CASE NO. 10-12960-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VIRGINIA LITTLE,
Appellant/Plaintiff,
v.

FOSTER WHEELER CONSTRUCTORS, INC.
Appellee/Defendant.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE No. 09-61003-CIV-COHN-Seltzer
THE HONORABLE BARRY S. SELTZER,
UNITED STATES MAGISTRATE JUDGE

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER, IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for amicus curiae, National Employment Lawyer's Association, certifies pursuant to 11th Cir. Rule 26.1-1 that the following persons have or may have an interest in the outcome of this particular case:

James I. Cohn, U.S. District Court Judge
Barry S. Seltzer, U.S. District Court Magistrate
Virginia Little, Appellant/Plaintiff
Randy A. Fleischer, Esq., Appellant's counsel
Foster Wheeler Constructors, Inc., Appellee/Defendant
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Florida Chapter of the National Employment Lawyers Association, amicus curiae
Jesse L. Skipper, counsel for amicus curiae,
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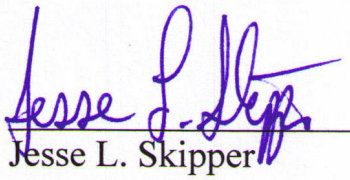

Jesse L. Skipper

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STATEMENT OF AMICUS CURIAE

The National Employment Lawyers Association is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace.

The Florida Chapter of NELA ("FLANELA") was founded in 1993 and has approximately 200 participating attorneys around the state. FLANELA has filed over 35 amicus briefs in this Court, the Florida Supreme Court, and Florida's District Courts of Appeal.

FLANELA has an interest in this case because it raises, in a single case, numerous important, fundamental issues in the interpretation of the Florida private-sector whistleblower statute ("FWA", for the "Florida Whistleblower Act.")[1] FLANELA considers the rights protected by the FWA to be fundamental to

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1 The statute, Fla. Stat. §§448.101-448.105, is commonly referred to as the "Florida Whistleblower Act", though this is really a misnomer. The law was in fact titled as "An act relating to labor regulations", and included, in addition to the foregoing sections, three sections amending the previously-enacted public-sector whistleblower statute. Laws of Florida, Ch. 91-285. Nevertheless, because the term "Florida Whistleblower Act" is commonly used, FLANELA uses the abbreviation "FWA" herein.

fairness and justice in the workplace and integral to the rule of law in society at large. FLANELA is concerned that the law has been developing with very little input from the Florida Supreme Court, and that what input the Florida Supreme Court has given - the rule of liberal construction and finding of legislative intent from *Golf Channel v. Jenkins* and *Arrow Air v Walsh* - has been disregarded.

Accordingly, while FLANELA supports reversal of the judgment on appeal, the thrust of this brief is to urge this Court to certify the issues raised herein to the Florida Supreme Court. Therefore, this brief does not attempt to re-state Appellant's arguments on appeal, or address the facts and record as they may support reversal or affirmance, but instead addresses fundamental issues in the interpretation of the FWA which have largely escaped in-depth consideration by state or federal courts up to this time. FLANELA hopes it can aid the Court by providing a broader perspective and in-depth analysis.

FLANELA has no financial interest in the outcome of this case. Appellant's counsel has consented to the filing of this amicus brief. Appellee's counsel has advised that she objects. Richard E. Johnson, Esq., FLANELA's Amicus Coordinator, has authorized the submission of this brief on behalf of FLANELA, pursuant to Mr. Johnson's authority from the FLANELA Board of Directors.

SUMMARY OF ARGUMENT

The FWA was enacted in 1991. Since then the Florida Supreme Court has addressed the statute only twice. FLANELA believes that, as a result, development of the law under the FWA has gone awry - largely, but not exclusively, in the federal courts - leading to several fundamental misinterpretations. In the instant case, the trial court accepted these misinterpretations, and in doing so repeatedly failed to correctly apply Florida law. On the main issue, whether the "law" underlying an FWA claim must be "specifically applicable to the employer," the trial court expressly declined to follow a Florida intermediate appeal court, in favor of federal trial court precedent, notwithstanding the Florida Supreme Court's statement that the FWA is "designed to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public." Broadly, the trial court ignored the Florida Supreme Court's mandate that the FWA be "liberally construed in favor of granting access to the remedy provided by the Legislature" and that limitations in the statute "should be narrowly construed."

While FLANELA supports reversal, FLANELA writes mainly to urge the Court to certify the issues raised below to the Florida Supreme Court, in order to allow that court to exercise its prerogatives under federalism principles and have a timely say in the development of the law under this important Florida statute.

ARGUMENT

The provision at issue in this case is Fla. Stat. §448.102(3), which provides:

> 448.102 Prohibitions.--An employer may not take any retaliatory personnel action against an employee because the employee has . . . (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation**.**

In both of the Florida Supreme Court cases addressing the FWA, *The Golf Channel v. Jenkins*, 752 So. 2d 561 (Fla. 2000) and *Arrow Air v. Walsh*, 645 So. 2d 422 (Fla. 1994), the court held that, as a remedial statute, the FWA must be "liberally construed in favor of granting access to the remedy provided by the Legislature" and that limitations in the statute "should be narrowly construed." Also, in both cases the Florida Supreme Court stated that the FWA is designed "to protect private employees who report or refuse to assist employers who violate laws enacted to protect the public." 752 So. 2d at 562, 645 So. 2d at 424 (emphasis supplied). These two points underlie and run throughout FLANELA's arguments herein.

