BLOWING A BROKEN WHISTLE: HOW THE LAW FAILS EMPLOYEES AND THE PUBLIC AND WHAT CAN BE DONE ABOUT IT

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I. INTRODUCTION

As Benjamin Franklin is believed to have said, "[i]t takes many good deeds to build a reputation and only one bad one to lose it."[1] The whistleblower may experience a loss of reputation by revealing information that should be disclosed for the public good, but that those in power find threatening.[2] Florida's Public Whistleblower Act ("PWA") is written with the assumption that processes protecting the reporting employee will prompt disclosures of conduct that could be illegal or unethical; however, if the employee is not confident about the protection available, then disclosures will not be encouraged.[3] Moreover, if the employee is going to suffer retaliation, such as a loss of reputation, the employee is not motivated to assist in improving public trust in

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1. ICMA & NAT'L LEAGUE OF CITIES, LEADING YOUR COMMUNITY: A GUIDE FOR LOCAL ELECTED OFFICIALS 71 (2008) (quoting Benjamin Franklin); *see also* DANIEL A. ROSEMOND, DEATH OF THE PUBLIC SERVANT 165 (2022) (summarizing the "bruised apple theory" that prevents an executive from being given a leadership opportunity following damage to the reputation and quoting Warren Buffett with a similar remark to that attributed to Benjamin Franklin).

2. I observed this dynamic both in 2018 and 2023, when the City of Milton's government terminated honorable public servants after they shared information that was not flattering to elected officials or their influencers.

3. Whistle-blower's Act (PWA), FLA. STAT. §§ 112.3187–.31895 (2024).

government.[4] Whether the PWA is a meaningful tool comes into question when a whistleblower is not protected or avoids using the procedures found within the PWA.

For example, on August 30, 2024, the Florida Department of Environmental Protection fired James Gaddis, a cartographer with the Office of Parks Planning, for violating department policy.[5] Gaddis released his justification as part of a GoFundMe post that explained Gaddis was "sounding the alarm" and doing "the only ethical thing" by releasing maps "depicting shocking and destructive infrastructure proposals, while keeping quiet as they were pushed through an accelerated and under-the-radar public engagement process."[6] Almost immediately, information putting Gaddis in a negative light was released to the press by another state agency.[7] Nonetheless, in response to public outcry, the state administration cancelled the public workshops and shelved the plans that would have allowed private development in public parks.[8] Gaddis achieved his stated goals and raised substantial funds to help him support his child without using the PWA.[9]

In contrast to James Gaddis, Daniel Rosemond, former City Manager of the City of Hallandale Beach, lost his reputation and home and recently lost a jury verdict of $4.4 million.[10] Considering

4. *See* ROSEMOND, *supra* note 1, at 177–78. This Article explores the PWA's limitations particularly in the context of experiences of former City Manager Daniel Rosemond, which he ably illustrates in his book, *Death of the Public Servant*, and which can be partly understood by reviewing *City of Hallandale Beach v. Rosemond*, 388 So. 3d 826 (Fla. 4th Dist. Ct. App.) *review denied*, No. SC2024-1265, 2024 WL 5181603 (Fla. Dec. 20, 2024).

5. Kimberly Miller, *State Parks Whistleblower Says He Was Fired, But Had To 'Stop the Madness.' No Regrets*, PALM BEACH POST (Sept. 6, 2024, 4:01 PM), https://www.palmbeachpost.com/story/news/2024/09/02/florida-state-parks-whistleblower-says-he-was-fired-but-doesnt-regret-decision/75049334007/.

6. James Gaddis, *Support an Ethical Whistleblower's New Start*, GOFUNDME (Sept. 2, 2024), https://www.gofundme.com/support-for-ethical-whistleblowers-new-start (showing that $257,848 has been raised as of March 26, 2025).

7. Kimberly Miller, *Documents Leaked on State Parks Whistleblower Reflect Forced Resignation from Previous Job*, PALM BEACH POST (Sept. 6, 2024, 4:27 PM), www.palmbeachpost.com/story/news/local/2024/09/05/james-gaddis-florida-state-parks-whistleblower-admits-previous-resignation/75084961007.

8. Jacob Ogles, *Fired Parks Employee Claims DEP Intended to Keep 'Atrocious' Plan Secret as Long as Possible*, FLA. POL. (Sept. 3, 2024), https://floridapolitics.com/archives/693958-fired-parks-employee-claims-dep-intended-to-keep-atrocious-plan-secret-as-long-as-possible/.

9. Miller, *supra* note 5.

10. City of Hallandale Beach v. Rosemond, 388 So. 3d 826, 836 (Fla. 4th Dist. Ct. App. 2024); *see generally* ROSEMOND, *supra* note 1, at 153–62, 177–96 (focusing, in particular, on Chapter 12, regarding the efforts to obtain reemployment and the emotional toll imposed on him by the character assassination that had been a part of his termination as well as Chapter 14, detailing the jury trial and the process leading up to it).

the facts as found by the jury, Rosemond should have benefited from PWA's protections. The PWA cannot motivate honest public officials to promote good government through the brave act of speaking up about conduct that is illegal or unethical if the statutory scheme is stingily interpreted and applied.

