IN THE SUPREME COURT OF FLORIDA

CHARLENE M. BIFULCO

CASE NO: SC09-172
DCA CASE NO.: 5D08-98

Petitioner,

v.

PATIENT BUSINESS & FINANCIAL SERVICES, INC.

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PUBWA: Public Whistle-Blower Act, Fla. Stat. §112.3187

PWA: Private Whistle-Blower Act, Fla. Stat. §48.101 et. seq.

I. STATEMENT OF THE CASE AND OF THE FACTS

A. Factual History of the Case.

Petitioner and Appellant/Plaintiff below, CHARLENE M. BIFULCO ("Ms. BIFULCO"), began working part time for the Respondent and Appellee/Defendant below, PATIENT BUSINESS & FINANCIAL SERVICES ("PBFS") on or about July 29, 2002 as an admitting registrar. (Vol. II, p. 317, ¶ 5). Ms. BIFULCO became a full time admitting registrar on or about January 23, 2003. *Id.*

On or about March 24, 2004, Linda Rogers ("Ms. Rogers"), another admitting registrar at PBFS, told Ms. BIFULCO that the manager of PBFS, Mr. Will Benham ("Mr. Benham"), had ordered Ms. Rogers to sign a physician's name to a Physician's Interim/Telephone Order ("Physician's Telephone Order") for a prescription for ativan, also known as, lorazepam. *Id.* at ¶ 6. According to 21 C.F.R. § 1308.14, lorazepam (ativan) is a schedule IV controlled substance. *Id.* Mr. Benham's ordering Ms. Rogers to sign a telephone script was in violation of 21 C.F.R. § 1306.21. *Id.* at 317-318, ¶ 6. A copy of this forged prescription is found in Ms. BIFULCO's Response to Defendant's Motion for Final Summary Judgment. (Vol. II, p. 343, Plaintiff's Composite Exhibit D; Vol. IV, p. 561, Plaintiff's Composite Exhibit D).

Ms. BIFULCO then told Ms. Rogers to document what had occurred regarding the taking of the prescription phone order. *Id.* at 318, ¶ 6. The name Ms. Rogers signed on this Physician's Telephone Order was for physician Dr. "Alhambra." *Id.* Ms. BIFULCO testified in her deposition that about one week to ten days after this event occurred, she complained to admitting supervisor, Ms. Robson, about the action of Mr. Benham.[1] *Id.*

On or about Monday, April 19, 2004, approximately 10:00 p.m., Ms. BIFULCO injured her back when restocking the admitting office. *Id.* at ¶ 7. Ms. BIFULCO picked up a full carton of paper from a pallet and just when she was picking up the box, she felt a sharp burning pain in her lower back and dropped the box. *Id.* On or about Monday, April 19, 2004, Ms. BIFULCO filled out an employee incident report documenting the injury for her employer. *Id.* On or about April 20, 2004, Ms. BIFULCO notified her supervisor, Ms. Robson, of her injury by putting a copy of the injury report under Ms. Robson's door. *Id.* Ms. BIFULCO worked the second shift and Ms. Robson worked the first shift. *Id.*

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[1] While Ms. Robson was Ms. BIFULCO's direct supervisor, Mr. Benham was Ms. Robson's superior. (Vol. 1, p. 106 # 9). Mr. Benham was second in command at PBFS and Mr. Arvin Lewis was first in command. (Vol. IV, p. 600, l. 21 to p. 601, l. 3).

On or about Wednesday, April 21, 2004, Ms. BIFULCO left a message for Terry Martin ("Ms. Martin"), workers' comp program supervisor, that she needed to see a doctor as quickly as possible. *Id.* On or about Thursday, April 22, 2004, Ms. BIFULCO was able to talk with Ms. Martin's assistant about seeing a doctor for her workers' comp injury. *Id.*

Late in the afternoon on April 22, 2004, Ms. BIFULCO was called into her supervisor, Ms Robson's office. *Id.* Ms. BIFULCO received a corrective action counseling memo from Ms. Robson for having a negative attitude and being rude to patients. *Id.* Ms. Robson would not identify any of the people purportedly complaining about Ms. BIFULCO's alleged attitude. *Id.*

On or about Monday, April 26, 2004, Ms. BIFULCO met with Human Relations Employee Advocate, Carol Raymond ("Ms. Raymond"), in person, to, among other things, object to the actions of Mr. Benham on March 26, 2004, ordering Ms. Rodgers to sign Dr. Alhambra's name to a Physician's Telephone Order. *Id.* Ms. BIFULCO showed Ms. Raymond, among other documents, the Physician's Interim/Telephone Order that Mr. Benham ordered Ms. Rogers to forge. (Vol. II, p. 318, ¶ 8; Vol. IV, p. 561). Ms. Raymond read the paperwork Ms. BIFULCO put in front of her and without more, told her to see a "newly hired, African-American lady in the Human Resources Department". (Vol. II, p. 318, ¶

8). Ms. Raymond did not identify the person that Ms. BIFULCO was to see with any more detail than that. *Id.* at 318-319, ¶ 8 . Ms. BIFULCO was objecting to the forgery of the script for Ativan Ms. Rogers was told to write which amounted to a violation of a law, rule or regulation. *Id.*

On or about Tuesday, April 27, 2004, Ms. BIFULCO further voiced her objection to PBFS's taking of this Physician's Telephone Order to Chief Human Resources Officer Al Alexander ("Mr. Alexander"), Director Patient Business & Financial Services, Arvin Lewis ("Mr. Lewis") and Halifax Medical Center Administrator, Dan Lang ("Mr. Lang"), by faxing documentation of everything that Ms. BIFULCO had previously shown Ms. Raymond, to them. *Id.* This documentation included the script that Ms. Rogers was ordered to write. *Id.* Ms. BIFULCO was objecting to the violation of a law, rule or regulation that was an activity, policy or practice of her employer when she faxed her concern to Mr. Alexander, Mr. Lewis and Mr. Lang. *Id.*

On or about Thursday, April 29, 2004, Mr. Benham and Ms. Robson approached Linda Hill ("Ms. Hill"), Employee Relations Supervisor, about alleged threats that Ms. BIFULCO was alleged to have made, which were not made in the presence of either Mr. Benham or Ms. Robson. *Id.* On or about April 30, 2004, Ms. Hill called Ms. BIFULCO and placed her on paid administrative leave

approximately one and one half hours prior to Ms. BIFULCO reporting for work. (Vol. I, p. 87-88, ¶ 18; Vol. II, p. 319, ¶ 8). All that Ms. Hill told Ms. BIFULCO during this phone call was that she was placing Ms. BIFULCO on paid administrative leave with Mr. Benham's approval but did not provide any other reason or explanation. (Vol. II, p. 319, ¶ 8).

On or about Friday, April 30, 2004, Ms. BIFULCO was finally seen by a physician for her workers' comp injury that occurred on April 19, 2004, and was diagnosed with a back injury. (Vol. II, p. 319, ¶ 9). On or about May 3, 2004, around 4:00 p.m., Ms. Hill called Ms. BIFULCO and while using a speaker phone told Ms. BIFULCO that Ms. BIFULCO's complaint letter was part of an ongoing investigation against her and that she was terminated because of purported threats Ms. BIFULCO made against PBFS employees. (Vol. I, p. 88, ¶20; Vol. II, pp. 319-320, ¶ 9). On or about May 24, 2004, Ms. BIFULCO received a COBRA letter from Halifax Community Health System stating that her group vision plan was ended on April 28, 2004 because of her termination of employment. (Vol. I, p. 88, ¶ 22; Vol. II, p. 320, ¶ 10).

