Litigating Under the Florida Private Sector Whistle-Blower's Act: Plaintiff Protection and Good Faith

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COMMENTS

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I. INTRODUCTION

The State of Florida has long been known for its hard-line judicial stance on labor and employment issues. Currently, challenges to Florida’s traditional at-will doctrine focus on the concept of whistleblowing and the recent amendment of Florida’s Public Sector Whistle-Blower’s Act (“Public Sector Act”) to include private sector employees. Interpretation of the Private Sector Whistle-Blower’s Act (“Private Sector Act”) has just begun. Indeed, Florida courts are currently delving into the many questions that the Private Sector Act presents. Lower state courts interpreting the Private Sector Act view employment jurisprudence on many different, and often contradictory, levels. Few cases have passed the pre-trial motion stage.

Today’s legal landscape can offer litigants a unique opportunity to take advantage of the statute’s newness: decisions interpreting Florida’s

1. Whistleblowing is “the act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, publicly ‘blows the whistle’ if the organization is involved in corrupt, illegal, fraudulent, or harmful activity. . . .” WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY vii (Ralph Nader et al. eds., 1972).
Public Sector Act\(^3\) may allow more protection for the "good-faith" private whistleblower. Such an interpretation may have important implications for private sector employees in Florida.

This Comment will examine the decisions of Florida courts and their interpretations of both the Public Sector and Private Sector Acts in Florida. Additionally, it will analyze these decisions in light of the available interpretive options, adopted in other jurisdictions, which serve generally to define the scope of whistleblower protection. Finally, this comment will discuss obstacles to suits brought under the Private Sector Act and possible strategies that practitioners may invoke in order to achieve just results for plaintiffs seeking its protection.

II. Florida's Employment Landscape

A. Background

At-will employment, a product of the Industrial Revolution, is based on the ideas of freedom of contract and mutual consideration. According to at-will philosophy, employees may expect job security only to the extent negotiated. Absent a written contract for employment specifically outlining an employer's rights and duties in relation to and in mutual consideration for the rights and duties of the employee, an employer can terminate the employee for "any reason or even for no reason at all."\(^4\) Modern commentators from the Law and Economics School of Legal Philosophy support the at-will relationship and argue that the doctrine offers industry advantages not otherwise available.\(^5\) For example, Professor Richard Epstein argues that the simplicity of the at-will relationship reduces litigation costs and binds the employer and employee together in the self-interested goal of avoiding the costs of hiring and firing.\(^6\)

Critics often counter that, in a modern economy, the Law and Economics argument neglects to address the practical assumptions upon which it rests. First, the argument assumes that the market for an employee's labor is viable, thus positioning the employee in a fair negotiating position with her employer. Moreover, the argument also assumes that the average American employee is in a realistic position to "take back her labor" when the employment situation calls for such

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3. Id. § 112.3187.
5. See generally RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995). The author argues that the simplicity of the at-will relationship is one of the doctrine's major advantages. See id. at 159.
6. See id. at 158-59.
power-based action. Finally, as discussed later in this Comment, expansive protection for whistleblowers may actually save litigation costs and promote the efficient use of resources, by publicly exposing the improper activities of private businesses that drain individual, community, local, state, and federal resources.

Since the mid-1900's, many social, political, and economic developments have sparked a new way of thinking about employment relations in the United States. Aside from the labor union movement of the 1930's, private workers remained largely unprotected in the workplace. "Standards of personal morality, life-style, dress and grooming, associational activities, and political ideology could be (and were) set by companies as conditions for hiring and advancement."7 In the 1960's, the expansion of protection for unionized workers, the strength of the Civil Rights movement, and the birth of consumer advocacy provided the context in which Americans began to question the power of private industry and the impact of that power on their lives.8 Furthermore, advancements in professional codes of ethics and the proliferation of model rules and codes have contributed to a new way of looking at the role of employees in the workplace today.9

The enactment of Title VII of the Civil Rights Act of 196410 forged an exception to the traditional American principle by prohibiting discriminatory employment practices which, despite the at-will relationship, an employer just could not engage in.11 Thereafter, Congress expanded this concept by providing specific protections against such unfair employment practices.12 The modern debate over whistlebrow-

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7. Loyalty and Dissent, supra note 4, at 4.
8. See id. at 5-7.
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this sub chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub chapter.
Id. at § 2000e-3(a).
11. See id. § 2000e-2(a) (prohibiting employment discrimination based on "race, color, religion, sex or national origin.").
12. See generally 29 U.S.C. § 215 (1994) (prohibiting discharge for exercising rights under minimum wage and hour laws); id. § 623 (prohibiting discharge or refusal to hire based on age); id. § 793 (prohibiting public employers or their agents from discriminating on the basis of a
ing, however, does not focus on anti-discrimination measures enacted by state and federal legislatures. Instead, whistleblower statutes generally seek to expand the breadth and extent of the protection for the employee in the workplace beyond the strictures of the at-will doctrine.

By its very nature, whistleblowing touches the nerve center of competing tensions in American employment history. On one hand, loyalty in one’s microcosmic place of employment, and to one’s employer, is a fundamental concept. Indeed, a basic tenet of the law of agency requires an agent “to act solely for the benefit of the principal.” Employees generally are expected to act in accordance with their employer’s interests, as evidenced by the inclusion of traditional non-competition clauses and confidentiality agreements in employment contracts.

On the other hand, the worker-citizen, as a member of society at large, has duties imposed upon her from sources such as the state (in the form of laws, ordinances, and rules), her religion, her profession, her community, and her family. This legal/ethical tension places the worker-citizen in a precarious position once she, in good-faith, suspects that her employer is engaging in some form of wrongdoing. As a society, we value both unrestrained individual freedom in a capital market as well as the ability to nobly protest when our collective sense of morality is offended. For the potential whistleblower, therein lies the conflict. If she “blows the whistle,” retaliation may ensue—she may be fired, transferred, demoted, “pushed-out,” or simply shunned and labeled a traitor. If she fails to act, some form of harm may result, ranging from the injustice of the employer getting away with illegal or unethical conduct to large-scale disaster, affecting many outside of the microcosm of employment.

Several recent examples serve as a reminder that the issue of whistleblowing is not as theoretical as the debate may suggest; in fact, the situations in which whistleblowing arises have far-reaching practical implications for the lives of many Floridians.

In 1996, an employee working at the Pinellas County Health

16. See generally Loyalty and Dissent, supra note 4. This book discusses situations where the whistle was not blown in time enough to save lives and prevent property destruction. Examples include defective Firestone tires, the harmful effects of asbestos exposure, the Love Canal disaster, the Ford Pinto, and Watergate. See id.
Department publicly released a list of more than 4,000 people infected with AIDS and the HIV virus, a leak called "the worst breach of AIDS confidentiality in the nation." Four years earlier, however, Dade County Public Records Supervisors were warned by Records Investigator Rhonda Cooley about potential security breaches and problems in records security policies. Cooley alleges that a supervisor told her to destroy these findings.

In the private sector, a whistleblower alleged that bent aircraft parts were straightened rather than replaced, as required by the parts manufacturer, at a SaberTech facility. This most recent allegation may eventually affect a reopening of the hearings instigated by the fatal Everglades crash that took the lives of 110 people in May of 1996.

Finally, an attorney working for Prudential Insurance Company in Jacksonville reported to state regulators that he witnessed another lawyer shredding documents in connection with allegations of "churning" by the insurance company. He blew the whistle after telling senior Prudential officials that he believed that "the failure to expose the episode amounted to 'obstruction of justice.'"

These examples, spanning only three months in Florida, suggest that whistleblowing plays an important role in regulating otherwise unseen unlawful business conduct in the state.

B. Florida's At-Will Jurisprudence

Florida employment jurisprudence reflects the traditional doctrine regarding the legal position of the American worker: an employee is terminable "at will."

[If the period of employment is indefinite, either party may terminate it at any time; that is, unless the employment contract specifically obligates both the employer and the employee for a definite term of employment, the employment is considered to be indefinite and terminable at the will of either party.

18. See id.
20. See id.
22. Id.
23. Catania v. Eastern Airlines, Inc., 381 So. 2d 265, 266 (Fla. 3d DCA 1980) (citations omitted). See also DeMarco v. Publix Supermarkets, Inc., 360 So. 2d 134, 136 (Fla. 3d DCA 1978) ("The established law is that where the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may
Describing Florida employment law, a federal judge commented that "Florida's at-will employment doctrine may be 'cold-hearted, draconian and out-dated,' but it is the law of Florida."  