I. THE TRIAL COURT ERRED IN HOLDING THAT A "LAW, RULE, OR REGULATION" UNDER THE FWA MUST BE "SPECIFICALLY APPLICABLE TO THE BUSINESS RATHER THAN THE PUBLIC AT LARGE."

The proposition that a "law, rule, or regulation" in an FWA claim must be "specifically applicable to the business rather than the public at large" is clearly erroneous, for multiple reasons. It contradicts the Florida Supreme Court's clear statement of the FWA's intent, above. On a textual level, as held in *Forrester v. John H. Phipps, Inc.*, 643 So. 2d 1109 (Fla. 1st DCA 1994), the phrase "applicable to the employer and pertaining to the business" does not modify the term "statute" at the beginning of Section 448.101(4), thereby obliterating the textual basis for the trial court's holding. And, the definition in Section 448.101(4) does not limit the term "law, rule, or regulation" in the first place, because it uses the term "includes," not "includes only" or "is limited to" or even "means." Finally, such a rule would lead to absurd results, would be impossible to apply in a coherent fashion, and is inconsistent with extant Florida case law.

A. THE "SPECIFICALLY APPLICABLE" RULE IS DIRECTLY CONTRARY TO THE FLORIDA SUPREME COURT'S STATEMENT OF THE INTENT OF THE FWA.

The trial court ruled that the "law, rule, or regulation" for an FWA claim must be one "specifically applicable to the business rather than the public at large." The Florida Supreme Court has stated that the intent of the FWA is " to protect private employees who report or refuse to assist employers who violate laws

enacted to protect the public." 752 So. 2d at 562, 645 So. 2d at 424. These propositions are clearly inconsistent. Based on this clear finding of legislative intent by the Florida Supreme Court, the "specifically applicable" rule is erroneous.

B. IN FLA. STAT. §448.101(4), THE CLAUSE "APPLICABLE TO THE EMPLOYER AND PERTAINING TO THE BUSINESS" DOES NOT MODIFY THE TERM "STATUTE" AT THE BEGINNING OF THE SECTION.

The proposition that a "law, rule or regulation" must be "specifically applicable to the business rather than the public at large" derives from Fla. Stat. §448.101(4), in the definitional section of the FWA. It provides that:

> (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 employer and pertaining to the business.

(Emphasis supplied). To sustain the trial court's interpretation, the clause "applicable to the employer and pertaining to the business" must be found to modify the term "statute" at the beginning of the section. This cannot be.

1. The trial court improperly disregarded *Forrester v. John H. Phipps, Inc.* and followed contrary federal court precedent.

In *Forrester v. John H. Phipps, Inc.*, the Court of Appeal of Florida, First District (the "First DCA")[2] directly rejected the trial court's interpretation, on the grounds that "applicable to the employer and pertaining to the business" does not modify the initial term "statute" in the section. In that case, the employee sued,

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2 FLANELA will hereinafter refer to Florida's intermediate appeal courts in this fashion.

claiming that her termination had been in retaliation for her publicly disputing the circumstances surrounding a reassignment of her duties, contending that the employer's characterization of those circumstances was false. 643 So. 2d at 1109-1110. On appeal from dismissal of the claim, the employer made the same argument accepted by the trial court in the instant case: that §448.101(4) requires that the underlying "law, rule, or regulation" be one "which pertains to the particular industry or business in which the employer is engaged." *Id.* at 1110. On the other side, the employee argued that "law, rule, or regulation" was broad enough to include "matters of public policy"; in that case, "such as the public policy against signing or agreeing to false statements, and the public policy against slander." *Id.* at 1110. The appeal court rejected both arguments.

In addressing the employer's argument, the court stated that it did not agree that the FWA "precludes the discharge of employees who refuse to participate in the violation of a law, rule or regulation pertaining only to the business engaged in by the employer."

> We think the language of the statute is clear, and that appellee's more restrictive interpretation is not what the legislature intended.

Id. at 1111. The court reasoned that "Given the placement of commas in section 448.101(4), we view the phrase "pertaining to the business" as modifying only a "local statute or ordinance." *Id.*

The *Forrester* court also rejected the employee's argument that matters of public policy, other than "enactments of a legislative or administrative forum," can serve as the law, rule or regulation under Section 448.102(3). The court stated that "this limitation to 'adopted' material only appears deliberate, and well-serves the public by hinging civil liability upon matters of which due notice, actual or imputed, has been conveyed." *Id.*

As the only Florida appeal court ruling on this issue, the trial court was bound to follow it unless there is persuasive indication the Florida Supreme Court would rule otherwise. *Galindo v. Ari Mutual Ins. Co.,* 203 F.3d 771 (11th Cir. 2000). This should apply doubly under Florida law, where it is well-settled that, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts. *Pardo v. State*, 596 So. 2d 665 (Fla. 1992). Thus, right now, *Forrester* is the law of Florida on this point. Yet, instead of *Forrester*, the trial court elected to follow another federal trial court, *Pinder v. Bahamasair Holdings,* 661 F.Supp. 2d 1348 (S.D.Fla. 2009). However, the *Pinder* court's discussion of this issue is not well-reasoned, misstates settled Florida law, and is clearly *dicta*.

