



THE SKY IS FALLING!

Would Chicken Little Be a Protected Whistle-blower Under the Florida Whistle-blower's Act?

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WHAT IS WHISTLE-BLOWING?

A WHISTLE-BLOWER
is a person who
exposes misconduct,
dishonest or illegal
activity in an
organization.



WHAT IS WHISTLE-BLOWING?

Phrase was coined by Consumer Advocate Ralph Nader in the early 1970s

A **WHISTLE-BLOWER**

is a person who exposes misconduct, dishonest or illegal activity in an organization.



LAWS THAT PROHIBIT WHISTLE-BLOWER RETALIATION

- The False Claims Act
- Sarbanes-Oxley Act
- Dodd-Frank Act
- 21 whistleblower laws in OSHA's Whistleblower Protection Program
- Florida's Private Whistle-blower Act
- Florida's Public Whistle-blower Act

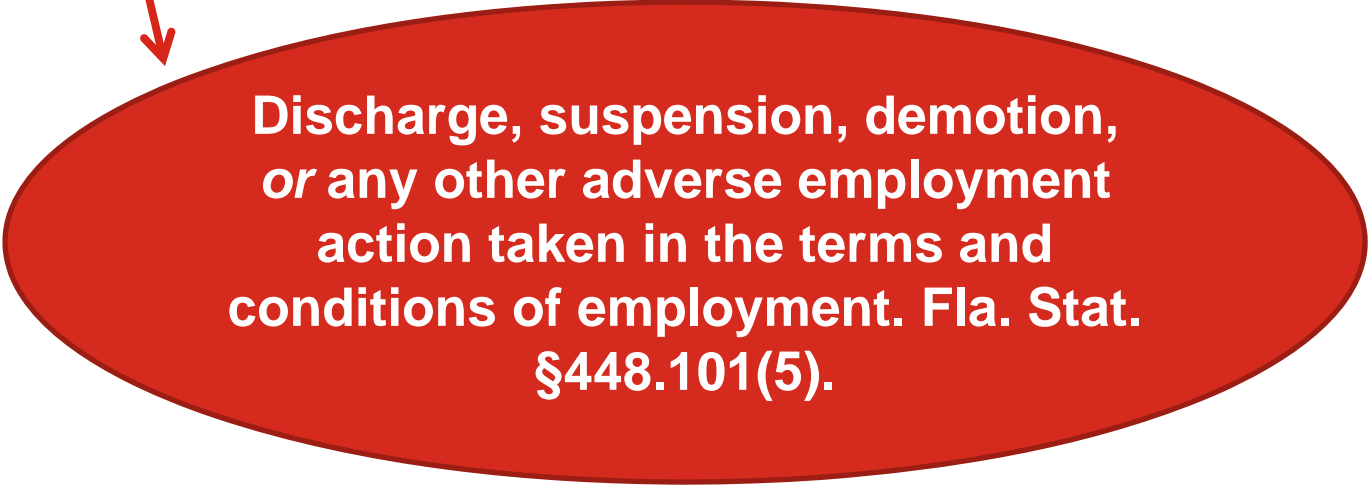
FLORIDA **PRIVATE** WHISTLE-BLOWER ACT, § 448.102, Fla. Stat.

Under the Florida Whistle-blower's Act (FWA), a private employer is prohibited from taking "retaliatory personnel action" based upon an employee's participation in any one of three types of protected whistle-blowing conduct.



FLORIDA **PRIVATE** WHISTLE-BLOWER ACT, § 448.102, Fla. Stat.

Under the Florida Whistle-blower's Act (FWA), a private employer is prohibited from taking **“retaliatory personnel action”** based upon an employee's participation in any one of three types of protected whistle-blowing conduct.



**Discharge, suspension, demotion,
or any other adverse employment
action taken in the terms and
conditions of employment. Fla. Stat.
§448.101(5).**

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Under the Florida Whistle-blower's Act (FWA), a private employer is prohibited from taking "retaliatory personnel action" based upon an employee's participation in any one of **three types** of protected whistle-blowing conduct.

- 1. Disclosure** §448.102(1): an employee who ***discloses*** or threatens to disclose an "activity, policy, or practice of the employer that is in violation of a law, rule, or regulation" to a government agency.

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Under the Florida Whistle-blower's Act (FWA), an employer is prohibited from taking "retaliatory personnel action" based upon an employee's participation in any one of **three types** of protected whistle-blowing conduct.

- 2. Assistance/Participation** §448.102(2): An employee who ***assists*** with an ongoing "investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer."