B. Procedural History of the Case

On or about December, 10, 2004, Petitioner's counsel sent a privileged letter to David J. Davidson, Esq. ("Mr. Davidson"), Corporate Counsel for PBFS and

Halifax Hospital Medical Center ("Halifax Hospital"),[2] regarding, among other things, Ms. BIFULCO claims against PBFS for workers' comp retaliation and retaliation under the private Whistle blower Act ("PWA"). (Vol. IV, p. 660-61). Mr. Davidson, corporate counsel, responded on December 13, 2004, stating that he would investigate the allegations. On December 21, 2004, corporate counsel denied wrongdoing on the part of PBFS, Ms. BIFULCO's employer. (Vol. IV, p. 662). Corporate counsel completed his investigation and did not request any additional time to reach a conclusion nor did he raise any suggestion that the Petitioner's claim was not accepted as notice under Fla. Stat. § 768 for any claim against PBFS or Halifax Hospital.

Almost one year later, on November 18, 2005, Ms. BIFULCO, through her counsel, filed a two count complaint against PBFS. (Vol. I, pp. 85-91). Count I was for violation of the Florida Whistle-blower Act, Fla. Stat. § 448.102(3) (hereafter "PWA") and Count II was for Discharge of Employment by Reason of Violation of Fla. Stat. § 440.205. *Id.*

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[2] While the demand letter was sent to Halifax Medical Center, Mr. Davidson, Esq., was listed as the registered agent for PBFS. (Vol. IV, pp. 566-68; p. 660-61). Mr. Davidson responded using a letterhead from the Halifax Community Health System. (Vol. IV, p. 662). At the time the demand letter was sent to Mr. Davidson, it was unknown how PBFS, Halifax Medical Center, Halifax Community Health System, Halifax Home Health, etc., related to each other, if at all.

Discovery ensued and PBFS, on April 5, 2006, stated in its response to Petitioner's First Request for Admissions that PBFS was an employer as defined by Fla. Stat. § 448.101(3) of the PWA. (Vol. II, p. 223, ¶ 3). Additionally, PBFS admitted that Ms. BIFULCO was an employee as defined by Fla. Stat. § 448.101(2) of the PWA. (Vol. II, pp. 223-224, ¶ 4). In its Answer, or in discovery responses, PBFS never raised the affirmative defense of Fla. Stat. § 768.28 (6) claiming PBFS was a special taxing district established under the legislature, or that PBFS, as a creation of that special taxing district, would be subject to such notice. (Vol. II, pp.197-243).

On January 31, 2007, Ms. BIFULCO's counsel served a motion to amend the complaint to add punitive damages. (Vol. I, pp.105-166). On February 21, 2007, Respondent served its Memorandum of Law in Opposition which, once again, never argued that PBFS was subject to Fla. Stat. § 768.28 (6) notice. (Vol. I, pp. 170-175).

A hearing was held on Petitioner's motion to amend to add punitive damages. (Vol. II, p. 261, ¶ 4). On February 27, 2007, the trial court denied Petitioner's motion to add punitive damages without prejudice. (Vol. I, p. 178, ¶ 2). Subsequently, Respondent's Motion for Final Summary Judgment stated in part that, "On February 27, 2007, this Court denied BIFULCO's motion to amend

finding that PBFS is a state agency pursuant to its relationship to Halifax Hospital Medical Center within the meaning of § 768.28, FLA. STAT. (2006), and directed PBFS to submit an affidavit of an officer of Halifax Hospital Medical Center specifying the relationship" (Vol. II, p. 261, ¶ 4). But that was not an accurate statement, as the Order from the Court stated only that, "Petitioner's Motion to Amend Her Complaint to Add Punitive Damages is denied without prejudice." (Vol. I, p. 178, ¶ 2).

As a result of the hearing on the motion to add punitive damages, on March 8, 2007, PBFS served notice of filing the affidavit of general counsel, Mr. Davidson, along with an affidavit and exhibits. (Vol. II, pp. 185-196). Mr. Davidson's affidavit, stated among other things, that PBFS was created and run by Halifax Hospital and that Halifax Hospital (not PBFS) was a special taxing district of the State. *Id.* at 185, ¶¶ 2, 3, 5. Specifically, corporate counsel Davidson attested,

> I am General Counsel for Halifax Hospital Medical Center, which is an independent taxing district for the State of Florida, and all of Halifax Hospital Medical Center's affiliate corporations.
>
> Respondent, Patient Business and Financial Services, Inc., was established by the Halifax Hospital Medical Center to assist it in carrying out its functions.

> Halifax Hospital Medical Center is the sole member of Patient Business and Financial Services, Inc. has complete control over the operations and management of Patient Business and Financial Services, Inc. (Vol. II, p. 185, ¶¶ 2, 3, 5).

Without any supporting documentation, corporate counsel attested and concluded that the Internal Revenue Service had determined that PBFS was an "instrumentality of the state." *Id*. at 186, ¶ 9.

On March 28, 2007, Respondent filed an unopposed motion for continuation of the trial. (Vol. II, pp. 251-252). This motion stated, among other things, "Neither party will be prejudiced by the continuance of this matter." *Id.* at 251, ¶ 3. On April 4, 2007, the trial Court granted the trial continuance. (Vol. II, pp. 253-54). On April 17, 2007, a joint motion was filed to transfer the case from one division to another because it was determined that the newly appointed circuit court judge was related to a member of the Respondent's law firm which would have resulted in the recusal of the judge. This motion was approved and an order was issued on April 23, 2007. (Vol. II, p. 258).

About one (1) month after the trial continuance was granted, on May 17, 2007, Respondent filed its first motion for summary judgment ("1st MSJ"). (Vol. II, pp. 261-65). In Respondent's 1st MSJ, the argument was made that the Petitioner failed to comply with pre-suit notice under Fla. Stat. § 768.28 (6) to not

only Halifax Hospital, but to the Department of Financial Services as well. *Id.* p. 262, ¶ 5. Respondent further argued that the Petitioner could not comply with the notice to the Department of Financial Services because more than three (3) years had passed since the Petitioner's termination from PBFS on May 3, 2004. *Id.* at pp. 261-264, ¶¶ 2, 9, 14, 15. Respondent in its 1st MSJ did not address the discrepancy between Fla. Stat. § 768.28 (6) with its three year statute of limitations on notifying the Department of Finance and the four year statute of limitations provided by filing an action under Fla. Stat. § 440.205. See *Scott v. Otis Elevator Co*., 524 So. 2d 642, 643 (Fla. 1988) ("The legislature, however, enacted section 440.205 subsequent to *Goehring*, creating a distinct limited statutory cause of action for retaliatory discharge in the area of worker's compensation. Claims under section 440.205 must be brought within the four-year statute of limitations set forth in section 95.11(3)(f) for statutory causes of action.").

On October 1, 2007, the Petitioner replied to Respondent's 1st MSJ. (Vol. II, pp. 316-358). Petitioner raised the argument that not only were both Fla. Stat. § 440.205 and 448.101, *et seq.*, remedial, but that they were statutory creations in derogation of the common law, applying the same logic which this Honorable Court has consistently applied. *Id.* at 320-328.

A hearing was held on Respondent's 1st MSJ on October 4, 2007. (Vol. 1, pp.1-44). Petitioner's counsel brought up the fact that the Respondent had prejudiced the Petitioner by filing the continuance for trial thereby causing the three (3) year statute of limitations to pass when Respondent had represented to the Court that "neither party would be prejudiced by the continuance." *Id.* at p. 38, l. 5-11. On October 16, 2007, the trial Court dismissed with prejudice Count II, the violation of Fla. Stat. § 440.205, of the Petitioner's Complaint because of failure to comply with pre-suit notice under Fla. Stat. § 768.28 (6). (Vol. III, pp. 532-535).