In *Pinder*, the plaintiff had objected to the employer's non-compliance with federal Transportation Safety Administration regulations, when another employee allowed a passenger to board an aircraft without an e-ticket, under a false name, and without entering the passenger's name in the flight manifest. On summary

judgment, the *Pinder* defendant argued that the actions of the employee in question were not actions "of the employer" as required under Section 448.102(3); in essence, that FWA liability could never be founded on a violation of law committed by a co-employee. The District Court denied the employer's summary judgment motion and granted the employee's cross-motion on liability. The court first reasoned that the defendant's argument relied on an "overly restrictive reading of the statute," because "a corporation can only act through its employees, and accordingly an employer can only violate regulations through the actions of its employees." 661 F.Supp.2d at 1351-1352.

The court then went on to correctly distinguish the main cases relied on by the employer, *Sussan v. Nova SE University*, 7823 So. 2d 933 (Fla. 4th DCA 1999), and *Ruiz v. Aerorep Group*, 941 So. 2d 505 (Fla. 3rd DCA 2006), on the grounds that, in both cases, the courts found that the acts objected to were not acts "of the employer," because not committed within the course and scope of employment. Only then did the *Pinder* court offer as additional grounds for distinction that, in *Sussan* and *Ruiz*, the laws in question - theft and battery - were not "specifically applicable to the business, as opposed to the public at large." *Id*. at 1353.

Clearly, the latter point was not directly before the *Pinder* court and not necessary to its reasoning. The regulations at issue in *Pinder* were specifically applicable to that defendant, so it was unnecessary to determine whether generally

applicable laws may support a whistleblower action. Nor did this genuinely serve to distinguish *Sussan* and *Ruiz*, because neither case advances this rationale, and the *Pinder* court had already distinguished both cases on their stated rationales.

Another indicator the *Pinder* court was in error is the statement that "laws against theft, battery, threats and sexual harassment are generally applicable laws" and therefore cannot support an FWA claim. *Id.* at 1353 (emphasis supplied). As the trial court in the instant case recognized, the notion that sex harassment, a form of employment discrimination, cannot support an FWA claim is wrong. Florida appeal courts have already expressly decided otherwise. *Underwood v. Rhone-Poulenc Rorer Pharmaceuticals*, 890 So.2d 429 (Fla. 4th DCA 2004) , *Rivera v. Torfino Enterprises*, 914 So. 2d 1087 (Fla. 4th DCA 2005), *Jenkins v. Golf Channel*, 714 So. 2d 558 (Fla. 5th DCA 1998), *aff'd*, 752 So. 2d 561 (Fla. 2000).

Pinder, while correct in its result, and correct in its reasoning directly supporting that result, was plainly wrong in its discussion of this issue, which was not before that court in any event. Much less does *Pinder* display any "persuasive indication" that the Florida Supreme Court would overturn *Forrester*. *Forrester* is the better reasoned and more persuasive opinion, and the trial court erred in refusing to follow it.

2. The text of the FWA contradicts the proposition that "applicable to the employer and pertaining to the business" modifies the initial term "statute" at the beginning of the section.

Consideration of the punctuation and syntax of §448.101(4) supports the interpretation in *Forrester*, and contradicts that of *Pinder*, especially in light of the *Golf Channel* liberal construction rule. First, it is a well-settled, if not hard-and-fast, rule that "relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote." *Kasischke v. State*, 991 So. 2d 803 (Fla. 2008). This is especially so where the last antecedent and the modifying phrase are <u>not</u> separated by a comma. *Id.* at 812-13 ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.")

Thus, the phrase "applicable to the employer and pertaining to the business" modifies the phrase "local statute or ordinance" which immediately precedes it.[3] The initial term, "statute," and the modifying clause, "applicable to the employer and pertaining to the business," are separated by too much verbiage for the latter to

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3 Or, underscoring the ambiguity of the statute, the phrase in question, working backward, could be held to modify "local . . . ordinance"; "local statute or ordinance" (the construction in *Forrester*); or "any rule or regulation adopted pursuant to any federal, state, or local statute or local ordinance," before finally reaching "any statute or ordinance" at the beginning of the section.

modify the former. If the legislature had intended that clause to modify "statute" it could easily have made this clear. For example, it could have said that:

> "law, rule, or regulation" is limited to any federal, state, or local statute or ordinance, *which is applicable to the employer and pertaining to the business*, or any rule or regulation adopted pursuant to any such statute or ordinance.

It did not do so.

Furthermore, even if the last-antecedent rule were disregarded, and the *Pinder* interpretation were plausible, the liberal construction rule would require that interpretation be rejected, because it is the least liberal to the employee, affords the least access to the FWA's remedies, and visits the greatest violence on the FWA's intended protections. Accordingly, the central proposition supporting the trial court's ruling is erroneous.

C. USE OF THE TERM "INCLUDES" IN FLA. STAT. §448.101(4) MEANS THAT PROVISION DOES NOT LIMIT THE MEANING OF "LAW, RULE, OR REGULATION."

