BEST PRACTICES IN DEALING WITH THE FLORIDA WHISTLE-BLOWER ACT

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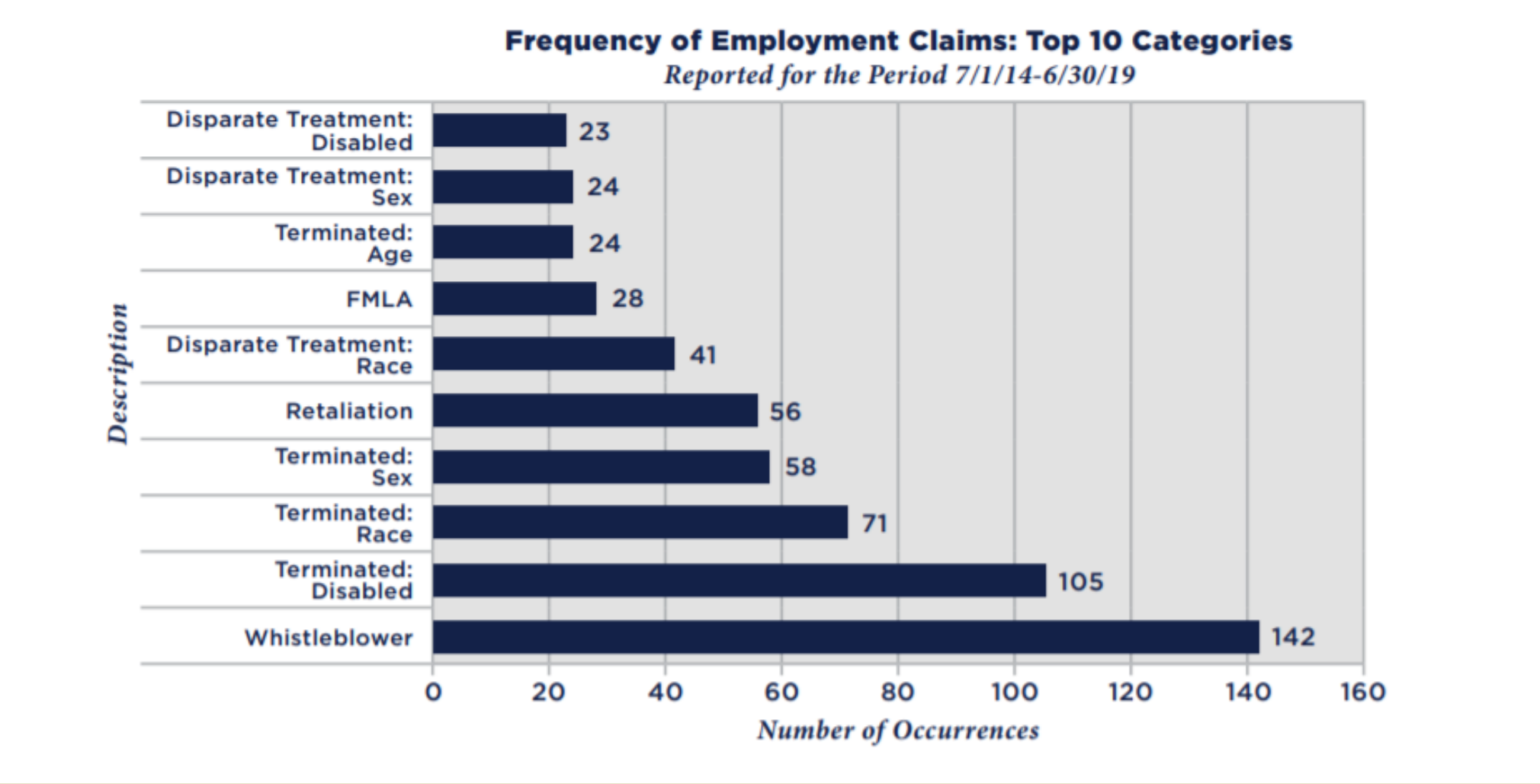
Agenda

- Florida Whistle-blower Act, Fla. Stat. § 112.3187
  - What the Law Says
  - How the Law Has Been Interpreted
  - How to Avoid the Unintended Consequences