Supporters of this doctrine argue that Florida's at-will environment provides fertile soil for the growth of new business because a pro-business community allows for industry stability by making loss allocation more certain. Indeed, the Florida Legislature is currently seeking to reform the tort system in an effort to stave off what is perceived to be a coup d'état for the state of Louisiana, who recently advertised its pro-business stance toward tort legislation in local newspapers. In fact, Florida's thirty-seven-member Constitutional Revision Commission is currently holding hearings on whether to include a tort reform initiative on the November 1998 ballot.

Although both the Florida legislature and the Florida courts have strongly adhered to the employment at-will doctrine, exceptions have been carved out. These exceptions include protections against wrongful discharge where an employment contract specifies a definite term of employment, where an employer's personnel policies providing for "cause only" termination give rise to an enforceable employment contract, for filing a worker's compensation claim, and for when an employee offers additional consideration for which she can expect to be terminated for cause only. The most recent inroad into the at-will doctrine came in 1991 when the Florida legislature amended its Public Sector Act, first passed in 1986, to include protection for private sector employees. While the motivation behind this exception is clear, both the Florida legislature and judiciary have encountered considerable difficulty in defining a coherent and defensible network of protections for the whistleblower in the workplace.
III. EXCEPTIONS TO THE AT-WILL DOCTRINE

A. Contract and Tort Theories

Many states have created exceptions to the at-will doctrine in order to provide a cause of action for wrongful or retaliatory discharge in the absence of a specific legislative pronouncement. Most of these states have grappled with the idea of whether to characterize a right of action for wrongful discharge as falling under contract or tort principles.\(^3\)

In the 1980's, Florida courts consistently rejected the adoption of either a tort or a contract action for wrongful or retaliatory discharge. Recent cases, however, suggest the existence of an exception where state or federal law states a clear and important public policy.\(^3\)

The Florida Supreme Court affirmed its acceptance of employment at-will in *DeMarco v. Publix Super Markets, Inc.\(^3\)* when it denied a cause of action to a supermarket employee discharged allegedly as a result of his filing a personal injury suit on behalf of his daughter who was injured when a bottle exploded. The court also rejected the argument that the “access to courts provision” found in Article I, Section 21 of the Florida Constitution created a private right of action for retaliatory discharge.\(^3\) In the same year, the Third District Court of Appeal relied on *DeMarco* in *Catania v. Eastern Airlines, Inc.*\(^3\)

In *Catania*, the plaintiffs brought suit asserting both tort and contract theories. Plaintiffs first argued that public policy required recognition of a wrongful discharge cause of action. The court noted:


34. 384 So. 2d 1253 (Fla. 1980).

35. See id. at 1254.

36. 381 So. 2d 265 (Fla. 3d DCA 1980).
discharge despite the old rule, doing so on public policy grounds. They have implied a good faith element restriction on an employer’s absolute and unbridled right to discharge for any reason, no reason, or a false reason, or they have found that in given instances the grounds for the discharge contravened other strong public policies of the state. We reject the plaintiff’s invitation to be a “law giver” in this case.37

The court reasoned that to extend such a cause of action would require the courts to weigh the employer’s motive for discharging the employee in each case, which courts have found “difficult and inappropriate.”38

As for a cause of action in tort, the Catania court stated that “[n]ot every violation of public policy is a tort in the absence of an allegation of acts constituting a breach of the plaintiff’s legal rights and causing injury to the plaintiffs’ person, property or reputation.”39 Despite the legislative intent expressed in section 447.01 of the Florida Statutes to protect the non-unionist, the unionist and the “right to work which is the right to live,” the court said that such a public policy was “too general to permit legal analysis.”40 In 1985, the Third District followed its Catania analysis in Hartley v. Ocean Reef Club, Inc.41 and explicitly stated that Florida law does not recognize a cause of action for retaliatory discharge based solely on a general notion of public policy.

In 1989, the Fifth District Court of Appeal summed up Florida law relating to causes of action for retaliatory discharge in Kelly v. Gill:42

In the absence of a specific statute granting a property interest, a contract of employment (implied or express) which is indefinite as to term of employment is terminable at the will of either party without cause and an action for wrongful discharge will not lie . . . . There is also no cause of action based in common law tort for wrongful dismissal such as negligence, malice, or retaliation. It is also clear that breach of an obligation of good faith and fair dealing has not been recognized in Florida as a viable cause of action, at least where a wrongful dismissal is claimed.43

This case was recently revisited by the United States District Court for the Northern District of Florida in Zombori v. Digital Equipment

37. Id. at 267.
38. Id.
39. Id. (citations omitted).
40. Id.
41. 476 So. 2d 1327 (Fla. 3d DCA 1985).
42. 544 So. 2d 1162 (Fla. 5th DCA 1989), rev. denied, 553 So. 2d 1165 (Fla. 1989). Accord Hartley, 476 So. 2d at 1330; Muller v. Stromberg Carlson Corp., 427 So. 2d 266, 269 (Fla. 2d DCA 1983).
43. Kelly, 544 So. 2d at 1164 (citations omitted).
In this case, the plaintiff alleged that she was fired because she aided her husband’s testimony in a suit against their employer by giving her husband’s lawyer a report compiled from the employer’s databases. Although Zombori brought suit under the Private Sector Act in Count I of her complaint, the employer sought only to dismiss Zombori’s prima facie tort claim. The federal court, sitting in diversity, recognized that “Florida law stands squarely against recognizing a common law prima facie tort claim based on retaliatory discharge.” Despite Zombori’s arguments that Florida law changed since Kelly, the court stated:

Notably, Florida’s legislature and courts have created exceptions to the at-will doctrine allowing employees to assert wrongful discharge claims in certain circumstances. By doing so, Florida’s legislators and judges have attempted to conform the doctrine to current public policy. Given these officials are elected and appointed by the people of Florida, it is their duty to define Florida law on this and other subjects... [Zombori’s] arguments are best addressed to the courts and legislature of Florida.

This deference to the legislature, while generally shared by Florida courts, becomes particularly significant when one focuses on the plight of the whistleblower. There are many important reasons, despite the at-will employment relationship, why courts should allow such causes of action in the case of whistleblowing, that would not necessarily apply to cases of employment dismissal in general.

It is well-settled that courts are hesitant to adopt general notions of public policy as a basis for employment decisions. “Public policy, like society, is continually evolving and those entrusted with its implementation must respond to its everchanging demands.” Thus, definitive statements of public policy come from the legislature. It is impossible, however, for lawmakers to address prospectively through general legislation the myriad of specific situations which arise. This is the court’s duty.

Thus, courts must recognize that, while deference to the legislature is desirable, the judiciary plays a role in the evolution of society and the public policy which it espouses. It is in this respect that public policy becomes a compelling argument for the whistleblower. The nexus of the at-will doctrine and public policy provides the opportunity for courts to pronounce the legislative intent of the state. For example, where the

45. See id. at 208.
46. Id.
47. Id. at 209-10.
48. See supra notes and accompanying text Part III.B.
legislature has passed a law prohibiting some form of business practice, and a whistleblower is discharged from employment because she has disclosed such a violation, more than equity requires that the whistleblower be protected from such injustice. Particularly where the whistleblower is faced with criminal sanctions or is otherwise under a duty to report improper conduct, the at-will doctrine can no longer operate as bar to justice. 50

The State of California has recognized such a distinction. In Petermann v. International Brotherhood of Teamsters, 51 the plaintiff was fired for refusing to lie under oath at the behest of his employer. The court held that the public policy of the state included the encouragement of truthful testimony in court. 52 Similarly, in Baiton v. Carnival Cruise Lines, 53 Florida’s Third District Court of Appeal found it significant that the plaintiff’s alleged discharge was based on his agreement to give testimony under oath, thus subjecting him to charges of perjury with attendant criminal sanctions, if he had testified untruthfully in order to save his job. In effect, the court held that a whistleblower can invoke the protection of the Private Sector Act when to comply with an employer’s request would be a crime.

With respect to actions based in contract, in Falls v. Lawnwood Medical Center 54 the Fourth District Court of Appeal reversed a grant of summary judgment in favor of the employer, where a genuine issue of material fact existed as to whether the employer’s personnel policies were part of the employee’s employment contract. This exception is grounded in the idea that where the employee is hired with the express understanding that the policies and procedures governing termination are those expressed by the employer in employee handbooks, personnel manuals, or other written or oral manifestations of policy, they are deemed to be the employee’s contract of employment. This decision has, however, been severely limited in subsequent applications.

For example, just two years after Lawnwood was decided, the First District Court of Appeal affirmed a grant of summary judgment in favor of the employer where the plaintiffs claimed that, since their employer was converted from a public to a private corporation, the policies in

50. But see DeMarco v. Publix Supermarkets, Inc., 384 So. 2d 1253 (Fla. 1980). In addition to the court’s reaffirmance of the at-will doctrine in this case, the decision demonstrates a choice on the part of the legislature and the courts between the plaintiff’s job and his daughter’s insurance issues, placing the burden directly on the employee. Such an interpretation would be unfortunate in the whistleblower context.