A second proposition, which necessarily underlies the trial court's ruling, is that §448.101(4) limits "law, rule or regulation" in the first place. This is incorrect, because §448.101(4) uses the term "includes." By its plain meaning, "includes" indicates what is included, and says little or nothing about what is excluded. *Pro-Art Dental Lab v. V-Strategic Group,* 986 So. 2d 1244 (Fla. 2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"), *Systems Components Corp. v. Fla.*

DOT, 14 So. 3d 967 (Fla. 2009) (same).

As discussed in *Childers v. State*, 936 So. 2d 585 (Fla. 1st DCA 2006) (en banc), *certification denied en banc*, 936 So. 2d 619, *rev. denied,* 939 So. 2d 1057 (Fla. 2006) :

> In standard usage, the use of the term "include" does not indicate that a list of subjects is exhaustive. Blacks Law Dictionary 766 (7th ed. 1999) defines "include" in pertinent part, as follows:
>
> > include, vb. To contain as a part of something. The participle "including" typically indicates a partial list: "the plaintiff asserted five tort claims, including slander and libel. . . ."
>
> Similarly, the author Bill Bryson explains that "include indicates that what is to follow is only part of a greater whole. To use it when you are describing a totality is sloppy. . . ." Bill Bryson, Troublesome Words 101 (3d ed. 2001).

936 So. 2d at 597. (citations omitted)

As in *Childers*, if the legislature had intended that the term "law, rule, or regulation" be limited to the matters described in §448.101(4), it could have said so, by using "is limited to" or "includes only" or "means". Thus, the trial court has implicitly ruled that the legislature was - in the words of the *Childers* court - "sloppy" in its choice of terms. Indeed, the trial court's ruling impermissibly re-writes the statute by substituting a more restrictive term for the more expansive term selected by the legislature. *See, Hawkins v. Ford Motor Co.*, 748 So. 2d 993 (Fla. 1999)(courts may not rewrite statutes contrary to their plain language). To do so in the instant case is all the more impermissible in view of the liberal

construction rule. Even if "includes" were somehow unclear, interpretation of unclear language in the FWA goes in only one direction: in favor of the employee.

Nevertheless, on three occasions, Florida's appeal courts - including the First DCA, in *Forrester,* - have apparently accepted, or at least assumed, that section 448.101(4) limits "law, rule or regulation." The court in *Tyson v. Viacom*, 760 So. 2d 276 (Fla. 4th DCA 2000), held that a federal court injunction entered in another case could not serve as a "law, rule, or regulation" under the FWA, in part because the term "includes", as used in 448.101(4), "in context, is unambiguously one of limitation, not enlargement."

In *Forrester*, the plaintiff argued that "because of the use of the term 'includes' in *section 448.101(4)*, the legislature did not intend the definition stated to be exclusive." 643 So. 2d at 111. While the court did not expressly reject this argument, it did obliquely indicate that 448.101(4) is a limiting provision, stating that:

> By the definition provided in *section 448.101(4)*, the phrase "law, rule or regulation" refers to enactments of a legislative or administrative forum. This limitation to "adopted" material only appears deliberate, and well-serves the public by hinging civil liability upon matters of which due notice, actual or imputed, has been conveyed.

Id. at 1112.

Similarly, in *New World Communications v. Akre*, 866 So. 2d 1231 (Fla. 2d DCA 2003), the Second DCA followed the *Forrester* court's rationale that the term "law, rule or regulation" is limited to adopted material, and in doing so cited §448.101(4) for the proposition that "the whistle-blower's statute specifically limits the definition of 'rule' to an 'adopted' rule." 866 So. 2d at 1233.

Again, FLANELA flatly contends that the proposition that §448.101(4) is a limiting provision - that "includes" somehow doesn't really mean "includes" - is erroneous. None of the above cases cites any prior authority, or explains or supports this assertion in any way. It is contrary to the plain meaning of the term "includes" and the clear precedent of the Florida Supreme Court cited above. In the face of the liberal construction rule, it should be unthinkable. Accordingly, FLANELA believes it is highly likely that the Florida Supreme Court, if presented with the question, would adopt the more liberal construction urged herein, and disapprove *Tyson*, *Forrester*, and *New World Communications* to the extent they accept it.

Importantly, FLANELA does <u>not</u> contend that this Court or the Florida Supreme Court should repudiate the rationale of *Forrester* that "law, rule or regulation" is limited to "adopted" material. Or, conversely, and perhaps more to the point, FLANELA does not ask this Court to hold that a court order (*Tyson*), or unenacted, amorphous "public policy" (*Forrester*), or an unpromulgated

administrative law doctrine (*New World Communications*), qualifies as a "law, rule or regulation" under the FWA. FLANELA does not attack the result of any of these cases, nor the central rationale - that "law, rule, or regulation" is limited to "adopted material" - on which they rest. Instead, FLANELA argues that the same rationale may and should be correctly drawn from the term "law, rule or regulation" itself. Whether by its plain meaning alone, or reinforced by the rule of *ejusdem generis*, this term evinces an intent to limit the scope of the FWA to enacted, or, in the words of the *Forrester* court, "adopted" law. Accordingly, FLANELA urges the rejection of the explicit reasoning of *Tyson* that the term "includes" in §448.101(4) is one of limitation, and to the extent *Forrester* and *New World Communications* so hold, those cases as well.