INCREASED FILINGS OF WHISTLE-BLOWER CLAIMS

More Frequent Filings Against State



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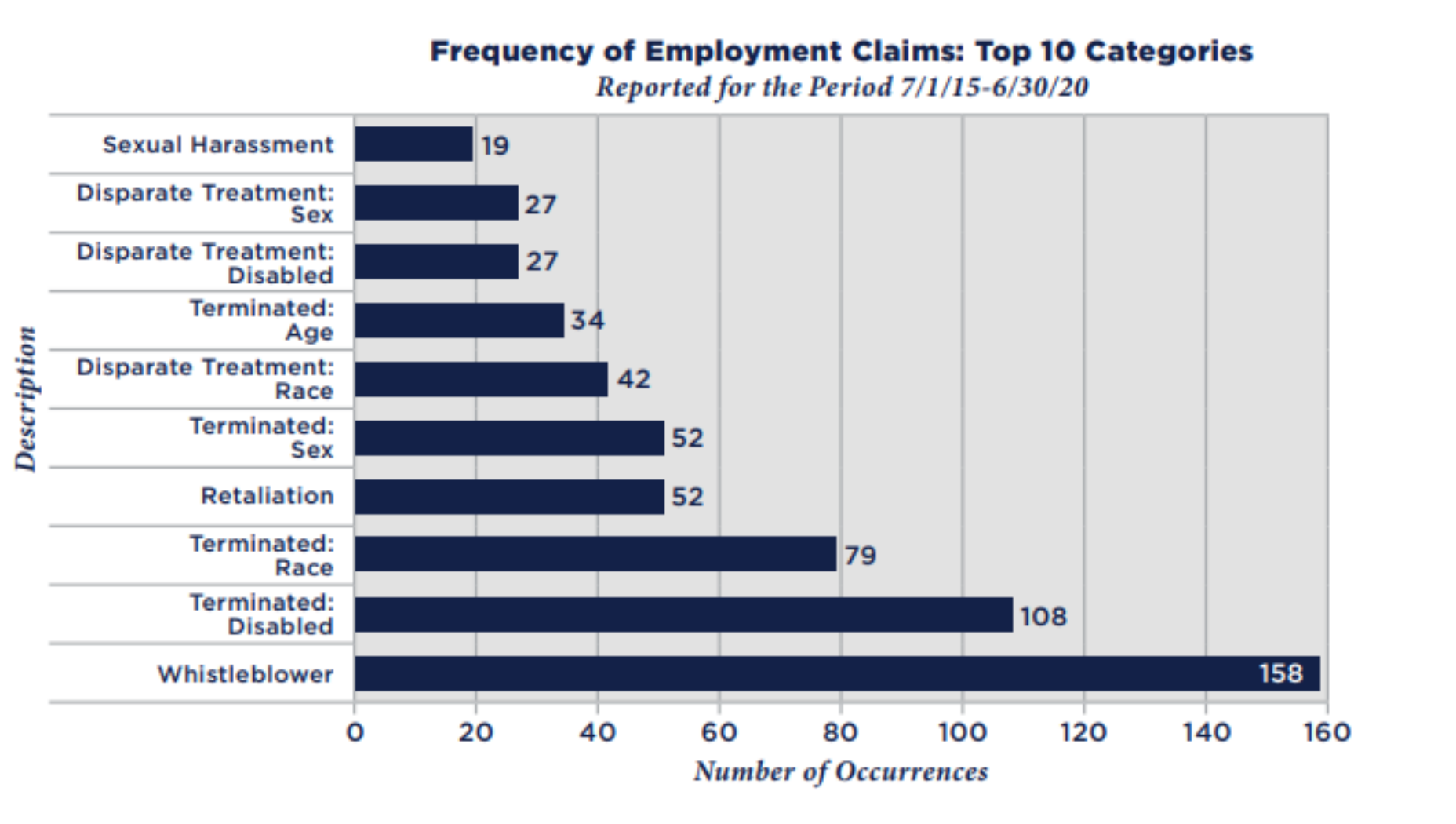
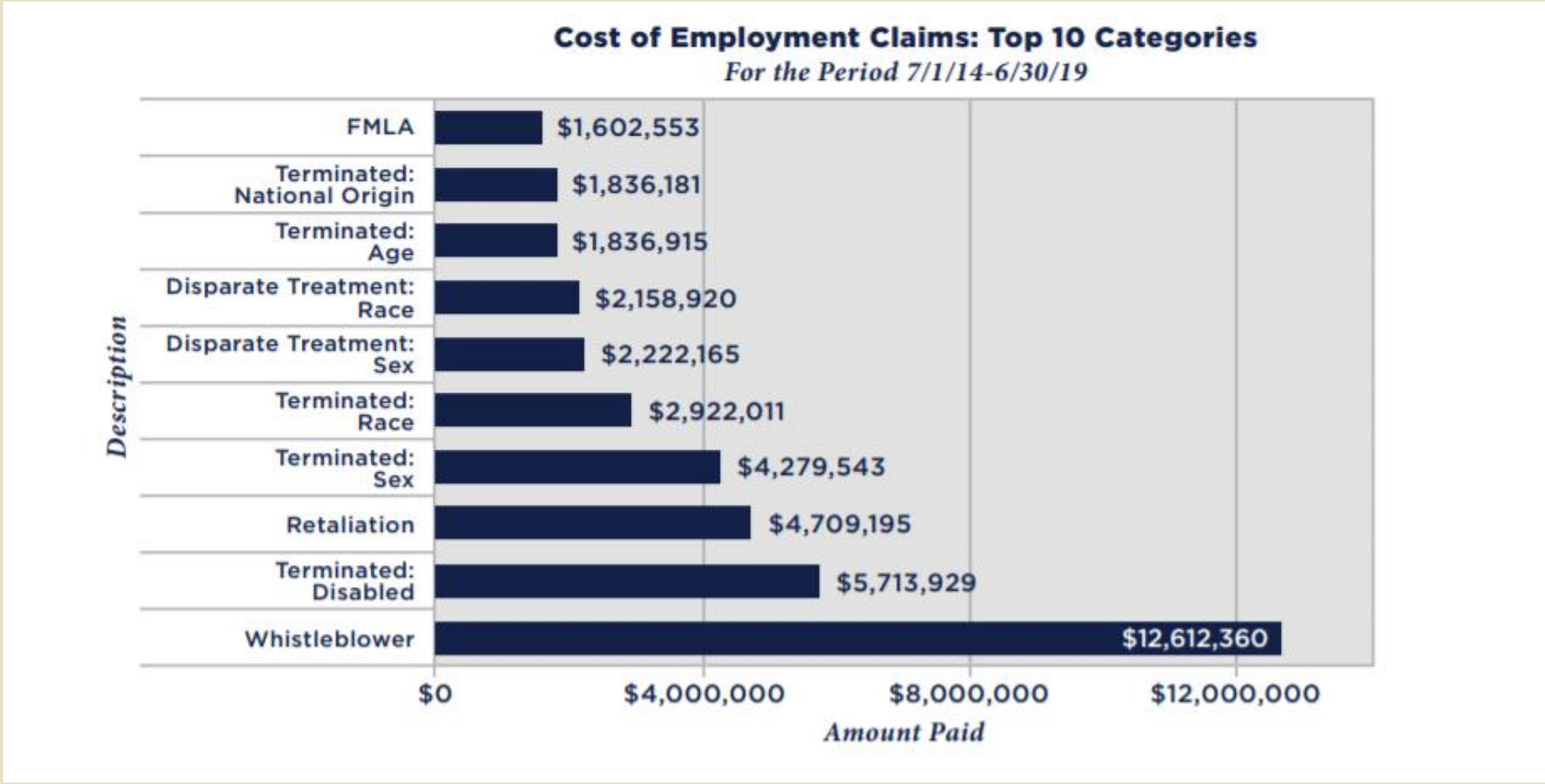