This Article delves into Rosemond's case and lessons we can learn from it to improve the efficacy of the PWA. A review of multiple decisions over the years suggests the PWA is inadequate, as worded and interpreted, to promote the reporting that those of us who have worked in, and around, local governments know should be encouraged. This Article proposes amendments in the spirit of the bedrock principle that is at the foundation of the PWA: "A public office is a public trust."[11]

II. STATUTORY FRAMEWORK

To implement the constitutional foundation that a public office is a public trust, the Florida legislature codified a Code of Ethics for Public Officers and Employees, which includes the PWA.[12] The PWA is just one of the tools within Part III of Chapter 112, which has an expressed legislative intent of "protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest."[13]

Within the PWA, the specified intent is twofold.[14] The PWA seeks to prevent retaliation by agencies or independent contracts against an employee who reports conduct that involves (1) a violation of law that creates a substantial risk to the public's safety, health, or welfare; or (2) an improper use of a government office, waste of funds, or abuse or neglect of duty by an agency, public officer, or employee.[15] The harms expected to be addressed by the PWA are thus summarized as follows:

- Violations of law creating a substantial and specific danger to public health, safety, or welfare;[16]

11. FLA. CONST. art. II, § 8.
12. PWA, FLA. STAT. §§ 112.3187–.31895 (2024).
13. *Id.* § 112.311(4).
14. *See id.* § 112.3187(2).
15. *Id.*
16. *Id.*

- Improper use of government office;[17]
- Gross waste of funds;[18]
- "[A]ny other abuse or gross neglect of duty on the part of an agency, public officer, or employee."[19]

Whether the PWA is successfully addressing these harms should be studied by the legislature or appropriate governmental agency with access to more data that is not in reported decisions; that assessment should be made available to the public without the necessity of a public records request so that citizens have an opportunity to reflect on how society can best achieve accountable and transparent governance.

In fairness, we cannot expect whistleblower law, on its own, to achieve enhanced public trust in governmental procedures and how personnel implement them. Leadership must model the values represented by the Code of Ethics found in the Florida Statutes.[20] Further, leaders must engage employees in the mission to realize an ethical, trustworthy government by, for example, training personnel on policies designed to uphold the law. The law can incentivize this modeling and training if the legislature makes the effort to improve the PWA.

Motivated and informed leaders can build a culture that promotes the "bold communication" needed to fulfill the legislative purposes codified in our constitution and statutory law.[21] Governmental organizations may have unique obstacles to creating the workplace culture that can promote bold communication in the private sector, where leaders can remain in place regardless of elections. However, engaged employees connected to the mission of public service can effectively speak up

17. *Id.*
18. *Id.*
19. *Id.*
20. *See* ICMA & NAT'L LEAGUE OF CITIES, *supra* note 1, at 73 ("Promoting a culture of ethics within the organization that emphasizes the means for accomplishing desired outcomes sets the stage for consistently ethical behavior among both elected official and employees.").
21. AMIE MCDANIEL REMINGTON, JD, THE ART [AND SCIENCE] OF HR 6–7 (2024) (illustrating "bold communication" by employees as a critical compliance tool in the workplace and noting the "inherent imbalance of power" between employers and employees that inhibits such communication). This book is not focused on public employment, but the lessons on leadership and the employer-employee relationship within the book are instructive for promoting the effective use of the PWA. For example, Remington provides practical advice on implementing a policy against sexual harassment. *Id.* at 243–49.

in a "culture of psychological safety," which can be achieved in any workplace where there is an understanding of how to build trust and mutual respect in relationships.[22]

The work is timeless and worthwhile, as reflected in devotion to the civic good in Ancient Athens revealed by the Athenian Oath:

> We will never bring disgrace on this our city by an act of dishonesty or cowardice. We will fight for the ideals and sacred things of the city both alone and with many. We will revere and obey the city's laws, and will do our best to incite a like reverence and respect in those above us who are prone to annul them or set them at naught. We will strive increasingly to quicken the public's sense of civic duty. Thus in all these ways, we will transmit this city, not only not less, but greater and more beautiful than it was transmitted to us.[23]

The principles reflected within the Athenian Oath represent a model for citizenship and for public service. As citizens, we should strive to respect and uphold the law and motivate others to maintain the same dedication. Honesty and courage are required to fulfill that mission, as the life experiences of whistleblowers demonstrate.

The hope represented by the Athenian Oath to preserve a civilized society for future generations is echoed in the ideals codified in Florida law to promote civic duty, honesty, and courage in those who participate in the functions of our government. The Florida Constitution reflects that honest and trustworthy officials are expected to occupy public office.[24] Further, public officials and employees are expected to be impartial, responsible, honest, trustworthy, and independent of outside influences.[25] The State of Florida has established an ethics code applicable to officials,

22. *Id.* at 9. Remington outlines suggestions to creating the kind of culture that promotes an employee's engagement with the goals of the organization and bold communication. *Id.* at 9–12.

23. ICMA & NAT'L LEAGUE OF CITIES, *supra* note 1, at viii (referring to the Athenian Oath as a "timeless code of civic responsibility," noted in history as taken by Athenians over 2000 years upon their entry into adulthood and public service); *see also Athenian Oath at the Maxwell School of Citizenship and Public Affairs Foyer*, VIRTUAL MUSEUM PUB. SERV., https://vmps.omeka.net/items/show/21 (last visited Mar. 30, 2025).

24. *See* FLA. CONST. art II, § 8.