D. THE "SPECIFICALLY APPLICABLE" RULE LEADS TO ABSURD RESULTS.

Statutes may not be construed so as to reach an absurd result. *Fla. Dept. of Environmental Protection v. ContractPoint Fla. Parks, L.L.C.*, 986 So. 2d 1260 (Fla. 2008). In effect, the trial court and *Pinder* have ruled that the Florida legislature intended to allow an employer to escape liability when it retaliates against an employee who objects to battery, perjury, heroin distribution, wire fraud, or arson; but be held liable when it terminates an employee for objecting to

commercial sign ordinance violations, unauthorized hair braiding4, a professional geologist's failure to maintain a current address with the state5, or illegally parking motor vehicles for the purpose of sale or rental.6 This is absurd.

E. THE "SPECIFICALLY APPLICABLE" RULE IS INCONSISTENT WITH EXISTING FLORIDA PRECEDENT.

First, the *Pinder* court interpreted the "specifically applicable" rule to exclude sex harassment and, by extension, other employment discrimination laws. As the trial court in the instant case recognized, Florida appeal courts had already held to the contrary, having ruled at least three times that employment discrimination laws may serve as the "law, rule or regulation" for an FWA claim. *Underwood, supra, Rivera, supra, Jenkins, supra.*

Second, at least two Florida appeal court decisions sustaining claims under the FWA have involved statutes of general application, and thus are inconsistent with the trial court's rationale. *Baiton v. Carnival Cruise Lines*, 661 So.2d 313 (Fla. 3d DCA 1995), *approved on other grounds*, *The Golf Channel v. Jenkins*, 752 So. 2d 561 (Fla. 2000)(perjury); *Roland v. Florida East Coast Railway*, 873 So.2d 1271 (Fla. 3d DCA 2004)(environmental regulations, burglary, illegal wiretapping). While neither of the foregoing cases directly addresses the issue here, those courts

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4 61G5-31.002(3), Fla. Admin. Code provides that: "Registration as a hair braider shall not authorize a registrant to practice hair wrapping. Registration as a hair wrapper shall not authorize a registrant to practice hair braiding.
5 See, Section 492.109, Florida Statutes
6 See, Section 316.1951, Florida Statutes

assumed that statutes of general application, like perjury and burglary, may serve as predicate "laws" for a whistleblower claim.

Finally, even *Sussan* and *Ruiz,* above, do not say that the laws at issue in those cases, theft and battery, cannot serve as "laws" underlying an FWA claim. They merely say that, in those cases, the underlying violations were not "of the employer" based on vicarious liability principles.

F. THE "SPECIFICALLY APPLICABLE" RULE PRESENTS VEXING AND ONEROUS PROBLEMS OF APPLICATION AND WILL LEAD TO INCONSISTENT, ARBITRARY AND ILLOGICAL RESULTS.

If the "specifically applicable" rule prevails, courts in whistleblower cases will be called on in each case to determine whether the "law" at issue is "specifically applicable to the business," on one hand, or applicable to the "public at large," on the other. A wide gap between these two concepts immediately presents itself: what about laws that are applicable to all employers, but not the public at large? One can see that, already, in the first two cases to accept this proposition, a conflict has emerged: the *Pinder* court included "sexual harassment" among those laws applicable to the "public at large", whereas the trial court in the instant case grudgingly recognized settled Florida precedent and found that sexual harassment may serve as the "law, rule, or regulation" underlying an FWA claim.

Another example would be workplace safety laws under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78. Presumably, both the *Pinder* court and the trial court below would deem OSHA applicable to the "public at large" and outside the FWA's protections, unless constrained by Florida precedent. As it happens, this issue too has been decided, in favor of the employee, by a Florida appeal court. *Diaz v. Impex of Doral, Inc.*, 7 So. 3d 591 (Fla. 3d DCA 2009).

This particular flaw in the "specifically applicable" rule seems especially pertinent to the instant case. Based on the facts, it seems apparent that the drug-free workplace provisions of Florida's workers compensation law, Fla. Stat. §440.102, are a potentially applicable "law, rule or regulation." Specifically, the facts as stated by the trial court and in Appellant's brief seem to support the conclusion that the job site superintendent and a company safety officer, who were at least in part charged with enforcing and administering drug-free workplace rules at the jobsite, were themselves doing drugs at work and actively conniving to cheat on drug tests by substituting others' clean urine.

Fla. Stat. §440.102(2) and (5) together require that drug tests be performed and that samples be collected "in a manner reasonably calculated to prevent substitution or contamination of the sample." Thus this seems precisely analogous to the TSA regulatory violations in *Pinder*, in that the law in question imposes obligations directly on the employer, the employer has designated certain

employees to comply with those obligations, and they have failed to do so. Accordingly, if the drug-free workplace laws are considered "specifically applicable" to the business, summary judgment should not have been entered.