Increased Costs



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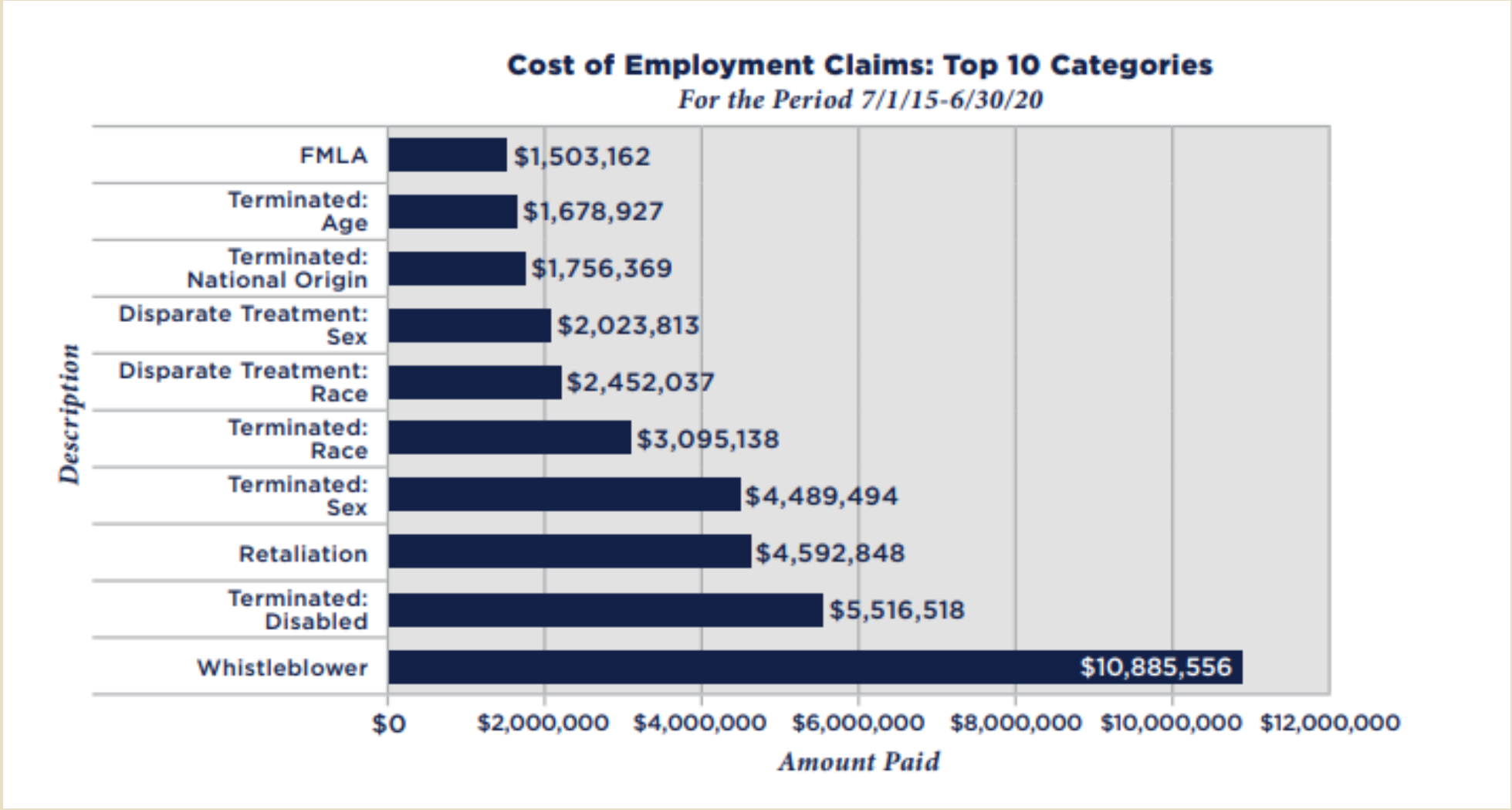

FLORIDA'S PUBLIC SECTOR WHISTLE-BLOWER ACT

What the Law Says

- Florida Statutes § 112.3187
  - It was enacted in 1986
  - It only prohibits retaliation
    - An employee is not protected from discharge merely because he or she engages in protected activity

What the Law Says

- No preferential treatment required
- Does not shield employee from meeting performance expectations or following workplace rules
- At-will employment still exists
- Manner of engaging in protected activity may not be protected
  - Disruptive conduct
  - Profanity
  - Abandoning or refusing work
  - Insubordination

What the Law Says

- Enacted to eliminate corruption and protect employees who report such actions in good faith
  - Not to address everyday operational disagreements
    - Smith v. City of Tallahassee, 2018 WL 6714325, at *7 (N.D. Fla. Dec. 13, 2018)
    - Rejecting an interpretation that "would risk making almost any exchange of e-mails or oral conversation between a boss and employee a whistleblower event."

What the Law Says

- It was not intended to reach every dispute between a supervisor and subordinate
  - Martinez v. Fla. Dep't of Corr., 2017 WL 4422351, at *4 (N.D. Fla. June 27, 2017)
    - "Under that logic, an employee could file a report and achieve whistle-blower status any time they believed an employee lied about them. That is absurd."

