NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NEW WORLD COMMUNICATIONS OF TAMPA, INC., d/b/a WTVT-TV, Appellant, v. JANE AKRE, Appellee.	)	Case No. 2D01-529

Opinion filed February 14, 2003.

Appeal from the Circuit Court
for Hillsborough County;
Ralph Steinberg, Judge.

William E. McDaniels and Thomas G. Hentoff of Williams & Connolly LLP, Washington, D.C., Patricia Fields Anderson, P.A., St. Petersburg, and Gary D. Roberts and Theodore A. Russell of Fox Group Legal Department, Los Angeles, California, for Appellant.

Michael S. Finch, St. Petersburg, and Stuart C. Markman, Robert W. Ritsch, and Katherine Earle Yanes of Kynes, Markman & Felman, P.A., Tampa, for Appellee.

Roy C. Young of Young, vanAssenderp, Varnadoe & Anderson, P.A., Tallahassee, for Amicus Curiae The Florida Chamber of Commerce.

Robert Corn-Revere and Brad C. Deutsch of Hogan & Hartson, LLP, Washington, D.C., for Amicus Curiae Belo Corp., Cox Television, Inc., Gannett Co., Inc., Media General Operations, Inc., and Post-Newsweek Stations, Inc.

KELLY, Judge.

New World Communications of Tampa, Inc., d/b/a WTVT-TV, a subsidiary of Fox Television, challenges a judgment entered against it for violating Florida's private sector whistle-blower's statute, section 448.102, Florida Statutes (Supp. 1998). We reverse.

In December 1996, WTVT hired the appellee, Jane Akre, and her husband, Steve Wilson, as a husband-and-wife investigative reporting team. Shortly after Akre and Wilson arrived at WTVT, they began working on a story about the use of synthetic bovine growth hormone ("BGH") in Florida dairy cattle. Their work on this story led to what could be characterized as an eight-month tug-of-war between the reporters and WTVT's management and lawyers over the content of the story. Each time the station asked Wilson and Akre to provide supporting documentation for statements in the story or to make changes in the content of the story, the reporters accused the station of attempting to distort the story to favor the manufacturer of BGH.

In September 1997, WTVT notified Akre and Wilson that it was exercising its option to terminate their employment contracts without cause. Akre and Wilson

responded in writing to WTVT threatening to file a complaint with the Federal Communications Commission ("FCC") alleging that the station had "illegally" edited the still unfinished BGH report in violation of an FCC policy against federally licensed broadcasters deliberately distorting the news. The parties never resolved their differences regarding the content of the story, and consequently, the story never aired.

In April 1998, Akre and Wilson sued WTVT alleging, among other things, claims under the whistle-blower's statute. Those claims alleged that their terminations had been in retaliation for their resisting WTVT's attempts to distort or suppress the BGH story and for threatening to report the alleged news distortion to the FCC. Akre also brought claims for declaratory relief and for breach of contract. After a four-week trial, a jury found against Wilson on all of his claims. The trial court directed a verdict against Akre on her breach of contract claim, Akre abandoned her claim for declaratory relief, and the trial court let her whistle-blower claims go to the jury. The jury rejected all of Akre's claims except her claim that WTVT retaliated against her in response to her threat to disclose the alleged news distortion to the FCC. The jury awarded Akre $425,000 in damages.

While WTVT has raised a number of challenges to the judgment obtained by Akre, we need not address each challenge because we find as a threshold matter that Akre failed to state a claim under the whistle-blower's statute. The portion of the whistle-blower's statute pertinent to this appeal prohibits retaliation against employees who have "[d]isclosed, or threatened to disclose," employer conduct that "is in violation of" a law, rule, or regulation. § 448.102(1)(3). The statute defines a "law, rule or regulation" as "includ[ing] any statute or . . . any rule or regulation adopted pursuant to

any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business." § 448.101(4), Fla. Stat. (1997). We agree with WTVT that the FCC's policy against the intentional falsification of the news – which the FCC has called its "news distortion policy" – does not qualify as the required "law, rule, or regulation" under section 448.102.

The FCC has never published its news distortion policy as a regulation with definitive elements and defenses. Instead, the FCC has developed the policy through the adjudicatory process in decisions resolving challenges to broadcasters' licenses. The policy's roots can be traced to 1949 when the FCC first expressed its concern regarding deceptive news in very general terms stating that "[a] licensee would be abusing his position as a public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news of facts concerning a controversy or to slant or distort the news." See Chad Raphael, The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid, 6 Comm. L. & Policy 485, 494 (2001) (quoting Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1246 (1949)).

The policy did not begin to take shape, however, until 1969 when the FCC was called upon to investigate complaints regarding news distortion. Raphael at 494. Notably, the FCC did not take the initiative to investigate these complaints, but rather acted only after Congress referred complaints it had received to the FCC. In a series of opinions issued in licensing proceedings between 1969 and 1973, the FCC stated that when considering the status of a broadcaster's license, it would take into consideration proven instances of "deliberate news distortion," also called "intentional falsification of

the news" or "rigging or slanting the news." In re CBS Program "Hunger in America", 20 F.C.C. 2d 143, 150-51 (1969). This series of FCC opinions has come to be known as the FCC's news distortion policy.

Akre argues that the FCC's policy is a rule as defined by section 120.52(15), Florida Statutes (1997), which provides:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

Even if we agreed with Akre that the FCC's news distortion policy was a "rule" as defined by section 120.52(15), her argument overlooks the fact that the whistle-blower's statute specifically limits the definition of "rule" to an "adopted" rule. § 448.101(4). "This limitation to 'adopted' material only appears deliberate, and well serves the public by hinging civil liability upon matters of which due notice, actual or imputed, has been conveyed." Forrester v. John B. Phipps, Inc., 643 So. 2d 1109 (Fla. 1st DCA 1994). We find the legislature's use of the word "adopted" in the statute to be a limitation on the scope of conduct that will subject an employer to liability under the statute.

It is undisputed that the FCC's news distortion policy has never been "adopted" as defined by section 120.54, Florida Statutes (1997). In that regard, Akre notes that federal agencies may announce general policies and interpretive principles through the adjudicative process and argues that the fact that "the FCC adopted the news distortion policy through an adjudicative process does not affect its validity or enforceability as a matter of federal law." This argument is flawed in two respects.

First, federal law recognizes a dichotomy between rulemaking and adjudication; it does not equate the two. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (Scalia, J., concurring). Second, while federal agencies may have discretion to formulate policy through the adjudicative process, the same is not true under Florida law. The Florida Legislature has limited state agencies' discretion to formulate policy through the adjudicative process by requiring agencies to formally adopt each agency statement that fits the definition of a "rule" under section 120.52. See § 120.54. As noted above, the legislature's use of the word "adopted" in the whistle-blower's statute was deliberate and was intended to limit the scope of conduct that will subject an employer to liability. This limitation is consistent with the legislature's requirement that agency statements that fit the definition of a "rule" be formally adopted. Recognizing an uncodified agency policy developed through the adjudicative process as the equivalent of a formally adopted rule is not consistent with this policy, and it would expand the scope of conduct that could subject an employer to liability beyond what Florida's Legislature could have contemplated when it enacted the whistle-blower's statute.

Because the FCC's news distortion policy is not a "law, rule, or regulation" under section 448.102, Akre has failed to state a claim under the whistle-blower's statute. Accordingly, we reverse the judgment in her favor and remand for entry of a judgment in favor of WTVT.

Reversed and remanded.

CASANUEVA, J., and GREEN, OLIVER L., SENIOR JUDGE, Concur.