25. Deborah L. Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 VT. L. REV. 579, 580–81 (1992). These considerations are reflected in the policy statements in Florida constitutional and statutory law applicable to government official conduct. My experience as a local government attorney and as a Mayor have taught me that the public continues to lack confidence in the transparency and accountability of government.

elected or appointed, as well as to employees and lobbyists.[26] Additionally, some local governments have their own enhanced ethics standards with a broader reach than state law and consistent with the Florida Constitution.[27] Specified types of dishonest and self-serving conduct are prohibited within the State of Florida ethics code, which is implemented and enforced through the Commission on Ethics and its Board.[28]

Encouraging reports of prohibited conduct to assist in the protection of the public welfare and common good supports the realization of the goals set forth in Florida constitutional and statutory law.[29] To that end, the Florida PWA prohibits governmental agencies and independent contractors from punishing employees for disclosing information pursuant to the statute in two separate subparagraphs within the legislation: first, agencies and contractors "shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information" pursuant to the Act; second, agencies and contractors "shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information" under that law.[30] Regardless of what may appear to be redundant, each provision of the statute must be interpreted to have meaning and application. The PWA defines "adverse personnel action" broadly by including "discharge, suspension, transfer, or demotion" as well as "the withholding of bonuses, [and] the reduction in salary or benefits"; furthermore, the legislation references "any other adverse action" that could be taken against an employee within the terms and conditions of the person's

26. Code of Ethics for Public Officers and Employees, FLA. STAT. §§ 112.311–.3261 (2024). For helpful resources as well as legislative updates, see FLA. ETHICS INST., https://floridaethics.org (last visited Mar. 30, 2025).

27. *See, e.g.*, TALLAHASSEE, FLA., CODE OF ORDINANCES §§ 2-3 to 2-17 (2019); PENSACOLA, FLA., CODE OF ORDINANCES §§ 2-5-1 to 2-5-4 (2011).

28. Florida Statutes refer to the Code of Ethics and establish the Commission on Ethics consistent with the Florida Constitution. *See* §§ 112.311–.3261.

29. The Executive Director of the Florida Commission on Ethics has recommended to the Board consideration of a proposal to amend the Florida PWA to enhance protections for employees who are fearful of retaliation for filing valid complaints. Memorandum from Kerrie Stillman, Exec. Dir., Fla. Comm'n on Ethics, to All Interested Pers., Proposed Legislation for 2025 (Nov. 20, 2024) (on file at https://ethics.state.fl.us/Documents/Ethics/2025LegislativeRecommendations.pdf?cp=2025124). The Commission currently has no jurisdiction to proceed against anyone who allegedly retaliates against an employee for a protected disclosure. FLA. COMM'N ON ETHICS, GUIDE TO THE SUNSHINE AMENDMENT AND CODE OF ETHICS FOR PUBLIC OFFICERS AND EMPLOYEES 32 (2025), https://ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf.

30. FLA. STAT. § 112.3187 (3)(b), (3)(e), (4)(a)–(b).

employment.[31] The PWA should be construed, based on its definitions and prohibitions, to establish a strong safety net for employees to prohibit any adverse change in the terms and conditions of employment motivated by a retaliatory animus.

Nonetheless, although the conduct prohibited by the PWA appears broad in scope, in practice, many pitfalls can be found on the winding road to relief for the whistleblower. The statutory scheme has, at times, been applied to narrow the scope of application, as the *Rosemond*[32] case illustrates; yet, as a remedial statute designed to eliminate public corruption, the PWA should be construed broadly to support achieving its ambitious purpose.[33] Florida can and should do better for ethical public employees speaking up about the wrongdoing of those in whom the public should be able to maintain trust.[34]

In general, the Florida PWA provides that employees who disclose certain types of information in a limited set of ways[35] may be protected from retaliatory action against them, provided the employee follows administrative procedures and asserts their rights in a lawsuit in a timely manner.[36] Employees who are

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31. *Id.* § 112.3187(3)(a).

32. City of Hallandale Beach v. Rosemond 388 So. 3d 826, 832 (Fla. 4th Dist. Ct. App. 2024).

33. Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992) (citing Amos v. Conkling, 126 So. 283, 287–88 (Fla. 1930)) (stating that remedial statutes should be construed broadly to achieve legislative purpose); *see also* Irven v. Dep't of Health & Rehab. Servs., 790 So. 2d 403, 406 (Fla. 2001) (stating that "[t]he statute could not have been more broadly worded").

34. See *infra* Part V for recommendations.

35. To be a protected disclosure, the information must correspond to a type described at FLA. STAT. § 112.3187(5) and must be disclosed to the correct official as set forth in *id.* § 112.3187(6). The information that is covered by the Act might be a report of a "violation or suspected violation of any federal, state, or local law, rule, or regulation . . . which creates and presents a substantial and specific danger to the public's health, safety, or welfare" or "any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty." *See id.* § 112.3187(5)(a)–(b). The statute provides the following:

> The information disclosed under this section must be disclosed to any agency or federal government entity having the authority to investigate, police, manage, or otherwise remedy the violation or act. . . . However, for disclosures concerning a local government entity . . . the information must be disclosed to a chief executive officer as defined in s. 447.203(9) or other appropriate local official.

Id. § 112.3187(6). The statute further describes the methods of disclosure that allow an employee to seek protection under the Act. *See id.* § 112.3187(7). It should be evident that any public employee contemplating making a disclosure that could be interpreted as blowing a whistle on misconduct should seek legal advice before disclosing to ensure the employee follows the procedures faithfully to avoid dismissal of a future claim. The Act does not impose a burden on employers to train employees on these provisions.

36. *Id.* §§ 112.3187–.31895.

eligible for this protection because they disclosed the type of information described in Section 112.3187(5) fall into five independent categories: (1) employees acting on their own initiative who make a written and signed complaint; (2) employees who refuse to participate in prohibited conduct; (3) employees "who initiate a complaint through the whistleblower hotline or the . . . Medicaid Fraud Control Unit"; (4) employees who file a written complaint to their supervisors; or (5) employees who submit a complaint to state investigatory authorities.[37]

The employee who suffers retaliation[38] may not immediately file a lawsuit; procedural requirements apply—some more onerous than others depending on the circumstances.[39] For example, the paragraph describing "remedies" sets forth duties to fulfill to be eligible for relief: the whistleblower who works for a state agency may file a complaint so long as the procedure in Section 112.31895 is followed.[40] Filing the complaint must occur within 180 days after receipt of the notice from the state agency, which must first have an opportunity to investigate the whistleblower allegations.[41] But that is not all. The local government employee must be mindful that after the employer takes action appearing to be retaliatory, if the local agency has an established hearing procedure through a local board established by ordinance or via a contract with the Division of Administrative Hearings ("DOAH") to have the complaint reviewed for findings of fact and conclusions of law, then the employee is subject to a 60-day clock to file their complaint with that governmental authority.[42] Following these proceedings, within 180 days, the local agency employee may pursue a civil

37. Igwe v. City of Miami, 208 So. 3d 150, 154–55 (Fla. 3d Dist. Ct. App. 2016) (citing § 112.3187(7)) (explaining the statutory construction basis for interpreting who is eligible to receive protection under the Florida Statutes).

