

# FLORIDA APPELLATE COURT RAISES BAR FOR WHISTLEBLOWER CLAIMS: KEY TAKEAWAYS AND 6 STEPS EMPLOYERS SHOULD TAKE NOW

Insights  
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A Florida state appellate court just issued a ruling raising the bar for workers pursuing whistleblower claims and making it easier for employers to defeat lawsuits before trial – but created a conflict with another appellate court in the state on this issue. Florida’s First District Court of Appeal held on November 20 that plaintiffs pursuing Florida Private Whistleblower Act (FPWA) claims must establish that they objected to or refused to participate in an *actual* violation of a law, rule, or regulation, and not just something they *believed* to be a violation. This decision highlights the disagreement between the appellate courts in Florida on whether an *actual* violation or just a *reasonable belief* that a violation occurred is enough for an employee to win a FPWA retaliation claim. This ruling underscores the need for the Florida Supreme Court to resolve the circuit split by issuing a definitive ruling resolving the matter once and for all. Regardless of the ultimate outcome, this decision serves as a reminder for employers of the importance of investigating and effectively responding to employee complaints. What do employers need to know about this decision?

## Safety-Related Concerns Turn Into Retaliation Claim

Clint Gessner worked for Gulf Power Company for nearly a decade. During his employment, he claims he raised several safety-related concerns. Gulf Power terminated Gessner’s employment after he allegedly used disparaging language towards a coworker and a team leader. Gessner sued his employer under the FPWA alleging that he was discharged in retaliation for objecting to certain practices “that were in

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violation of state and/or federal laws or that he reasonably and objectively believed were in said violation.”

Gulf Power argued that Gessner failed to establish that he refused to participate in an *actual* violation of law, rule, or regulation. Gessner relied on Fourth District Court of Appeal (DCA) precedent and argued that he did not need to prove an actual violation – he only needed to present evidence of a *good-faith, objectively reasonable belief* that his employer’s actions were illegal.

The trial court rejected this view and aligned itself with the *actual* violation standard established in the Second DCA. It held that the FPWA’s protection against employment retaliation applies only if an employee shows that their employer committed an actual violation of a law, rule, or regulation. Finding that Gessner failed to meet this standard, it ruled in the employer’s favor.

Gessner appealed the trial court’s summary judgment order and the First DCA agreed with the trial court – an actual violation of a law, rule, rule or regulation is required. The First DCA decision means we have a conflict between district courts – which raises the chances that the Florida Supreme Court could weigh in to resolve the conflict.

## **A Good Reminder for Employers**

While the actual violation standard is favorable for employers, the best retaliation claims are the ones that are never pursued. Having robust reporting procedures for employee concerns, thorough investigations, a strong performance management system, and progressive discipline policies could mean you can avoid retaliation claims before they ever get filed. What steps can you take to adequately respond to employee concerns and reduce the risk of retaliation claims?

## **6 Steps Employers Can Take**

### **1. Develop a Strong Performance Management System**

You should implement a robust performance management system that includes goal setting, ongoing monitoring, and year-end feedback. Feedback should be specific and include tangible examples of achievements. This process should be transparent to employees and applied consistently year after year. By creating a strong



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performance management system, you can mitigate the timing of alleged protected activity and adverse employment actions. Consider these practical tips:

- Create an annual timeline that outlines specific periods for goal setting, mid-year reviews, and year-end evaluations.
- Train managers to view performance management as a critical responsibility rather than a routine administrative task.
- Ensure managers provide candid feedback and constructive criticism to avoid vague or conflicting statements. For instance, if an employee with average performance reviews is terminated for poor performance, the lack of clear feedback could lead to claims of inconsistency.

## **2. Implement and Regularly Review Written Policies and Procedures**

Provide every employee with a copy of your workplace policies and procedures during onboarding, and require a signed acknowledgment. You should also train to identify policy violations and understand the importance of applying policies consistently and uniformly.

Clearly communicating policies and procedures helps promote transparency and establish expectations for progressive discipline. Providing specific examples of policy violations allows managers to reference them in written disciplinary actions, ensuring employees understand that progressive discipline is not unexpected. Review these policies regularly to ensure they align with updated legal requirements as well as internal operational changes.

## **3. Apply Progressive Discipline Consistently**

Terminations should never come as a surprise. You should implement a written progressive discipline policy, acknowledged by all employees, to ensure clarity. Managers should receive training on how to apply this policy and effectively document violations to maintain a clear record. Human Resources should oversee disciplinary actions to verify consistency across the organization. By maintaining uniform application, employers can refute claims of unequal treatment and demonstrate fair enforcement of workplace policies.

#### **4. Keep Detailed Records of Conversations**

You should follow up verbal discussions of workplace concerns with written communication, which could be as simple as an email, to create a record of what was discussed and agreed upon. Documenting these conversations helps mitigate the risk of misinterpretation and provides evidence of the employer's efforts to communicate clearly and address employee concerns. Written records also reinforce the employer's commitment to transparency and follow-through.

#### **5. Create Reporting Procedures for Employee Concerns**

You should ensure that your company has robust reporting procedures for employees to raise concerns. Creating reporting procedures allows concerns to be addressed quickly before they escalate into serious disputes. Additionally, the scope of an employee's concerns should be well documented so there is not any dispute over the substance of the employee's concerns. Additionally, when employees see that their concerns are handled respectfully and timely, they are more likely to have trust in the dispute resolution process. Overall, reporting procedures encourage open communications between all parties and provides clear documentation of the issues.

#### **6. Conduct a Prompt and Adequate Investigation**

You should be prepared to open an investigation into a complaint immediately after it has been submitted to demonstrate a prompt response. Each investigation should be conducted in a genuine effort to fairly and impartially determine what occurred, whether the conduct violated company policy, and, if so, what the appropriate response is. You must also properly train investigators to use sound judgement based on the allegations of each complaint.

#### **Conclusion**

We'll continue to monitor developments in this area and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to ensure you receive the latest news directly to your inbox. For more information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney [in our Florida offices](#).