DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

ELAINE E. DAHL

Appellant/Cross-Appellee,

v. **CASE NO. 2D02-1383**

ECKERD FAMILY YOUTH ALTERNATIVES, INC., a Florida Corporation d/b/a Eckerd Youth Development Center,

Appellee(s)/Cross-Appellant(s).
_____/

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

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SUMMARY OF ARGUMENT

The court below erred in dismissing Dahl's Private Whistleblower Act complaint on the grounds that because Eckard Family Youth Alternatives, Inc., although a private employer, was an independent contractor with the state of Florida, Dahl's claims counld only be brought under the Public Whistleblower Act, §112.3187 et seq., Florida Statutes. Both the Public Whistleblower Act and the Private Whistleblower Act specifically provide that the respective Acts "do not diminish the rights, privileges, or remedies of an employee under **any other law or rule**." §112.3187(11) and §448.105, Florida Statutes (emphasis added). Thus, under the plain meaning rule of construction, a whistleblowing employee has the choice of proceeding against a private employer - who also happens to be an independent contractor with the state - under either the Public Whistleblower Act or the Private Whistleblower Act or both. Because here, Dahl's claims under the Public Whistleblower Act were time-barred, she had the right to proceed under the Private Whistleblower Act.

ARGUMENT

THE PUBLIC WHISTLEBLOWER ACT, §112.3187, FLORIDA STATUTES, IS NOT THE EXCLUSIVE REMEDY FOR AN ACTION AGAINST A PRIVATE EMPLOYER OTHERWISE SUBJECT TO THE PRIVATE WHISTLEBLOWER ACT, §448.101, FLORIDA STATUTES, WHICH ALSO HAPPENS TO BE AN INDEPENDENT CONTRACTOR WITH A STATE AGENCY

A. Background And Framework For Analysis Of This Case.

On November 23, 1999, Appellant, Elaine E. Dahl, filed an action in federal court alleging, in addition to several federal causes of action, that the Defendant/Appellee, Eckerd Family Youth Alternatives, Inc. (hereafter referred to as "EFYA"),[1] violated the Florida Private Whistleblower Act, §448.101, et seq., Florida Statutes. On March 29, 2001, the federal court entered an order dismissing the federal action, including her state law claims.

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[1] EFYA is a private not-for-profit organization that serves at-risk and troubled youth through a range of 37 residential and community-based programs. In addition to servicing youth through its contract with the Department of Juvenile Justice, it provides services to the general public and is most recognized for its wilderness education system. The company also provides an Early Intervention & Prevention Services program, violence prevention curriculum in elementary schools, as well as day treatment and follow-up aftercare programs. To participate in an EFYA program, a youth must have shown significant difficulty in functioning in social, family and/or school environments and their emotional and behavior problems have been unresponsive to treatment involving a less intensive level of care. Children may be enrolled by their parents or referred through other social service agencies, schools, or through the juvenile justice system. See website at http://www.eckerd.org.

Dahl thereafter filed a motion for rehearing and clarification requesting that the federal court clarify its dismissal order to state that her state Private Whistleblower Act claims were dismissed "without prejudice." On June 1, 2001, the federal court entered an order granting Dahl's request and stating that her Private Whistleblower Act claims were dismissed without prejudice. On June 19, 2001, Dahl filed the instant action in the Circuit Court of Pinellas County reasserting her state claims under the Private Whistleblower Act.

EFYA filed a motion to dismiss arguing (1) that Dahl's claims were barred by the two-year statute of limitations contained in §448.103(1)(a); (2) that Dahl's claims were precluded by statutory immunity under §768.28(9)(a) and (11)(a), Florida Statutes; and (3) that Dahl's complaint should be dismissed because the Private Whistleblower Act is not applicable to her claims inasmuch as EFYA is an independent contractor with the state and therefore her only remedy is through the Public Whistleblower Act.

The court below denied the motion to dismiss as to grounds (1) and (2), finding that they were affirmative defenses not properly raised through a motion to dismiss. However, the court granted the motion on the third ground, holding that EFYA was an "independent contractor" with the State and therefore Dahl's only remedy was an action under the Public Whistleblower Act, not the Private Whistleblowers Act, because the Public Whistleblower Act specifically refers to employers who are

"independent contractors." Hence, since EFYA was an independent contractor with the state, the Public Whistleblower Act applied exclusively (Record below at 145-146). Florida NELA, as Amicus, submits to this Court that the circuit court's analysis was in error.