38. The statute provides that an "agency or independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for" a protected disclosure and further "shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's [protected] disclosure." § 112.3187(4)(a)–(b).

39. *Id.* § 112.3187(8)(a)–(b) (providing administrative requirements for employees of state agencies and local governments, including submitting a complaint to the Florida Commission on Human Relations for investigation prior to pursuing a civil action and providing short deadlines to act to preserve one's rights). The statute further provides the employee may file an action within 180 days of the prohibited conduct "after exhausting all available contractual or administrative remedies." *Id.* § 112.3187(8)(c).

40. *Id.* § 112.3187(8)(a).

41. *Id.*

42. *Id.* § 112.3187(8)(b); *see also* FLA. STAT. § 120.65 (2024) (regarding DOAH).

action.[43] If the local agency has not established a hearing procedure by ordinance or contracted with DOAH to review complaints, the employee may bring a civil action within 180 days of the wrongful conduct without first using an administrative process.[44]

The employee who files a timely lawsuit after satisfying the exhaustion of remedies requirements must then prove that (1) their disclosure was the type of disclosure that is protected; (2) the employee suffered an adverse action; and (3) the events are causally connected based on evidence that fits within the analytical model applied by the courts.[45] The burden-shifting analysis of *McDonnell Douglas Corp. v. Green*,[46] a decision framing how evidence is considered in employment discrimination and retaliation law matters, applies.[47] The employer has the opportunity to establish the affirmative defense that the adverse action was based on a legitimate, non-retaliatory reason and would have been taken regardless of the exercise of protected rights.[48] When the employer presents a legitimate basis to conclude the adverse action was not motivated by the retaliatory motive, then the employee must establish the decision-maker(s) are lying to cover up prohibited conduct or otherwise effectively attack the employer's investigation and fact-finding in reaching a conclusion to take adverse action.[49]

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43. § 112.3187(8)(b).

44. *Id.*

45. *See, e.g.*, Fla. Dep't of Child. & Fams. v. Shapiro, 68 So. 3d 298, 305–06 (Fla. 4th Dist. Ct. App. 2011) (recognizing a whistleblower plaintiff may assert a "cat's paw" theory of liability to establish causation). As illustrated in the dissenting opinion of *Rosemond*, results inconsistent with the broad remedial purpose of the PWA follow when a court prevents the "cat's paw" theory of liability from being used to demonstrate causation. *See* City of Hallandale Beach v. Rosemond, 388 So. 3d 826, 837–39 (Fla. 4th Dist. Ct. App. 2024) (Ciklin, J., concurring in part and dissenting in part).

46. 411 U.S. 792, 802–04 (1973). The analysis in this early decision arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, is fundamental reasoning for employment disputes. I agree that Title VII decisions are instructive for purposes of applying the PWA, but when a Title VII case is used to limit the protections of the PWA, a court risks creating precedent contrary to legislative intent.

47. *See, e.g.*, Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1132–33 (Fla. 4th Dist. Ct. App. 2003).

48. *See* § 112.3187(10). I would caution that it is easy for an employer to create a legitimate, non-retaliatory reason for adverse action as multiple reasons may drive various decisions. A retaliatory animus taints even legitimate reasons in my view in the context of preserving public trust.

49. *See* Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 427–28 (Fla. 4th Dist. Ct. App. 2015); *see also* Griffin v. Deloach, 259 So. 3d 929, 932 (Fla. 5th Dist. Ct. App. 2018)

A pressing concern regarding the text of the statute relates to the availability of pain and suffering damages. The relief that is mandatory is set forth within the statute, which is couched in a permissive and inclusive grammatical structure: "the relief must include the following," but does not mandate non-economic, pain and suffering damages, resulting in arguments that such relief is not permitted.[50] Without that type of relief being available, as it is in other states,[51] I question how many employees would be motivated to come forward.[52] Without a statutory amendment, caselaw that supports an award for pain and suffering may be limited in future appellate litigation as suggested by the Florida League of Cities ("FLC") in its amicus brief in the *Rosemond* case.[53]

The relief that is expressly mandated[54] is as follows:

- Reinstatement to the same or equivalent position held prior to the adverse action,[55] or reasonable front pay as an alternative form of relief.[56]

(summarizing several restrictive iterations of standards of proof for pretext evidence required for a whistleblower to survive summary judgment to try the case to a jury).

50. *See* § 112.3187(9). The appellate decision analyzed in this Article did not reach the question, but in the amicus brief filed by the FLC, it was argued that non-economic damages were unavailable to whistleblowers based on the plain language of the statute, regardless of the rule of construing broadly remedial statutes. *See* Florida League of Cities' Amicus Curiae Brief in Support of Appellant City of Hallandale Beach at 4–11, *Rosemond*, 388 So. 3d 826 (No. 4D22-2642) [hereinafter Amicus Brief for Appellant] (criticizing cases where relief was available).

51. *See, e.g.*, GA. CODE. ANN. § 45-1-4(e)(2)(E) (2017) (allowing relief for "any other compensatory damages allowable at law").

