IN THE FLORIDA SUPREME COURT

CASE NO. SCO9-172
DCA Case No. 5D08-98
Circuit Court Case No.: 2005-32018-CICI

CHARLENE M. BIFULCO,

Petitioner,

v.

PATIENT BUSINESS & FINANCIAL SERVICES, INC.,

Respondent.

ANSWER BRIEF FILED ON BEHALF OF RESPONDENT

ON REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

This is an appeal, pursuant to Fla. Const. Art. V §(3)(b)(3) for conflict jurisdiction under Fla. R. App. P. 9.120, from the Fifth District Court of Appeal's order affirming in part and reversing in part, the Final Summary Judgment rendered on December 13, 2007, granting final summary judgment in favor of defendant, Patient Business and Financial Services ("PBFS"), as to both Count I and Count II of the complaint and incorporating the Order of Dismissal as to Count II of Plaintiff's Complaint rendered on October 16, 2007.

It is undisputed that PBFS was established by and is a wholly consumed subsidiary of Halifax Hospital Medical Center ("Halifax Hospital"), which is an independent taxing district for the State of Florida. (R. Vol. II, p.185)[1]. PBFS was established to assist Halifax Hospital in carrying out its functions. (R. Vol. II, p.185). Specifically, PBFS operates as its billing arm, responsible for negotiating contracts, billing patients, patient registration, and case management, among other things. (R. Vol. II, p.185). Halifax Hospital is PBFS' only client, has complete control over the operations and management of PBFS, and shares the same Board of Directors of

[1] R._____refers to the Record on Appeal and the volume and page of the record to which reference is made.

PBFS. (R. Vol. II, p.186). Further, the Internal Revenue Service determined that PBFS is an "instrumentality of the state." (R. Vol. II, p.186).

Plaintiff, Charlene Bifulco ("Bifulco"), began her employment with PBFS on July 29, 2002. (R. Vol. I, p. 85). On April 22, 2004, Bifulco was counseled by and received a Corrective Action Counseling Memo from Tracy Robson, Bifulco's direct supervisor, due to complaints for having a negative attitude and being rude to patients and staff. (R. Vol. II, p. 209). Specifically, Bifulco threatened to come to work with a scalpel and cut up one of her supervisors. (R. Vol. IV, pp. 615-619). She also threatened to bring an Uzi to work. (R. Vol. IV, p. 617). On April 28, 2004, Bifulco was placed on administrative leave pending an investigation of the complaints. (R. Vol. II, p.209). As a result of threatening the lives of her supervisors and coworkers, Bifulco was terminated effective May 3, 2004. (R. Vol. II, pp.210, 224-225).

On or about December 10, 2004, Bifulco's counsel, Frederick C. Morello, Esquire, mailed correspondence regarding Bifulco's claims to David J. Davidson, Esquire, General Counsel for Halifax Hospital. (R. Vol. IV, pp. 636-637). On February 2, 2006, Bifulco filed a two count action against PBFS. (R. Vol. I, pp. 85-91).

In Count I, Bifulco alleged that her employment was terminated in violation of Florida's Whistle Blower Act, Fla. Stat. §448.102(3) (2006). (R. Vol. I, pp. 88-90).

Specifically, Bifulco claimed that she was terminated for objecting to the actions of manager William Benham on March 26, 2004 alleging that he ordered another admitting registrar to sign a doctor's name to a Physician's Telephone Order for a prescription for ativan. (R. Vol. I, p. 89). In Count II, Bifulco alleged that her employment was terminated in violation of Florida's Workers' Compensation Retaliation Act, Fla. Stat. §440.205 (2006). (R. Vol. I, pp. 90-91). Specifically, Bifulco claimed that she was terminated because she filed an employee incident report for workers' compensation after allegedly injuring her back when restocking the admitting office on or about April 19, 2004. (R. Vol. I, pp. 90-91).

PBFS filed an answer on March 3, 2006 and asserted as an affirmative defense that Bifulco failed to state a claim upon which relief may be granted (SR. Vol. II, pp. 724-733).[2] On April 5, 2006, PBFS responded to Plaintiff's First Requests for Admissions to Defendant, No. 3, inadvertently admitting that PBFS is an "employer" under Fla. Stat. §448.101(3). (R. Vol. II, p. 223).