What the Law Says

- Prohibits retaliation against an employee or person for certain protected conduct
  - Includes applicants, employees, and independent contractors

What the Law Says

- Applies to agencies and contractors
  - Agency is defined to include any county or municipality
  - No minimum number of employees
  - Contractor includes any private company that contracts with a government agency
- No individual liability

What the Law Says

- Protected activity requires:
  - Disclosure of specific information
  - To a specific person
  - In a specific manner
- Does not require an actual violation
- Does not require violation by the employer
  - Can be a report about a co-worker or contractor

Disclosure of Specific Information

- Violation or suspected violation of law, rule, or regulation
  - Creates a substantial and specific danger to the public's health, safety, or welfare
- Not all violations of law are covered
- But suspected violations can be covered
  - Objectively reasonable, good-faith belief for suspected violation
    - Castro v. Sch. Bd. of Manatee County, Fla., 903 F. Supp. 2d 1290, 1302 (M.D. Fla. 2012)

Disclosure of Specific Information

- Act or suspected act of:
  - Gross mismanagement
    - Defined in the statute
      - Continuous pattern of
      - Managerial abuses, wrongful action, arbitrary action, capricious action, fraudulent conduct, or criminal conduct
      - Which may have a substantial adverse economic impact

Disclosure of Specific Information

- Malfeasance
  - Not defined in the statute
  - "The doing of an act which a person ought not to do at all"
- Misfeasance
  - Not defined in the statute
  - "Improper doing of an act which a person might lawfully do"

Disclosure of Specific Information

- Gross waste of public funds
  - Not defined in the statute
  - Typically must be more than inefficiency or simple neglect
- Medicaid fraud or abuse
  - Not defined in this statute

Disclosure of Specific Information

- Gross Neglect of Duty
  - Also undefined in the statute
  - Modifier of "gross" was added in 1993
  - Typically must be more than simple neglect
  - Florida Supreme Court interpreted "gross neglect of duty" for official misconduct
    - "When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross."
    - State ex rel. Hardie v. Coleman, 155 So. 129, 132 (Fla. 1934)

Disclosure of Specific Information

- Employee must show that he/she disclosed protected information for relief under the act
  - Grand jury secrecy is not an exception
    - Hatfield v. N. Broward Hosp. Dist., 277 So. 3d 121, 123 (Fla. 4th DCA 2019)
    - "Relief under the Whistle-blower's Act requires a protected disclosure."
    - "Without knowing the nature of any information Hatfield disclosed, she cannot show that she is entitled to mandatory temporary reinstatement under section 112.3187(9)(f)."

Disclosure to a Specific Person

- For state agencies, it is a broad list
  - Any agency or federal government entity having authority to investigate, manage, or remedy the violation
    - Office of the Chief Inspector General
    - An agency or any other inspector generals
    - FCHR
    - Whistle-blower Hotline

Disclosure to a Specific Person

- For local government entities, it is narrower
  - Chief Executive Officer as defined under PERA
    - § 447.203(9): The person "who is responsible to the legislative body of the public employer for the administration of governmental affairs"
  - Other appropriate local official
    - Not defined in the statute
    - Case law defines as an individual who is capable of investigating or remedying the purported violation

Disclosure in a Specific Manner

- A written and signed complaint on employee's own initiative
- "Any written complaint to their supervisory officials"
- The employee or person is requested to participate in an investigation, hearing, or inquiry conduct by an agency
- The employee or person refuses to participate in an adverse action under this statute
- Complaint to the whistle-blower hotline or MFCU hotline

What the Law Says

- Exclusions under the act
  - Any person who committed or participated in committing the violation
    - Includes partial responsibility
  - Any person who knowingly discloses false information

What the Law Says

- Prohibited acts
  - Dismissal
  - Suspension
  - Transfer
  - Demotion
  - Withholding of bonus
  - Reduction in salary or benefit
  - Any other action taken impacting the terms and conditions of employment
- Adverse personnel action is defined in the statute

What the Law Says

- Prohibited action must be taken "for disclosing information" pursuant to this statute.
  - Decision maker must have knowledge of the protected activity
  - Employee must establish "but for" causation
- Affirmative Defense
  - No relief can be awarded if the employer shows that the adverse action was based on grounds other than the protected activity and would have been taken even in the absence of the protected activity.

What the Law Says

- Exhaustion of administrative remedies
  - State employees
    - Must file with Office of Chief Inspector General or FCHR
    - 60 days to file from adverse action
    - FCHR investigates and lawsuit may be filed within 180 days of conclusion of investigation

What the Law Says

- Local government employees
  - Local government is defined as:
    - Regional, county, or municipal entity
    - Special district
    - Community college district
    - School district
    - Any political subdivision thereof

What the Law Says

- Exhaustion requirement applies only if the local government has establish a procedure by ordinance or contracted with DOAH to conduct a hearing under this act.

What the Law Says

- Ordinance requirements
  - Enacted by the legislative body
    - This can include approval of a policy by a school board
    - Julian v. Bay Cty. Dist. Sch. Bd., 189 So. 3d 310, 311 (Fla. 1st DCA 2016)
  - To hear whistle-blower complaints
  - By impartial persons
  - Make findings of fact and conclusions of law

What the Law Says

- The ordinance does not have to reference the whistleblower act, but can be a grievance policy as long as it complies with the other requirements of the statute
  - Dinehart v. Town of Palm Beach, 728 So. 2d 360, 362 (Fla. 4th DCA 1999)
  - Sch. Bd. of Hillsborough Cty. v. Woodford, 270 So. 3d 481, 485 (Fla. 2d DCA 2019)

What the Law Says

- Contract with DOAH
  - Includes school board contract with DOAH
  - Contract does not have to specifically reference whistleblower claims
  - It must be broad enough to adjudicate these disputes

What the Law Says

- Sch. Bd. of Hillsborough Cty. v. Woodford, 270 So. 3d 481, 485 (Fla. 2d DCA 2019)
  - "The contract is sufficient as long as hearings under section 112.3187(8)(b) are among the administrative matters that DOAH would be contractually required to adjudicate at the request of a local governmental authority. Describing DOAH's contractual obligation with general language broad enough to encompass other administrative matters does not render it insufficient."