52. Daniel Rosemond's book, among news reports relating to other whistleblowers, reveals the emotional toll that public employees experience after engaging in what they in good faith believed was protected activity under a whistleblower law. *See, e.g.*, *2024 Whistleblower of the Year*, TAF COALITION (Oct. 3, 2024), https://www.taf.org/2024-whistleblower-of-the-year/.

53. The FLC noted in the amicus brief in *Rosemond* that non-economic, pain and suffering damages was wrongly permitted in the following cases: *Iglesias v. City of Hialeah*, 305 So. 3d 20, 22 (Fla. 3d Dist. Ct. App. 2019) and *Wojcik v. School Board of Orange County*, No. 6:20-cv-126-Orl-37LRH, 2020 WL 10731652, at *2–3 (M.D. Fla. May 18, 2020). Amicus Brief for Appellant, *supra* note 50, at 6 n.1. As an insurance provider to local governments, the FLC can be expected to continue to argue against damages to limit risk and avoid increased costs, which local governments no doubt expect the FLC to do. *See About the League*, FLA. LEAGUE OF CITIES, https://www.flcities.com/about-pages/about (last visited Mar. 27, 2025).

54. FLA. STAT. § 112.3187(9).

55. Luster v. West Palm Beach Hous. Auth., 801 So. 2d 122, 123 (Fla. 4th Dist. Ct. App. 2001).

56. § 112.3187(9)(a). If reinstatement is not feasible, then the front pay award is mandatory, which could be a substantial award depending on the evidence and credible calculations of expert witnesses. *See id.*

- "Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate."[57]
- "Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the adverse action."[58]
- "Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith."[59]
- Injunctive relief[60]
- Temporary reinstatement pending the outcome of the complaint under specific circumstances (not applicable to municipal employees).[61]

This brief summary reveals a potentially onerous process for the whistleblower to find shelter in the PWA with a series of challenges to achieve protected status. The whistleblower should be prepared to use terms of art to trigger understanding of a report of illegal or unethical conduct and should be sure that report is submitted to the correct individual or entity in a format that is recognized as protected activity. Moreover, the whistleblower should have a large savings account or generous family and friends available to provide support should retaliation hinder reemployment—the process takes a substantial amount of time to complete because of the series of steps available to the employer to appeal any successes.

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57. *Id.* § 112.3187(9)(b).

58. *Id.* § 112.3187(9)(c). The wording here is not the same type of wording in statutes providing for emotional distress damages, but if adverse action causes emotional distress, arguably it is appropriate compensation to award. *See id.*

59. *Id.* § 112.3187(9)(d). The entirety of this subparagraph is important as it contains the standard for determining when an employee might be liable to pay the governmental organization's fees if the government prevails; this language establishes a high burden on the government, which is helpful because otherwise employees are unlikely to report wrongdoing out of fear that retaliation will cost them their jobs and they will have no meaningful access to the court system because of potential liability for fees. *See id.*

60. *Id.* § 112.3187(9)(e).

61. *Id.* § 112.3187(9)(f); see Section 112.3187(9)(a)–(f) for recitation in its entirety; for an absurd result, see also *Hatfield v. North Broward Hospital District*. 277 So. 3d 121, 122–23 (Fla. 4th Dist. Ct. App. 2019) (denying Hatfield temporary reinstatement after participating in a state attorney's investigation regarding a Sunshine Law violation, for which Hatfield's supervisor was later indicted by a grand jury following her participation, and yet she was unable to establish the PWA was intended to protect her because of a strict reading of the plain language of Section 112.3187(9)(f)).

III. AN ORCHESTRATED RETALIATORY CAMPAIGN: CITY OF HALLANDALE BEACH V. ROSEMOND[62]

As detailed in his book, *Death of the Public Servant*, Daniel Rosemond experienced such a sense of betrayal and loss by elected officials in the City of Hallandale Beach that he has spent years recovering from the setbacks generated when an angry commissioner marshalled a majority to push Rosemond out of his position after multiple failed motions prior to the 2016 election.[63] Although he was aware after the November 2016 election that Commissioner Keith London had successfully campaigned to replace a member who had voted against Rosemond's termination in the past, Rosemond was nonetheless shocked by the way in which London carried out his mission to remove Rosemond from city government.[64]

Rosemond had served as a senior city staff member for several years for the City of Hallandale Beach before being promoted, on a divided 3–2 vote, to serve as city manager in 2016.[65] Prior to his promotion, Rosemond had participated in the investigation of an internal race discrimination complaint against Commissioner Keith London.[66] During that interview, Rosemond shared information that implicated London in a violation of the Sunshine Law and revealed London had directed employees' actions in violation of a city rule.[67] This information was shared with London during the investigation, and London was one of the nay votes later that year when the city commission promoted Rosemond.[68]

London, who became the Vice Mayor after the 2016 election, set a special meeting a few weeks later to persuade his new majority to fire Rosemond based on alleged misconduct.[69] Vice

62. City of Hallandale Beach v. Rosemond, 388 So. 3d 826, 839 (Fla. 4th Dist. Ct. App. 2024) (Ciklin, J., concurring in part and dissenting in part).

63. *See generally* ROSEMOND, *supra* note 1. Rosemond weaves his wisdom from decades of local government experience with the facts that triggered the litigation throughout most of the chapters of his book, but Chapters 10–13 are especially pertinent. *Id.*

64. *Id.* at 177–78.

65. *Rosemond*, 388 So. 3d at 828.

66. *Id.*

67. *Id.*; *see also* ROSEMOND, *supra* note 1, at 185–86 (detailing the allegations of the Sunshine Law violation as well as London's repeated failed efforts to have Rosemond fired until he secured his majority as a result of the November 8, 2016, election).