On October 11, 2007, the Respondent served its second motion for summary judgment ("2nd MSJ"). (Vol. II, pp. 359-361). The predominant premise of this 2nd MSJ was that PBFS was a creature of Halifax Hospital and therefore, was a special taxing district not subject to the PWA. *Id*. The Petitioner served her response to the 2nd MSJ on December 3, 2007. (Vol. IV, pp. 538-568). Petitioner's counsel argued in their response that PBFS met the statutory definition of an employer under the PWA and that the public Whistle-blower Act ("PUBWA") was not the exclusive remedy in all PUBWA actions, most particularly where an independent contractor as defined by PUBWA is involved. *Id.* at 542-547.

On December 4, 2007, the eve of the 2nd MSJ hearing, the Respondent moved to withdraw and amend its response to Petitioner's First Request for

Admissions, # 3. (Vol. IV, p. 581-584). In its responses to Petitioner's First Request for Admissions # 3, which were served upon the Respondent on or about April 5, 2006, the Respondent admitted that it was an "employer" as defined by Fla. Stat. § 448.101(3). *Id.* at p. 581, ¶ 1. The Respondent claimed that its answering admission # 3 was "in error". *Id.* at 581, ¶ 2. The trial court allowed PBFS to withdraw its answer to admission # 3. (Vol. IV, p. 677). No reason was contained within the trial court's Order as to why it allowed the Respondent to withdraw its previous admission # 3. (Vol. IV, p. 677).

On December 6, 2007, the trial court heard Respondent's 2nd MSJ. (Vol. IV, pp. 678-679). On December 13, 2007, the court dismissed Petitioner's PWA claim because the trial court declared that PBFS was a state agency and not a private employer. *Id.* The court stated, among other things,

> On October 11, 2007, defendant filed a Motion for Final Summary Judgment based on the Plaintiff's failure to state a cause of action as to Count I under Florida's Private Whistle Blower Act. 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. Therefore, defendant's Motion for Final Summary Judgment as to as to (sic) Count I for a violation of Florida's Private Whistle Blower Act is hereby **GRANTED.** (Vol. IV, p. 678, ¶ 2).

This final order encompassed the dismissal of both Counts I and II. *Id.* at pp. 678-679. On January 2, 2009, the 5th DCA filed an opinion reversing the trial court's summary judgment order only on Petitioner's Fla. Stat. §440.205 claim but upholding the trial court's summary judgment on her Fla. Stat. § 448.102(3), PWA, claim.

II. SUMMARY OF ARGUMENT

We are now at the crossroads, post-*Maggio*, of whether Chapter 768.28(6) notice is required for a Fla. Stat. ¶ 440.205 discharge claim for wrongful termination by reason of filing a valid workers' compensation claim. The Fifth DCA's decision in Bifulco, that Chapter 768.28(6) notice is not required for a Fla. Stat. § 440.205 claim, is correct because the District Court's logic is entirely consistent with this Honorable Court's decisions in *Scott v. Otis Elevator Co.*, 524 So. 2d 642 (Fla. 1988), *Trianon Park Condo Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) and *Maggio v. Fla. Dept. of Labor*, 899 So. 2d 1074 (Fla. 2005) and the pre-*Maggio* decisions of *Kelly v. Jackson Co. Tax collector*, 745 So. 2d 1040 (Fla. 1st DCA 1999) and *Osten v. City of Homestead*, 757 So. 2d 1243 (Fla. 3d DCA 2000), should be disapproved.

Additionally, this Honorable Court should reverse the Fifth DCA in Bifulco where it upheld the decision of the trial court that the PUBWA was the exclusive

remedy against PBFS, a billing company, and that the PWA could not be applied. PBFS best fits the description of an independent contractor under the PUBWA and should also be subject to a PWA claim. This Honorable Court should consider the reasoning in *Dahl v. Eckerd Family Youth Alternatives, Inc.*, 843 So. 2d 956, 958 (Fla. 2nd DCA 2003) and find that, under the facts of Bifulco, the PWA is also a remedy for the Petitioner and PUBWA was not her exclusive remedy.

III. ARGUMENT AND STANDARD OF REVIEW

This Court accepted jurisdiction under Fla. Const. Art. V, § (3)(b)(3) for conflict jurisdiction and under Fla. R. App. P. 9.120 by its Order dated July 7, 2009. Even though an issue is not a basis for conflict jurisdiction, once this Court grants conflict jurisdiction, it may address other issues properly raised and argued before the Court. See *State of Florida v. T. G.*, 800 So. 2d 204, 211 at fn. 4 (Fla. 2001) (citing *Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982) *Hall v. State of Florida et.al.*, 752 So. 2d 575 (Fla. 2000). The standard of review of an order of summary judgment is de novo review. See *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005)(the standard of review for summary judgment is de novo)(citing *Volusia Co. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)).

A. The decision of Fifth District Court of Appeal in Bifulco should be upheld in finding that §768.78(6) notice is not required for a claim brought pursuant to Fla. Stat. §440.205 because the Fifth District followed the analysis of this Court in *Trianon Park* and *Scott v. Otis Elevator*, after considering this Court's analysis in *Maggio* to reach its holding.

The Fifth DCA relied upon this Court's analysis in *Trianon Park Condo Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985) and *Scott v. Otis Elevator Co.*, 524 So. 2d 642 (Fla. 1988) in deciding that Fla. Stat. § 768.28(6) notice is not required for a Fla. Stat. § 440.205 claim. As such, the decisions of *Kelly v. Jackson County Tax Collector*, 745 So. 2d 1040 (Fla. 1st DCA) and *Osten V. City of Homestead* 757 So. 2d 1243, 1244 (Fla. 3d. DCA 2000) (which relied upon the reasoning of the 1st DCA in *Kelly*) are incorrectly decided and should be disapproved. Both of these cases are based upon a pre-*Maggio* analysis.

B. Florida employment is "at-will" and statutes which offer employees protection are remedial and in derogation of common law.

Employment in Florida is at-will and any law, rule or regulation, federal or state, protecting an employee's right to work, to exercise certain employment rights without discrimination or retaliation, is in derogation of the common law. This Honorable Court has consistently upheld this fundamental principle.

Absent a written employment contract for a specific duration, employment in Florida has always been "at-will". See *DeMarco v. Publix Super Markets, Inc.*,

386 So. 2d 1253 (Fla. 1980); *Macquire v. American Family Life Assurance Co.*, 442 So. 2d 321 (Fla. 3d. DCA 1983) and *Mayo v. City of Highland Park Hospital Corp.*, 460 So. 2d 571 (Fla. 3d. DCA 1984); *Walton v. Health Care District of Palm Beach*, 862 So. 2d 852 (Fla. 4th DCA 2003).

Because Fla. Stat. §440.205 provides protection to certain employees falling under it, it is a remedial statute and in derogation of common law. In analyzing a claim under §440.205, this Honorable Court in *Smith v. Piezo Technology*, 427 So. 2d 182 (Fla. 1983), answered a certified question from the 1st DCA that Fla. Stat. §440.205 (1979):

> . . . creates a **statutory cause of action** for wrongful discharge in retaliation for an employee's pursuit of a workers' compensation claim and such action is not cognizable before a deputy commission but rather is cognizable in a court of competent jurisdiction. (*Id*. at 183-184) (emphasis added).