What the Law Says

- No requirement to give notice of policy or contract with DOAH.
  - Sch. Bd. of Hillsborough Cty. v. Woodford, 270 So. 3d 481, 486 (Fla. 2d DCA 2019)
    - "[T]he Act does not require that a local governmental authority affirmatively place employees on notice that they must exhaust the local governmental authority's administrative remedy."

What the Law Says

- Practical issues when the entity only has a DOAH contract
  - What is a complaint?
  - What type of document is required?
  - With whom is it filed?
    - The statute requires the local government entity
  - How it is filed?

What the Law Says

- Employee has 60 days to follow the procedure or request a hearing
- Employee has 180 days after the final decision by the entity to file a lawsuit
- If no administrative procedure or contract with DOAH, employee has 180 days from adverse personnel action to bring a civil action.

What the Law Says

- Lack of subject matter jurisdiction if fail to exhaust administrative remedies
  - Dist. Bd. of Trustees of Broward Cmty. Coll. v. Caldwell, 959 So. 2d 767, 771 (Fla. 4th DCA 2007)
  - Menendez v. City of Hialeah, 143 So. 3d 1136, 1138 (Fla. 3d DCA 2014)
  - Pushkin v. Lombard, 279 So. 2d 79, 81 (Fla. 3d DCA 1973)
- The court is not limited to the four corners of the complaint.
  - Steiner Transocean Ltd. v. Efremova, 109 So. 3d 871, 873 (Fla. 3d DCA 2013)
  - Seminole Tribe of Florida v. McCor, 903 So. 2d 353, 357 (Fla. 2d DCA 2005)

What the Law Says

- Entitled to dismissal with prejudice
  - Husman v. Colchiski, 689 So. 2d 286, 288 (Fla. 2d DCA 1996).
  - Williams v. City of Miami, 87 So. 3d 91, 92 (Fla. 3d DCA 2012)
  - Robinson v. Dep't of Health, 89 So. 3d 1079, 1083 (Fla. 1st DCA 2012)
  - McGregor v. Bd. of Comm'rs of Palm Beach County, 674 F. Supp. 858, 861 (S.D. Fla. 1987).

What the Law Says

- All other employees or persons
  - Must exhaust all available contractual or administrative remedies
  - 180 days to file suit
  - This applies to employees of government contractors or local government applicants

What the Law Says

- No Other Proof or Procedures Specified
  - Statute is silent on application of Title VII burden-shifting
- Right to a Jury Trial

What the Law Says

- Relief Available
  - Reinstatement or front pay
  - Compensation for lost wages, benefits, or other lost remuneration
  - Attorney's fees and costs
    - No fees under the act for the defendant unless the action was frivolous or filed in bad faith
    - The defendant can use the offer of judgment statute

What the Law Says

- Injunction
- Temporary reinstatement
- No catch-all provision for other damages
  - No emotional distress damages or punitive damages
- No sovereign immunity limits

What the Law Says

- Election of remedies applies
  - Employee must choose one:
    - Civil service appeal
    - Unfair labor practice procedure
    - Grievance procedure under CBA
    - Whistle-blower action

What the Law Says

- Temporary reinstatement
  - To the former position or an equivalent position
  - Pending the final outcome of the complaint
- Limited to claims based on discharge
  - "An employee complains about being discharged in retaliation for a protected disclosure"
  - Non-renewal is not discharge

What the Law Says

- No reinstatement if:
  - Disclosure was made in bad faith;
  - Disclosure was made for a wrongful purpose;
  - Disclosure was made after the agency's initiation of personnel action
    - Requires documentation of the performance deficiency or violation of disciplinary standard

What the Law Says

- No other standard provided
- Not available for municipal employees

What the Law Says

- Confidentiality Protected by Florida Statutes § 112.3188
  - Name or identity of the individual may not be disclosed without consent unless necessary to protect public health, safety, or welfare or necessary in the course of the investigation
  - Investigation of protected disclosures is exempt during active investigation
  - Violation is a misdemeanor

HOW THE LAW HAS BEEN INTERPRETED

Did the Legislature Mean What It Said?

- Irven v. Dep't of Health & Rehab. Services, 790 So. 2d 403 (Fla. 2001).
- The Florida Supreme Court held that § 112.3187 must be liberally construed.
- As a result, the language of the statute does not limit the court's interpretation of statute.

Did the Legislature Mean What It Said?

- Irven v. Dep't of Health & Rehab. Services, 790 So. 2d 403 (Fla. 2001).
  - An employee was terminated after she questioned the transfer of a child dependency action.
  - She complained to her supervisor and the agency attorney that the transfer of venue was improper.

Did the Legislature Mean What It Said?

- A court had previously granted an unopposed motion to transfer venue of the dependency proceedings to Polk County.
  - The employee asserted that the motion mistakenly represented that the child's residence was Polk County.
  - The employee asked the agency attorney to correct the mistake and the attorney refused.

Did the Legislature Mean What It Said?

- Her whistle-blower claim was tried and a jury returned a verdict in favor of the employee.
- On appeal, the Second DCA held § 112.3187 waived sovereign immunity and, as a result, that waiver must be limited to the acts or conduct clearly and unequivocally prohibited by the statute.
- The Second DCA noted: "To decide otherwise would turn 'every disagreement by an agency employee with the handling of a matter subject to judicial supervision and control' into a whistleblower action."