68. *Rosemond*, 388 So. 3d at 828.

69. *Id.* at 829 (referencing that London had served as campaign manager for the new commissioner and that London and Lazarow, who also voted nay with London on the promotion for Rosemond, joined London and the new commissioner in the 3–2 vote to fire

Mayor London asserted the termination should be "for cause," and that his proposed reasons be made a "permanent record" to inform prospective employers.[70] London proposed a resolution reflecting the city manager was terminated for cause, and again, London's new majority supported him.[71]

Rosemond challenged the termination at a hearing, as provided by the charter, and refuted that he had committed "misconduct," which was required to be established for a "cause" separation.[72] The city commission affirmed its prior decision, nonetheless.[73]

Rosemond filed a lawsuit against the city that asserted termination in violation of the Florida PWA as well as breach of contract.[74] During the trial below, the city moved for directed verdict on both whistleblower retaliation and breach of contract claims.[75] The motions were denied, and a jury found in favor of Rosemond in his claims of retaliatory discharge and breach of contract; however, the Fourth District Court of Appeal reversed the jury verdict based on its conclusion that the city was entitled to a directed verdict on the whistleblower claim.[76]

The majority set aside the jury verdict although the evidence at trial had "demonstrated that Commissioner London orchestrated a retaliatory campaign against"[77] Rosemond following the investigation into London, who had served as campaign manager for both commissioners who joined him in voting to terminate Rosemond.[78] As stated by Judge Ciklin in his opinion, Commissioner Lima-Taub admitted at a public meeting that she had "entirely adopted" what she later understood to be a

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Rosemond); *see also id.* at 839–40 (Ciklin, J., concurring in part and dissenting in part) (referencing that London was campaign manager for both of his supporting votes in the 3–2 decision to fire Rosemond).

70. *Id.* at 829 (majority opinion).

71. *Id.*

72. *Id.* at 829–30; *see also id.* at 839–40 (Ciklin, J., concurring in part and dissenting in part) (elaborating that the misconduct was highly questionable and founded on unreliable evidence).

73. *Id.* at 829 (majority opinion).

74. *Id.*

75. *Id.* at 830.

76. *Id.* at 830–31. The appellate court rejected the city's argument that the contract award should be reversed. *Id.* at 836. This is one example of the financial burden on the whistleblower: Rosemond's severance benefits were unavailable to him in 2016 when he was terminated purportedly "for cause"; nearly ten years later, Rosemond may finally collect on the contract damages awarded to him at trial. *Id.*

77. *Id.* at 839 (Ciklin, J., concurring in part and dissenting in part).

78. *Id.*

"misleading representation" by London, who had accused Rosemond of theft[79] and had omitted material facts that would have exonerated Rosemond.[80] Commissioner Lazarow's testimony acknowledged the material omissions of Commissioner London in his effort to fire Rosemond and the significance of those omissions, which, if known, would have changed the result of the vote.[81] Further, the evidence revealed the city did not follow protocol in responding to Rosemond's public records request as he attempted to prepare for the hearing to challenge the termination.[82] The requested records, some of which would have refuted Commissioner's London's claims against Rosemond, were not received promptly upon request; rather, the documents were produced approximately a week after his hearing to challenge the dismissal, in contrast to Commissioner London's own standard that public records should be available the same day as requested.[83] Rosemond was unable to secure other employment despite diligent efforts[84] and had to relocate to live with his adult children because of the financial devastation he experienced as a result of the city's actions.[85]

The majority decision in *Rosemond* not only sets aside a jury verdict without a full description of the facts underpinning the verdict but examines the theory of liability myopically without acknowledging the practical realities of government decision-making processes. Moreover, the majority failed to analyze the theory of liability with appropriate contextualization from other decisions that should have been included in the analysis. Instead, the majority concluded summarily that a way to prove causation in a retaliatory discharge case simply could not be applied as the

79. Allegations of misconduct should not be lightly made regardless of the circumstances, but I would add that an allegation of theft against a Black employee by a White supervisor should be especially scrutinized based on my thirty years of experience in employment disputes.

80. *Id.* at 839–40.

81. *Id.*

82. *Id.* at 840.

83. *Id.*

84. Rosemond v. City of Hallandale Beach, No. CACE 17-001355, 2022 WL 22860437, at *4 (Fla. 17th Cir. Ct. Sept. 2, 2022). Evidence was presented that he submitted 40 applications with no success. *Id.*

85. Nicole Duncan-Smith, *'Was Absolutely Wronged': Florida Jury Awards Former City Manager $4.4M Nearly Six Years After Commissioners Voted to Fire Him with Cause and No Severance*, ATLANTA BLACK STAR (Mar. 3, 2022), https://atlantablackstar.com/2022/03/03/was-absolutely-wronged-florida-jury-awards-former-city-manager-4-4m-nearly-six-years-after-commissioners-voted-to-fire-him-with-cause-and-no-severance/.

lower court had done.[86] To justify its reasoning, the majority relied on cases that the dissenting judge distinguished in his opinion.[87]

At the heart of the dispute between the parties was the application of what has been called the "cat's paw" theory of liability. With a cat's paw theory of liability, the plaintiff proves that the "supervisor's influence with the decisionmaker" is "strong enough to actually cause the adverse employment action."[88] According to *Rosemond*, the cat's paw theory in the government context involved proving Vice Mayor London's "almost absolute control and choreography of the City's retaliatory campaign."[89] The city had argued that the employee was required to prove each member of the majority voting to terminate Rosemond had an independent retaliatory intent.[90] Rosemond argued that without evidence of independence by each member of the voting bloc, the leading official acts as a cat's paw for the governmental entity through leadership of a voting bloc.[91]

The jury found that the termination had not been predicated on grounds other than, and would not have been taken absent, Rosemond's exercise of protected activity.[92] However, the city's motion for directed verdict was premised on the idea that the facts should not have been submitted to the jury in the first instance without proof of retaliatory intent in each decision-maker.[93]

In agreement with the city that a jury verdict should be set aside, the *Rosemond* majority went into detail about the history of the cat's paw theory by retelling the centuries-old fable from which the theory sprang.[94] In *State v. Bracewell*,[95] the court explained:

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86. *Rosemond*, 388 So. 3d at 832.