Further the *Smith* court determined:

> Rather, our legislature has proscribed a wrongful discharge because of an employee's pursuit of a workers' compensation claim. It must be assumed that a provision enacted by the legislature is intended to have some useful purpose. *Girard Trust Co. V. Tampashores Development Co.*, 95 Fla. 1010, 117 So. 786 (1928).
>
> "Where a statute requires an act to be done for the benefit of another or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general

> rule of law is that the party injured should have an action; for where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident."
>
> 95 Fla. at 1015-16, 117 So. at 788 (quoting 25 R.C.L. 979-80 (1919)). Thus, because the legislature enacted a statute that clearly imposes a duty and because the intent of the section is to preclude retaliatory discharge, the statute confers by implication every particular power necessary to insure the performance of that duty. *Mitchell v. Mitchell,* 2 Fla. 594 (1849). We hold, therefore, that *section* 440.205 does create a statutory cause of action. *Smith* at 184.

In *Scott v. Otis Elevator*, 524 So. 2d 642 (Fla. 1988) ("*Scott* I") upon examination of a 440.205 cause of action, this Honorable Court declared that:

> Retaliatory discharge is tortious in nature. See, e.g., *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308, 104 Ill. Dec. 751 (1986), cert. denied, 483 U.S. 1032, 107 S. Ct. 3248, 97 L. Ed. 2d 779 (1987); *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364 (Nev. 1987); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987); *Holien v. Sears, Roebuck and Co.*, 298 Ore. 76, 689 P.2d 1292 (1984); *Cagle v. Burns and Roe, Inc.*, 106 Wash. 2d 911, 726 P.2d 434 (1986). States adopting this tort generally consider it grounded on intent rather than negligence, allowing recovery of emotional distress and punitive damages as well as lost wages in appropriate cases. *Prosser and Keeton on the Law of Torts* § 130, at 1029 (5th ed. 1984). Florida does not recognize a common law cause of action for retaliatory discharge. See *Smith v. Piezo Technology & Professional Administrators*, 427 So. 2d 1821 (Fla. 1983). *Scott* I at 643.

Similarly, when this Honorable Court examined the PWA Fla. Stat. §112.3187 et. seq. in *Martin County v. Edenfield*, 609 So. 2d 27 (Fla. 1992) ("*Martin*"), this Court declared that:

> Florida law is well settled that ambiguity is a prerequisite to judicial construction, and in the absence of ambiguity the plain meaning of the statute prevails. *Holly v. Auld*, 450 So. 2d 217 (Fla. 1984). Moreover, even if we accepted the proposition that ambiguity exists, 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. *Martin County* at 29.

In *Arrow Air v. Walsh*, 645 So. 2d 422 (Fla. 1994)("*Arrow Air*"), this Honorable Court examined the PWA and again found that it was remedial legislation and not subject to retroactive application:

> However, we have never classified a statute that accomplishes a remedial purpose by creating substantive new rights or imposing new legal burdens as the type of "remedial" legislation that should be presumptively applied in pending cases. See *L. Ross, Inc. v. R.W. Roberts Const. Co., Inc.*, 481 So. 2d 484 (Fla. 1986) (statute creating right to attorney's fees could not be applied retroactively); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (only statutes that do not create new or take away vested rights are exempt from the general rule against retrospective application.) Our decision in *Martin County* cannot support a contrary conclusion because we

were not addressing the retroactive application of the statute at issue there. Rather, we were addressing whether under the 1987 version of *section* 112.3187 an employee's participation in the wrongdoing he disclosed could serve as an absolute shield from liability under the statute. In that context, we determined that in light of its "remedial" purpose--"to encourage the elimination of public corruption by protecting public employees who 'blow the whistle'"--the statute should be liberally construed in favor of granting access to the remedy. 609 So. 2d at 29.

The district court is correct that the private sector Whistle-Blower's Act serves a similar purpose--to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public. However, the Act accomplishes this purpose by creating a new cause of action and thereby directly affects substantive rights and liabilities. Such is the clear effect of the act because a common law tort for retaliatory discharge has never been recognized within this state. *See Scott v. Otis Elevator Co.*, 572 So. 2d 902, 903 (Fla. 1990) (Florida does not recognize common law tort for retaliatory discharge); *Smith v. Piezo Technology & Professional Admrs.*, 427 So. 2d 182, 184 (Fla. 1983) (same); *Demarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980) (when term of employment is for indefinite period, either party may terminate the employment at any time and for any reason, without incurring liability). (*Arrow Air* at 424).

C. <u>Where do we go from *Maggio*– The evolution of employment law claims and Chapter 768 notice post-*Maggio*. Call it by any other name, employment law statutes are in derogation of the common law and have been consistently declared as remedial statutes by this Honorable Court.</u>

In *Maggio v. Florida Department of Labor and Employment Security*, 899 So. 2d 1074 (Fla. 2005)("*Maggio*"), this Court addressed the issue of whether the *Florida Civil Rights Act* was subject to the pre-suit requirements of Fla. Stat. 768.28(6). Once again, the *Maggio* Court declared that the *Florida Civil Rights Act* is a remedial statute and to support that conclusion this Honorable Court wrote:

> *The Florida Civil Rights Act* is a remedial statute that the Legislature has expressly provided is to be "liberally construed to further the general purposes" of the Act and the particular provisions involved. § 760.01(3), Fla. Stat. (2003); see also *Woodham v. Blue Cross & Blue Shield of Florida, Inc.*, 829 So. 2d 891, 897 (Fla. 2002) (stating that "we are guided by the stated statutory purpose of liberally construing the [Act] in favor of a remedy for those who are victims of discrimination, and the companion principle that requires us to narrowly construe statutory provisions that restrict access to the courts"); *Joshua v. City of Gainesville*, 768 So. 2d 432 at 435 (Fla. 2000) ("We are guided by the Legislature's stated purpose for enacting . . . chapter [760] and its directive that the Act be liberally construed . . . ."). (*Maggio* at 1077).

In reaching its conclusion that §768.28 pre-suit notice is not required for a Chapter 760 claim, this Court's analysis included the following: 1.) Chapter 760 had a waiver of sovereign immunity by including in the statue the definition of employer; 2.) Chapter 760 has its own administrative notice requirements to file with the FCHR; and 3.) The legislature has the power to specify what, if any,

provisions of Chapter 768 apply, as the legislature decided only to reference subsection (5) in Chapter 760. *Id.* at 1078-1080.

The *Maggio* Court's greatest emphasis was on the third prong of this analysis and that is, when the legislature wants Chapter 768 or a portion of thereof to apply, it has the ability to do so.

D. When the legislature wants to apply Chapter 768 to any statutory cause of action it has not been shy in doing so.

There are numerous examples where the Legislature intended Fla. Stat. § 768.28 to apply to a statute. For example, the Legislature specifically added to Fla. Stat. § 760 referencing Fla. Stat. § 768.26 (5) which, according to the *Maggio* Court, excluded all other references to that statute. *Maggio* at 1080. ("If the Legislature intended all the provisions of section 768.28 to apply to the Florida Civil Rights Act, there would have been no reason to refer only to subsection (5)."). *Id.* Further, as this Honorable Court determined in *City of Hollywood v. Lombardi*, 770 So. 2d 1196 (Fla. 2000):

> However, "**the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law**." *Brannon v. Tampa Tribune*, 711 So. 2d 97, 100 (Fla. 1st DCA 1998); see *Schwartz v. Geico Gen. Ins. Co.*, 712 So. 2d 773, 775 (Fla. 4th DCA 1998). **"Furthermore, the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new**

> **version.**" (*Id.* at 1202)(quoting *Brannon*, 711 So. 2d at 100)(emphasis added).