Did the Legislature Mean What It Said?

- The Florida Supreme Court rejected this argument, finding that the statute is remedial in nature and must be liberally construed to give effect to the legislation.
- It found that the statute could not be more broadly worded, which supports a liberal construction of the statute.

Did the Legislature Mean What It Said?

- It concluded that the employee had alleged that the employer engaged in misfeasance when it "knowingly misinformed the court relative to facts material to the dependency action" and failed to correct the misinformation.
- It concluded that this conduct falls within the protections of the Whistle-blower Act.
- Numerous cases have cited the Irven decision to support a liberal construction of protected activity under the statute.

Did the Legislature Mean What It Said?

- Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1127-29 (Fla. 4th DCA 2003)
  - Her job duty was to prepare an affirmative action report.
  - She asserted that she was retaliated against when she included her personal opinions in the report, despite her supervisor's instruction to remove those opinions.
  - The Fourth DCA found that there was an issue of fact for trial.

Did the Legislature Mean What It Said?

- Rosa v. Dep't of Children & Families, 915 So. 2d 210, 211–12 (Fla. 1st DCA 2005)
  - The court concluded that a letter, which "could be construed as an employee 'ranting' about personal conflicts with another employee," was sufficient to create a disputed issue of fact as to whether the employee engaged in protected activity.
  - It specifically cited the requirement to use a liberal construction when it found that "'misfeasance' [can include] negligent acts committed by an employee of an agency."

Did the Legislature Mean What It Said?

- Hussey v. City of Marianna, Fla., 5:10-CV-322/RS-CJK, 2011 WL 3294837, at *1 (N.D. Fla. Aug. 1, 2011)
  - The plaintiff reported violations of the City's personnel policy manual.
  - The court concluded:
    - "Straying from those policies may be an indication of managerial abuse and because of the policy in favor of a broad interpretation of the statute, employees are afforded protection for reporting suspected violations of those policies."

Did the Legislature Mean What It Said?

- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *3 (S.D. Fla. Jan. 20, 2017)
  - The court found that the plaintiff engaged in protected activity even when he did not mention any specific policies in two of the complaints.
  - Because the plaintiff mentioned the policy manual in one of the three complaints, the court read the other two complaints as incorporating the same reference under the "principle of liberal construal."

Did the Legislature Mean What It Said?

- Guido v. City of Crystal River, Florida, 5:03-CV-231-OC-10GRJ, 2006 WL 1232815, at *1–2 (M.D. Fla. May 8, 2006)
  - The police chief asked employees to inform local business, while they were off-duty and out of uniform, about how harmful three candidates to city council could be if elected.
  - The plaintiff complained to the city manager about this request and she also reported that the police chief smelled of alcohol.

Did the Legislature Mean What It Said?

- The court expressed "serious doubts as to whether all of the Plaintiff's complaints could constitute protected activity for purposes of the Whistle-blower's Act."
- Yet, it noted:
  - "[T]he Court is mindful that the provisions of the Whistle-blower's Act are to be read liberally."

Did the Legislature Mean What It Said?

- Gardner v. Madison County Sch. Bd., 4:15CV121-MW/CAS, 2016 WL 9506040, at *3 (N.D. Fla. Jan. 22, 2016)
  - "This Court agrees that a supervisor's verbal abuse of an employee could create a good-faith belief that malfeasance or misfeasance occurred if, for example, the supervisor's behavior included derogatory comments, profanity, or the like."

Did the Legislature Mean What It Said?

- However, the court noted that there was a limited on liberal construction:
  - "[Plaintiff] points to no case where a court found that the bare fact that a supervisor raised his voice and yelled at an employee for conduct on the job was enough to support a whistleblower claim. Even when giving it a liberal construction, the whistleblower statute does not reach that far."

Did the Legislature Mean What It Said?

- Other courts have recognized the limits of liberal construction
  - Martinez v. Florida Dep't of Corr., 4:15-CV-00544-MW-CAS, 2017 WL 4422351, at *4 (N.D. Fla. June 27, 2017)
    - "Even when liberally construing the statute, one filing a report that a fellow employee lied about them is not a protected activity under the Florida Whistle-blower's Act. Under that logic, an employee could file a report and achieve whistle-blower status any time they believed an employee lied about them. That is absurd."

Did the Legislature Mean What It Said?

- Turner v. Inzer, 4:11-CV-567-RS-WCS, 2012 WL 4458341, at *3 (N.D. Fla. Sept. 26, 2012), aff'd, 521 Fed. Appx. 762 (11th Cir. 2013)
  - An e-mail sent to a supervisor where the plaintiff requested confirmation of content of meeting minutes was not protected activity even though the plaintiff later asserted that she objected to the removal of the language from the minutes.

Did the Legislature Mean What It Said?

- Jones v. Sch. Bd. of Orange County, Fla., 604CV540ORL31KRS, 2005 WL 1705504, at *10 (M.D. Fla. July 20, 2005)
  - "Under a most liberal construction of the Whistleblower Act, causation remains a necessary factor."
- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *3 (S.D. Fla. Jan. 20, 2017)
  - "I should not be concerned about the protection of my job *if* I bring violations of the Sunshine Laws to your attention."
  - Despite liberal construction, this statement is not protected activity.

Did the Legislature Mean What It Said?

- Jacobs v. City of W. Palm Beach, 914CV80964ROSENBERGB, 2015 WL 4742906, at *2–3 (S.D. Fla. Aug. 10, 2015)
  - Liberal construction did not save the plaintiff's FWA claim based on her complaint that the city had violated the FMLA when it terminated another employee during FMLA leave.
  - The plaintiff only offered her subjective belief that this termination decision endangered the public's health, safety, or welfare.
  - However, it was undisputed that the public was being served as these duties were being performed by others.

