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Florida Whistleblower Act Requires Showing of Actual Violation, Federal Court Rules

By **Stephanie L. Adler-Paindiris** and **Matthew A. Klein**

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Florida's private-sector Whistleblower Act ("FWA") protects only those employees who can show an *actual violation* of a law, rule, or regulation, a federal district court has held. *Graddy v. Wal-Mart Stores East, LP*, No. 5:16-cv-9-Oc-28PRL (M.D. Fla. Feb. 14, 2017).

The FWA (Florida Statute Section 448.102) prohibits private-sector employers from retaliating against employees who report employers' legal violations to authorities or who refuse to participate in violations of the law. To prove a prima facie case under the FWA, the plaintiff must establish that:

1. he or she engaged in statutorily protected expression;
2. he or she suffered an adverse employment action; and
3. the adverse employment action was causally linked to the protected activity.

Confusion as to what employees need to show to claim protection under the FWA has persisted since 2015, when a Florida appellate court, unlike another court, held that the

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employee must show an actual violation of the law. *Kearns v. Farmer Acquisition Co. d/b/a Charlotte Honda*, 157 So.3d 458 (Fla. 2d DCA 2015). Another Florida appellate court had held two years earlier that an employee need only show that he or she had a good-faith belief a violation occurred when claiming protection under the law. *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013).

Since *Aery*, Florida's federal district courts have adopted the good-faith belief standard, concluding that *Kearns* did not directly conflict with *Aery*, and that *Aery* was the law of the state.

Under the good-faith belief standard, if an employee refuses to engage in an activity at work because he or she *mistakenly believed* the activity is illegal, the employee likely will enjoy whistleblower protections from any adverse employment action arising out of not performing his or her job. Critics argue that this frustrates Florida's status as an at-will employment state.

The *Graddy* court's "actual violation" holding may make it easier for an employer to defend against an employee's FWA claim. The federal court decision interpreting Florida law could mark a new, employer-friendlier chapter in the search for the appropriate interpretation of the FWA. In this case, the court granted summary judgment to the employer after finding the employee did not make out a prima facie case.

We will continue to monitor developments under this law. Employers should consider reviewing their policies and practices to ensure they appropriately address employee whistleblower claims.

If you have any questions about the FWA or require assistance with other workplace issues, please contact the Jackson Lewis attorney with whom you usually work.

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