In all other respects, PBFS maintained that it was an agency of the state via its relationship with Halifax Hospital. In the complaint, PBFS denied the paragraph alleging it was an "employer" under Fla. Stat. §448.101(3), and further explained its affiliation with Halifax Hospital in the depositions of PBFS' Director on October 4,

[2] SR.____refers to the Supplemental Record of Appeal and the volume and page of the record to which reference is made.

2006 and of PBFS' General Counsel on July 10, 2007. (R. Vol. IV, pp. 590-593, 605, 659). Additionally, both PBFS and Bifulco's counsel in this matter routinely referred to defendant as "Halifax" throughout the depositions in this matter, and PBFS' non-expert witness list served January 26, 2007 predominantly listed the relevant witnesses as Halifax Hospital employees. (SR. Vol. II, pp. 734-737).

On January 31, 2007, Bifulco moved to amend her complaint to add a claim for punitive damages. (R. Vol. I, pp. 105-106). PBFS expressly asserted its status as a state agency as a defense.[3] On February 27, 2007, the lower Court denied Bifulco's motion to amend, finding that PBFS is a state agency pursuant to its relationship to Halifax Hospital within the meaning of Fla. Stat. §768.28 and directing PBFS to submit an affidavit of an officer of Halifax Hospital specifying the relationship. (R. Vol. I, p. 178-179).

On March 8, 2007, PBFS filed the affidavit of David J. Davidson, General Counsel of Halifax Hospital, which included as exhibits the Articles of Incorporation and Bylaws of PBFS. (R. Vol. II, pp. 183-196). With this, it is undisputed that PBFS was established by and is a wholly consumed subsidiary of Halifax Hospital, which is an independent taxing district for the State of Florida. (R. Vol. II, p. 185).

[3] The February 23, 2007 transcript from the hearing on Bifulco's motion to amend the complaint is referenced in the Supplemental Record of Appeal as Exhibit C and attached to PBFS's Directions to the Clerk as Exhibit C.

On March 28, 2007, PBFS filed an unopposed motion for continuation of the trial "as a result of essential non-party witness availability, namely William Benham and Linda Hill, and for reasons of which the duty of loyalty and confidentiality prohibit counsel for PBFS from disclosing," which was granted on April 4, 2007. (R. Vol. II, pp. 251-254).

On May 17, 2007, PBFS filed a motion for final summary judgment as to both counts of the complaint for failure to state a cause of action. (R. Vol. II, pp. 261-265). PBFS asserted that Bifulco failed to comply with the pre-suit notice requirements of Fla. Stat. §768.28(6) to the Department of Financial Services, which could not be cured because more than three (3) years had lapsed since Bifulco's termination on May 3, 2004. (R. Vol. II, p. 262). On October 16, 2007, the trial court dismissed Count II with prejudice on this basis. (R. Vol. III, pp. 532-535). Specifically, the Court stated, in pertinent part:

> This Court has previously determined that Defendant, by virtue of its subsidiary relationship to Halifax Hospital Medical Center, is a state agency for purposes of section 768.28.
>
> Plaintiff failed to present her claims in writing to the Department of Financial Services within the three-year period required by section 768.28(6)(a). Pursuant to section 768.28(6)(b), "the requirements of notice to the agency and denial of the claim…are conditions precedent to maintaining an action." Where the time for pre-suit notice has expired, and it is apparent that the plaintiff can not fulfill the requirement, the trial court must dismiss the complaint with prejudice. *Levine v. Dade County School Bd.*, 442 So.2d 210, 213 (Fla. 1983).