52. See id. at 27.

53. 661 So. 2d 313 (Fla. 3d DCA 1995).

54. 427 So. 2d 361 (Fla. 4th DCA 1983).
effect before the transition withstood the transfer. The court held that the plaintiff’s “assertions that the alleged personnel policies were part of their contract of employment with the new [corporation] were mere unilateral expectations, rather than mutual promises necessary to create a binding contractual term.” The court distinguished Lawnwood by stating that, in that case, a genuine issue of material fact existed concerning the existence of a provision of termination only for just cause. Ultimately, the court found that the employer had not explicitly made the decision to provide for termination with cause, even though it expressly adopted the predecessor corporation’s policies and procedures which did so provide.

Again, in the 1988 case of Lurton v. Muldon Motor Co., the First District Court of Appeal refused to find an employer’s written policy requiring termination for just cause binding on the employer for two reasons. First, the policy was not in effect when the plaintiff was hired. In fact, the plaintiff had actually written the policy for his employer during his employment. Second, the court stated that because this case reached the appellate court after a full-blown trial, it was distinguishable from Lawnwood, which was an appeal from a grant of summary judgment. This appears significant in light of the fact that the appellate court acknowledged the trial court “made no explicit finding that the manuals were not a term of the employment contract,” and instead found such a finding implicit in the lower court’s decision.

Most recently, the First District summarized the law in Florida regarding when an employer’s written policies give rise to causes of action for wrongful termination. In Linafelt v. Bev, Inc. Enterprises, the court stated that “[U]nilateral policy statements cannot, without more, give rise to an enforceable contract. In Florida, policy statements are not employment contracts unless there is an express reference in the statement to a period of employment and the benefits to accrue therefrom.”

After Linafelt, it seems clear that Florida law has witnessed the demise of the Lawnwood doctrine. The language of Linafelt limits the

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55. See Bryant v. Shands Teaching Hospital and Clinics, Inc., 479 So. 2d 165, 168 (Fla. 1st DCA 1985).
56. Id. at 168 (citations omitted).
57. See id.
58. See id.
59. 523 So. 2d 706 (Fla. 1st DCA 1988).
60. Id. at 709.
61. 662 So. 2d 986 (Fla. 1st DCA 1995).
use of an employer's policy statements to cases in which a contract otherwise exists by requiring the presence of a definite term of duration—that which traditionally has drawn the line between employment at-will and employment existing under an express contract. In contrast, *Lawnwood* allowed the use of an employer's policy procedures to prove the existence of an implied contract. In the end, this unfortunate line of cases has effectively limited the *Lawnwood* case to its specific facts and has made the possibility of successfully arguing the foregoing "policies and procedures" cases extremely doubtful.

**B. Legislative Proscription**

Generally, states have created public policy protections for wrongful discharge in two different ways. Some states view a cause of action for wrongful discharge as an exception to the at-will doctrine. An excellent expression of this point of view is found in the dissenting opinion by Justice Clarence Brown in *Phung v. Waste Management, Inc.*

Although the case held that public policy does not require that there be an exception to the at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of the law, Judge Brown drew on the exceptions to the at-will doctrine adopted by other states, and aptly summarized as follows:

> [The doctrine of at-will employment developed in a laissez-faire climate that encouraged industrial growth and strongly approved an employer's right to control his own business . . . . Although I am well aware that today's climate demands continued industrial growth, in my view, justice requires that an employee conduct business in a lawful manner. . . . [T]he state has a legitimate interest in knowing that the regulations which protect Ohio's citizenry are complied with by the persons being regulated.]

Under this view, an employer could not fire an at-will employee for reasons that contravene general notions of public policy. Although Florida has expressly rejected this possibility in other contexts, public policy is a thread running throughout cases interpreting both the Private and

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64. 491 N.E.2d 1114 (Ohio 1986).

65. Id. at 1118.

66. See Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 ( Fla. 3d DCA 1985) (rejecting the notion that a cause of action for wrongful discharge exists based on general conceptions of public policy).
Public Whistle-Blower Acts. These cases seem to indicate an extent to
which the court may accept public policy justifications for furthering the
protections of the private sector whistleblower, despite the lack of spe-
cific language in the statute. It seems that if the employer's violation is
serious enough, Florida courts may allow some leeway.

For example, in Forrester v. John H. Phipps, Inc., Pamela For-
rester sued her employer, Channel Six, for suspending her several times
following her refusal to retract statements made to a local newspaper
regarding disciplinary actions previously taken against her. The trial
court dismissed her complaint with prejudice, agreeing with the
employer that the Private Sector Act covered only violations of law,
rules or regulations that pertained specifically to an employer's business.
The First District Court of Appeal rejected this view as too narrow an
interpretation of sections 448.101-.105. On the other hand, the court
also rejected the plaintiff's argument that the "law, rule or regulation"
language of section 448.101 was broad enough to encompass matters of
public policy. The court stated:

We are confident that the legislature did not intend to create a cause
of action for what essentially amounts to an internal and personal
dispute between appellant and her employer . . . Justice Terrell once
observed "public policy was described as a very unruly horse, and,
when once you get astride it, you never know where it will carry
you." 69

The court affirmed the dismissal of the complaint with prejudice
because it could not "agree that the 'public policy' issues such as those
complained of by the appellant fall within the ambit of section
448.101(4)," 70 thus suggesting that agreement with false statements and
slander were not important enough public policy justifications to invoke
statutory protection under the Private Sector Act.

In Hutchison v. Prudential Insurance Co., however, the Third
District Court of Appeal granted the plaintiff leave to amend his com-
plaint to include a claim under the Private Sector Act, in addition to his
Public Sector Act claim, suggesting that, in the opinion of the court, his
allegations of unfair trade practices in violation of section 626.9541 of

67. See, e.g., Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); Baiton v. Carnival
Cruise Lines, Inc., 661 So. 2d 313, 316 (Fla. 3d DCA 1995); Kelder v. ACT Corp., 650 So. 2d
647, 649 (Fla. 5th DCA 1995); Forrester v. John H. Phipps, Inc., 643 So. 2d 1109, 1112 (Fla. 1st
DCA 1994); Hutchison v. Prudential Ins. Co. of Am., 645 So. 2d 1047, 1048 (Fla. 3d DCA 1994).
68. 643 So. 2d 1109 (Fla. 3d DCA 1994).
69. Id. at 1111-12 (citations omitted).
70. Id. at 1112.
71. Hutchinson, 645 So. 2d at 1048.
the Florida Statutes, were of enough merit to justify an opportunity to seek protection under both Acts.

Although public policy justifications for the recognition of exceptions to the at-will doctrine have rarely been accepted, Florida courts have explicitly recognized an exception to the at-will doctrine where the legislature has defined a clear public policy requiring it. This exception allows a cause of action for wrongful discharge where the discharge violates a clear and obvious expression of legislative intent to prohibit such dismissals in specific situations. This recognition of public policy, as opposed to contract or tort theories, directly relates to statutory enforcement as a policy goal. As of 1998, however, this doctrine has been applied in only two situations. In the workers compensation context, section 440.205 of the Florida Statutes states: “Coercion of employees. No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee’s valid claim for compensation or attempt to claim compensation under the Workers’ Compensation Law.” The Florida Supreme Court announced this exception in Smith v. Piezo Technology & Professional Administrators. Relying on traditional rules of statutory construction, the court stated:

Where a statute requires an act 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.

Further, the court explained its reason for adopting such an exception: “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.”

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72. See Smith v. Piezo Tech. and Prof’l Adm’rs, 427 So. 2d 182 (Fla. 1983).
73. See id. at 184 (stating that the law concerning the at-will doctrine is well entrenched in the jurisprudence of this state and may not be modified on any basis but a clear statutory abrogation of the rule); see also Bryant v. Shands Teaching Hosp. and Clinics, Inc., 479 So. 2d 165, 167 (Fla. 1st DCA 1985) (“While it is true that the legislature may carve out exceptions to the at-will doctrine, . . . this court is not free to identify additional statutory modifications of the at-will doctrine unless the legislature renders a clear statement of its intent to do so.”); accord Maguire v. American Family Life Assurance Co. of Columbus, 442 So. 2d 321, 323 (Fla. 3d DCA 1983).
74. FLA. STAT. § 440.205 (1997).
75. 427 So. 2d 182 (Fla. 1983).
76. Id. at 184 (quoting Girard Trust Co. v. Tampashores Dev. Co., 117 So. 786, 788 (1928)).
77. Id. (quoting Mitchell v. Maxwell, 2 Fla. 594 (1849)).
Similarly, the Florida legislature passed The Whistle-Blower's Act of 1986 to protect public employees from retaliation for exposing improper employer conduct that threatens the "health, safety, or welfare" of the citizens of Florida. Without leaving the courts to interpret whether the statute provided a cause of action, the legislature provided one, allowing for express remedies. Furthermore, the Private Sector Act arose from the 1991 amendment of the existing Whistle-Blower Act (section 112.3187), by granting private sector employees comparable and explicit whistleblowing protections. Section 448.101 et. seq., introduced as Senate Bill 74 and later becoming Session Law 91-285, extends the protection of section 112.3187 to private employees in firms of ten or more employees. The bill was enacted into law during the 1991 legislative session. Sections four and five of the Bill were subsequently codified as the current Private Sector Act, sections 448.101 through 448.105. Because the Private Sector Act is merely the result of an amendment to the Public Sector Act, it is reasonable to expect Florida courts to interpret both acts in a very similar, if not identical, fashion.