87. *Id.* at 832–34 (majority opinion); *see also id.* at 836–39 (Ciklin, J., concurring in part and dissenting in part).

88. *Id.* at 832 (majority opinion).

89. *Id.*

90. *Id.* at 830. Those of us who have been involved with local government can cite many occasions of "follow the leader" behavior by elected officials who do not evidence independent decision-making processes and reliably follow the loudest or brashest or most outwardly confident member of the voting body. Not everyone makes decisions using the same critical analysis a judge is accustomed to applying.

91. *Id.* at 832.

92. *Id.* at 831.

93. *Id.*

94. *Id.* at 832 (quoting State v. Bracewell, 220 So. 3d 1228, 1234 (Fla. 1st Dist. Ct. App. 2017)).

95. *Bracewell*, 220 So. 3d at 1229 (addressing the issue of whether an employee with retaliatory intent who was empowered to make recommendations on adverse actions could ultimately result in the government agency's vicarious liability based on its blind adoption of the employee's recommendations).

> The "cat's paw" metaphor derives from a seventeenth-century French fable involving a conniving monkey who convinces a cat to reach into a fire to retrieve roasting chestnuts. The cat burns its paws in the process and the monkey escapes unscathed with the chestnuts. In the employment law context, cat's paw liability refers to a situation in which a biased subordinate, who lacks decisionmaking power, "clearly causes the tangible employment action, regardless of which individual actually signs the employee's walking papers." "In other words, by merely effectuating or 'rubber-stamp[ing]' a discriminatory employee's 'unlawful design', the employer plays the credulous cat to the malevolent monkey and, in so doing, allows itself to get burned – i.e., successfully sued."[96]

Then, the *Rosemond* majority concluded summarily that the structure of the commission does not allow the possibility of a cat's paw theory of liability because Vice Mayor London was merely one of several decision-makers, and he was not a "subordinate."[97] Each member had an equal vote.[98] Respectfully, the majority exhibits a failure of common sense by neglecting to extrapolate from the real-life circumstances of Vice Mayor London's majority by rigidly applying the underlying story that inspired the cat's paw metaphor.[99]

The majority reasoned its conclusion was consistent with *Mason v. Village of El Portal*,[100] in which the terminated employee, a police chief, did not show record evidence that the asserted nondiscriminatory reasons for termination by the three-member majority of the village were all unworthy of belief—it was not enough to show the decision was tainted by one member's lack of credibility.[101]

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96. *Id.* at 1231 (first quoting Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998); then quoting Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 272 (2d Cir. 2016)).

97. *Rosemond*, 388 So. 3d at 832.

98. *Id.* at 828–29.

99. Dissenting Judge Ciklin noted that reliance on *Bracewell* was misplaced because the court there did not consider the issue presented in the *Rosemond* case: whether one member of a decision-making body can act as the monkey in the cat's paw scenario. *See id.* at 836–37 (Ciklin, J., concurring in part and dissenting in part).

100. 240 F.3d 1337, 1337–38 (11th Cir. 2001). Dissenting Judge Ciklin points out in his opinion that this Section 1983 opinion does not discuss the cat's paw theory of liability. *See Rosemond*, 388 So. 3d at 836 (Ciklin, J., concurring in part and dissenting in part).

101. *Rosemond*, 388 So. 3d at 832–33 (relying on *Mason*, 240 F.3d at 1338–39). Arguably, one member could, through false or discriminatory remarks during discussion of a motion, taint the decision-making process even if the other members are acting in good faith, but that experience by local government employees is not taken into account by the applicable

The court also relied[102] on the principle in *Matthews v. Columbia County*,[103] in which the court explained that proving one unconstitutional motive among voting members is not sufficient to establish unconstitutional motives in others; rather, the court held that this did not impute an unconstitutional motive on the other two panel members who voted similarly.[104] The Eleventh Circuit reasoned that adopting a rule to the contrary would force the "well-intentioned lawmaker" to "vote against [their] own view of what is best for [the] county or to subject [the] county to Section 1983 liability."[105] After this sweeping statement, the Eleventh Circuit concluded, "[w]e think the law compels no such outcome."[106]

Respectfully, I consider the analysis of the Eleventh Circuit panel in *Matthews* to be fundamentally flawed. In fact, the "well-intentioned lawmaker" always has another choice: (1) call out the unconstitutional, retaliatory, discriminatory, or otherwise inappropriate foundation for a policy or decision; (2) urge the members to vote no because the motion, resolution, or ordinance is being pursued for an improper purpose; and (3) seek the result that is in the best interest of the local government with a fresh debate on a new motion or revised resolution or ordinance to ensure clarity that the outcome is not motivated by an improper purpose.[107] Moreover, members of a board are responsible to ensure their votes are well-informed to fulfill their duty as public servants. Had all commissioners in the City of Hallandale been well-informed, Rosemond would not have been fired. To avoid unnecessary

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standards of proof and liability. In such situations, a local government attorney using independent judgment can protect the process through sound legal advice and suggestions on how to ensure a decision is not tainted by bias. For Rosemond, that was not apparently available: the city attorney had just been fired, and the CRA attorney who was in attendance to fulfill temporarily the role of city attorney had previously been directed by the Vice Mayor to draft the exit agreement. *See* ROSEMOND, *supra* note 1, at 131–32.