Yet, as the examples above show, the distinction between "specifically applicable to the business" and applicable to the "public at large" does not provide a reasoned basis for decision when the law is applicable to employers, as employers, but across a broad range of businesses. The "specifically applicable" rule simply does not address this kind of law. Only by analogy to the cases cited above can one derive an answer. In short, for this kind of law the distinction is useless, even though this point could well be determinative in the instant case.

A similar problem exists with laws that are generally applicable to commercial matters, but not to individuals in their personal relations. An example would be Florida's Deceptive and Unfair Practices Act, Fla. Stat §§501.201-501.213. While on one hand the statute by its terms applies to everyone,[7] and across a broad range of businesses, on the other it only regulates commercial conduct. Is that "specific" enough? If not, by what conceivable rationale could one argue that the Florida legislature intended to exclude it from the FWA? Wouldn't this be another example of an absurd result?

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7 *See*, Fla. Stat. §501.2075 (Subjecting "any person, firm, corporation, association, or entity, or any agent or employee of the foregoing" to the statute).

The same can be said for laws requiring the registration of securities. Unless certain exemptions are met, a company may not issue and sell securities without complying with registration requirements. *See*, Fla. Stat. §517.07 (unlawful "for any person to sell or offer to sell a security within this state unless" exceptions apply) (emphasis supplied). Is this proscription "specifically applicable" to the securities business, or to "any" person, i.e. the "public at large"? Obviously, in a sense, the answer is both. And again, the "specifically applicable" rule doesn't address the question. A court applying it would have to make an essentially arbitrary decision, leading to inconsistent and illogical results.

In fact, the distinction is easily rendered illusory in almost any case. For example: no person may engage in banking, securities dealing, the business of insurance, or liquor sales without proper authorization. *See*, *respectively*, Fla. Stat. §655.922, Fla. Stat. §517.021(6) and §517.12, Fla. Stat. §624.401(1), and Fla. Stat. §562.12(1). So, in that sense, these laws clearly apply to the public at large. But, in another sense, they are "specifically applicable to the business" because they only apply when a person engages in those specific activities. So, do these statutes fall within the FWA's protection? Presumably so, but the distinction itself provides no rationale for reaching this result. In such cases, courts would necessarily have to return to some conception of the broad intent of the FWA to reach a decision. Again, basing FWA protection on the distinction between laws "specifically

applicable to the business" and laws applicable to the public at large is not only plainly wrong, for all the reasons already set forth, but would be useless in practice as a guide to courts in reaching a decision.

G. CONCLUSION.

From every angle, the trial court's interpretation falls short: the broad intent of the FWA as expressed by the Florida Supreme Court, existing Florida appeal court precedent, the text of the statute, the rules of construction, and practical considerations. This Court should reject the trial court and *Pinder's* interpretation, or certify this case to the Florida Supreme Court to allow it the chance to do so.

II. AN FWA PLAINTIFF NEED NOT SHOW THAT SHE OBJECTED TO AN ACTUAL VIOLATION OF LAW BY THE EMPLOYER, ONLY THAT THE ACTIVITY, POLICY, OR PRACTICE WAS ATTRIBUTABLE TO THE EMPLOYER AND VIOLATED THE LAW, OR THAT THE PLAINTIFF REASONABLY SO BELIEVED.

The trial court accepted and applied two additional interrelated and erroneous interpretations of the FWA. These derive from an oft-repeated misstatement of the statute's language, to the effect that the FWA requires "a violation of law by the employer." The first erroneous proposition is that an FWA plaintiff must show an actual violation of law, as opposed to the "reasonable belief" allowed under federal law. The second is that an FWA plaintiff must show that the employer could be held legally responsible for the underlying illegal conduct, thus importing the entire corpus of vicarious liability law into the FWA. Both are in error.

A. A "REASONABLE BELIEF" STANDARD SIMILAR TO THAT APPLIED UNDER TITLE VII ANTI-RETALIATION PROVISIONS SHOULD BE APPLIED TO THE FWA.

Whether a reasonable belief standard applies to the FWA is an open question in Florida law. No Florida appeal court has ruled on the issue. Yet, it is well-settled in federal employment discrimination law that an employee's reasonable belief that a violation of law occurred is sufficient to support a retaliation claim. FLANELA urges that a similar standard be applied to the FWA.

1. The text of the FWA better supports a reasonable belief standard.

The FWA refers to "any activity, policy, or practice of the employer which is in violation of a law, rule or regulation." Nothing in the text expressly requires proof of an actual violation. To the contrary, the express inclusion of "policy," means that violations of law that have not yet occurred, but which might be expected to result from such a policy in the future, may support an FWA claim. If an actual violation of law were required, then the statute would be limited to past conduct; i.e. "activities." Indeed, if an actual violation were intended, a much simpler formulation was available: the legislature could have simply referred to a "actual violation of a law, rule, or regulation by the employer" and obviated the entire question. Instead the legislature expressly allowed an employee to safely object to an illegal *policy*, which by definition includes policies that have not yet resulted in any actual violation of law.

2. A reasonable belief standard applies to the anti-retaliation provisions of the Florida Civil Rights Act[8] and Title VII[9], with less textual support than is found in the FWA.

