

## SECTION V: FLORIDA'S WHISTLEBLOWER ACT: F.S. 448.102

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

- (1) Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy, or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy, or practice
- (2) Provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer
- (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation. (no written notice by employee required)

Florida's Whistleblower Act has two separate causes of action, **one of which does not require as a condition precedent, the Employee having actually reported the improper action suspected.**

An Employer **CAN NOT** fire an employee who has disclosed or threatened to disclose to any appropriate governmental agency, under oath, in writing an activity policy or practice of the employer that is in violation of a **law, rule or regulation.**

**Condition Precedent to subsection (1):** The Employee **MUST** provide written notice to the supervisor or employer in advance of any action (lawsuit) to provide the employer an opportunity to remedy the situation.

**F.S. 448.102(2):** protects an employee who provided information to or testified before any appropriate government agency, person, or entity conducting an investigation, hearing or inquiry into an alleged violation of any law, rule or regulation by the employer.

### **F.S. 448.102(3): THE EMPLOYER NIGHTMARE CASE**

An Employer **CANNOT** fire an employee who objected to, or refused to participate in, any activity policy, or practice of the employer which is in violation of a law, rule or regulation. Prevents retaliation by Employer. **No Actual Written Objection Is Required To Be Delivered By The Employee Nor Any Report Of The Activity To Any Outside Person Or Entity.**

Attorney's Fees can be assessed against the Employer **or** the Employee: the Court has discretion to award attorney's fees to the prevailing party.

## Defenses to a Whistleblower Claim

**1 Bad Faith Defense:** Employees are not protected and do NOT have a legal remedy when employee is motivated for bad faith reasons such as *extortion*. But, the good faith requirements are not stated in private sector, but implied that such requirements do apply.

**2 Good Faith:** employee, although not certain that the employer has committed an act in violation of a law, rule or regulation, takes action with good faith in reporting an alleged or suspected violation. If the Employee is fired because of it, Employee has legal remedy against Employer for violation of the Whistleblower Act.

**PRACTICE TIP: Be Aware And Warned:** The Plaintiff's goal is to get to a jury, to seek sympathy against the "big bad employer".

**3 Preemption Affirmative Defense:** Where another State or Federal law or act is the exclusive remedy: explore this before answering the complaint.

**4 Bar To Suit:** The Employee **CANNOT** recover if the employee failed to notify the employer about the illegal activity, policy or practice as required by 448.102(1) **OR** if the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by this act: affirmative defenses.

Punitive damages are inapplicable in federal cases, but might be available in FWA cases. The Employee must proffer evidence of malicious behavior. **PUNITIVE DAMAGES:** Are precluded by *Branche v. Airtran Airways*, 314 F.Supp .2d 1194; and *Hanna v. WCI Communities, Inc* 348 F.Supp.2d 1332.

There is NO automatic private sector act overruling the at will doctrine. The Employee essentially must give written notice. The Law is not clear whether self-regulating industry guideline rules fall within definitions of the Whistleblower Act.

**PRACTICE TIP:** The private employer must have more than 10 employees for the employee to have a cause of action under the Whistleblower Act.

## Statute Of Limitations On Whistleblower Claims 448.103

Employee has **2 years** to file suit after discovering that the alleged retaliatory personnel action was taken, or must file within 4 years after the personnel action was taken whichever is earlier.

## Venue

Employee can file suit in Venue where action occurred, where the plaintiff resides or where the employer has its principal place of business.

### **Litigation Procedures, Court Authority And Remedies For Plaintiff:**

There are several things a Court can do in regards to Remedies:

1. Court can issue an *injunction* restraining the continued violation of this act
2. Court can order the Employee reinstated to the same position or to equivalent position.
3. Reinstatement full fringe benefits and seniority rights
4. Award compensation for lost wages, benefits and other remuneration
5. Any other compensatory damages allowable at law
6. **Award Employee Attorney's Fees And Costs.**

**PRACTICE TIP: Another Warning For Employers:** an employee can get out of arbitration clause if suing under whistleblower act. It's a known plaintiff litigation tactic.

There is a right to jury trial under FWA.

### **Prima Facie Case**

Plaintiff must prove that:

1. The employee engaged in statutorily protected expression;
2. The employee suffered an adverse employment action; and
3. The adverse employment action was causally linked to the statutorily protected activity.

*See Sierminskiv. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir.2000 )(citing *Olmsted v. Taco Bell*, 141 F. 3d 1457, 1460 (11th Cir.1998)); *Rice-Lamar v. City of Ft. Lauderdale*, 853 So.2d 1125, 1132 (Fla. 4th DCA 2003)(applying the Title VII burden shifting analysis to a claim brought under Florida's public Whistle-Blower Act); *Taylor v. Memorial Health Systems, Inc.*, 770 So.2d 752, 754 (Fla. 5th DCA 2000)(putting forth the elements required for a claim brought under Fla. Stat.§ 448.102(1)); *Golf Channel v. Jenkins*, 752 So.2d 561, 568 (Fla.2000)(finding the written notice requirement inapplicable to claims brought pursuant to Fla.Stat. § 448.102(2) and (3)). Only upon such showing does the burden shift to the defendant to put forth a legitimate reason for the adverse employment action. *Sierminski*, 216 F.3d at 950.

### **Burden Of Proof To Survive Directed Verdict at Trial**

The Plaintiff must show that Defendant actually engaged in activities that violated those

laws, rules or regulations or that she refused to participate in activities that would have violated a law, rule or regulation as defined under Florida law.

### **CASE LAW ON THE FWA**

Seven month period between employee's protected activity in complaining about unsafe working conditions and his termination was too protracted, standing alone, to give rise to a reasonable inference that the termination was caused by the protected activity so as to be actionable under FWA.

Even if employee could establish prima facie case under Florida's Whistleblower's Act, employer produced credible evidence that it terminated the employee, not because he complained about safety problems at lumber mill, but because he refused to attend a scheduled meeting to discuss his six month absence from work, and employee failed to show that legitimate, non-retaliatory proffered reason was a pretext for unlawful retaliation; fact that employer did not impose progressive discipline on the employee was insufficient to permit a reasonable fact finder to conclude that pretext existed. Florida's Whistleblower's Act. West's F.S.A. § 448.102(3). *Bell v. Georgia-Pacific Corp.*, 390 F. Supp. 2d 1182 (M.D. Fla. 2005).

An Employee who allegedly was terminated based on his opposition to employment discrimination against his co-worker wife established causal connection element of prima facie case of retaliation under Title VII and Florida Civil Rights Act, given employee's testimony that he complained to supervisor regarding sexual harassment that he believed his wife was experiencing and the close temporal proximity that existed between employee's complaint and termination of his employment. Civil Rights Act of 1964, § 704(a), 42U.S.C.A. § 2000e-3(a); West's F.S.A. § 760.01 et seq. *Singh v. Green Thumb Landscaping, Inc.*, 390 F. Supp. 2d 1129 (M.D. Fla. 2005).