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# Defense Digest

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*Florida – Employment Law*

## With The Downturn In the Economy, Florida Employers Are Being Faced With Accusations of Improper Termination By Its Former At-Will Employees—How Can the Florida Employer Protect Itself From the Time and Expense of Unwarranted Litigation?

By Jeannie A. Liebegott, Esq.*

Key Points:

- The Florida Whistleblower Act borrows the same analysis for a prima facie case of unlawful retaliation under Title VII.
- A well documented personnel file will be useful in demonstrating the employer's legitimate non-retaliatory business decision.
- The employee has the ultimate burden of proving that each of the employer's legitimate non-retaliatory reasons are, in fact, false and cannot substitute its own judgment for that of the employer.

Under Ch. 448, Florida Statutes, a Florida employer may not take any retaliatory personnel action against an employee because the employee has either:

1. Disclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy or practice of the employer that is in violation of a law, rule or regulation. However, this subsection does not apply unless the employee has, in writing, brought the activity, policy or practice to the attention of a supervisor or the employer and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.

2. Provided information to, or testified before, any appropriate governmental agency, person or entity conducting an investigation, hearing or inquiry into an alleged violation of a law, rule or regulation by the employer.

3. Objected to, or refused to participate in, any activity, policy or practice of the employer which is in violation of a law, rule or regulation.

Although some may argue the economy is getting better in the face of the recent economic meltdown, employers are seeing more and more cases of retaliation throughout Florida as employees are being faced with massive layoffs throughout the state. In order for a employee to initially prove a Florida whistleblower case, they must produce evidence similar to that to maintain a case of unlawful retaliation under Title VII. *Barlow v. Conagra Foods, Inc.*, 2005 U.S. Dist. LEXIS 31398 (M.D. Fla. 2005). "However, unlike Title VII's unlawful retaliation provisions, the Florida Whistleblower Act requires the plaintiff to actually prove a violation of a law, rule or regulation in order to succeed." *Id.* (citing *White v. Purdue Pharma, Inc.*, 369 F.Supp 2d 1335 (M.D. Fla. 2005). For example, if the employee accused the employer of allowing sexual harassment to go on at the work place and

the employee complains to its employer and is terminated, the employee has to prove sexual harassment occurred. Under the Florida Whistleblower Act ("FWA"), "A prima facie case of retaliation in the absence of direct evidence of retaliatory intent... must show that (1) there was a statutorily protected participation, (2) that an adverse employment action occurred, and (3) that there was a causal link between the participation and the adverse employment action." *Bell v. Georgia-Pacific Corporation*, 390 F. Supp.2d 1182, 1187-1188 (Fla. M.D. 2005); *see* also *Novella v. Wal-Mart Stores, Inc.*, 459 F.Supp.2d 1231 (M.D. Fla. 2006)(citing *Gupta v. Florida Bd. Of Regents,* 212 F.3d 571, 587 (11th Cir. 2000)).

Once the employee has met the first hurdle, the next step is for the employer to produce evidence of its "legitimate, non-retaliatory reasons for the adverse employment actions." Once the employer is able to demonstrate such reasons, the employee has to produce evidence that each of the reasons given by the employer is false or not true—this is known as a "pretext." It is important to note that "[a]n employee may not recover in any action brought pursuant [the FWA] if… the retaliatory personnel action was predicated upon a ground other than the employee's exercise of a right protected by this act." *Id. See* also Ch. 448.103(1)(c), Fla. Stat.

In Florida, some courts have acknowledged the following as legitimate business reasons:

1. Not being able to fulfill the employee's job responsibility for which it was hired by the employer, including qualifications and licensing. *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17 (Fla. 3rd DCA 2009)(A company is not required by law to retain sub-par employees who under-perform their duties . . . ." *Winegard v. W.S. Badcock Corp.*, 2008 U.S. Dist. LEXIS 33339 (M.D. Fla. 2008).

2. Failure to complete probationary period. *Bicknell v. City of St. Petersburg*, 2006 U.S. Dist. LEXIS 8789 (M.D. Fla. 2006).

3. An employer's decision to maintain an employee over another or hire one candidate over another can be based on subjective factors as long as they can be analyzed under a objective evaluation. *Chapman v. AI Transp.*, 229 F.3d 1012 (11th Cir. 2000).

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