FLORIDA **PRIVATE** WHISTLE-BLOWER ACT, § 448.102, Fla. Stat.

Under the Florida Whistle-blower's Act (FWA), an employer is prohibited from taking "retaliatory personnel action" based upon an employee's participation in any one of **three types** of protected whistle-blowing conduct.

- 3. Objection/Opposition** §448.102(3): An employee who ***objects*** to or refuses to participate in "any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation."

IS NOTICE TO EMPLOYER REQUIRED?

- **Only for “Disclosure” whistle-blowing!**
Jenkins v. Golf Channel, 725 So. 2d 561 (Fla. 2000).
 - For disclosure whistle-blowing claims, the FWA requires *both*:
 - **written notice** and
 - **a reasonable opportunity to cure the unlawful activity.**

IS NOTICE TO EMPLOYER REQUIRED?

- Notice to employer **is not** required for Assistance/Participation or Objection/Opposition whistle-blowing.

WHAT IF THE EMPLOYEE IS CHICKEN LITTLE?



What if the employee is hit by an acorn and thinks the sky is falling?

(i.e., what if the employee is wrong in their complaint that the employer is doing something unlawful?)

WHAT IF THE EMPLOYEE IS CHICKEN LITTLE?



The majority of the lower courts have ruled that private FWA requires an objection to an **ACTUAL** violation of a law, rule, or regulation

BUT . . .

WHAT IF THE EMPLOYEE IS CHICKEN LITTLE?

SCARY AERY

Aery v. Wallace Lincoln Mercury of Lake Park (Fla. 4th DCA 2013).



First appellate court that ruled on the standard of proof required in a private FWA case.

Said ***good faith belief*** by employee is enough

WHAT IF THE EMPLOYEE IS CHICKEN LITTLE?

SCARY AERY

Aery v. Wallace Lincoln Mercury of Lake Park (Fla. 4th DCA 2013).



All three Florida federal district courts have applied *Aery*.

So. . . for now, assume that a ***good faith belief*** of a violation is enough

FLORIDA **PUBLIC** WHISTLE-BLOWER ACT, § 112.3187, Fla. Stat.

Prohibits “agencies” and “independent [agency] contractors” from retaliating against “employees” and persons who make certain protected disclosures.

F.S. 112.3187(2)



FLORIDA **PUBLIC** WHISTLE-BLOWER ACT, § 112.3187, Fla. Stat.

Protected Disclosures:

- **Does the disclosure go to a matter of public concern?**
 - violation or suspected violation of a law, rule or regulation which presents a *substantial danger to the public health, safety or welfare*

FLORIDA **PUBLIC** WHISTLE-BLOWER ACT, § 112.3187, Fla. Stat.

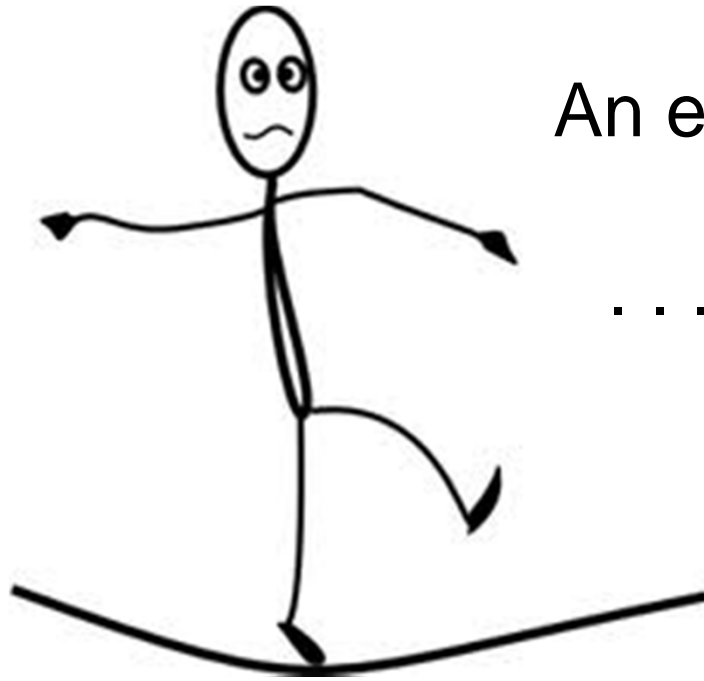
Protected Disclosures:

- **Does the disclosure go to a matter of public concern?**
 - act or suspected act of gross mismanagement, malfeasance, misfeasance, waste of funds, or gross neglect of duty

PUBLIC EMPLOYEES AND PERSONS PROTECTED INCLUDE THOSE:

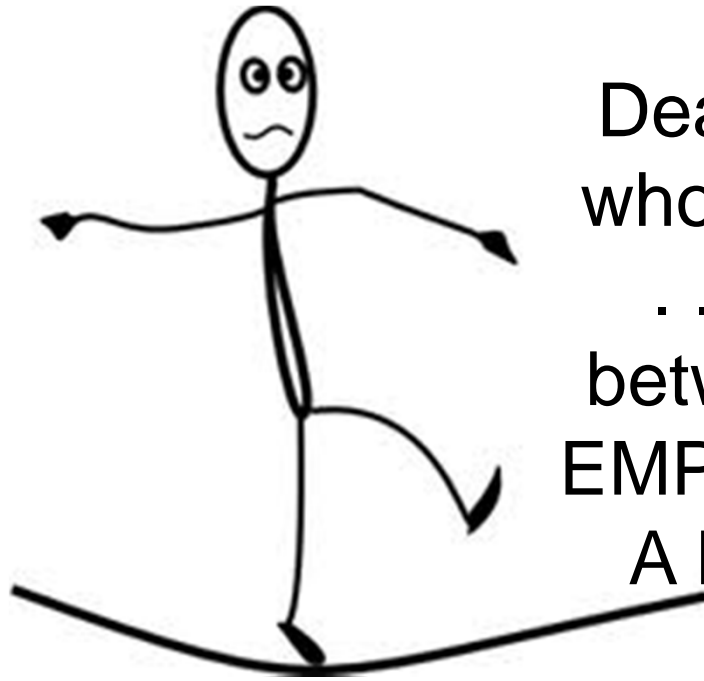
- who disclose information on their own initiative in a **written and signed** complaint (email will suffice) (**Disclosure**);
- who are requested to participate in an investigation, hearing, or other inquiry (**Participation**);
- who refuse to participate in any adverse action prohibited by this section (**Opposition**)

WHISTLE-BLOWER OR COMPLAINER?



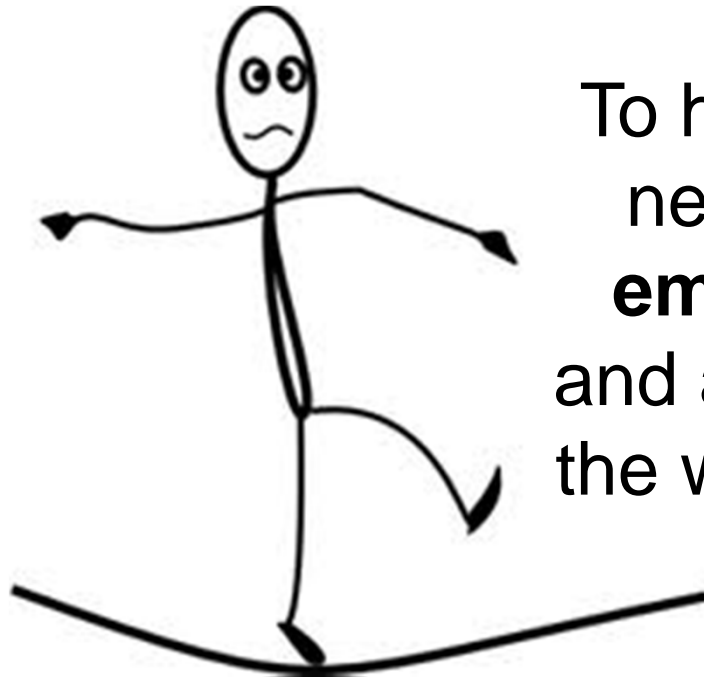
An employee who has made
a complaint
. . . are they a WHISTLE-
BLOWER???

WHISTLE-BLOWER OR COMPLAINER?