> In Count II, Plaintiff asserts a claim of retaliatory discharge and seeks relief under section 440.205, Florida Statutes. Because Plaintiff did not comply with the pre-suit notice requirements of section 768.28(6), the claim asserted in Count II is due to be dismissed with prejudice. *Kelley v. Jackson County Tax Collector*, 745 So.2d 1040, 1040 (Fla. 1st DCA 1999) (holding that "[a]n action for retaliatory discharge under section 440.205 is clearly a 'tort' within the meaning of section 768.28 and pre-suit notice is therefore required").
>
> With regard to Plaintiff's 440.205 claim, Plaintiff's reliance on *Maggio v. Florida Dep't of Labor & Employment Security*, 899 So.2d 1074 (Fla. 2005) is misplaced. In *Maggio*, the Court held that "claims filed pursuant to the Florida Civil Rights Act of 1992 are not subject to the pre-suit notice requirements of section 768.28(6)." 899 So.2d at 1075. The *Maggio* Court specifically declined to "determine the correctness" of the *Kelley* decision, *Id*. at 1081 n.4, but did distinguish the Florida Civil Rights Act from section 440.205:
>
> > In contrast to the Florida Civil Rights Act, the retaliatory discharge provision of the Workers' Compensation Law has no pre-suit notice requirements, no designated forum for adjudicating claims, no provision for the type of relief to which an aggrieved party is entitled, and no reference to any portion of section 768.28.
>
> *Id.* at 1081. Pursuant to *Kelley*, therefore, Plaintiff's 440.205 claim is due to be dismissed for failure to fulfill the pre-suit notice requirements of section 768.28(6). Although a four-year statute of limitations applies to a workers' compensation retaliation action under section 440.205, dismissal with prejudice is proper in light of the three-year period for pre-suit notice prescribed in section 768.28(6).

(R. Vol. III, pp. 533-534).

On October 12, 2007, PBFS filed a second motion for final summary judgment as to Count I for a violation of the Private Whistle Blower Act ("Private WBA"). (R.

Vol. II, pp. 359-361). PBFS argued that it did not meet the statutory definition of "employer" under the Private WBA because it was a state agency and not a private employer, and as such, Bifulco failed to state a cause of action. (R. Vol. II, pp. 359-360).

Prior to the hearing on the motion, PBFS moved to withdraw and amend its response to Plaintiff's First Requests for Admissions to Defendant, No. 3, due to error and inconsistency with its position in the litigation of this case. (R. Vol. IV, pp. 581-584). The trial court granted the motion to withdraw the admission. (R. Vol. I, p. 82). Specifically, the Court stated:

> I'm going to grant [PBFS's] motion to be released from that admission because I can't go forward on an admission that's contrary to what everybody knows is the situation as it exists. It would be to do a futile thing to try a case based on a faulty premise like that.

(R. Vol. I, p. 82).

On December 13, 2007, the trial court dismissed Count I and granted Final Summary Judgment as to both counts, stating:

> The Court found that there was no genuine issue of material fact and that because defendant is a state agency, it is not an "employer" as defined by Fla. Stat. §448.103(3) of Florida's Private Whistle Blower Act.

(R. Vol. IV, pp. 678-679).

The final order encompassed the dismissal of both Count I and Count II. (R. Vol. IV, pp. 678-679). On January 9, 2008, Bifulco filed a Notice of Appeal and the

appeal to the Fifth District Court of Appeal commenced. (R. Vol. IV, pp. 680-682). On January 2, 2009, the Fifth District Court of Appeal issued an opinion. The appellate court affirmed the trial court's dismissal of Count I, violation of Florida's Whistle Blower Act, and reversed the trial court's dismissal of Count II, Worker's Compensation Retaliation claim.

STANDARD OF REVIEW

The standard of review governing the ruling of a trial court on a motion for summary judgment is *de novo*. *State v. Presidential Women's Center*, 937 So.2d 114, 116 (Fla. 2006). *See Major League Baseball v. Morsani*, 790 So.2d 1071, 1074 (Fla. 2001). Rule 1.510(b), Florida Rules of Civil Procedure, permits a court to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 1.510(b), Fla.R.Civ.P. The burden of proving an absence of genuine issue of material fact is upon the moving party and is limited only to those issues made by the pleadings. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966). Summary judgment is a useful tool designed to provide trial judges with the authority to avoid the expense and delay of trial or an unnecessary lawsuit when a party is unable to support by any competent evidence any material issue of fact. *National Airlines v. Florida Equipment Co. of Miami*, 71 So.2d 741 (Fla. 1954).