The Legislature has specifically added the applicability of Fla. Stat. § 768.28 to statutes such as, Fla. Stat. § 556.106 ("Any liability of the state and its agencies and its subdivisions which arises out of this chapter is subject to the provisions of s. 768.28."). Fla. Stat. § 556.106 (2)(a). Fla. Stat. 768.28 is nothing new to the legislature and when it wants to apply it, the legislature has done so in various statutes frequently and consistently.[3]

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[3] For example, see:

1. Fla. Stat. § 45.061(5)(1987, 1990);
2. Fla. Stat. § 110.504(4)(1978, 1979, 1983, 1996, 1999);
3. Fla. Stat. § 111.071 (1)(a)(1979, 1980);
4. Fla. Stat. § 119.15 (8) (1995, 1998, 2005, 2006);
5. Fla. Stat. § 163.01(3)(h)(1969, 1979, 1981, 1982, 1983, 1985, 1987, 1988, 1990, 1991, 1993, 1995, 1996, 1997, 1999, 2001, 2002, 2003, 2004, 2006, 2007);
6. Fla. Stat. § 189.443 (2000);
7. Fla. Stat. § 190.043 (1980);
8. Fla. Stat. § 213.015 (13) (1992, 1995, 1996, 1997, 2000, 2002);
9. Fla. Stat. § 252.36 (c)(5)(l) (1974, 1977, 1979, 1981, 1983, 1993, 1995, 1999, 2001, 2005, 2006);
10. Fla. Stat. § 252.51(1974, 1983, 1995, 2000);
11. Fla. Stat. § 252.89 (1988);
12. Fla. Stat. § 252.944(1998);
13. Fla. Stat. § 260.0125 (1998, 2001);
14. Fla. Stat. § 282.5004 (1999);
15. Fla. Stat. § 284.31 (1972, 1974, 1979, 1983, 1986, 1988, 1999, 2003);
16. Fla. Stat. § 284.38 (1972, 1979, 1981);
17. Fla. Stat. § 288.9625 (2)(a)(2007);
18. Fla. Stat. § 316.6146 (2003);

19. Fla. Stat. § 321.24 (5)(1957, 1971, 1995, 1997, 2005, 2007);
20. Fla. Stat. § 322.13 (1)(b)(1939, 1940, 1941, 1957, 1978, 1985, 1987, 1991, 1993, 1995, 1996);
21. Fla. Stat. § 324.022(1) (1988, 1989, 1999, 2007);
22. Fla. Stat. § 337.19(1)(1955, 1969, 1984, 1993, 1996, 1999);
23. Fla. Stat. § 351.03 (4)(a)(c)(1874, 1919, 1973, 1976, 1980, 1981, 1982, 1984, 1986, 1992, 1999);
24. Fla. Stat. § 373.1395(4) (1992, 1994, 1995);
25. Fla. Stat. § 381.0056(10)(1974, 1977, 1978, 1979 1981, 1984, 1985, 1990, 1995, 1997, 1999, 2000, 2001, 2002, 2006);
26. Fla. Stat. § 381.0302(11) (1992, 1993, 1995, 1997, 1998, 2000, 2002);
27. Fla. Stat. § 393.075(3)(1988, 1995, 1999, 2000, 2003, 2004, 2006);
28. Fla. Stat. § 394.9085(7)(2006);
29. Fla. Stat. § 395.50(5)(b)(1994, 1995, 2000);
30. Fla. Stat. § 401.425(3)(b)(1989, 1990, 1992, 1993, 1995, 1996);
31. Fla. Stat. § 403.0862(4)(1986);
32. Fla. Stat. § 403.706(17)(c)(1974, 1977, 1978, 1979, 1980, 1987, 1988, 1993, 1998, 2000, 2000, 2002, 2003);
33. Fla. Stat. § 409.1671(1)(f)(1)(2), *et seq.*,(1994, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006);
34. Fla. Stat. § 409.175(15)(b)(1969, 1970, 1976, 1977, 1978, 1980, 1981, 1983, 1984, 1985, 1987, 1988, 1990, 1991, 1993, 1994, 1995, 1996, 1997, 1998, 2000, 2001, 2002, 2003, 2004);
35. Fla. Stat. § 411.01(5)(a)(11)(1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006);
36. Fla. Stat. § 420.504(8)(1980, 1981, 1983, 1985, 1988, 1993, 1996, 1997, 1998, 2003, 2005, 2007);
37. Fla. Stat. § 420.507(40)(1980, 1984, 1988, 1989, 1991, 1993, 1997, 1998, 2000, 2001, 2002, 2004, 2006, 2007);
38. Fla. Stat. § 455.221(3)(1969, 1973, 1977, 1979, 1981, 1992, 1993, 1994, 1997, 1999);
39. Fla. Stat. § 455.32(5)(2000, 2001, 2004, 2005);
40. Fla. Stat. §946.5026(1992, 2001).

The *Maggio* Court examined the historical purpose of Fla. Stat. §768.28 and concluded:

> However, we have previously stated that the "sole purpose [of the enactment of *section* 768.28] was to waive [sovereign] immunity[,] which [previously] prevented recovery for breaches of existing common law duties of care." *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985) (emphasis added); see also *Hill*, 513 So. 2d at 133 (agreeing with a federal court's conclusion that section 768.28 "was limited to traditional torts; specifically, those in which the state would be liable if it were a private person"). *Maggio* at 1081.

It seems inconceivable that Fla. Stat. §768.28 was designed to protect the "sovereign" from statutory employment claims. In these cases, the "sovereign" is an employer with a direct relationship with the employee. Taken to its further and most bizarre extreme, filing a workers' compensation claim or unemployment compensation claim would require application of Fla. Stat. §768.28. That interpretation simply seems incredulous. The employer knows when it takes an adverse action against an employee, presumably knows the law and has personnel records. Whether it be a Fair Labor Standards Claim under 29 U.S.C. § 201, *et seq.*, Family Medical Leave Act claim under 29 U.S.C. § 2611, *et seq.*, or a Title VII claim under 42 U.S.C.§ 2000e, *et seq.*, to name but a few under federal law or any statutory state employment law claim like Fla. Stat. 440.205, Chapter 760 (Florida's version of Title VII) or whistle-blower claim, supervisory decision

makers, most often, along with Human Resources, are decision makers for adverse employment actions. The federal and state statutes almost always have anti-retaliation provisions for reporting violations within the purview of the statute. See 29 U.S.C. § 215(a)(3)(illegal to discharge or discriminate against employee who complained under the FLSA), 29 U.S.C. § 2615 (a)(2)(illegal to discriminate or discharge employee for opposing illegal practice under this title), and 42 U.S.C. § 20002-3(a) (illegal to discriminate against one who testifies, participates, assists or makes charges against employer under this title). It certainly cannot be credibly argued that the employers do not have notice when an employee is injured on the job, as Chapter 440 requires a Notice of Injury Report to be filed with the state, (see Fla. Stat. § 440.185) or, in the case of a whistle-blower, that the employee is objecting to a violation of law, rule or regulation as the whistle-blowing is typically in response to a direction of management. Therefore, this Court's interpretation of the purpose of Chapter 768.28, to apply to common law torts, is simply sound legal reasoning and makes sense practically and historically. The purpose of all employment statutes, federal or state, is to protect the employees who fall under their coverage. This employment relationship is not closely analogous to a medical malpractice claim under state law, or a deprivation of rights under 42 U.S.C. §1983.[4]

[4] In *Majette v. O'Connor et.al.*, 811 F.2d 1416 (11th Cir 1987), the 11th Circuit

The "sovereign" in a medical malpractice case or excessive force case under color of law usually have very limited contact with those that are harmed. In many of those cases, memories and records fade about a limited contact typically with a member of the general public the sovereign serves. Such is not the case with the employer – employee relationship, which is a far more intimate relationship.

