the illegal practices. (Appendix #2).

Respondent initially filed a Complaint alleging that Petitioner divulged trade secrets without the consent of Respondent. Petitioner filed a Counterclaim against Respondent, JONES CHEMICALS, INC., on April 16, 1998. In paragraph 8 of the

Counterclaim Petitioner alleges that he "...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..."

During the limited discovery in this case, the Respondent served two sets of Interrogatories, each containing one question. Respondent's Second Set of Interrogatories requested the identity of documents referred to in paragraph 8 of the Counterclaim, in which Petitioner claimed to have given notice to his employer.

Attached to the Answer to the Second Set of Interrogatories (Appendix #3) are two memoranda, Exhibits B & C, each prepared by the Petitioner. Exhibit C states that if the market is disturbed in Florida and a price war breaks out, "heads will roll;" that Petitioner is "extremely uncomfortable with the market area because of restrictions;" and, that he hopes to talk to the president of the company. Exhibit B to the Counterclaim was written the day before Exhibit C. Petitioner had learned during his employment of Respondent's history of involvement in price fixing, and when he observed it continuing, he wrote the memoranda expressing his discomfort.

Respondent filed a Motion for Summary Judgment claiming that the two memoranda which Petitioner claimed to satisfy the written notice requirement under Florida Statute Section 448.103(c), and as interpreted by Potomac System Engineering, Inc. v. Deering, 683 So.2d 180 (Fla. 2d DCA 1996), were, as a matter of law,

insufficient notice to the Respondent to entitle the Petitioner to recover under the Whistle Blower Act. Respondent argued that the memoranda did not identify the illegal activity, policy, or practice, and did not afford the Respondent a reasonable opportunity to correct the illegal activity, policy, or practice (paragraph 4 of Motion for Summary Judgment at Appendix #4).

A hearing was held on October 22, 1998, and final summary judgment was granted on the Counterclaim. (Appendix #5). A timely appeal followed to the second district court of appeals who affirmed the decision of the trial court and certified conflict with the third and fifth districts. See, McEowen v. Jones Chemicals, 24 Fla. L. Weekly D2081 (2nd DCA September 17, 1999).

The Petitioner then filed his notice of appeal to this court.

SUMMARY OF THE ARGUMENT

During his employment, Petitioner learned that Respondent and other chlorine companies were involved in an agreement to price fix the chlorine and bleach market by agreeing to high-bid and/or no-bid potential customers. In March, 1998, Petitioner, in writing, brought this illegal activity to the attention of a supervisor, and objected to participation in the illegal activity. The employer had a reasonable opportunity to correct the activity, but, instead, on March 19, 1998, Petitioner was terminated.

Written notice should not apply to a Whistle Blower case pursuant to §448.102(3) because the employee has already objected or refused to participate in alleged illegal activity, so written notice to the employer to cure would be unnecessary. Furthermore, an employee who was terminated on the spot by his supervisor for failure to participate in an illegal activity has no opportunity to deliver the so-called required written notice, and, therefore, the written notice requirement should apply. The general intent behind the Whistle Blower's Act can only reasonably be interpreted as meaning that written notice and opportunity to cure as a pre-condition to bringing suit only applies to alleged violations of Subsection 448.102(1).

The Petitioner did provide written objections to participating in a price-fixing or price war. The memoranda were sent to his superior, and he hoped to speak to the company president directly about the situation. Because the Act does not specify either what type or form of written notice is required, or its contents, the memoranda in this

case should be sufficient detail to enable the employer to investigate it, and thus would fulfill the requirement of written notice.

ARGUMENT

I. Whether an employee who brings an action under Section 448 of the Whistle Blower Protection Act, alleging retaliatory personnel action because of employee's objection to activity or practice of the employer, which is in violation of a law, rule, or regulation, is required to give written notice to the employer prior to filing the action.

The Petitioner's Counterclaim was filed pursuant to Fla. Stat. Section 448.102(3) alleging adverse employment consequences as a result of objecting to illegal price fixing activities. The notice requirement of Section 448.102, when read apart from Section 408.103, appears to not apply to an action brought under subsection (3). Notice and opportunity to cure is not mentioned in the other subsections. However, subsection 448.103(1), setting forth an employee's remedy for being the victim of retaliatory conduct by an employer, creates an ambiguity or uncertainty as to whether the notice provision is limited to violations of subsection (1) of Section 448.102, or whether it applies to all three types of whistle blower violations described in Section 448.102. Paragraph (c) of subsection 448.103(1) provides that an employee may not recover in *any* action if he fails to notify his employer "as required by section 448.102(1)." One conclusion that could be drawn is that paragraph (c) of subsection 448.102(1) incorporates the notice requirement to all three types of actions.