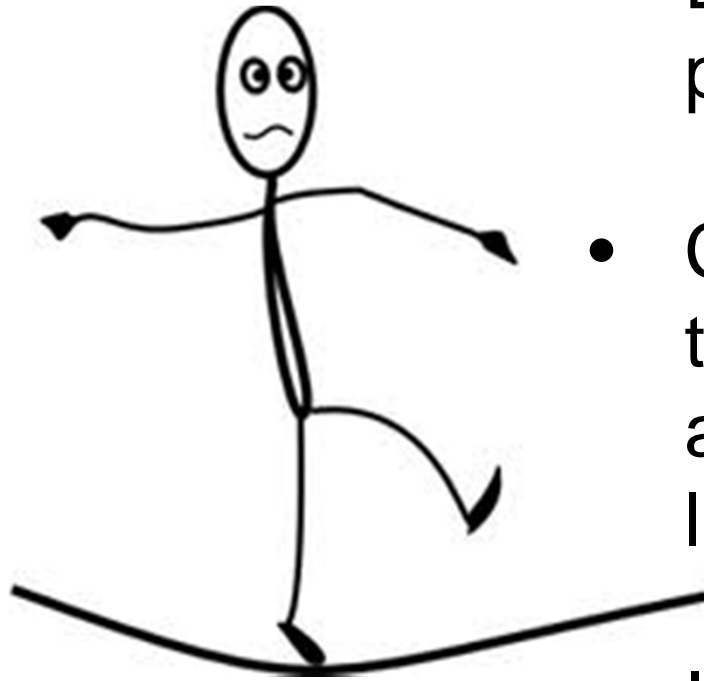
Dealing with an employee
who has made a complaint
. . . walking a tightrope
between **MANAGING THE
EMPLOYEE** and **AVOIDING
A RETALIATION CLAIM**

WHISTLE-BLOWER OR COMPLAINER?



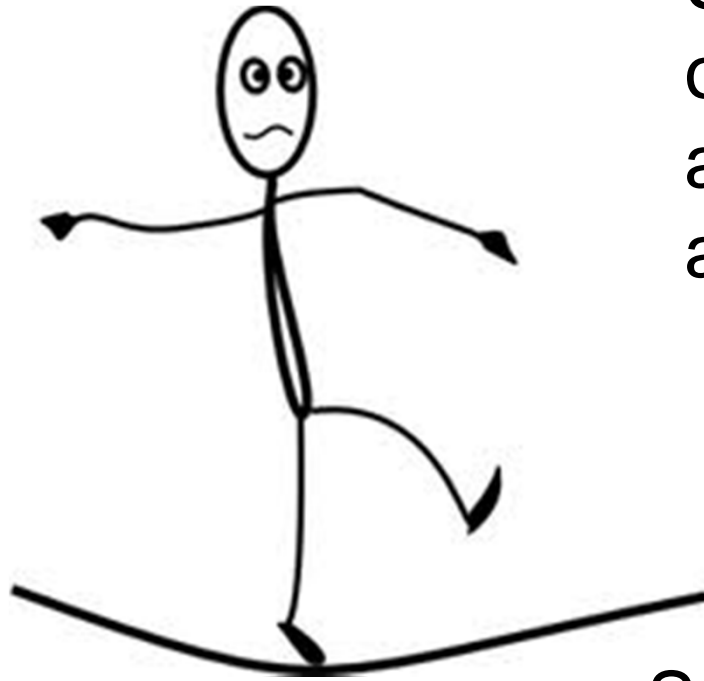
To have FWA claim – there needs to be an **adverse employment action . . .** and a **causal connection** to the whistle-blower complaint

CAUSAL CONNECTION



- Decision maker knew of the protected activity
- Close proximity between the report and the adverse action suggests a causal link – timing is critical!
- Inconsistencies in explanation for adverse employment action

CAUSAL CONNECTION



- Sharp contrast of treatment of employee before and after notice of protected activity

**SAME BURDEN SHIFTING
APPROACH AS TITLE VII
RETALIATION**

NON-RETALIATORY REASON FOR EMPLOYMENT ACTIONS

- Legitimate business reasons
- Consistency
- Documentary support

AVOIDING WHISTLE-BLOWER CLAIMS

- **Respond to employee complaints**
 - Don't take complaint personally
 - Maintain confidentiality
 - Implement strong anti-retaliation policy
 - Train managers and supervisors
 - Remove authority from alleged retaliator to make employment decisions about accuser (separate if you can)
 - Investigate thoroughly

AVOIDING WHISTLE-BLOWER CLAIMS

- **Respond to employee complaints**
 - Notify complainant of the outcome of investigation
 - Take complaints seriously – even if you know the employee is incorrect
- **Assess the risks before taking adverse action**
 - Consider complaint, timing, response to complaint and precedent

AVOIDING WHISTLE-BLOWER CLAIMS

- **Dealing with Performance Issues**
 - Objectively document performance
 - Be fair
 - Never terminate on the spot

PRESENTATION

THANK YOU!

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