Unlike the worker's compensation statute, this amendment created an express civil right of action for private employees who blow the whistle and who are discharged in retaliation for doing so. Section 448.103(2) lists the relief available to a whistleblower invoking the statute's protection: injunction, reinstatement of employment, benefits and seniority, back pay, and any other compensatory damages allowable at law. Section 448.104 allows the prevailing party to receive reasonable attorney's fees, costs and expenses. Section 448.105 expressly provides that "[t]his act does not diminish the rights, privileges, or remedies of an employee or employer under any other law or rule or under any collective bargaining agreement or employment contract."

Following the analysis in Smith and cases in which statutory interpretation is required, in the whistleblowing context, the court's duty is clear: Because "the statute confers . . . every particular power necessary to insure the performance of that duty," the court must grant access in favor of the remedy. Generally, whistleblower laws are construed

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79. Id. § 112.3187(9).
81. Id.
82. See Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994).
84. Id. § 448.103(2).
85. Id. § 448.104.
86. Id. § 448.105.
87. Smith, 427 So. 2d at 184 (quoting Mitchell v. Maxwell, 2 Fla. 594 (1849)).
88. See Arrow Air, 645 So. 2d at 424.
broadly in light of their remedial purpose.  

At least one Florida decision thus far has construed the meaning of "remedial" with respect to the Private Sector Act. In *Arrow Air, Inc. v. Walsh*, Michael Walsh, a flight engineer, alleged he was fired for delaying a scheduled flight for five hours until repairs could be made to the plane's hydraulic system, and for reporting the safety violations in connection with that flight. The Florida Supreme Court held that, while a law with a remedial purpose is presumed to apply retroactively absent specific statutory language to the contrary, the Private Sector Act should not be so applied. The court, agreeing that a law creating new substantive rights and liabilities creates a new presumption against retroactive application, was primarily concerned with employers being held liable for retaliatory discharge without receiving actual or constructive notice of their potential liability. This confirms the business certainty policy of Florida's pro-employer at-will doctrine, suggesting that construction of statutes affecting this policy will allow only narrowly drawn exceptions.

To conclude that the Private Sector Act creates an exception to the at-will doctrine in Florida does not require the creation of a cause of action in either tort or contract for retaliatory discharge, nor does it require the courts to create an exception to the judicially created at-will doctrine in favor of public policy. Simply stated, the legislature has proscribed termination of employment, in spite of the at-will doctrine, where it is done in retaliation for whistleblowing. As a remedial act, there is even more support for such a conclusion.

Florida courts have yet to explicitly recognize that either the Public Act or the Private Sector Act are express legislative exceptions to the at-

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89. See, e.g., *Neal v. Honeywell, Inc.*, 826 F. Supp. 266 (N.D. Ill. 1993). *Neal* stated that: Many courts have addressed issues under different federal whistleblower protection statutes. Almost without exception, they have held that the coverage of the statute at issue should be broadly construed so as to include internal, or 'intracorporate' whistleblowing, even where the conduct involved did not come under the literal terms of the statute. *Id.* at 270; see also *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (National Labor Relations Act); *Jones v. Tennessee Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991) (Energy Reorganization Act); *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991) (Clean Water Act); *Rayner v. Smirl*, 873 F.2d 60, 63 (4th Cir. 1989) (Federal Railroad Safety Act).
90. 645 So. 2d at 424 (Fla. 1994).
91. See *id.* at 425.
92. See *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985); *Walker & LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 241 (Fla. 1977); *Dep't of Revenue v. Zuckerman-Vernon Corp.*, 354 So. 2d 353, 358 (Fla. 1977).
93. *Arrow Air*, 645 So. 2d at 424 (a presumption against retroactivity will generally coincide with legislative and public expectations) (quoting *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994)).
will doctrine. As explored below, there are sound reasons for adopting such a interpretation.

IV. FLORIDA’S PRIVATE SECTOR ACT

As previously noted, the Private Sector Act creates a substantive right of action in a private employee who blows the whistle on employer conduct that is in violation of a law, rule or regulation. Once the Private Sector Act is invoked, however, ambiguities arise. Courts have only recently begun to interpret the statutory language of the Private Sector Act, thus creating considerable uncertainty for plaintiffs currently seeking its protection. Moreover, case law is sparse—both procedurally and substantively. In fact, most of the reported cases end in the pre-trial motion stage, and those that do shed light on the Private Sector Act’s substantive content are conflicting and confusing at best.

The Private Sector Act limits the definition of private sector whistleblowing to three specific categories of action enumerated in sections 448.102(1), (2) and (3). The first, section 448.102(1), prohibits retaliation against an employee who has “[d]isclosed, 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.” According to this subsection, an employee must provide written notice to the supervisor or employer in advance of any action in order to provide the employer an opportunity to remedy the situation. The literal language of this subsection also suggests that what the employee discloses must in fact be “in violation of a law, rule, or regulation.” As explored later, this would be an unfortunate interpretation.

The second subsection, section 448.102(2), protects an employee who “[p]rovided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, [94] 94. See id. “[T]he private sector Whistle-Blower’s Act serves ... 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.” Id.
95. FLA. STAT. § 448.102(1) (1997).
96. The Florida Statutes are organized according to a statutory numbering system found in the preface to each volume of the Florida Statutes: Chapter, subchapter, section, subsection, paragraph, subparagraph. See Baiton v. Carnival Cruise Lines, Inc., 661 So. 2d 313, 316 n.5 (Fla. 3d DCA 1995); Daniel R. Levine, Baiton v. Carnival Cruise Lines: An Important Decision in the Evolution of Florida’s Whistle-Blower’s Act, FLA. B.J., May 1996, at 59.
97. See FLA. STAT. § 448.102(1) (1997). “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.” Id.
98. Id.
or inquiry into an alleged violation of a law, rule, or regulation by the employer." 99 Finally, section 448.102(3) shields an employee who "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation" from retaliation. 100

According to the Florida Supreme Court, the Private Sector Act is remedial in nature and, as such, "should be liberally construed in favor of granting access to the remedy." 101 A comparative analysis of public and private sector case law may shed light on what to expect in Florida courts when litigating substantive Private Sector Act claims, particularly where the issues present determinative outcomes for plaintiffs’ lawyers where either (1) the employee did not provide written notice to the appropriate entity before blowing the whistle, (2) the employee relies on authority other than a law, rule or regulation, or (3) the employee had a good faith belief that the employer was engaging in prohibited activities.