In *Carter v. Health Management Assocs.*, 989 So. 2d 1258 (Fla. 2d DCA 2008), the Second DCA ruled that the reasonable belief standard applied by federal courts under federal discrimination law (*See, e.g., Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989)) applies to the FCRA as well.

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8 Fla. Stat. §§760.01-760.11 (2010) (the "FCRA").

9 Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §§2000e, et seq.

The anti-retaliation provision of the FCRA provides:

> It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

Section 760.10(7), Florida Statutes.

Clearly, the FCRA, on its face, contains no language overtly supporting a "reasonable belief" standard. It refers to "any practice which is unlawful," not any practice the employee believes is unlawful. Accordingly there is less basis for finding a reasonable belief standard under the FCRA than under the FWA. The same goes for federal anti-retaliation provisions, which are essentially identical to the state provisions. 42 U.S.C. §2000e-3(a). In sum, if a reasonable belief standard applies to Title VII and the FCRA, then it certainly should apply to the FWA as well.

3. Requiring an actual violation would thwart the remedial purpose of the FWA, contrary to the liberal construction rule.

The FWA is very broad, in the sense that it, in effect, incorporates the entire body of laws, rules and regulations that may apply to an employer. No employee can reasonably be expected to know all of the elements, defenses, exceptions, and loopholes in every law, rule or regulation. If an employer is free to retaliate against an employee who has genuinely, and reasonably, got it wrong, then few employees will feel confident enough to speak out against illegal conduct or

policies. Thus, the purpose of the FWA, to encourage employees to speak out in this way and protect them from retaliation when they do so, will be thwarted.

4. An actual violation requirement would be excessively burdensome to apply, and is thus an illogical and absurd result.

The actual violation standard would require a cumbersome case-within-a-case in every FWA case, and raise a welter of vexing practical and legal issues. At the least, an actual violation requirement would require that a plaintiff present proof supporting every element of the underlying violation in her case-in-chief at trial. But, would the plaintiff also be required to present proof overcoming defenses? Or, would the defendant have the burden of proof on "defensive matters" directed to underlying violations, even though proof of the underlying violation would, in some literal sense, be part of the plaintiff's case-in-chief?

And which defenses? At the pleading stage, would a defendant's mere denial directed to the underlying violation be sufficient to support raising any and all defensive issues at trial? Or should defenses to the underlying violations be treated as affirmative defenses to the FWA claim itself, requiring factually sufficient pleading by the defendant?

Likewise, how to treat burden of proof issues? Where the underlying violation pertains to a criminal statute, does that import a "beyond a reasonable doubt" standard - applicable only to the case-within-a-case - into a civil FWA case? If so, how is the jury to be instructed on this without engendering confusion? Or,

if the underlying violation pertains to an administrative regulation, does that import the entire complex body of substantive and procedural administrative law, federal and state, into these state court civil proceedings?

While FLANELA has no ready answer to these issues, one thing can be said with certainty: resolving these issues, and devoting court resources to receiving and considering the evidence and legal argument they would require, would draw the trial court far afield from the core concern of the FWA, which is protecting employees who are just trying to do the right thing and obey the law, from retaliation. Based on these considerations, requiring proof of an actual violation would be illogical and absurd, and thus an impermissible interpretation of the FWA. *Fla. Dept. of Environmental Protection, supra.*

5. Conclusion

The foregoing demonstrates that a "reasonable belief" standard is a reasonable interpretation of the FWA. Under the liberal construction rule, that's all it takes, regardless of what a court may think is the better interpretation. Ambiguity in the FWA gets clarified in only one direction, in favor of the employee. Accordingly a reasonable belief standard should apply under the FWA.

B. AN FWA PLAINTIFF NEED NOT PROVE THE EMPLOYER IS VICARIOUSLY LIABLE FOR THE UNDERLYING ILLEGAL CONDUCT, SO IT IS ERROR TO IMPORT THE ENTIRE CORPUS OF VICARIOUS LIABILITY LAW INTO THE FWA.

If the Florida legislature had intended to require that an FWA plaintiff prove the employer actually liable for the underlying "law, rule, or regulation," it could easily have used the phrase "violation of a law, rule or regulation by the employer." Instead, the FWA uses language that is more attenuated and verbose, for no apparent purpose other than to avoid that very result. §448.102(3) refers to an "activity, policy or practice of the employer which is in violation of a law, rule or regulation."

FLANELA would urge that any illegal "activity, policy, or practice" of a lower-level employee that occurs within the time and space confines of the workplace be considered "of the employer." In other words, it should be sufficient that the illegal conduct in question was committed by the employer's employees at work during work hours.[10] This interpretation is clearly more consistent with the plain language of the FWA. And, again, so long as FLANELA's interpretation is reasonably plausible, it prevails, as the interpretation that provides greater access to the FWA's remedies. Based on these points, FLANELA believes it highly likely that the Florida Supreme Court would accept FLANELA's interpretation.

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10 This should not be the only basis. For example, if the violation is committed by or at the direction of upper management, and there is some nexus with the business, it should be attributable to the employer regardless of when and where committed.