SUMMARY OF ARGUMENT

Bifulco's claim for workers' compensation retaliation under Fla. Stat. §440.205 is a tort within the meaning of section 768.28 and pre-suit notice is required. *Kelley v. Jackson County Tax Collector*, 745 So.2d 1040 (Fla. 1st DCA 1999). Fla. Stat. §768.28 requires a plaintiff to give notice of her claims in writing to the appropriate agency and the Department of Financial Services within three (3) years of the claim. Bifulco failed to allege compliance with, and otherwise failed to provide the requisite pre-suit notice to the Department of Financial Services. More than three (3) years had elapsed since the date of Bifulco's employment termination, and the accrual of both of her causes of action. As such, the trial court properly dismissed Bifulco's claim for workers' compensation retaliation and the appellate court's decision reversing the order should be reversed.

A claim can only be brought under the Private WBA against an "employer," which is defined as "any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." Fla. Stat. §448.101(3). PBFS was established by and is a wholly consumed subsidiary of Halifax Hospital, which is an independent taxing district for the State of Florida. As such, PBFS is an instrumentality of the state and government entity, not a private employer. PBFS consistently maintained its status as a government entity, except for an inadvertent

error in response to a request for admission, which was properly withdrawn. Because PBFS is a governmental entity and not a private employer, Bifulco failed to state a cause of action under the Private WBA and summary judgment was properly granted by the trial court in favor of PBFS and against Bifulco and the appellate court's decision should be affirmed.

ARGUMENT

I. BIFULCO FAILED TO COMPLY WITH THE PRE-SUIT NOTICE REQUIREMENTS OF FLA. STAT. §768.28(6), THEREFORE, THE TRIAL COURT PROPERLY DISMISSED BIFULCO'S CLAIM FOR WORKERS' COMPENSATION RETALIATION UNDER FLA. STAT. §440.205.

The existing state of the law is clear: "An action for retaliatory discharge under Fla. Stat. §440.205 is clearly a tort within the meaning of Fla. Stat. §768.28 and pre-suit notice is therefore required." *Kelley v. Jackson County Tax Collector*, 745 So.2d 1040 (Fla. 1st DCA 1999) (citing *Scott v. Otis Elevator Co.*, 524 So.2d 642 (Fla. 1988) (holding that retaliatory discharge is tortious in nature)); *see also Osten v. City of Homestead*, 757 So.2d 1243, 1244 (Fla. 3d DCA 2000) (affirming the trial court's dismissal of the count for retaliatory discharge where no statutory notice of the claim was provided pursuant to Fla. Stat. §768.28).

Fla. Stat. §768.28(6) provides in pertinent part:

> (a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, ... presents such a claim in

> writing to the Department of Financial Services, within three years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing...
>
> (b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action ...

Fla. Stat. §768.28(6) requires written notice to the agency or subdivision and Department of Financial Services within three (3) years of the accrual of the claim before suit may be filed against any state agency. *Levine v. Dade County School Bd.*, 442 So.2d 210, 212 (Fla. 1983). In *Levine*, the District Court certified the following question to this Court:

> May a plaintiff maintain an action to recover damages from a state agency or subdivision, pursuant to section 768.28(6), Florida Statutes (1977), if he notified the appropriate agency but failed to present a written notice of claim to the Department of Insurance, which has no interest or role in the proceedings other than to report claims to the legislature, and no prejudice resulted?

Id. at 212.

The Court ruled:

> We are compelled to answer the question in the negative and approve the decision of the district court of appeal.
> …
> Section 768.28(6) clearly requires written notice to the department within three years of the accrual of the claim before suit may be filed against any state agency or subdivision except a municipality. Because this subsection is part of the statutory waiver of sovereign immunity, it must be strictly construed. [citations omitted]. In the face of such a

> clear legislative requirement, it would be inappropriate for this Court to give relief to the petitioner based on his or her own beliefs about the intended function of the Department of Insurance in the defense of suits against school districts. Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute. [citations omitted].

Id. at 212-213. "Where the time for such notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement, the trial court has no alternative but to dismiss the complaint with prejudice." *Id.* at 213.

Several years later, this Court again found that the failure to give pre-suit notice is fatal. In *Menendez v. North Broward Hospital District*, 537 So.2d 89 (Fla. 1988), the plaintiff brought a tort action against a hospital, but failed to plead and prove that the plaintiff complied with the pre-suit notice requirements of Fla. Stat. §768.28(6) (1977). *Id.* at 90. The hospital moved to dismiss with prejudice four (4) years later asserting that the plaintiff failed to state a cause of action; namely the plaintiff failed to plead the requisite pre-suit notice and could not cure the defect. *Id.* The plaintiff asserted that the hospital, by its actions, waived the notice requirement as to the hospital and the Department and was estopped from raising notice as a defense. *Id.* The Department was not a party to the case and did not appear in the case. *Id.* at 91.