If this Court would do an about face from its *Trianon Park* analysis that Chapter 768 was meant to apply to common law torts, and instead took the position that all actions not criminal are "torts", the resulting application would be absurd and we would enter the Bizarro World of employment law.[5] For example, if this Court were to decide "torts" as used in Chapter 768 was meant to apply to all civil actions, unemployment claims and workers compensation claims would require Fla. Stat. §768.28(6) notice before filing. Chapter 768 was not intended to shield the sovereign for statutory causes of action that were not previously common law torts, like medical negligence. See *Maggio* at 1081 fn. 5.

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concluded that Fla. Stat. § 768.28(6) was an exhaustion of administrative remedies requirement not applicable to 42 U.S.C. § 1983 actions. *Id.* at 1418 citing to *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L.Ed. 172 (1982) (holding exhaustion of state administrative remedies is not a prerequisite to a § 1983 action).

[5] Bizarro is a fictional supervillain (superhero in the Bizarro World) who appears in comic books published by DC Comics. Bizarro and the Bizarro World have become somewhat well known in popular culture, and the term Bizarro is used as to describe anything that uses twisted logic or that is the opposite of something else. Widpedia.

Fla. Stat. § 440.205 was adopted by the Legislature in 1979. The Private Whistle-blower Act was adopted by the Legislature in 1991.

As the First DCA wrote in *Florida Dept. Of Education v. Garrison*, 954 So. 2d 84 (Fla. 1st DCA 2007):

> Although, unlike the Florida Civil Rights Act, the Public Whistle-blower's Act makes no specific reference to any of the provisions of section 768.28, this does not demonstrate that the Legislature was unaware of section 768.28 when it drafted the Public Whistle-blower's Act in 1986 (**section 768.28 having been enacted in 1973**) or that it somehow lacked the ability to make a specific reference to section 768.28 had it so desired. Rather, **we view this as an indication that there was no legislative intent that any of the provisions of section 768.28 apply to a cause of action under the Act, which, like the Florida Civil Rights Act, is a "stand-alone statutory scheme" designed to provide an aggrieved party with a remedy against the state or its agencies or subdivisions under certain, specified conditions.** *Garrison* at 86. (Emphasis added).

If the legislature wanted to apply Chapter 768.28 to employment law statutes, it had decades of opportunity to do so, but it has not. Employment law statutes have been consistently interpreted by this Court as remedial and for public policy reasons, namely to protect employees covered by the statute, this Court has declared they are to be liberally construed to apply full force and effect of the statutory scheme.

E. The Fifth District Court erred upholding a Summary Judgment that PBFS could no be sued under the PWA. PBFS was not more than an independent contractor with Halifax Medical Center as its sole client, for medical billing purposes.

The Fifth District Court determined that "PBFS is a not-for-profit corporation established for the sole purpose of performing billing services for Halifax Medical Center, a special taxing district of the state of Florida." *Bifulco v. Patient Bus. & Fin. Servs.*, 997 So. 2d 1257, 1258 (Fla. 5th DCA 2009).

PBFS was not legislatively created as a special taxing district like Halifax Hospital Medical Center. Instead, PBFS was created by Halifax Hospital Medical Center to act as its only "client". As such, PBFS fits more closely to the definition of independent contractor under PUBWA. See Fla. Stat. § 112.3187(3)(d). There is nothing prohibiting the application of the PWA to PBFS as that application still comports to the legislature's creation of the PWA.

Halifax Hospital Medical Center ("Halifax Hospital") is a special taxing district supported by ad valorem property taxes which are levied yearly by its board pursuant to authority from the State of Florida. (Vol. IV, p. 616, l. 9-14; see *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 568 (Fla. 1999)("*HHMC*")).[6]

[6] *HHMC* was sent to this Court by this District Court which asked a question of great public importance regarding Fla. Stat. § 395.3035(4), the Confidentiality of Hospital Records and Meetings statute. *Id.* at 568. This Court approved the decision of the 5th DCA holding this section unconstitutional. *Id*. at 570.

In *Eldred v. North Broward Hospital District*, 498 So. 2d 911 (Fla. 1986) ("*Eldred*"), this Court was faced with a certified question of, "Is North Broward Hospital District, by its operation of the hospitals within said district, a corporation primarily acting as an instrumentality or agency of the state?" *Id.* at 912. This Court approved the lower court decision holding that the hospital was a special taxing district "within the sovereign immunity provisions of *section 768.28, Florida Statutes* (1975)" and added, "the qualification that a special taxing district is an 'independent establishment of the state' under the provisions of *section 768.28(2)*." *Id*. According to *Eldred*,

> Special taxing districts are also considered local governmental entities for the transfer of powers and functions with counties or municipalities. Art. VIII, § 4, Fla. Const. Additionally, special taxing districts, along with other local governmental entities, are authorized to issue bonds, article VII, section 12, and to establish civil service systems, article III, section 14. Numerous court decisions of this state recognize the governmental status of special taxing districts. *Id.* at 913, internal citations omitted.

There is no question that had the Petitioner sued Halifax Hospital Medical Center, which she did not, that she would have been suing a special taxing district created by the Legislature. (Vol. 1, p. 12, l. 2-3; p. 63, l. 2-3; p. 85; *HHMC* at 568). However, the Petitioner sued PBFS, a separate, non-profit corporation which was created by Halifax Hospital Medical Center and is not a creation of the

Legislature as a special taxing district. (Vol. I, p. 85; p. 185, ¶ 3; Vol. IV, p. 566-67; p. 618, l. 7-10).

PBFS was created as a non-profit corporation under Chapter 617 of the Florida Statutes,

> . . . exclusively for the purposes of: (1) providing health care related services within the Halifax Hospital Medical Center Taxing District (the "District"); (2) to assist the District in carrying out its public purpose as specified in Chapter 79-577, Laws of Florida, as amended; and (3) to carry out the two above listed purposes in compliance with Chapter 617, Florida Statutes. (Vol. II, pp. 187-88; see also Vol. II, p. 191).

A non-profit corporation formed under Chapter 617, can "[s]ue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person." Fla. Stat. § 617.0302 (2). According to Fla. Stat. 617.2001 (2), "A corporation not for profit organized prior to December 1, 1987, pursuant to the provisions of chapter 85-56, Laws of Florida, or to the provisions of s. 2, chapter 87-296, Laws of Florida, may conduct the practice of medicine, conduct programs of medical education, and carry on major medical research efforts." PBFS was organized in 1995 and under this statute, cannot conduct the practice of medicine, etc.. (Fla. Stat. § 617.2001(2); Vol. IV, pp. 566-68).

According to Halifax Hospital general counsel, PBFS performs revenue related functions for Halifax Hospital which include billing and collecting. (Vol.

IV, p. 616, l. 21-25). Additionally, PBFS registers patients, verifies insurance, works on quality improvement and performs case management which does not include the direct care of patients. *Id.* p. 617, l. 1-12. According to Employee Relations Specialist, Nancy Davis, PBFS is an "umbrella company" which is "the billing entity for our enterprise, for our organization." (Vol. II, p. 285, l. 20 to p. 286, l. 4). However, nowhere at the Florida Department of State, Division of Corporations does it show that PBFS is related to Halifax Hospital. (Vol. VI, pp. 566-68).

The PUBWA defines agency to mean:

> (a) "Agency" means any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university. (Fla. Stat. § 112.3187 (3)(a)).

The PUBWA applies to Halifax Hospital as a special taxing district created by the State of Florida. However, PBFS is an entity created separately from Halifax Hospital by Halifax Hospital and was not legislatively created as a special taxing district. PBFS is best described as an independent contractor in relation to Halifax Hospital.