Whether written notice to the employer is a required element of *all* whistle

blower actions has been addressed by three district courts of appeal with each reaching different conclusions. In Baiton v. Carnival Cruise Lines, Inc., 661 So.2d 313 (Fla. 3d DCA 1995), the third district held that the notice requirement applied only to actions under Subsection 448.102(1). Baiton, an employee of Carnival Cruise Lines, agreed to testify on behalf of a fellow employee in the latter's lawsuit against Carnival. Baiton alleged that Carnival attempted to compel him to lie in this other lawsuit and he refused. Baiton was then fired and brought an action against Carnival under the Whistle Blower Act. The trial court dismissed Baiton's complaint with prejudice. On appeal, Carnival argued that the dismissal was proper because Baiton had failed to give Carnival written pre-suit notice. The third district disagreed, explaining as follows:

> 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* [emphasis in original] 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*.
>
> The reference to 'this subsection' means subsection 448.102(1). Consequently, where an employee asserts a violation of subsection 448.102(1), the employee is required to give written notice to the supervisor or employer and an opportunity for the employer to correct the activity, policy, or practice. Similarly, if the employee brings a lawsuit

> against the employer alleging a violation of subsection 448.102(1), the employee may not recover 'if he failed to notify the employer about the illegal activity, policy, or practice *as required by s. 448.102(1).' Id.* Section 448.103(1)(c) [emphasis in original] [footnote omitted].
>
> 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.* Section 448.102(3). In the present case Baiton is proceeding under subsection 448.102(3). As there is no written notice requirement for subsection 448.102(3), Carnival's objection on this point is not well taken.

661 So.2d at 316.

The second district reached the opposite conclusion in Potomac Systems Engineering, Inc. v. Deering, 683 So.2d 180 (Fla. 2d DCA 1996). In that case, Deering alleged that he had been fired after he refused to participate in misconduct relating to the use of government equipment. Potomac denied these allegations and claimed that Deering was terminated because he had made certain statements which jeopardized the company's relationship with the government. The jury found in favor of Deering.

On appeal, the employer argued that Deering did not have a cause of action under the Whistle Blower's Act because he did not provide written notice. Deering

contended that an employee's cause of action does not depend on written notice unless the employee is acting pursuant to section 448.102(1). The second district court rejected that argument, reasoning that:

> Section 448.103(1) affords a remedy to employees who have been retaliated against for actions they have taken pursuant to either section 448.102(1) or 448.102(2) or 448.102(3). This remedy is only available, however, if the employee has complied with section 448.103(1)(c). We read section 448.103(1)(c) to provide that an employee may not recover in any action brought pursuant to section 448.103(1) if he fails to notify the employer about the illegal activity, policy, or practice as required by section 448.102(1), *i.e*. in writing, bringing the activity, policy, or practice to the attention of a supervisor or the employer and affording the employer a reasonable opportunity to correct the activity, policy, or practice.
>
> Although we recognize that the whistle blower's act is designed to encourage employees to report certain violations without fear of reprisal, we do not believe it is unduly burdensome to require employees to notify their employer of their complaint in writing before being entitled to the civil remedies provided by the act. The requirement promotes the purpose of the act by affording the employer the first opportunity to correct a violation. This allows the employer to avoid, among other things, unnecessary harm to its reputation, the burden of undergoing an investigation and preparation for a hearing or trial.

683 So.2d at 182.

In Jenkins v. The Golf Channel, 714 So.2d 558 (Fla. 5th DCA 1998) review granted, 728 So.2d 202 (Fla. 1998), the fifth district held that the written notice

requirement as a precondition to bring suit only applies to alleged violations of subsection 448.102(1). The court explained that:

> The Whistle Blower's Act is remedial in nature and so should be liberally construed. See Schultz v. Tampa Electric Co., 22 Fla. L. Weekly D22561 (Fla. 2d DCA 1997); see also Arrow Air, Inc. v. Walsh, 645 So.2d 422 (Fla. 1994). The purpose of the Whistle Blower's Act is to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public. Arrow Air; Vanacore v. UNC ARCDO, Inc., 697 So.2d 892 (Fla. 1997). Requiring written notice and an opportunity to cure would seem to frustrate the intent of the Legislature in many circumstances. For example, under subsection 448.102(2), the employee may not be allowed to give notice if called to testify before a "closed door" investigation. Under subsection 448.102(3), the employee has already objected or refused to participate in alleged illegal activities so written notice to the employer to cure would be superfluous. Furthermore, consider an employee who is terminated on the spot by his supervisor for refusing to dump hazardous waste in a waterway. No opportunity is reasonably available to deliver the so-called required written notice in such a case. If the legislature, for some reason, meant to require the employee to protect the termination after the fact with a written notice addressed generally to the employer, it has missed the mark with the confusing language of this statute.
>
> The ambiguity in sections 448.102 and 448.103 can be resolved by recognizing that each section operates in its own sphere. Section 448.102 outlines three different "prohibitions." Under subsections 448.102(2) and (3), retaliatory action against an employee who provides information pursuant to a government investigation or objects to his/her employer about any illegal activity is prohibited unconditionally. Under subsection 448.102(1),

> retaliatory action against an employee who has disclosed or threatens to disclose, in writing and under oath, information to a government agency regarding an illegal activity is prohibited *only* if the required notice and opportunity to cure has been given. Section 448.103 provides for the remedies and relief available when the prohibited retaliatory acts set forth in section 448.102 occur. We conclude paragraph (c) of subsection 448.103(2), read in pari materia with section 448.102 and the other portions of section 448.103, and in light of the general intent behind the Whistle Blower's Act, can only reasonably be interpreted as meaning that written notice and opportunity to cure as a precondition to bringing suit only applies to alleged violations of subsection 448.102(1).