A. The Written Notice Requirement

Recently, the Fifth District Court of Appeal interpreted the Public Sector Act’s requirement that employee complaints be issued in writing. 102 Patricia Kelder was a Social Rehabilitation Counselor at ACT, an independent contractor receiving funds from HRS, and was responsible for providing mental health counseling services to patients for which Medicaid would reimburse the independent contractor. Kelder brought suit under the Public Sector Act alleging wrongful termination because she repeatedly complained to her supervisors that she was required to bill Medicaid patients for services and time that they were not receiving. Kelder’s complaint was dismissed because she complained internally, but not to "any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act," as required by the Public Sector Act. 103

Two sections of the Public Sector Act were at issue in this case: section 112.3187(6) and section 112.3187(7). The first, entitled "To Whom Information is Disclosed," states that:

The information discussed under this section must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act,

99. Id. § 448.102(2).
100. Id. § 448.102(3).
101. Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) (quoting Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992), interpreting the private sector Whistle-Blower’s Act in light of its public counterpart).
102. See Kelder v. ACT Corp., 650 So. 2d 647 (Fla. 5th DCA 1995).
including, but not limited to, the Office of the Chief Inspector General, an agency inspector general or the employee designated as agency inspector general under s. 112.3189(1) or inspectors general under s. 20.055, the Office of Public Counsel, and the whistle-blower’s hotline created under § 112.3189. However, for disclosures concerning a local government entity, including any regional, county or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer as defined in s. 447.203(5) or other appropriate official.104

The second, entitled “Employees and Persons Protected,” states: “This section protects employees and persons who disclose information on their own initiative in a written and signed complaint . . . .”105

The court rejected Kelder’s argument that section 112.3187(7) implies that if an employee complained to her supervisors in writing, she does not have to disclose the information to an agency or federal government entity. Indeed, Kelder argued that because her employers were made aware of her complaint and could “remedy the violation,” no further complaints were necessary. The court, however, read subsections (6) and (7) together, remarking that they were “no models of clarity.”106 The court stated:

Where construction is required, the court should seek to effectuate the legislative intent. Thus, even if the two subsections create an ambiguity when read together, the legislature’s amendment of the word “shall” to “must” evinces a legislative intent that, in order to obtain relief under the statute, the employee must disclose the information to an appropriate agency or federal government entity.107

On the other hand, in Hutchison v. Prudential Life Insurance Company,108 the Third District Court of Appeal held that where a Prudential employee sent a letter to the Monroe County Sheriff’s Department in an effort to alert them to what he believed to be Prudential’s misrepresentation of life insurance policies as retirement plans, the letter was sufficient to fulfill the statutory requirement of “a written and signed complaint” found in section 112.3187(7). Additionally, the court rejected Prudential’s argument that the plaintiff should have notified the Florida Department of Insurance instead of the Sheriff’s Department. The court stated that “[w]hile the Sheriff’s Department is not an insurance regulatory agency, the Sheriff’s Department clearly did have

104. Id. § 112.3187(6).
105. Id. § 112.3187(7).
106. Kelder, 650 So. 2d at 649.
107. Id.
authority to... otherwise remedy the violation."\textsuperscript{109} In the end, the court not only reversed the dismissal of the complaint, but also granted Hutchison leave to amend his complaint to plead an alternative claim under the Private Sector Act.

The Third District interpreted the Private Sector Act writing requirement in \textit{Baiton},\textsuperscript{110} with results more in line with \textit{Hutchison}, than with the \textit{Kelder} decision. Baiton, a seaman, alleged retaliatory discharge resulting from his agreement to testify against Carnival Cruise Lines in a suit brought under the Jones Act\textsuperscript{111} by a co-worker. The court reversed the trial court's order dismissing with prejudice Baiton's second amended complaint for failure to state a cause of action under the Private Sector Act.\textsuperscript{112}

From the outset, the court characterized Baiton as "an at-will employee of Carnival,"\textsuperscript{113} thus setting the stage for an opinion recognizing that the analysis to follow would implicate the at-will rule in Florida in a new way. In holding that Baiton stated a cause of action, the court construed the substantive pre-condition requirement of written notice to the employer found in two separate sections of the Private Sector Act. The first, section 448.102(1), qualifies the first category in which a whistleblower is protected—that is, where the employee has "[d]isclosed, or threatened to disclose" employer activity. This subsection explicitly states that it "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."\textsuperscript{114} This writing requirement is noticeably absent from the other two categories of protected activity, sections 448.101(2) and (3).

The second provision in which a written notice requirement is mentioned is section 448.103(1), which creates the right to action. Paragraph (c) states:

An employee may not recover in any action brought pursuant to this subsection if he failed to notify the employer about the illegal activity, policy, or practice as required by s. 448.102(1) or if the retalia-

\textsuperscript{109} \textit{Id.} at 1049 (citation omitted).
\textsuperscript{110} 661 So. 2d 313, 314 (Fla. 3d DCA 1995).
\textsuperscript{111} The \textit{Baiton} court cited \textit{Smith v. Atlas Off-Shore Boat Serv., Inc.}, 653 F.2d 1057, 1061-64 (5th Cir. 1981), for the proposition that an employer may not retaliate against an at-will employee for filing a Jones Act claim because "such a retaliatory discharge 'constitutes an abuse of the employer's absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy'—namely, the right to file a personal injury action against the maritime employer." \textit{Id.} at 314.
\textsuperscript{112} \textit{Id.} at 317.
\textsuperscript{113} \textit{Id.} at 314.
\textsuperscript{114} \textit{Fla Stat.} § 448.102(1) (1997).
tory personnel action was predicated upon a ground other than the employee’s exercise of a right protected by this act.\textsuperscript{115}

Thus, it has been argued that paragraph (c) of section 448.103, read together with section 448.102, requires an employee to provide written notice to the employer any time the employee intends to act under any one of the enumerated categories in section 448.102.\textsuperscript{116} The \textit{Baiton} court, however, rejected this argument.\textsuperscript{117}

Despite the language of section 448.103(1) of the statute, the court construed the written notice requirement to apply to only those claims invoking protection under section 448.102(1) of the Private Sector Act, which specifically calls for such notice.\textsuperscript{118} In doing so, however, the court failed to adequately address Carnival’s argument that the literal reading of sections 448.102 and 448.103 together required such notice in all situations.\textsuperscript{119} Moreover, the court did not address the facial ambiguity of the statute. Perhaps the justification for this is that the adoption of an interpretation calling for written notice in all circumstances would produce results at odds with legislative intent, and would offend one’s good common sense. Indeed, the Supreme Court of Florida stated that where statutory construction is required, the court should seek to effectuate the legislative intent.\textsuperscript{120}

The Second District Court of Appeal, however, in \textit{Potomac Systems Engineering, Inc. v. Deering},\textsuperscript{121} certified a conflict with the \textit{Baiton} court to the Florida Supreme Court over the written notice requirement. In this case, Plaintiff Deering alleged that he was fired from his position as a Deputy Director of Florida Operations for a defense contracting firm because he refused to participate in acts of “mischarging, misreporting, and the unauthorized use of government equipment in violation of federal law.”\textsuperscript{122} Deering brought suit under section 448.102(3) of the Private Sector Act alleging he was fired in retaliation for refusing to participate in practices of the employer which were violations of law.\textsuperscript{123} Mr. Deering did not provide notice to his employer of his suspected violations of federal law.\textsuperscript{124} Noting the conflict between the two courts, the \textit{Potomac} court held that the remedy outlined in section 448.103(1) is

\begin{thebibliography}{99}
\item 115. \textit{id.} § 448.103(1)(c).
\item 117. \textit{See Baiton}, 661 So. 2d at 316.
\item 118. \textit{id.} at 317.
\item 119. Levine, \textit{supra} note 96, at 60.
\item 120. \textit{See} Kelder v. ACT Corp., 650 So. 2d 647, 649 (Fla. 5th DCA 1995).
\item 121. 683 So. 2d 180 (Fla. 2d DCA 1996).
\item 122. \textit{Id.} at 181.
\item 123. \textit{See id.}
\item 124. \textit{See id.}
\end{thebibliography}
only available if the employee has complied with section 448.103(c), which requires written notification to the employer.\textsuperscript{125} The \textit{Potomac} court cited with approval an unpublished decision of the United States District Court for the Middle District of Florida for the same interpretation. In \textit{Martin v. Honeywell, Inc.},\textsuperscript{126} the Federal District Court held that "the plain language of the statute imposes a written notice and opportunity to cure requirement as an element of proof in every private sector whistleblower claim because section 448.103(1)(c) incorporates the notice provision set forth in 448.102(1)."\textsuperscript{127} Accordingly, the \textit{Honeywell} court dismissed the complaint of the plaintiff who failed to assert in his complaint that notice was given.\textsuperscript{128} Remarkably, the \textit{Honeywell} court stated that "[w]hether or not written notice to the employer is a required element of a whistleblower claim appears to be a question of first impression in Florida,"\textsuperscript{129} without citation to the \textit{Baiton} opinion decided in 1995. This is unfortunate because, despite the conflicting decisions in \textit{Baiton} and \textit{Potomac}, the only existing analysis of the statutory provisions which takes into account Florida's statutory numbering system is \textit{Baiton}.\textsuperscript{130}