B. Both the Public Whistleblower Act and The Private Whistleblower Act specifically provide that the remedies contained in each are not exclusive

Section 112.3187(11) of the Public Whistleblower Act provides as follows:

> **(11) EXISTING RIGHTS.**--Sections 112.3187-112.31895 do not diminish the rights, privileges, or remedies of an employee under **any other law or rule** or under any collective bargaining agreement or employment contract; however, the election of remedies in s. 447.401 also applies to whistle-blower actions. (emphasis added). [2]

Section 448.105 of the Private Whistleblower Act provides, in virtually identical language, the same rights:

> **Existing rights.** This 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 (emphasis added).

These provisions preserving the parties' "existing rights" have yet to be construed by the courts of the state of Florida and the question is thus one of first

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[2] The elections of remedies referred to in §447.401 speaks only to a government career service employee's option of electing to appeal an adverse action or grievance through either a civil service board, unfair labor practice, or grievance procedure/arbitration, but not more than one. It is inapplicable in this case.

impression for this Court.[3] Perhaps no court has construed these provisions because their plain meaning is so obvious that no "construction" has been necessary. "It has long been a rule of statutory construction that statutes must be given their plain and obvious meaning and courts should assume that the legislature knew the plain and ordinary meaning of words when it chose to include them in a statute." ***Hankey v. Yarian***, 755 So. 2d 93, 96 (Fla. 2000). See also, ***Aetna Cas. & Surety Co. v. Huntington Nat'l Bank***, 609 So. 2d 1315, 1317 (Fla. 1992); ***Thayer v. State***, 335 So. 2d 815, 817 (Fla. 1976); ***Sheffield v. Davis***, 562 So. 2d 384, 386 (Fla. 2d DCA 1990). "It is a fundamental principle of statutory construction that where a statute is plain

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[3] Other statutes have similar provisions, but they too have not been judicially construed. See, **§175.381,** Florida Statutes (Firefighter Pensions) ("nothing contained in this act or in chapter 175 shall operate to reduce presently existing rights or benefits of any firefighter, directly, indirectly, or otherwise"); **§185.39**, Florida Statutes (Police Pensions) ("nothing contained in this act or in chapter 185 shall operate to reduce presently existing rights or benefits of any police officer, directly, indirectly, or otherwise"); **§501.615(11)**, Florida Statutes (Telemarketing Act) ("The provisions of this section shall not reduce, restrict, or eliminate any existing rights or remedies available to purchasers"); **§765.106**, Florida Statutes (Advance Health Care Directives) (" The provisions of this chapter are cumulative to the existing law regarding an individual's right to consent, or refuse to consent, to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor, competent or incompetent person, or a patient's family may have under the common law, Federal Constitution, State Constitution, or statutes of this state."); **§985.502**, Florida Statutes (Interstate Compact on Juveniles), Article II ("EXISTING RIGHTS AND REMEDIES.--All remedies and procedures provided by this compact shall be in addition to and not in substitution for other rights, remedies and procedures, and shall not be in derogation of parental rights and responsibilities.").

and unambiguous there is no occasion for judicial interpretation." ***Forsythe v. Longboat Key Beach Erosion Control Dist***., 604 So. 2d 452, 454 (Fla. 1992).

It is obvious from reading Section 112.3187(11), that just because an employee working for a private employer who is an independent contractor with the state has a cause of action under the Public Whistleblower Act, s/he has not waived other remedies or causes of action. Since the Public Whistleblower Act "do[es] not diminish the rights, privileges, or remedies of [the]employee under any other law or rule," "other laws" would include any rights the employee has under the Private Whistleblower Act. The court below judicially legislated into the Public Whistleblower Act that it is the exclusive remedy for an employee of a private company that happens to be an independent contractor with the state solely because the Public Whistleblower Act "is more specific than the Private Whistleblower Act with respect to an employee that is an "independent contractor" (Record below at 145). This interpretation erroneously construes the statute in contradiction to the legislative intent of the Public Whistleblower Act and the plain meaning of the language used in the act.