The PUBWA defines an independent contractor to "mean[s] a person, other than an agency, engaged in any business and who enters into a contract, including

a provider agreement, with an agency." Fla. Stat. §112.3187 (3)(d). Halifax Hospital has a contractual relationship with PBFS through its Articles of Incorporation and bylaws. (Vol. II, pp. 185-196).[7]

Halifax Hospital is PBFS's only "client". *Id.* p. 185, ¶ 4. Therefore, PBFS is most logically an independent contractor for purposes of Fla. Stat. § 112.3187.

As an independent contractor, PBFS may be sued under the PUBWA. See Fla. Stat. 112.3187. It is the Petitioner's position that the PUBWA is not the only remedy available to those employees who blow the whistle when an independent contractor is involved. Suits may be brought under the PWA as well. See *Hutchison v. Prudential Insurance Co. of America, Inc.*, 645 So. 2d 1047, 1050 (Fla. 3d DCA 1994)("*Hutchison*") (plaintiff allowed to plead alternative cause of action under the PWA as well as original action under the PUBWA); see also *Dahl v. Eckerd Family Youth Alternatives, Inc.*, 843 So. 2d 956, 958 (Fla. 2nd DCA 2003)("Nowhere, however, does the *public-sector act* provide that it is the exclusive remedy for employees of independent contractors of state agencies who are retaliated against for their whistle-blowing activities.").

In *Dahl*, 843 So.2d 956, the court reviewed an order of dismissal of an amended complaint with prejudice by the circuit court which determined:

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[7] Fla. Stat. 617.0302 (7) allows PBFS to, among other things, make contracts.

> . . . that Dahl's exclusive remedy was Florida's public-sector whistle-blower act, sections 112.3187-.31895, Florida Statutes (1999). Because any action under the public-sector act was barred by the statute of limitations, the circuit court dismissed Ms. Dahl's complaint with prejudice. Ms. Dahl now appeals from the dismissal of her complaint. Eckerd cross-appeals from that aspect of the circuit court's order that failed to consider Eckerd's defenses of sovereign immunity and statute of limitations. We hold that the circuit court erred as a matter of law in finding that Ms. Dahl could bring a complaint only under the public-sector act; accordingly, we reverse and remand for reinstatement of her complaint, and we affirm the cross-appeal. *Id.* at 957.

When analyzing the application of PUBWA and PWA the *Dahl* court found that neither Act was an exclusive remedy:

> Nowhere, however, does the public-sector act provide that it is the exclusive remedy for employees of independent contractors of state agencies who are retaliated against for their whistle-blowing activities. To the contrary, both of these statutes are remedial and should be broadly construed. The most important relationship they speak to is that between the employer and the employee; 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 whistle-blower act. Both acts are designed for the protection of employees who "report or refuse to assist employees who violated laws enacted to protect the public." *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 424 (Fla. 1994). *See also Golf Channel v. Jenkins,* 752 So. 2d 561, 562 (Fla. 2000). And, as Ms. Dahl points out, both the public- and private-sector acts contain sections specifically stating that their provisions do "not diminish the rights, privileges, or remedies of an employee [or employer, in the case of the private-sector act] under any

> other law or rule or under any collective bargaining agreement or employment contract." §§ 112.3187(11); 448.105. (*Id.* at 958).

In *Dahl*, the District Court examined the 3rd DCA opinion of *Hutchison v. Prudential Insurance Co. of America*, 645 So.2d 1047 (Fla. 3DCA 1994):

> The Third District found that the insurance company was an independent contractor for purposes of the *public-sector act*, observing that "Prudential takes too narrow a view of the statute, which is a remedial one. *See Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992). '[T]he statute should be construed liberally in favor of granting access to the remedy.' *Id." Hutchison*, 645 So. 2d at 1049. Significantly, in conclusion, the court held as follows:
>
> In the proceedings here, Prudential concedes that the facts set forth in the second amended complaint also suffice to state a good cause of action under the private sector whistle-blower's act, §§ 448.101-448.105, Fla. Stat. (1991). Since there must be further proceedings, we direct that on remand plaintiff be given an opportunity to amend to plead an alternative claim under sections 448.101-448.105. *Hutchinson.* at 1050.
>
> Although the *Hutchison* case arises within a context different from Ms. Dahl's, the fact that at least one court has recognized that retaliation for whistle-blowing activities may come within the ambit of both the public- and private-sector acts is persuasive, particularly given the total lack of language in either act suggesting that the converse is true.
>
> In conclusion, we hold that the fact that Eckerd is "subject to" the *public whistle-blower act* does not diminish Ms. Dahl's right to take advantage of another

remedial statute -- the *private whistle-blower act*. (*Dahl* at 958-959).

1. The PWA covers Ms. Bifulco's whistle-blowing and her case should not have been disposed of by Summary Judgment.

The PWA provides Ms. BIFULCO with a remedy for her whistle-blowing activities. As stated, *supra*, PBFS admitted, on April 5, 2006, in Requests for Admissions that Ms. BIFULCO was an employee for purposes of Fla. Stat. §448.101. (Vol. II, pp. 197-198, p. 223, # 4;Vol. IV, p. 581). This admission, that Bifulco was defined as an "employee" under Fla. Stat. § 448.101(2), was never undone by the trial court as the trial court had previously allowed PBFS to deny a prior admission without explanation in its order, which stood in the court file for over eight (8) months, that it was an employer under §448. (Vol. II, pp. 197-198, p. 223). Fla. Stat. §448.101(2) defines employee as, "'Employee' means a person who performs services for and under the control and direction of an employer for wages or other remuneration. The term does not include an independent contractor."

Fla. Stat. § 448.101(3) defines an employer as, "'Employer' means any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." The Legislative history of the PWA demonstrates that the PWA applies to both the public and private sector. (Vol. III, p. 376). In the House of Representatives Committee on Employee and Management Relations

Committee Bill Analysis & Economic Impact Statement dated January 7, 1991, pertaining to HB 163 with companion bill SB 74, stated in its "Summary":

> **Prohibits a public or private employer** from discharging, suspending, demoting, or taking any other adverse personnel action against an employee in retaliation for disclosing or refusal to participate in an illegal activity or practice of an employer. (Vol. III, p. 381). (Emphasis added).

In the Senate Staff Analysis and Economic Impact Statement dated April 4, 1991 regarding CS/SB 74, the Senate examined public impact and noted that, "The number of incidents to which the bill may apply is unknown." (Vol. III, p. 364). The Senate also noted in its section on the Effect of Proposed Changes that, "The bill prohibits an employer of ten or more persons from taking retaliatory action against an employee . . . ." (Vol. III, p. 364). Nothing was mentioned about an employer being only a private employer. *Id.* In fact, the bill was, entitled "An act relating to labor regulations; prohibiting employers from taking retaliatory personnel action against employees under certain conditions; authorizing civil actions and providing specified relief; providing for certain employer relief; providing an effective date." *Id.* at 368. On April 25, 1991, the Senate passed SB 74 then sent it to the House. *Id.*

In the House of Representatives Committee on Employee and Management Relations Final Bill Analysis & Economic Impact Statement which was passed as CS/SB 74, dated June 10, 1991, the "Summary" stated:

> **Prohibits a public or private employer** who employs more than 10 persons from discharging, suspending, demoting, or taking any other adverse personnel action against an employee in retaliation for disclosing or refusal to participate in an illegal activity or practice of an employer. *Id.* at 376. (Emphasis added).

The Substantive Analysis in the June 10, 1991, HB 163 noted that "private employees are excluded under the provisions of the Whistle-blower Act of 1986" (PUBWA). (Vol. III, p. 377). In noting the effect of the proposed changes, it was stated:

> C/S for House Bill 163 **prohibits an employer who employs 10 or more persons from taking retaliatory action against an employee** who discloses or threatens to disclose information to an appropriate governmental agency, concerning an employer activity in violation of a law, rule, or other regulation that pertains or is applicable to the business of the employer. This provision is not applicable, however, unless the employee has brought the violation to the attention of the employer or supervisor, and said party has had a reasonable opportunity to remedy the violation. (Vol. III, p. 377 ¶ B).(Emphasis added).

