

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY - CIVIL DIVISION

STEVE WILSON and JANE AKRE,

Plaintiffs,

CASE NO. 98-02439

vs.

DIVISION: "D"

NEW WORLD COMMUNICATIONS
OF TAMPA, INC., a Florida Corporation,
d/b/a WTVT CHANNEL 13, TAMPA,

Defendant.

**PLAINTIFF WILSON'S MOTION FOR REHEARING ON ISSUE OF
JURY INSTRUCTIONS, AND MOTION FOR RE-TRIAL OF
PLAINTIFF WILSON'S WHISTLEBLOWER CLAIM**

Pursuant to Fla. R. Civ. P. 1.530 (a), Steve Wilson, Plaintiff *pro se*, hereby moves this honorable Court for a rehearing on the issue and judicial ruling with regard to jury instructions related to Defendant's motive or motives for termination of Plaintiffs' employment, and also respectfully moves for a re-trial on this Plaintiff's whistleblower claim in wake of error in the instructions as described above. The grounds for these motions are as follows:

1. During the trial of this matter, Defendant New World Communications of Tampa, by and through its attorneys of record, proposed jury instructions which, contrary to existing law and recent court opinions, did not provide that the jury could find in favor of this Plaintiff if it found that a motivating factor for any retaliatory personnel action was Plaintiff's exercise of rights protected by Florida's Whistleblower law.

2. Instead, and over the strongly stated objections of this Plaintiff and attorneys for co-plaintiff Jane Akre, the Court allowed an instruction to the jury which read:

**"You must determine whether the Defendant WTVT
terminated the employment of Ms. Akre and Mr. Wilson
because they objected to or refused to participate in an
activity or practice of the Defendant that violated a federal**

law, as described above. If you determine that this was the reason (emphasis added) for the Defendant's termination of Plaintiff's employment, then your verdict should be for Plaintiff's.

3. Title VII, 42 U.S.C. §2000e-2(m) states:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

This same standard of proof that applies to discrimination claims rooted in federal labor law has also been found applicable to claims based upon Florida's Whistleblower statute, as described in 4 below.

4. Less than a month before the approval of jury instructions in this case at bar, a similar controversy was settled by a decision of the Eleventh Circuit. In Sierminski v. Transouth Financial Corporation, ___ F.3d ___, 2000 U.S. App. LEXIS 14692 (11th Cir. 2000) in which the court affirmed and approved of the application of the causation analysis under Title VII's retaliation provision to a claim under §448.102. The court wrote:

Plaintiff contends the district court applied the wrong analysis in determining that there was no material fact issue regarding the causal link between plaintiff's actions and her subsequent termination. Sierminski alleged she was terminated in retaliation for objecting to her former supervisor's illegal notary practices, in violation of Florida's Whistleblower's Act, section 448.102, Florida Statutes. We apply the state's substantive law in this diversity case. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). The Act states: "An employer may not take retaliatory action against an employee because the employee has ... (3) objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." § 448.102(3), Fla. Stat. There are no cases discussing what standards to apply to determine whether the necessary causal link between the alleged retaliatory action and the objection to illegality has been established.

On appeal, plaintiff concedes the lack of Florida case law regarding causation, but contends the district court erred in using as a guideline the burden shifting proof standards for retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the federal equivalent to Florida's Whistleblower's Act. Once plaintiff establishes a prima facie case by proving only that the protected activity and the negative employment action are not completely unrelated, the burden shifts to the defendant to proffer a legitimate reason for the adverse action. See, e.g., *Olmsted v. Taco Bell*, 141 F.3d 1457, 1460 (11th Cir. 1998). The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the "legitimate" reason is merely pretext for prohibited, retaliatory conduct. *Olmsted*, 141 F.3d at 1460 (11th Cir. 1998).

In the absence of any guiding case law, the district court correctly applied the analysis used in Title VII retaliation cases.

CONCLUSION

Wherefore, in light of the law and arguments stated above, the jury should have been instructed that liability on the part of the Defendant could be established by this Plaintiff with a showing that this Plaintiff's protected conduct was a substantial or motivating factor in the Defendant's retaliatory personnel actions. For all of the reasons stated above, Plaintiffs' motions should be granted.

Respectfully submitted,



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