Moreover, the \textit{Potomac} court cited \textit{Appeal of Bio Energy Corp.},\textsuperscript{131} a decision of the New Hampshire Supreme Court, for the proposition that "[t]he [notice] requirement promotes the purpose of the act by affording the employer the first opportunity to correct a violation. This allows the employer to avoid, among other things, unnecessary harm to its reputation, the burden of undergoing an investigation and preparation for a hearing or trial."\textsuperscript{132} What remains unstated in the \textit{Potomac} opinion is New Hampshire's \textit{other} stated goal: that employers should not be "able to retain the benefit of notification, while avoiding the burdens imposed if the employee was discharged because of his or her notification to the employer. Such an interpretation would thwart the Act's primary purpose of encouraging employees to report their employers' violations of law."\textsuperscript{133} Without a balancing of these goals in the interpre-

\begin{itemize}
  \item \textsuperscript{125} See \textit{id.} at 182.
  \item \textsuperscript{126} No. 95-234-CIV-T-24(A), 1995 WL 868604 (M.D. Fla. July 18, 1995).
  \item \textsuperscript{127} \textit{id.} at *1.
  \item \textsuperscript{128} \textit{id.}
  \item \textsuperscript{129} \textit{id.}
  \item \textsuperscript{130} See \textit{Baiton}, 661 So. 2d 313, 315 (Fla. 3d DCA 1995); see also \textit{Levine, supra} note 95, at 59.
  \item \textsuperscript{131} 607 A.2d 606 (N.H. 1992).
  \item \textsuperscript{132} \textit{Potomac}, 683 So. 2d at 182.
  \item \textsuperscript{133} \textit{Bio Energy}, 607 A.2d at 608. In summary, the court stated: "We wish to promote the dual purposes of the Act—to encourage employees to come forward and report violations without fear of losing their jobs and to ensure that as many alleged violations as possible are resolved informally within the workplace." \textit{id.} at 609.
\end{itemize}
tation of Florida’s Private Sector Act, a consistent rationale is impossible in the whistleblower context.

Consistent with Baiton, the Hutchison court was also concerned that too narrow an interpretation of the statutory provisions would defeat the remedial purpose of the statute.\textsuperscript{134} In fact, in rejecting Prudential’s argument in Hutchison that only violations of laws, rules or regulations that threatened the health, welfare or safety of the public at large were the subject of protected whistleblowing, the court said, “[i]f the statute were given that interpretation, it would defeat the remedial purpose since there would be few, if any, situations to which the statute would apply. We do not think that the legislature intended any such interpretation.”\textsuperscript{135}

Accordingly, Daniel R. Levine argues that the result in Baiton was just, despite the court’s flawed analysis.\textsuperscript{136} He argues that the court should have rested its decision on what must have been the legislative intent of the statute.\textsuperscript{137} There is, however, little guidance as to what that the legislative intent was at the time of the Private Sector Act’s passage as an amendment to section 112.3187 (The Public Sector Act). One could reasonably assume that the intent expressed under 112.3187 could be applied to the new Private Sector Act:

It is the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public’s health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee.\textsuperscript{138}

Of course, one should infer that only the first sentence of intent could possibly apply, that is, those actions that create a substantial and specific danger to the public’s health, safety, or welfare. The legislature does not, however, include this limiting language in the Private Sector

\begin{notes}
\item[134] Hutchison v. Prudential Life Ins. Co., 645 So. 2d 1047, 1049 n.4 (Fla. 3d DCA 1994).
\item[135] Id.
\item[136] But see Kelder v. ACT Corp., 650 So. 2d 647, 649 (Fla. 5th DCA 1995) (holding that the statute required written notice to a governmental entity in order to effectuate the legislative intent evinced by 1992 amendments despite the fact that supervisor may have had ability to remedy the violation).
\item[137] See Levine, supra note 96, at 60.
\item[138] FLA. STAT. § 112.3187(2) (1997).
\end{notes}
Act and Hutchinson suggests that such an interpretation would contravene even the intent behind the Public Sector Act itself.

The court in Baiton, however, did not look to the legislative intent under section 112.3187. Instead, it construed Baiton's complaint as being one for "refusing to lie under oath," thus falling within the ambit of section 448.102(3), which prohibits retaliation because the employee has "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule or regulation."139 This is so, according to the court, because lying under oath is perjury, a crime under sections 837.012 and 837.02 of the Florida Statutes.140 This is significant because it suggests that the court is willing to carve out an exception to the at-will doctrine where compliance with the employer's wishes would either violate a civic obligation (truthful testimony under oath), or subject the employee to criminal penalties. Other states have adopted identical reasoning in this situation.141 This may be seen as a *quid pro quo* to the employee in an at-will situation, in that, notwithstanding the broad discretion afforded to the employer, a fair system is in place to protect the employee in cases where the employer may have acted beyond that discretion. In this respect, there is no business policy at risk, thus comporting with the at-will doctrine rather than requiring an exception to it.

Moreover, Levine presents two situations in which a literal reading of the statutory language, as urged by Carnival and applicable to the employers' arguments in Honeywell and Potomac, would produce absurd results and argues that "[i]f, in fact, the writing requirement applied to all three subsections of § 448.102, then the statute would be, for all practical purposes, defunct."142 In the practical world, an

140. See id.
141. See Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984) (holding a cause of action was stated for wrongful discharge where the employee alleged he was fired because he refused to deliver spoiled milk in violation of California unadulterated milk laws); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (allowing cause of action for wrongful discharge where the employee alleged he was fired for refusing to participate in illegal price fixing); Petermann v. International Bhd. of Teamsters 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (holding that a cause of action arises for wrongful discharge where the employer attempts to coerce a criminal action—perjury); Trombetta v. Detroit, Toledo & Ironton R.R. Co., 265 N.W.2d 385 (Mich. Ct. App. 1978) (allowing a cause of action where plaintiff alleged dismissal as a result of refusing to falsify state pollution reports); Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1980) (recognizing that where a discharge violates clear public policy, a cause of action may be maintained). But see Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (holding that while an public policy exception would be wise, the federal court could not create such an exception for Georgia and Texas); Ivy v. Army Times Publ'g Co., 428 A.2d 831 (D.C. 1981) (holding no cause of action for wrongful discharge where an employee testified truthfully, but adversely to employer, in a suit brought against the employer, and was fired).
142. Levine, *supra* note 96, at 60.
employee who fears retaliation would never blow the whistle. Additionally, written notice would encourage disloyalty in the case of the employee who is “building a case” against her employer. This result would be at odds with the goal of maintaining a cohesive, efficient and productive workplace environment consistent with Florida’s pro-business policy.

If the policy behind the notice requirement is to provide employers an opportunity to cure any violation of a law, rule or regulation, that policy is effectuated by the statute without requiring written notice under subsections 448.102(2) and (3). Section 448.102(2) contemplates an “investigation, hearing, or inquiry” already in progress. Thus, additional notice from the employee that her employer’s conduct is a violation of a law, rule or regulation is absurd. The employer, in the midst of governmental action via “agency, entity or, person” is fully aware of the inquiry, thus obviating the need for a reminder from an employee who is called to “provide information” or testify within that context. Had the legislature intended to require an employee to apprise her employer of her intent to comply with a subpoena, it would have so stated. Of course, such notice would be nonetheless inappropriate.

Under section 448.102(3), an employee who has objected to, or refused to participate in, any activity, policy or practice of the employer has given constructive notice of her belief that the conduct in question is objectionable. In this situation, however, a strong argument can be made that an interpretation in favor of constructive notice would require an employer to investigate every employee’s refusal to perform before terminating on insubordination grounds. Perhaps in this situation, the written objection serves an evidentiary function in that judicial resources are conserved because written notice obviates the need for dueling testimony as to whether an objection or refusal was made and, if so, what was said. Of course, it is the function of the jury is to resolve such questions of credibility and, in employment cases, such testimony is an element of almost every cause of action. In reality, allowing oral or constructive notice would add nothing new to the mix. In the end, requiring written notice in all subsections of section 448.102 would lead to absurd results. Where a literal reading of a statute would produce absurd results, construction is required.

Moreover, the Public Sector Act may help support the Third District’s private sector decisions in that section 112.3188 provides for the protection of the whistleblower by imposing a confidentiality requirement on those to whom the employee is expected to report suspected violations.143 Indeed, the legislature provided that “[a]ny person who
willfully and knowingly discloses information or records made confidential under this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.” 144 Thus, it is reasonable to argue that the Florida Legislature understood the implications of blowing the whistle and recognized the danger: employers do not like it. Confidentiality protects the worker from adverse treatment, 145 and the policy behind such a requirement does not change in the private context. On the contrary, where the state has less opportunity to step in and aid the whistleblower, a written notice requirement for a private sector employee would be the last nail in the proverbial coffin. In this regard, the same analysis should apply to private sector employees who require greater protection from retaliation (as the ultimate boss is not the state), and who have no recourse to the protection of the confidentiality of their disclosures. Under the Public Sector Act, the analysis comes full-circle: the employee does not have to provide written notice of her complaint to her employer per se; 146 rather, she has the option of submitting a complaint to the Chief Inspector General, Agency Inspector General, Office of the Public Counsel, or the whistleblower hotline. 147

Unfortunately, the Private Sector Act is a victim of sloppy drafting by the Florida legislature. 148 This is significant for Florida courts in light of the traditional consideration given to rules of statutory construction. These canons are particularly strong in the area of employment law as such issues uniquely pit the role of the judiciary against the role of the legislature in the nexus of competing American values.