Nevertheless, beginning with *Sussan, supra,* two Florida appeal courts and at least three federal trial courts have ruled this was required. *Ruiz, supra, Pinder, supra, McIntyre v. Delhaize America, Inc.*, Case No. 8:07-cv-2370-T-30TBM 2009 U.S. Dist. LEXIS 33026 (M.D.Fla. April 17, 2009), *Kelleher v. Pall Aeropower Corp*., Case No: 8:00-cv-365-T-26EAJ, 2001 U.S. Dist. LEXIS 5463 (M.D.Fla. February 8, 2001). In none of these cases is the correct construction offered above even considered, much less rejected, nor the language of the statute explicitly analyzed. Thus the body of precedent accepting this proposition is building, without the language of the FWA ever having been carefully considered. Accordingly, it is timely that the Florida Supreme Court have an opportunity to address this point.

III. THIS ISSUES RAISED HEREIN SHOULD BE CERTIFIED TO THE FLORIDA SUPREME COURT FOR RESOLUTION.

Overwhelmingly, the federal courts are interpreting the FWA.[11] That would be fine, but for the fact that, as the foregoing demonstrates, the federal courts (albeit, not only the federal courts) have persistently misinterpreted the statute, and in every such instance have done so to the detriment of employee protections, inconsistent with the Florida Supreme Court's liberal construction rule. Even in the instant case, where a Florida intermediate appeal court has clearly spoken, the trial court disregarded it in favor of weak federal District Court precedent, again to the employee's detriment.

This state of affairs gives offense to the federalism principles underlying *Erie Railroad Co. v. Tompkins*, 304 U.S. 64; 58 S. Ct. 817; 82 L. Ed. 1188 (1938). As Justice Brandeis stated:

> [T]he U.S. Constitution . . . recognizes and preserves the autonomy and independence of the states in their legislative and judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.

304 U.S. at 78-79. (quoting *Baltimore & Ohio R. Co*. v. *Baugh*, 149 U.S. 368, 401

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11 A Lexis search with the search terms " 448.101 or 448.102 or 448.103 or 448.104 or 448.105 and florida" (which should retrieve every case citing any part of the FWA, and little else) yields 65 results in the database of all Florida cases, 3 in the Florida Supreme Court and the remainder in the DCA's. The same search yields 191 responsive results (3 non-responsive) in the database of all federal court cases, 18 in this Court, 1 in the U.S. Supreme Court, and the remainder in District Courts.

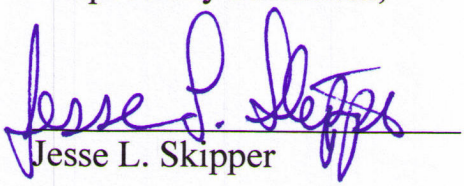
(1893). It is now over a decade since the Florida Supreme Court last addressed the FWA. Because so many critical issues, which FLANELA views as misinterpretations, are collected in one case, this case provides a prime opportunity for the Florida Supreme Court to address the FWA. Such an action is timely, because the body of case law, state and federal, adopting these misinterpretations is steadily growing. As it grows, employees are increasingly discouraged from bringing contrary cases. This, in turn, progressively decreases the likelihood of these issues ever reaching the Florida Supreme Court based on conflict among the DCAs. Now is the time to give the Florida Supreme Court a chance to speak, before it is too late. Accordingly, FLANELA urges this Court to certify the issues raised in this brief to the Florida Supreme Court.

CONCLUSION

The FWA has been misinterpreted on each of the points raised above. While FLANELA supports reversal in this case, FLANELA mainly urges this Court to refer this matter to the Florida Supreme Court.

This Court should grant this request, not only because the interpretations of the FWA adopted by the trial court are wrong, though they surely are, and not only because it is timely that the Florida Supreme Court address the FWA, though it surely is; but also because the FWA is important, in that it represents a fundamental, if implicit, tenet of our republic. We are citizens, not serfs. Employment is at bottom a contractual relationship, not an element of a hierarchical social system. Contractual obligations, even those implied in law, are always subject to enacted law. One's obligations as a citizen are owed directly to the state, its Constitution and its law, and supersede one's duties to an employer when the two conflict. The FWA is important because it is a concrete expression of this abstract fundamental concept.

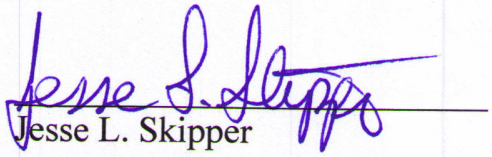
Respectfully submitted,



Jesse L. Skipper

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) and 29(d). This brief contains 6,862 words from Page 1 through the end of Page 30.



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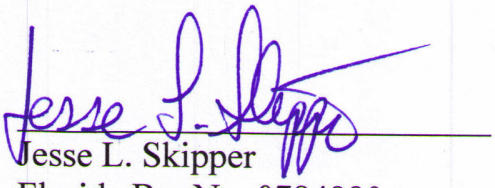
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Amicus Brief were furnished on August 27, 2010, two in paper format, and by e-mail, to Angelique Groza Lyons, Esq., Constangy, Brooks & Smith, LLP, 100 North Tampa St., Suite 3350, Tampa FL 33601-1840, alyons@constangy.com, and to Randy A. Fleischer, Esq., Law Offices of Randy A. Fleischer, P.A., 8258 State Rd 84, Davie FL 33324, randy@igc.org.



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