Did the Legislature Mean What It Said?

- Other courts have observed that the rule of liberal construction can only be used when the statutory text is ambiguous.
  - Quintini v. Panama City Hous. Auth., 102 So. 3d 688, 690 (Fla. 1st DCA 2012)
    - "The rule cannot be used to defeat the plain meaning of the statute."
    - Report to a federal agency was not protected activity under § 112.3187

Does McDonnell Douglas Framework Apply?

- "To establish a prima facie claim under Florida's Whistleblower statute, the requisite elements set forth under a Title VII retaliation claim are applied."
  - Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1132 (Fla. 4th DCA 2003)

Does McDonnell Douglas Framework Apply?

- Other courts have applied the framework from Title VII retaliation cases.
  - Hopkins v. Am. Sec. Group A-1, Inc., 17-22447-CIV, 2017 WL 4326099, at *3 (S.D. Fla. Sept. 26, 2017)
  - Laird v. Bd. of County Commissioners, 3:15CV394-MCR-CJK, 2017 WL 1147472, at *8 (N.D. Fla. Mar. 26, 2017)
  - Turner v. Inzer, 4:11-CV-567-RS-WCS, 2012 WL 4458341, at *3 (N.D. Fla. Sept. 26, 2012), aff'd, 521 Fed. Appx. 762 (11th Cir. 2013)
  - Guido v. City of Crystal River, Florida, 5:03-CV-231-OC-10GRJ, 2006 WL 1232815, at *5 (M.D. Fla. May 8, 2006)
  - Jones v. Sch. Bd. of Orange County, Fla., 604CV540ORL31KRS, 2005 WL 1705504, at *10 (M.D. Fla. July 20, 2005)
    - Holding that actual retaliatory intent and knowledge are necessary elements of FWA

Does the Employee Have to Complain in Writing?

- A written complaint is not required when the manner of the disclosure was based on the employee's required participation in an investigation, refusal to participate in an adverse action, or contact with the whistle-blower hotline.
- Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 421-22 (Fla. 4th DCA 2015)

Is an E-mail a Signed Writing?

- "An email qualifies as a signed writing."
- King v. Bd. of County Commissioners, 226 F. Supp. 3d 1328, 1336–37 (M.D. Fla. 2016)
  -

Is Participation Alone Protected Conduct?

- Shaw v. Town of Lake Clarke Shores, 174 So. 3d 444, 446 (Fla. 4th DCA 2015)
  - A police officer complained about an employee of a neighboring village in an anonymous letter to that village.
  - The town where the police officer worked conducted an investigation into the author of the letter.
  - The police officer participated in the investigation and admitted to authoring the letter.
  - In this complaint, the plaintiff did not allege that he made any other disclosures during the investigation.

Is Participation Alone Protected Conduct?

- The court affirmed the dismissal of his complaint based on lack of protected activity.
  - Plaintiff's participation in the investigation was not sufficient.
  - He had to make a protected disclosure during his participation.
  - He failed to allege that he made any such disclosure.
- The letter was not a written and signed complaint, even though he later admitted to authoring the letter.

What Is "Other Appropriate Local Official"?

- Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 424 (Fla. 4th DCA 2015)
  - It is defined as an official or entity, including a member of a board, who "has the authority to investigate, police, manage, or otherwise remedy the violation or act."
  - The individual or entity must be affiliated with the local government.
    - Thus, a federal agency cannot an appropriate local official.
- This was an issue of first impression.

What Is "Other Appropriate Local Official"?

- Laird v. Bd. of County Commissioners, 3:15CV394-MCR-CJK, 2017 WL 1147472, at *9 (N.D. Fla. Mar. 26, 2017)
  - The plaintiff provided a memorandum, drafted by another person, to his supervisor.
  - The court found that the information in the memorandum could have involved a suspected violation of law, gross mismanagement, or misfeasance.

What Is "Other Appropriate Local Official"?

- It noted that "Florida courts construe the term 'other appropriate local official' broadly to include government entities empowered 'to investigate complaints and make reports or recommend corrective action.'"
- However, in this case, the supervisor was a head of a department, not an investigative office.
- Thus, the plaintiff did not make a disclosure to a protected recipient.

What Is "Other Appropriate Local Official"?

- Perez Escalona v. City of Miami Beach, 227 So. 3d 722, 723–24 (Fla. 3d DCA 2017)
  - The plaintiff, a project coordinator, on a water line construction project reported concerns to his three fellow engineers.
  - The court found that it was a disputed issue of fact as to whether the co-workers were appropriate local officials.
  - It reversed the trial court's judgment on the pleadings.

Is It Protected Activity When Employee Has a Duty to Disclose?

- Igwe v. City of Miami, 208 So. 3d 150, 156 (Fla. 3d DCA 2016), reh'g denied (Dec. 20, 2016), review denied, SC17-80, 2017 WL 1056173 (Fla. Mar. 21, 2017)
  - The plaintiff was the Independent Auditor General for a city and he reported to the city commission.
  - He had a duty to report his conclusions and financial analysis to the commission.
  - As part of his job duties, he provided a report disclosing misconduct to the commission.

Is It Protected Activity When Employee Has a Duty to Disclose?

- He also was subpoenaed to provide information to the SEC.
- The court concluded that he engaged in protected activity, even though he made these disclosures in the course of performing his job duties.

Does the Employee Have to Complain About His Employer?

- Kogan v. Israel, 211 So. 3d 101, 107 (Fla. 4th DCA 2017)
  - The act does not require that the disclosure concern the employee's employer as long as the subject is still covered by the act.
  - The plaintiff was employed by a sheriff's office.
  - He complained about misconduct by a city police department.
  - The court found that he engaged in protected conduct because the city was an agency under the act.

Can the Sheriff Enact an Ordinance for Administrative Exhaustion?