In *Menendez*, the District Court certified the following question to this Court:

> In a tort action brought against a governmental agency where the Department of Insurance is not made a party, can the statutory

> requirement of notice to the Department contained in Section 768.28(6) be waived by conduct of the defending agency?

Id.

Affirming the order dismissing the plaintiff's case with prejudice, the Court in *Menendez* held:

> This Court has thus determined that absent an allegation of departmental notice, the complaint fails to state a cause of action. ... [N]otice to the Department is an essential element of the cause of action. As such, the right to raise this defense is controlled by Florida Rule of Civil Procedure 1.140(h)(2) [relating to the defense of failure to state a cause of action; reciting rule in its entirety]. Under our ruling in *Levine* and the facts presented here, the hospital raised a viable and timely defense which could be asserted by motion any time prior to or at the trial on the merits.

Id.

Bifulco failed to plead and comply with the pre-suit notice requirements of Fla. Stat. §768.28. Specifically, Bifulco failed to allege compliance with, and otherwise failed to provide the requisite pre-suit notice to the Department of Financial Services. Such notice is a condition precedent to maintaining the action against PBFS. *Levine*, 442 So.2d at 211-212; *see also* Fla. Stat. §768.28(6). At the time of hearing on summary judgment, more than three (3) years had elapsed since the date of Bifulco's employment termination, and the accrual of both of her causes of action. Therefore, the time for Bifulco to give such notice had lapsed so that it was apparent that she

cannot fulfill the requirement. Thus, the lower court properly dismissed Bifulco's claim for workers' compensation retaliation with prejudice.

Bifulco's reliance on *Florida Dep't of Education v. Garrison*, 954 So.2d 84 (Fla. 1st DCA 2007) is misguided, because *Garrison* held that Fla. Stat. §768.28(6) has no application to a claim under Florida's *Public* Whistle Blower's Act ("Public WBA"), *emphasis added.* In the context of the Public WBA, *Garrison* analyzed the Florida Supreme Court's opinion in *Maggio v. Fla. Dep't of Labor and Employment Sec.*, 899 So.2d 1074 (Fla. 2005), which held that the pre-suit notice requirements of Fla. Stat. §768.28(6) have no application to a cause of action under the Florida Civil Rights Act of 1992 ("FCRA").

The *Maggio* and *Garrison* decisions analyzed the legislative intent of the Public WBA and FCRA, respectively, assessing whether the statutes individually waived sovereign immunity, included pre-suit notice requirements, or expressly referenced Fla. Stat. §768.28. Both decisions specifically distinguished workers' compensation retaliation claims under Fla. Stat. §440.205.

The *Maggio* Court stated:

> [I]n contrast to the Florida Civil Rights Act, the retaliatory discharge provision of the Workers Compensation Law has no pre-suit notice requirements, no designated forum for adjudicating claims, no provision for the type of relief to which an aggrieved party is entitled, and no reference to any portion of section 768.28. See §440.205, Fla. Stat. (2003).

Maggio, 899 So. 2d at 1081. The Court concluded that the fact that pre-suit notice was required pursuant to Fla. Stat. §768.28 for a workers' compensation violation had no bearing on whether pre-suit notice was required under the Florida Civil Rights Act. *Id*.

The *Garrison* Court stated:

> We likewise conclude that the Public-Whistle-blower's Act is distinguishable from section 440.205, and therefore the decisions construing section 440.205 are not persuasive in resolution of the issue addressed in this case.

Garrison, 954 So.2d at 87.

Bifulco also argued that if the legislature intended for Fla. Stat. §768.28 to apply to a workers' compensation retaliation claim, it would have included a reference to the statute. Bifulco then cited a number of Florida statutes that expressly referenced section 768.28. Bifulco's argument is without merit, and attempts to turn the *Maggio* Court's analysis on its head as the *Maggio* court found the lack of such a reference significant in finding that pre-suit notice was required under section 768.28; not the other way around as Bifulco suggests.