Nothing in the Legislative history suggested that the PWA only pertained to private employers. Rather, the Legislative history strongly supports that the PWA applies equally to public sector employers who have ten (10) or more employees.

(Vol. III, pp. 364, 377). Case law also supports this proposition. See *Dahl* and *Hutchison*, *supra.*

2. PBFS admitted that it was an employer as defined by Fla. Stat. §448.101(3) and that Ms. Bifulco was an employee as defined by Fla. Stat. §448.101(2) since it answered petitioner's requests for admissions on April 5, 2006. It was not until Respondent's Summary Judgment hearing, after receiving Petitioner's Responsive Memo, that it sought to undo what it had already admitted for over 18 months. However, even if the Respondent did not make this admission, it still was an employer under Fla. Stat. 448.101(3).

Respondents moved for Final Summary Judgment on October 11, 2007, and a Notice of Hearing for December 6, 2007, was served to the Petitioner on October 22, 2007. (Vol. III, pp. 359-361; Vol. IV, p. 678). On December 4, 2007, (18 months after answering the Request for Admissions and only two days before the hearing scheduled for 30 minutes), Respondent filed a Motion to Withdraw and Amend its Response to Request for Admission No. 3 of Respondents Responses to Petitioner's First Requests for Admission. (Vol. IV, pp. 581-584). Respondent also amended the Notice of Hearing to include the Motion to Withdraw. The hearing took place on December 6, 2007, as planned, and the circuit judge granted the motion.

Fla. R. Civ. P. 1.370(b) states,

> Effect of Admission. --Any matter admitted under this rule is conclusively established unless the court on

> motion permits withdrawal or amendment of the admission. Subject to rule 1.200 governing amendment of a pretrial order, the court may permit withdrawal or amendment 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.** Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against that party in any other proceeding. (Emphasis added).

Counsel for the Defense argued at hearing that the admission he sought to withdraw at this hearing was "inadvertently marked 'admitted'" and that this was inconsistent with its position from the beginning of the lawsuit. (Vol. I, p. 47, l. 20-24). However, in its motion to withdraw admission # 3, counsel admitted that "PBFS' first occasion to argue 768 application as a defense was in response to Petitioner's Motion to Amend Her Complaint to Add Punitive Damages filed January 31, 2007 . . . ." (Vol. IV, pp. 581-82, ¶ 3). Petitioner's counsel noted that this admission had twice prior been filed with the court and that Respondent's counsel had previous opportunity to correct any perceived error, yet failed to do so. (Vol. I, p. 50, l. 24 to p. 51, l. 10). It wasn't until the eve of summary judgment that the Respondent sought to withdraw its admission that it was an employer under Fla. Stat. § 448.101(3) after the Respondent received Petitioner's responsive memorandum pointing out that PBFS's argument was disingenuous and a non

issue because of the admission. (Vol. I, p. 51, l. 9-10; Vol. II, p. 223, # 3; Vol. IV, pp. 581-584).

Even the trial Court admitted that allowing the withdrawal of this admission response would prejudice the Petitioner. (Vol. 1, p. 55, l. 22 to p. 56, l. 21). The court stated, among other things, "Well, obviously it would prejudice you. . . . THE COURT: He may not have a case without that." *Id.* at p. 56, l. 6; l. 16-17. Later, the Court stated, "If I let them out on admission, I think they're out of the case." *Id.* at 79, l. 14-15. Regardless, the court allowed the Respondent to withdraw its admission that it was an employer under Fla. Stat. § 448.101(3) without explanation. But, the Respondent never sought to reverse its admission that the Petitioner was an employee under Fla. Stat. 448.101(2) thus conclusively establishing that Ms. BIFULCO was an employee of PBFS under the PWA. (Vol. II, p. 224, # 4; Fla. R. Civ. P. 1.370(b)). The finding of the trial court allowing the Respondent to withdraw its admission that it was an employer under Fla. Stat. § 448.101(3) was prejudicial and went straight to the heart of the Petitioner's case. (Vol. I, p. 56, l. 6-7).

In *Istache v. Pierre*, 876 So. 2d 1217 (Fla. 4th DCA 2004)("*Istache*"), the Fourth DCA faced the issue of whether the court erred in its refusal to "set aside the defense responses to the request for admissions filed in error." *Id.* at 1219. The Fourth DCA noted that this District favored amending responses so that a case

could be decided on its merits. *Id.* In *Istache*, unlike the present case, the admission responses were due to a clerical error. *Id.* at 1218. In *Istache,* it was clearly established that the responses were in error because of ten (10) responses to eight (8) requests for admission. *Id.* Additionally, it was argued that opposing counsel had to know of the mistake since a pretrial stipulation on the issues had been prepared. *Id.*

In the present case, Respondent did not commit a scrivener's error in its admission admitting that PBFS was an employer under Fla. Stat. § 448.101(3) and had maintained that it was for approximately eighteen (18) months prior to wanting to change its position. (Vol. IV, pp. 581-584). The Legislative history of the PWA, *supra*, also supports that PBFS was an employer under Fla. Stat. § 448.101(3).

What the trial court and District Court failed to recognize was that the PWA and the PUBWA are not mutually exclusive remedies and neither diminished the rights, privileges or remedies of an employee under any other law. *Dahl*, 843 So. 2d at 958. As discussed, *supra*, a public employee can take advantage of both the PWA and PUBWA for his/her claim of retaliation for blowing the whistle on the employer. This logical application of both as remedial statutes, under the facts of the Bifulco case, are consistent with the prior application of employment law remedial statutes by this Honorable Court.

IV. CONCLUSION

Because this Honorable Court's historical interpretation has been consistent with employment statutes, declaring them remedial as they were in derogation of the common law, and that sovereign immunity was designed to protect the sovereign from common law torts, not employment statutory causes of action, Chapter 768.28 should not apply to Fla. Stat. §440.205 and the Fifth DCA's opinion in *Bifulco* should become the law of the State in resolving the conflict with *Kelly* and *Osten* decisions. Additionally, the Fifth DCA's decision to uphold the trial court's decision that the PWA does not apply to Ms. BIFULCO's case should be reversed.

Respectfully, the Petitioner prays to this Honorable Court for the following relief: 1.) Approve the Fifth DCA's opinion on its holding that Chapter 768.28(6) notice is not required for a Fla. Stat. ¶ 440.205 claim and disapprove the decisions in *Kelly* and *Osten*; and 2.) Reverse the Fifth DCA's decision that PBFS is not subject to application of the PWA and the PUBWA is not the exclusive remedy under these facts; and 3.) Render a decision finding that employment statutes in Florida are not at all subject to Fla. Stat. 768.28 unless and until the Legislature specifies its applicability in each such statute, in whole or in part, as the Legislature so determines.

Respectfully submitted,

/s/ Frederick C. Morello, Esq.
Frederick C. Morello, Esq.

/s/ Michael G. Howard, Esq.
Michael G. Howard, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing to Thomas J. Leek, Esq. & Kelly Parsons, Esq., 150 Magnolia Ave., P.O. Box 2491, Daytona Beach, FL 32115-2491 on this 3rd day of August, 2009, by the indicated method:

■ U.S. Mail □ Fax □ Hand Delivery □ Overnight Delivery
□ Certified Mail □ Process Server

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response complies with the font requirements (Times New Roman 14-point font) of Rule 9.100(l), Florida Rules of Appellate Procedure.

/s/ Frederick C. Morello, Esq.
Frederick C. Morello, Esq.