- Bradshaw v. Bott, 205 So. 3d 815, 819 (Fla. 4th DCA 2016), review denied, SC17-81, 2017 WL 1908398 (Fla. May 10, 2017)
  - The court found that the sheriff was a local government entity.
  - Therefore, to require administrative exhaustion, the sheriff must contract with DOAH to conduct a hearing under the act.
    - It noted that the sheriff could not pass an ordinance to establish an administrative procedure.

Can the Sheriff Enact an Ordinance for Administrative Exhaustion?

- The court held that, because the sheriff did not contract with DOAH, there was no administrative exhaustion requirement.
- The section of the act requiring the exhaustion of contractual remedies did not apply to employees of a local government entity.

Can a School Board Adopt an Ordinance for Administrative Exhaustion?

- Julian v. Bay County Dist. Sch. Bd., 189 So. 3d 310, 311–12 (Fla. 1st DCA 2016), review denied, SC16-904, 2016 WL 4440844 (Fla. Aug. 23, 2016)
  - The school district is a local governmental entity for the purpose of determining the administrative exhaustion procedure.
  - Although a school board is not a legislative body, it does enact policies.

Can a School Board Adopt an Ordinance for Administrative Exhaustion?

- A school board's policy establishing an administrative procedure for handling whistleblower claims is an ordinance under the whistle-blower act.
- The court noted that, because the term ordinance is not defined, it applied the common meaning to take official action of a general and permanent nature, such as a public enactment or decree.
- Thus, the court recognized that the school board is empowered to take such action in the enactment of its policies and its policies satisfy the definition of ordinance.

What Is the Standard for Temporary Reinstatement?

- Courts have applied the following standard:
  - The plaintiff made a disclosure protected by the statute;
  - The plaintiff was discharged; and
  - The disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.
- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *1 (S.D. Fla. Jan. 20, 2017)
- Competelli v. City of Belleair Bluffs, 113 So. 3d 92, 94–95 (Fla. 2d DCA 2013)

What Is the Standard for Temporary Reinstatement?

- Does Rule 1.610 apply to requests for temporary reinstatement?
  - Marchetti v. Sch. Bd. of Broward County, 117 So. 3d 811, 813 (Fla. 4th DCA 2013)
  - Broward County v. Meiklejohn, 936 So. 2d 742, 747 (Fla. 4th DCA 2006)
- Does the plaintiff have to establish an inadequate remedy at law to invoke the court's equitable jurisdiction for an order of temporary reinstatement?
- Does the defense in § 112.3187(10) apply to temporary reinstatement?

What Is the Standard for Temporary Reinstatement?

- Does discharge include constructive discharge?
  - Luster v. W. Palm Beach Hous. Auth., 801 So. 2d 122, 124 (Fla. 4th DCA 2001)
  - "It does not appear that this includes the employee's voluntary choice to refuse continued employment."
  - Employee was transferred and refused to accept new position.

What Is the Standard for Temporary Reinstatement?

- Does discharge include non-renewal?
  - Pritz v. Sch. Bd. of Hernando County, Case No. CA-14-1121 (5th Jud. Cir. May 16, 2009)
    - The term "'discharge' denotes an action which differs from a 'non-renewal' of a contracts and does not include the term 'non-renewal.'"
  - Meredith v. Sch. Bd. of Osceola Cty., 2007 WL 9719101, at *8 (M.D. Fla. July 11, 2007)
    - The plaintiff "was not terminated without cause or with cause; rather, her annual contract expired and was not renewed."

What Is the Standard for Temporary Reinstatement?

- A reduction in salary is not a discharge.
  - Metro. Dade Cty. v. Milton, 707 So. 2d 913, 914-915 (Fla. 3d DCA 1998)
  - Temporary reinstatement has been limited to the extreme action of discharge

What Is the Standard for Temporary Reinstatement?

- If reinstatement is awarded, does the employee have to be reinstated to his or her previous position?
- Are there any other defenses available such as the employee does not meet the minimum qualifications?
- What if the employee engages in misconduct during temporary reinstatement?
- How do you manage an employee who has been temporarily reinstated?

What Is the Standard for Temporary Reinstatement?

- Can the plaintiff obtain temporary reinstatement without a showing of retaliation?
- Does there have to be a temporal proximity or other evidence of causal connection between the protected activity and the discharge?
- Can the court award back pay as part of the temporary reinstatement?

What Is the Standard for Temporary Reinstatement?

- Does the employer have the right to appeal the temporary reinstatement order?
  - Marchetti v. Sch. Bd. of Broward County, 117 So. 3d 811, 812 (Fla. 4th DCA 2013)
- How long is an employee entitled to temporary reinstatement?
- Is the employer entitled to a stay of the reinstatement order during an appeal?

What Is the Standard for Temporary Reinstatement?

- Is the employer entitled to damages from wrongful temporary reinstatement?
- Why are municipalities but not counties exempt from the remedy?

HOW TO AVOID THE UNINTENDED CONSEQUENCES

Avoiding Unintended Consequences

Avoiding Unintended Consequences

- Consider creating a whistle-blower policy
  - Administrative exhaustion requirement
  - Defining other appropriate local official
- Investigate any complaints made
  - Request specific facts
  - Request identity of witnesses and documents
  - Conduct a thorough investigation

Avoiding Unintended Consequences

- Document performance issues and all disciplinary action, including verbal warnings
  - Including any discussion or debate regarding disciplinary action
  - Complete annual performance evaluations
  - Encourage objective documentation that cannot be disputed

Avoiding Unintended Consequences

- Manage employees even if they make complaints
- Train supervisors
- Consider severance agreements
- Enforce election of remedies

QUESTIONS?

Disclaimer

The information contained in these materials is intended as an informational report on legal developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

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