Fla. Stat. §440.205 does not reference section 768.28, therefore, the statutes cited by Bifulco are not relevant. Further, it is presumed that statutes are passed with the knowledge of existing statutes, so courts must favor a construction that gives effect

to both statutes rather than construe one statute as being meaningless or repealed by implication. *Butler v. State*, 838 So.2d 554 (Fla. 2003); *see also*, i.e., *State v. Langdon*, 978 So.2d 263 (Fla. 4th DCA 2008) (statutes must be read together to ascertain their meaning). "There first must be a hopeless inconsistency between the two statutes before rules of construction are applied to defeat the express language of one of those statutes." *Freeman v. State*, 969 So.2d 473 (Fla. 5th DCA 2007). In fact, it is improper to resort to the canons of statutory construction when the texts of different statutes are plain and unambiguous. *Freeman*, 969 So.2d 473.

Other Florida statutes that reference section 768.28 are not relevant to whether pre-suit notice is required for a workers' compensation retaliation claim. Fla. Stat. §768.28 and Fla. Stat. §440.205 are not disparate and do not require reconciliation, so they should be read together giving meaning to both. That is what the First District Court of Appeal did in *Kelley* and the Third District Court of Appeal did in *Osten.* Because Bifulco's claim for workers' compensation retaliation under Fla. Stat. §440.205 is a tort within the meaning of section 768.28, pre-suit notice is required. *Kelley*, 745 So.2d 1040; *Osten*, 757 So.2d at 1244. The trial court properly dismissed Bifulco's claim for workers' compensation retaliation and the appellate court's reversal should be reversed.

II. PBFS DOES NOT QUALIFY AS AN "EMPLOYER" UNDER FLA. STAT. §448.101(3), THEREFORE, THE TRIAL COURT PROPERLY DISMISSED BIFULCO'S CLAIM UNDER THE PRIVATE WBA.

In the Initial Brief, Bifulco argued that the trial court erred in permitting PBFS to withdraw its answer to a request for admission admitting it was an "employer" as defined pursuant to Fla. Stat. §448.101(3). This decision is reviewed by an abuse of discretion standard. *See*, i.e., *Ramos v. Growing Together, Inc*., 672 So.2d 103 (Fla. 4th DCA 1996). Here, the trial court did not abuse its discretion in granting PBFS' motion to withdraw its request for admission.

Fla.R.Civ.P. 1.370(b) provides that the Court may allow a party to withdraw or amend a prior admission "when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits." (emphasis added).

The liberal standard favors amendment in order to allow disposition on the merits. *Melody Tours, Inc. v. Granville Mkt. Letter, Inc.*, 413 So.2d 450, 451 (Fla. 5th DCA 1982); *Istache v. Pierre*, 876 So.2d 1217 (Fla. 4th DCA 2004). The party opposing the withdrawal must prove that such withdrawal will prejudice it in maintaining an action on the merits. Fla.R.Civ.P. 1.970(b). Having to prepare for trial on the merits is not the type of prejudice which the plaintiff can raise to combat the

defendant's motion for withdrawal because preparing for a trial on the merits was the plaintiff's burden from the beginning. *Durrance v. Thompson*, 486 So.2d 711 (Fla. 5th DCA 1986).

Here, PBFS expressly and consistently maintained that it is a corporation affiliated with Halifax Hospital and under the "umbrella" of Halifax Hospital from the inception of the lawsuit to the present. In the complaint, PBFS denied the paragraph alleging it was an "employer" under Fla. Stat. §448.101(3), and further explained its affiliation with Halifax Hospital in the depositions of PBFS' Director on October 4, 2006 and of PBFS' General Counsel on July 10, 2007. (R. Vol. IV, pp. 590-593, 605, 659), (SR. Vol. II, pp. 724-733). Additionally, both PBFS and Bifulco's counsel in this matter routinely referred to defendant as "Halifax" throughout the depositions in this matter, and PBFS' non-expert witness list served January 26, 2007 predominantly listed the relevant witnesses as Halifax Hospital employees. (SR. Vol. II, pp. 734-737). Further, PBFS expressly asserted its status as a state agency as a defense to Plaintiff's Motion to Amend Her Complaint to Add Punitive Damages filed by Bifulco on January 31, 2007, which was denied because PBFS is an instrumentality of the state. (R. Vol. I, pp. 105-166).