B. Law, Rule or Regulation

Another issue raised in cases brought under the Private Sector Act is what constitutes a “law, rule, or regulation.” 149 The reported cases, and at least one unreported case, have defined the parameters of that phrase. According to section 448.101(4), “Law, rule, or regulation includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the

144. Id. § 112.3188(2)(c)(4).
145. See id. § 448.101(5) (defining retaliatory personnel action as “the discharge, suspension, or demotion by an employer of an employee or any other adverse employment action taken by an employer against an employee in the terms and conditions of employment.”).
146. See Kelder v. ACT Corp., 650 So. 2d 647, 648 (Fla. 5th DCA 1995).
148. In declining to follow the Central District of California’s construction of the Federal False Claims Act, the Northern District of Illinois dropped a footnote, stating: “If only Congress more often heeded Voltaire’s advice: ‘Let all laws be clear, uniform and precise: to interpret laws is almost always to corrupt them.’” Neal v. Honeywell, Inc., 826 F. Supp. 266, 273 n.7 (N.D. Ill. 1993) (quoting Voltaire, Philosophical Dictionary (1962)).
Florida courts are reticent to grant access to Private Sector Act remedies against an employer when the conduct alleged is not tied specifically to a statute. In *Forrester v. John H. Phipps, Inc.*, the Third District Court of Appeal held that slander and false statements did not constitute laws, rules or regulations sufficient to invoke the Act’s protection. In that same year, the Third District held that when a plaintiff can point to a specific statutory provision governing employer conduct, a claim could be stated under the Act. In *Hutchinson v. Prudential Insurance Company of America*, the employer, an insurance company, was alleged to have engaged in unfair trade practices in violation of Florida Statutes section 626.9541. The Court granted the plaintiff leave to amend his complaint to include a claim under the Private Sector Act.

In *Baiton*, the Third District discussed the grounds on which an employee could object to, or refuse to participate in, any activity, policy, or practice of the employer. The Court held that the employee’s refusal to lie under oath constituted a law, rule, or regulation pursuant to Florida Statutes section 837.012 and 837.02, which provides criminal penalties for perjury. The *Baiton* case represents the broadest interpretation of “law, rule or regulation.” Conceivably, such an interpretation could be construed to include societal obligations which, although not pertaining to an employer’s specific business conduct, apply to all Florida employers.

Currently, this specific issue is being reviewed by the Fourth District Court of Appeal in *Maisonville v. Central Florida Lion Eye & Tissue Bank*. The plaintiff, a Director of Tissue Donation at the bank, is appealing from a directed verdict on the issue of whether guidelines promulgated by the Eye Bank Association of America for tissue banks could constitute laws, rules or regulations pertaining to the employer’s business. The resolution of this appeal will determine whether self-regulating industry standards are included in the statutory definition of “law, rule, regulation.”

While the literal statutory language does not include general industry standards, it would be a manifest injustice to exclude them from the definition. This is especially so in cases such as *Maisonville*, where eth-

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150. *Id.* § 448.101(4).
151. See *Forrester v. John H. Phipps, Inc.*, 643 So. 2d 1109, 1111-12 (Fla. 3d DCA 1994).
152. See *Hutchinson v. Prudential Ins. Co. of Am.*, 645 So. 2d 1047, 1048 (Fla. 3d DCA 1994).
153. See *id*.
154. See *Baiton v. Carnival Cruise Lines, Inc.*, 661 So. 2d 313, 315 (Fla. 3d DCA 1995).
155. See *id*.
ical practices and procedures exist for the administration of certain industries and, as a society, we most certainly want to encourage compliance with them where the industry is not specifically regulated by federal or state law. The *Baiton* court’s interpretation in this context is progressive in that the Court adopts an interpretation of 448.101(4) that could include self-regulating industry standards. Perjury, while statutorily defined, also compromises the adversarial litigation system and implicates the effectiveness of the judicial process in addition to defining a civic obligation. In this vein, whether or not such statutory language is available should make no difference.

C. *The Good-Faith Whistleblower*

1. *Traditional Notions*

The phrase “good-faith” is a legal nicety that is quick to both draw support and escape exact definition. In the whistleblower context, good faith, as traditionally understood, means that an employee is motivated to blow the whistle *in good faith*, or, in an effort to truly remedy the situation in which she finds herself and her employment. Along this line of analysis, most states require that an employee cannot be protected under Whistle-Blower statutes when motivated for bad faith reasons such as extortion. The Florida Supreme Court, in *Martin County v. Edenfield*, held that public employee participation in improper employer conduct was a defense, not an exception to the statute’s protections. In 1992, however, the Florida Public Sector Act was amended to deny protection to whistleblowers who “committed or intentionally participated in committing the violation or a suspected violation.” In *Edenfield*, the effect of the amendment was foreshadowed. The court noted in a footnote that “[t]his may not be true under the statute as it was amended on July 7, 1992. . . . These amendments, however, were retroactive only until July 1, 1992. Accordingly, the 1992 amendments do not apply to the present cause of action.” This foresight was solidified in *Kelder v. ACT Corp.* The Public Sector Act does not apply to prisoners, former prisoners who seek to blow the whistle with regard to

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158. 609 So. 2d 27 (Fla. 1992).
160. Martin, 609 So. 2d at 29 n.2.
161. 650 So. 2d 647 (Fla. 5th DCA 1995). See id. at 649 (construing the effects of sections 112.3187(6) and (7) together, the court recognized the new language added by the 1992 amendment).
their period of incarceration, or persons who have committed or intentionally participated in the wrongdoing.162 With respect to the participant in the wrongful act, this provision excludes the employee who is motivated to blow the whistle by less honorable intentions.

The Private Sector Act does not explicitly require that a private employee have a good faith reason for blowing the whistle. Although, as stated above, it is reasonable to assume that the public and private acts will be interpreted in a similar fashion, it is important to note that the Private Sector Act does not include such a limitation in its statutory language.

2. A PRACTICAL CONCEPTION OF GOOD FAITH

Good faith can also be understood to mean that the employee, although not certain that her employer has committed an act violative of a law, rule or regulation, acts with good faith in reporting an alleged or suspected violation. This interpretation of good faith is more complex than the first, as it implicates the at-will doctrine at its very core; such an interpretation, in effect, is determinative on the issue of who decides whether a whistleblower is prima facie protected—the employer or the courts. The resolution of this issue will, in the real world, determine the outcome of most litigation of retaliatory discharge cases in Florida courts.

For the private sector whistleblower, Florida law is unclear as to the protections afforded to the employee who is not absolutely certain that her employer has engaged in improper conduct. Many states have extended protections for whistleblowers who merely suspect improper conduct. In the public context, for example, New York’s Whistleblower statute has been interpreted to require that “the employee need not be right that a violation has in fact occurred but is protected if the employee reasonably believed that a violation had occurred.”163 Even Florida’s Public Sector Act protects the good faith whistleblower. The meaning of section 112.3187 is unambiguous: it protects the employee who discloses “[a]ny violation or suspected violation of any federal, state, or local law, rule, or regulation”164 and, “[a]ny act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.”165 There is no case law in Florida expounding on this issue in the public context because, with good faith

165. Id. § 112.3187(5)(b) (emphasis added).
whistleblowers covered, the only questions are whether the whistleblower is the type of person the statute was designed to protect, and whether the disclosures were made with improper intentions.

Florida’s Private Sector Act uses language different from the Public Sector Act with regard to the good faith whistleblower. Under the Private Sector Act, an employer may not take retaliatory personnel action against an employee who has “[d]isclosed, or threatened to disclose, . . . an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation”;\textsuperscript{166} “[p]rovided information to, or testified before any . . . entity conducting an investigation, hearing, or inquiry into an alleged violation”;\textsuperscript{167} or “[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule or regulation.”\textsuperscript{168} It could be argued that the literal language of the statute suggests that an employee who, in good faith, suspects her employer is acting in violation of a law, rule or regulation is not protected under the Private Sector Act, unless the employer is already under investigation by a government agency, person or entity. Such an interpretation would hold the whistleblower to an unusually high standard, requiring the employee to be the agent “on the inside,” if you will. Under this view, the private employee is required to be absolutely certain of the employer’s actions before blowing the whistle. In effect, this interpretation would encourage the private whistleblower, at the moment she suspects her employer is engaging in wrongdoing, to begin a personal investigation of her employer in order to prove that her suspicion is correct. Unfortunately, this would result in situations where employees are forced to “build a case” against their employers. This is not a desirable outcome for either employers or employees. Indeed, the traditional business environment should foster loyalty, discretion, and confidentiality.\textsuperscript{169} It is in this context that Florida courts should look to the jurisprudence of other states who, like Florida, not only adhere strongly to the at-will doctrine, but also encourage good faith whistleblowing. Such action would promote logical coherence within Florida’s employment jurisprudence, and would support what may be the best course of action for whistleblower policy.

