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Florida DCAs Split on Whether Employees Are Required Under Private Sector Whistleblower's Act to Prove an Actual Violation of the Law

Citing the plain wording of the statute, Florida's Second District Court of Appeals recently held that Florida's private sector Whistleblower's Act (Section 448.102, Florida Statutes) ("FWA")—which prohibits private sector employers from retaliating against employees who report employers' violations of law, rule or regulation to the authorities or who refuse to participate in such violations—protects only those employees who can show an actual violation of a law, rule or regulation. *Kearns v. Farmer Acquisition Co., d/b/a Charlotte Honda*, No. 2D12-6388 (Fla. 2d DCA Feb. 11, 2015). This standard makes it easier for an employer to defend against an employee's claim. However, the court's interpretation conflicts with the views of a sister DCA, making it likely that the Florida Supreme Court will be called upon to resolve the split or that the state legislature will weigh in on the issue.

In 2013, Florida's Fourth District Court of Appeals held that an employee becomes eligible for protection under the FWA merely by showing he had a good faith belief that the employer was violating a law, rule or regulation. *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). Federal courts have since adopted this holding. Under the Fourth District standard, if an employee refuses to engage in an activity at work because he or she mistakenly believes the activity is illegal, the employee likely will enjoy whistleblower protections from any discipline that would arise out of not performing his or her job. This frustrates Florida status as an at-will employment state.

~ By Matthew A. Klein, Jackson Lewis

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