On March 8, 2007, PBFS also filed the affidavit of David J. Davidson, General Counsel of Halifax Hospital, which was accepted by the Court. (R. Vol. I-II, pp. 183-

196). With this, it is undisputed that PBFS was established by and is a wholly consumed subsidiary of Halifax Hospital, which is an independent taxing district for the State of Florida. (R. Vol. II, p. 185). PBFS was established to assist Halifax Hospital in carrying out its functions, and specifically, PBFS operates as its billing arm, responsible for negotiating contracts, billing patients, patient registration, and case management, among other things. (R. Vol. II, p. 185). Halifax Hospital is PBFS' only client, has complete control over the operations and management of PBFS, and shares the same Board of Directors of PBFS. (R. Vol. II, pp. 185-186). Further, the Internal Revenue Service determined that PBFS is an instrumentality of the state. (R. Vol. II, pp. 186).

The response to Plaintiff's First Requests for Admissions to Defendant, No. 3, admitting that it is an "employer" under Fla. Stat. §448.101(3) stands isolated and in stark contrast to the position maintained by PBFS in every other instance. The trial court properly granted relief from such admission, finding that proceeding under the fiction that PBFS met the definition of employer under the Private WBA contrary to "what everybody knows is the situation as it exists." (R. Vol. I, p. 82). Refusing to allow PBFS to withdraw the admission would be to declare that a state agency must subject itself to liability under a statute whose express language is designed to exclude it from its reach. Bifulco could not and can not satisfy her burden of showing

prejudice. As such, the trial court did not abuse its discretion in granting PBFS' motion to withdraw.

III. PBFS IS NOT AN INDEPENDENT CONTRACTOR SUBJECT TO THE PRIVATE WBA, BUT INSTEAD, PBFS IS A STATE AGENCY THAT CAN BE SUED ONLY UNDER THE PUBLIC WBA.

Bifulco argued that because Halifax Hospital created PBFS as a separate entity, it was not legislatively created as a special taxing district and is therefore best described as an "independent contractor" under Fla. Stat. §112.3187. (Initial Brief, p. 28). Bifulco draws this conclusion claiming that PBFS has a contractual relationship with Halifax Hospital through its Articles of Incorporation and Bylaws and because Halifax Hospital is PBFS' only client. (Initial Brief, p. 32). As an independent contractor, Bifulco argued, lawsuits against PBFS can be brought under the Public WBA and Private WBA. *Id.* Bifulco's argument is without merit.

PBFS is not a private entity but instead an instrumentality of the state and therefore a government entity. A plaintiff can not state a cause of action for a violation of the Private WBA against a government entity. *Wallace v. School Bd. of Orange County, Fla.*, 41 F.Supp.2d 1321, 1331 (M.D. Fla. 1998). Contrary to Bifulco's allegation, the Private WBA and the Public WBA are mutually exclusive under the instant facts. *Id.*

An independent contractor is defined under Fla. Stat. §112.3187 as "a person, other than an agency, engaged in the business and who enters into a contract, including a provider agreement, with an agency." PBFS does not meet this definition. PBFS is a wholly consumed subsidiary of Halifax Hospital, which has complete control over the operations and management of PBFS. (R. Vol. II, p. 185). The Internal Revenue Service determined that PBFS is an "instrumentality of the state," therefore; it is part and parcel of Halifax Hospital as an agency and government entity. (R. Vol. II, p. 186). Finally, the Articles of Incorporation and Bylaws of PBFS are not signed by Halifax Hospital, are not part of an agreement with Halifax Hospital, and do not establish a contractual relationship between Halifax Hospital and PBFS. (R. Vol. II, p. 186).