This court has granted review on the issue of whether or not written notice is a precondition to bring suit. Jenkins v. The Golf Channel, 714 So.2d 558 (Fla. 5th DCA 1998) review granted, 728 So.2d 202 (Fla. 1998). This court should review and approve the opinions of the third and fifth district courts of appeal.

II. Whether the written notices which are attached to the Counterclaim are insufficient notice as a matter of law to recover under the Whistle Blower Protection Act.

The Respondent in its Motion for Summary Judgement argued that the notices that were claimed to satisfy the written notice precondition were insufficient, as a matter of law, to allow Petitioner to recover under the Whistle Blower Act. The Respondent claimed that the memoranda do not identify the illegal activity, policy or practice, and do not afford a reasonable opportunity to correct any such activity, policy or practice, relying upon Schultz v. Tampa Electric Company, 704 So.2d 605 (Fla. 2d DCA 1997)(Employee statements in a memorandum to his employer which set forth disagreements with what employee perceived to be employer's lack of effort regarding its conservation "programs" did not disclose activity, policy or practice of company that violated law, rule, regulation, and the statements were ruled insufficient to state a cause of action under the Whistle Blower Act).

The second district affirmed holding that...the two memoranda..."fail to disclose any illegal activity, policy or practice of Jones Chemical, Inc."

The Act does not specify either the type or form of written notice required, or the contents of the notice, except that it must bring the activity, policy, or practice to the attention of a supervisor or the employer and it must afford the employer a reasonable opportunity to correct the activity, policy, or practice. In Exhibit C attached to the

Answer to Interrogatories (Appendix # 3) the Petitioner states to his supervisor that he is extremely uncomfortable because of market restrictions imposed by his employer, and that there had been a threat that "heads will roll" if the Florida market is disturbed and a price war breaks out. In that memorandum that Petitioner states that he looks forward to discussing these concerns with the president of the corporation, Jeff Jones.

The Petitioner alleges in his Counterclaim that he had become aware of the history of price fixing by Respondent, and that when he learned of the continuing violations and threats, he wrote the memoranda.

The issue of whether or not the memoranda are sufficient to identify an illegal activity, policy or practice, and/or afford a reasonable opportunity to correct such activity, policy or practice is a jury question, and should not be decided by summary judgment. Because it is the Petitioner's position that his intent in sending the memoranda to his supervisor was to bring the activity, policy or practice to the attention of his supervisor, and that the memoranda afforded the employer a reasonable opportunity to correct the activity, policy, or practice, an issue of fact arose, and summary judgment should not have been granted. Factual disputes, such as whether or not the notice was sufficient and attempts to interpret intent are jury questions and preclude summary judgment. Wallace v. Pensacola Rent-A-Wreck, Inc., 616 So.2d 1048 (5th DCA 1993). (When evidence before court on summary judgment is

conflicting or will permit different reasonable inferences, it should be submitted to jury and summary judgment is precluded.)

Even if this court finds that the issue is not a jury question, the notices should be found to be sufficient under the facts of this case. It is clear that the Petitioner is talking about market restrictions imposed by his employer and that if the market is disturbed and a price war breaks out, "heads will roll."

These memoranda sufficiently identify that illegal practice of price fixing, threats by the employer not to disturb the status quo, and the Petitioner's desire to speak to the president of the company to address his concerns. While the Act neither specifies how detailed nor in what form is required of the written notice, the memoranda at issue give the employer enough information to investigate and correct the practice. See, Metropolitan Dade County v. Coats, 559 So.2d 71 (Fla. 3 DCA 1990) (Under Section 768.28(6), written notice is prerequisite to lawsuit. However, subsection (6) of 768.28 does not prescribe any particular form, other than in writing, for furnishing notice. As long as the notice gives sufficient detail to enable state agencies to investigate, then it fulfills the requirement of subsection (6).).

CONCLUSION

This court should approve the decisions of the third and fifth district courts of appeal, and reverse the decision of the second district court of appeal.

The memoranda which Petitioner claims satisfies the written notice requirement as interpreted by the second district court of appeal, are sufficient. The memoranda identify the issues of price fixing, the threat that the market must remain undisturbed, and an attempt or desire to discuss the issue with the president of the corporation.

Respectfully submitted,

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By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to William C. Guerrant, Jr., Esquire, P.O. Box 2231, Tampa, FL 33601, this ____ day of November, 1999.

LAW OFFICE OF ROGER L. YOUNG, P.A.

By:_____

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