Furthermore, there was no need for the legislature to use the term "independent contractor" in the Private Whistleblower Act because, by definition, all non-governmental employers with ten or more employees are private employers to whom

the Act applies.[4] Their status or non-status as an "independent contractor" is irrelevant to their coverage under the Private Whistleblower Act. Both the Public Whistleblower Act and the Private Whistleblower Act have been held by the Supreme Court to be remedial and should be given a liberal construction. See ***Martin County v. Edenfield***, 609 So. 2d 27, 29 (Fla. 1992) ("We believe it clear that the public employee Whistle-Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.' As a remedial act, the statute should be construed liberally in favor of granting access to the remedy."); reaffirmed in ***Irven v. HRS***, 790 So. 2d 403, 405(Fla. 2001), and ***Golf Channel v. Jenkins***, 752 So.2d 561, 565-566 (Fla. 2000) ("remedial statutes [such as the Private Whistleblower Act] should be liberally construed in favor of granting access to the remedy provided by the Legislature").

Where legislatures have intended for the remedies in a whistleblower statute to be exclusive, they have clearly so stated. For example, The New Jersey Conscientious Employee Protection Act, N.J. Stat. Ann. 34:19-8 (West 1988), provides that "the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective

[4] "(3) "Employer" means any private individual, firm, partnership, institution, corporation, or association that employs ten or more persons." 448.101(3), Florida Statutes.

bargaining agreement, State law, rule or regulation or under the common law."[5] Likewise, the Massachusetts Whistleblower Act provides that "the institution of a private action in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the rights and remedies available to him, for the actions of the employer, under any other contract, collective bargaining agreement, state law, rule or regulation, or under the common law." Mass. Gen. L. ch. 149, (f).[6] See also, NY Labor Law 740 (7) (McKinney 1988), to similar effect.

C. The Purpose of the Public and Private Whistleblower Acts would be thwarted by the limitations imposed by the court below.

The circuit court's limitation on a whistleblower's remedies is incompatible with the broad language in the Public Whistleblower Act which establishes that the remedies of an employee of a private company which happens to have a contract with the state are not to be limited to those contained in the Public Whistleblower Act.

As the Eighth Circuit noted in another whistleblower context:

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[5] However, even the New Jersey courts have interpreted this waiver provision as applying "only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA," and "does not prevent an employee from proceeding with his or her common-law tort and contract claims that are sufficiently distinct from the CEPA claim." ***Young v. Schering Corp***, 141 N.J. 16, 660 A.2d 1153, 1155, 1160 (N.J. 1995).

[6] Massachusetts courts have also limited this waiver provision similarly to New Jersey. See, ***Haddad v. Scanlon***, 1999 Mass. Super. LEXIS 272 (1999).

> Laws protecting whistleblowers are meant to encourage employees to report illegal practices without fear of reprisal by their employers. These statutes generally use broad language and cover a variety of whistleblowing activities. Accordingly, when the meaning of the statute is unclear from its text, courts tend to construe it broadly, in favor of protecting the whistleblower. This is often the best way to avoid a nonsensical result and "to effectuate the underlying purposes of the law."

Haley v. Retsinas, 138 F.2d 1245, 1250 (8th Cir. 1998), quoting ***United States v. S.A.***, 129 F.3d 995, 998 (8th Cir. 1997). Here, however, the meaning of §112.3187(11) and §448.105 is not "unclear from its text." Nothing in either the Public Whistleblower Act or the Private Whistleblower Act seeks to limit the right of a whistleblowing employee to seek redress through either or both of the statutes if s/he otherwise meets the criteria in the statutes. The liberal construction of the Public Whistleblower Act mandated by the Supreme Court in ***Edenfield*** and ***Irven*** and of the Private Whistleblower Act in ***Golf Channel*** requires nothing less.

CONCLUSION

For the above reasons, and for such other reasons as may be presented upon oral argument of this appeal, Amicus Curiae respectfully urges the Court to reverse the Circuit Court's Order dismissing Dahl's Private Whistleblower Act claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. mail, to **Jennifer Daley**, Esquire, Amlong & Amlong, P.A., Counsel for Appellant, 500 N.E. 4th Street, 2nd Floor, Ft. Lauderdale, FL 33301, and **Steven G. Burton**, Esquire, Broad & Cassel, Counsel for Appellees, 100 North Tampa Street, Tampa, FL 33602, this _____ day of June, 2002.

_____
Frederick W. Ford, Esquire

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using Times New Roman 14 point font.

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Frederick W. Ford