In the private context, the Oregon decision in \textit{McQuary v. Bel Air Convalescent Home, Inc.}\textsuperscript{170} provides interesting facts as a basis for discussion of the good faith issue. Laurie McQuary was the In-Service Director of Nurses Training and Education at the Bel Air Convalescent

\textsuperscript{166} Id. § 448.102(1) (emphasis added).
\textsuperscript{167} Id. § 448.102(2) (emphasis added).
\textsuperscript{168} Id. § 448.102(3) (emphasis added).
\textsuperscript{169} See Blumberg, \textit{supra} note 14.
\textsuperscript{170} 684 P.2d 21 (Or. Ct. App. 1984).
Home. McQuary alleged that she was fired from her position as a result of her threat to report the nursing home administrator for patient abuse against her aunt, a patient at the home.\textsuperscript{171} The Oregon Court of Appeals characterized the whistleblower's dilemma in this way:

Either plaintiff must act at her peril in making a complaint, risking her job if the complaint later turns out to be unfounded, or the employer must act at its peril in firing her, risking damages if she turns out to have acted in good faith. On balance, we believe that the social harm from reporting in good faith a complaint that may turn out, after investigation, to be unfounded is potentially far less than the harm of not reporting a well-founded complaint for fear of the consequences. The social benefit from investigating all potentially significant violations of a patient's statutory rights is far greater than the social benefit, if any, from allowing an employer to terminate an employee who in good faith reports to the appropriate authorities situations which prove not to be violations.\textsuperscript{172}

In this case, McQuary alleged in good faith that her employer's actions violated her aunt's rights under the Nursing Home Patient's Bill of Rights, for which the Oregon Health Division is responsible for enforcing. The court stated that "a report to it would be a societal obligation of a person who knows of violations . . . . A discharge for reporting a violation of that policy to the proper authority would thus be a discharge for fulfilling a societal obligation and would be actionable."\textsuperscript{173}

In fact, many jurisdictions that support a strong at-will doctrine also support such good faith whistleblowing. In Florida, such an interpretation is essential. Although public policy justifications have not held sway in the Florida courts for the extension of worker protection, recent case law suggests that there may be a discernible place for such arguments in the whistleblower context. There are only two Florida decisions that, while not addressing this specific ambiguity, may suggest an answer to the question of whether a plaintiff who in good faith blows the whistle is protected. In \textit{Cray v. NationsBank of North Carolina}, the employee invoked the protections of sections 448.101 through 448.105 after being terminated from his position as a registered securities representative.\textsuperscript{174} The employee alleged that he believed that NationsBank

\begin{itemize}
\item \textsuperscript{171} See \textit{id.} at 22-23.
\item \textsuperscript{172} \textit{Id.} at 23.
\item \textsuperscript{173} \textit{Id.} Noting that the Oregon Legislature's desire to protect patients reflected a "comparable concern on the part of the federal government," the court stated: "42 C.F.R. § 442.311 shows that that protection is an important public policy analogous to the performance of jury duty or the avoidance of defamation, policies which the Supreme Court has found to justify wrongful discharge claims." \textit{Id.}
\end{itemize}
and NationSecurities were violating various state and federal laws governing the sale of securities and addressed a complaint in writing to senior officers of both companies. Pursuant to the parties’ stipulation, the case was referred to an NASD (“National Association of Securities Dealers”) arbitration panel who ultimately decided that the plaintiff was terminated in violation of the Private Sector Whistle-Blower’s Act.\(^{175}\)

While this decision arrived in court on a motion to confirm the arbitration award and various other arbitration-related motions, it is significant to the extent that the defendants did not seek to vacate the arbitrator’s award based on the ground that the decision was “arbitrary or capricious.” This standard, one of two non-statutory grounds for vacatur of an arbitration award recognized by the Eleventh Circuit, defines an award as “arbitrary or capricious” if it “exhibits a wholesale departure from the law, or if a legal ground for the arbitrator’s decision cannot be inferred from the facts of the case, or if the reasoning is to faulty that no judge or group of judges could ever have conceivably made such a ruling."\(^{176}\) On the other hand, the defendants in this case may not have raised the issue because the only remedy granted by the arbitrators was reinstatement.\(^{177}\) While not directly on point, it can be inferred that the plaintiff’s good faith allegation of a violation of a law, rule or regulation was sufficient in this case.

More recently, a Florida state court verdict was reported in a case where the plaintiff, a Donor Tissue Transplant Coordinator, was terminated after complaining to supervisors and the Director of the tissue bank that various employees at the bank were engaging in unethical practices and procedures in procuring next-of-kin consent for the removal of corneal tissue, eliminating negative medical history from donor records, and misuse of lab equipment resulting in the transplantation of unhealthy cells into unsuspecting donees.\(^{178}\) The Court denied the Tissue Bank’s motion for summary judgment, thus giving the plaintiff an opportunity to prove that “private entity or self-regulating industry standards, such as the guidelines of the Eye Bank Association of America, may operate as a functional equivalent of a public regulatory agency.”\(^{179}\) At trial, the defendants moved for a directed verdict and, after the jury returned a verdict for the plaintiff on her Private Sector

\(^{175}\) See id. at *3.


\(^{177}\) See Cray, supra note 170.


\(^{179}\) Id. at Editor’s note.
Whistle-Blower's claim, awarding a total of $132,380.60 (including damages for pain and suffering), the court granted the motion on the ground that there was no state or federal "law, rule or regulation" upon which plaintiff's contentions could be founded. As of June 1998, appeals by both parties are pending.

V. Practitioner's Note: Florida Litigation and Strategy

Oftentimes, a plaintiff's lawyer has one goal in mind when it comes to employment issues: Get to the jury! With a private whistleblower as a client, however, this task may prove more difficult that at first glance.

In theory, all lawyers hope that their whistleblowing clients will consult them before actually blowing the whistle. In reality, however, and as any practitioner who has represented a whistleblower knows, this almost never occurs, as employees rarely are in a position to keep private attorneys on retainer. So, in preparation for the day when an actual whistleblower walks into the office, here are some important aspects of the Private Sector Act to note.

First and foremost, Florida courts have not yet explicitly recognized the Private Sector Act as creating an exception to the common law at-will doctrine via legislative fiat. There is support for this argument in light of the Florida Supreme Court's decision in Smith v. Piezo Technology & Professional Administrators, Inc. in the worker's compensation context. The problem is that the Private Sector Act has less in the way of legislative history to drawn upon than did the Workers Compensation Act, upon which the workers compensation exception is based. This may prove problematic in that it may be difficult to draw a meaningful analogy between the tort insurance-dominated subject of workers compensation and the state's recent acceptance of whistleblowing as protected conduct in the workplace.

Second, there are several procedural obstacles to overcome before filing suit. Initially, the private employee must work in an organization with more than ten employees in order to qualify as an "employee" under the statute. It is yet unclear whether the Baiton or the Potomac court's interpretation of the Private Sector Act's written notice requirement will survive. A definite resolution remains to be seen. At this point, it would be prudent to counsel potential whistleblowers to submit written notice of alleged violations to the employer. Moreover, a court

180. Id.
181. See generally LOYALTY & DISSENT, supra note 4 (providing an overall description of the typical whistleblower through ten stories of those who have blown the whistle).
182. 427 So. 2d 182 (Fla. 1983) (creating an exception to the at-will doctrine based on a cause of action created by workers compensation laws).
will find a "law, rule or regulation" if a specific federal or state statute directly pertains to the employer's business. It remains to be seen whether self-regulating industry guidelines will fall within this definition.

Finally, as to whether or not a private employee who, in good faith, blows the whistle on a suspected violation is protected under the Private Sector Act or not, only time will tell. Many states have adopted such an interpretation in the absence of statutory language in spite of a strong stance in favor of the at-will doctrine. The task is to persuade the Florida courts to accept such a reading of the statute.

It would seem to be a waste of legislative and judicial resources to deny statutory protection to private employees who are in the best position to uncover improper conduct in the workplace, perhaps resulting in the conservation of consumer resources or even lives, yet who are in the worst position to disclose such evidence. Nor would we want to encourage behavior that taints the honorable motivations behind protected whistleblowing. Ultimately, it will be up to the citizens of the state of Florida to demand from their representatives the scope of whistleblower protection they deem fair. Until then, despite elusive statutory protections, the private sector employee blows the whistle at her own risk.

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