Bifulco relies on *Dahl v. Eckerd Family Youth Alternatives*, 843 So.2d 956 (Fla. 2d DCA 2003) and *Hutchison v. Prudential Ins. Co. of America*, 645 So.2d 1047 (Fla. 3d DCA 1994) to support her assertion. In *Dahl,* the plaintiff sued her employer for allegedly violating the Private WBA. *Dahl,* 843 So.2d at 956. Ms. Dahl was employed by the Eckerd Youth Development Center, a private rehabilitative school for juvenile offenders, which was operated by Eckerd Family Youth Alternatives, Inc. pursuant to a contract with the Department of Juvenile Justice. The trial court dismissed the plaintiff's complaint, finding that the plaintiff's exclusive remedy was

the Public WBA. *Id.* at 957. The appellate court reversed the decision; however, the holding was limited to employees of independent contractors whose employers contract with public entities. *Id*. at 958. Specifically, the Court stated that the Public WBA is not the exclusive remedy for employees of independent contractors whose employers contract with state agencies. *Id.* "The fact that the employer might be an independent contractor of the state is incidental and does not exclude the employer's actions from the private-sector whistleblower act." *Id*.

In *Hutchison,* the issue was whether a former insurance salesman for Prudential could file an action under the Public WBA against the insurance company after being fired for reporting alleged unfair trade practices to the Monroe County Sheriff's Department, which maintained a contract with the insurance company for payroll deduction of premiums. *Hutchison,* 645 So.2d at 1048. The Third District Court of Appeal found:

> We think that the existence of the payroll-deduction contract between Prudential and the Monroe County Sheriff's Department qualifies Prudential as an "independent contractor" as defined in the statute. Where, as alleged here, an insurer enters into a payroll deduction agreement with a governmental agency, and then sells insurance policies to individual employees as policies which can be paid for through payroll deduction, the insurer is an independent contractor for purposes of the Whistle-blower's Act.

Dahl and *Hutchison* have no application to the instant case. PBFS is not an independent contractor to a state agency, but instead is an agency and government

entity under the umbrella of Halifax Hospital. There is no correlation between *Dahl* and *Hutchison* and the instant case because the facts and holdings of these cases are distinguishable and inapplicable.

Bifulco further argued that, based on the statutory language and legislative history, the Private WBA "equally applies to public sector employers who have ten or more employees." (Initial Brief, p. 37). There is no support for this contention. The Private WBA defines an "employer" as "any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." Fla. Stat. § 448.101(3). The word "private" qualifies each word in the series of types of employers so that it gives the effect of stating "any private individual, private firm, private partnership, private institution, private corporation, or private association that employs ten or more persons." The statutory language does not include public sector employees but expressly excludes them with the word "private." In fact, the Public WBA was enacted to give redress to public employees. Further, the legislative history adds nothing to the express statutory language.

Finally, Bifulco argues that because the Public WBA, the Private WBA, and Fla. Stat. §440.205 are remedial in nature, the statutes should be construed liberally in favor of granting access to the remedy provided by the Legislature. While these statutes are remedial and allow for liberal construction, the Legislature was very

specific in drafting Fla. Stat. §440.205 in correlation with section 768.28 as well as including "private" in the Private WBA. The Court is not required and is prohibited from re-writing what has been expressly drafted and approved by the Legislature.

CONCLUSION

Bifulco's claim for workers' compensation retaliation under Fla. Stat. §440.205 is a tort within the meaning of section 768.28 and pre-suit notice is required. *Kelley v. Jackson County Tax Collector*, 745 So.2d 1040 (Fla. 1st DCA 1999). Bifulco failed to give notice of her claim to the Department of Financial Services within three (3) years of the claim, therefore, the trial court properly dismissed Bifulco's claim for workers' compensation retaliation and the appellate decision reversing the order should be reversed.

As part and parcel of Halifax Hospital, PBFS is an instrumentality of the state and a government entity. PBFS, therefore, does not qualify as an "employer" under the Private WBA. Because a plaintiff can not state a cause of action for a violation of the Private WBA against a government entity, Bifulco failed to state a cause of action under the Private WBA and summary judgment was properly granted by the trial court in favor of PBFS and against Bifulco and the appellate court's decision affirming the trial court's dismissal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail and facsimile this 24th day of August, 2009 to Frederick C. Morello, Esquire, of Frederick C. Morello, P.A., 111 N. Frederick Avenue, 2nd Floor, Daytona Beach, Florida 32114.

/s/Thomas J. Leek
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2) in that Respondent's Answer Brief was typed using Times New Roman 14-point font.

/s/Thomas J. Leek
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