

Lawyer

THE HILLSBOROUGH COUNTY BAR ASSOCIATION

**IS WRITTEN NOTICE A CONDITION PRECEDENT TO BRINGING A
WHISTLEBLOWER CAUSE OF ACTION AGAINST A PRIVATE EMPLOYER?**
March, 1997

Section 448.102 of the Florida Statutes, Florida's Private Whistleblower Act, provides a cause of action for an employee who engages in whistleblower activity. More specifically, the law prohibits an employer with ten or more employees from taking retaliatory personnel action against an employee in three situations. The first situation is where an employee discloses or threatens to disclose to a governmental agency under oath in writing that the employer is doing something illegal. In this first situation, an employer is provided a "reasonable opportunity" to correct the illegal practice. See §448.102(1). The second situation is where an employee has either provided information or testified before any governmental agency regarding an alleged violation of a law, rule, or regulation by his or her employer. See §448.102(2). The third situation is where an employee objects to or refuses to participate in any activity, policy, or practice of the employer which is a violation of a law, rule, or regulation. See §448.102(3).

The remedies available to an injured employee pursuant to this law are an injunction, reinstatement of the employee to the same position held before the retaliatory personnel action, reinstatement of all fringe benefits and seniority rights, compensation for lost wages, benefits and other remunerations and any other compensatory damages allowable at law. The court also has the discretion to award reasonable attorneys' fees, court costs and expenses to the prevailing party. Recently, there has been a disagreement among the Circuits as to whether the statute requires an employee to provide an employer with written pre-suit notice in order to recover damages in all three situations.

In *Baiton v. Carnival Cruise Lines, Inc.*, 661 So. 2d 313 (3rd DCA 1995), the court held that the written notice requirement did not apply to claims relating to claims under subsection 448.102(2), relating to governmental investigations, or subsection 448.102(3), relating to an employee's objection to or refusal to engage in illegal activity. The court concluded that the written notice requirement only applied to subsection 448.102(1), relating to disclosure or threatened disclosures to any governmental agencies.

The Second District Court of Appeals in *Potomac Systems Engineering, Inc. v. Phillip A. Deering*, 683 So. 2d 180 (Fla. 2d DCA 1996) reached a different conclusion on this exact issue. In *Potomac*, the court held that an employee is afforded a remedy pursuant to Florida's Private Whistleblower Act only if that employee has given the employer written notice and a reasonable opportunity to correct the practice. The court reached this finding by holding that 448.102 and 448.103(1)(c), must be read together.

Accordingly, the current case law in this district is clear -- written notice is a prerequisite to bringing any claims pursuant to Florida's Private Whistleblower Statute.

Cynthia N. Sass, Esquire
Law Offices of Cynthia N. Sass, P.A.