102. *Rosemond*, 388 So. 3d at 833–34.

103. 294 F.3d 1294 (11th Cir. 2002). In *Matthews*, the plaintiff prevailed at a jury trial on her claim arising under 42 U.S.C. § 1983 that her position was eliminated in retaliation for protected speech on a government matter. *Id.* at 1295–96. Again, dissenting Judge Ciklin notes in his opinion that the *Matthews* court did not contemplate the cat's paw theory of liability. *See Rosemond*, 388 So. 3d at 837 (Ciklin, J., concurring in part and dissenting in part).

104. *Matthews*, 294 F.3d at 1297–98 (citing *Mason*, 240 F.3d at 1337).

105. *Id.* at 1298.

106. *Id.*

107. As a mayor and former government attorney, I find this solution so simple and straightforward that I am amazed it was missed in the limited analysis of the opinions by the judges. Perhaps their jobs have insulated them from the practical realities faced by local government officials and employees.

conflict, officials can adopt the practice of asking questions about documentation and evidence in support of proposed actions and taking the time to understand the material facts before drawing conclusions. Officials need not specifically accuse their fellow board members of illegal motivations.

After relying on bits and pieces of distinguishable cases, the district court of appeal then iced the cake of circular logic for Rosemond by relying in part on his former colleague's case, *Whitfield v. City of Hallandale Beach*,[108] to justify rejection of a theory of liability that corresponded to the influence Vice Mayor London had on the terminations of Whitfield and Rosemond.[109] In *Whitfield*, the district court granted summary judgment and dismissed the city attorney's claim.[110] The Southern District of Florida reasoned that a cat's paw theory of liability allowed "the animus of a non-decision-making employee" to "be imputed to a neutral decisionmaker, if that decisionmaker did not conduct an independent investigation." In such a case, "the non-decision-making employee is using the neutral decisionmaker as a 'mere conduit' or 'rubber stamp.'"[111]

This framing of the theory of liability by the district court of appeal compels the conclusion that the employee loses because members of a voting body are equal decision-makers. The court assumes that a member of the voting body cannot manipulate the other members into adopting false premises and executing a decision tainted by illegal animus. The court chose to adopt an analysis that very literally followed the cat's paw fable to define that theory of liability in a manner that is fatal to any claim by a city official whose employment depends on the vote of a board.[112]

The majority in *Rosemond* relied on the federal court's review of the evidence in Whitfield's case to sum up its reasoning about

108. No. 19-CV-60926-WPD, 2021 WL 4987938 (S.D. Fla. May 14, 2021).

109. *Rosemond*, 388 So. 3d at 834–35.

110. *Whitfield*, 2021 WL 4987938, at *3–5.

111. *Id.* at *3 n.2 (first citing Roberts v. Randstad N. Am., Inc., 231 Fed. App'x. 890, 895 (11th Cir. 2007); then quoting Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999)).

112. In his dissent, Judge Ciklin pointed out that the court in *Whitfield* did not foreclose the application of the cat's paw theory in this context; rather, the district court's analysis in *Whitfield* revealed the theory was considered and rejected because of a lack of sufficient evidence. *Rosemond*, 388 So. 3d at 839 (Ciklin, J., concurring in part and dissenting in part) (citing *Whitfield*, 2021 WL 4987938, at *3). The dissent points out what the majority's analysis overlooks: *Whitfield* was a different suit, involved different protected activity, a different final termination hearing, and presumably at least some different evidence. *Id.*

the facts in *Rosemond*, concluding that a cat's paw theory of liability was not available because, after listening to Mayor London's reasoning, Commissioners Lazarow and Lima-Taub voted to terminate the employee.[113] Respectfully, this reasoning reveals the lack of understanding judges seem to share on how local government decisions are made. This is precisely how board members gain support from political allies to further an agenda. Where a board member is motivated by an improper purpose, but his allies nonetheless owe him allegiance, the outcome of the vote is predictable regardless of the substance of the discussion. The pertinent circumstances, from my experience as a mayor and local government attorney, are not the same facts the federal court and district court of appeal majority found so compelling. That commissioners listened to a fellow commissioner's reasoning is no substitute for an official's duty to act in the public interest by taking the time to be correctly informed of the material facts. Arguably, the two commissioners who followed Vice Mayor London's lead were derelict in their duty to be adequately informed before taking action. The court's analysis enables the dereliction of that duty to be repeated in the future by other elected officials because a whistleblower must prove an independent, retaliatory motive for each decision-maker.

Thankfully, dissenting Judge Ciklin explains in his well-reasoned opinion how the majority overlooked facts that should have been considered based on the standard applicable to setting aside jury verdicts; his evaluation of the decisions cited in the majority opinion reveal the distinguishing characteristics of those opinions.[114] Judge Ciklin's opinion is useful for crafting statutory and procedural solutions to the problems generated by the majority's stingy application of the PWA.

As is so often the case with legal principles, there are various words and phrases used that encompass broader applications than others. Judge Ciklin pointed out the majority's neglectful analysis by noting that the issue in *Rosemond* was not addressed by the decisions on which the majority relied.[115] Additionally, the dissent remarked that the situation in *Rosemond* could arguably fall under the cat's paw theory of liability as it has been described by the

113. *Id.* at 835 (majority opinion).
114. *Id.* at 836–40 (Ciklin, J., concurring in part and dissenting in part).
115. *Id.* at 836–37, 839.

United States Supreme Court, which found that a commissioner's vote as a member of a majority constituted an "ultimate employment decision" despite that commissioner's lone vote being insufficient for action.[116]

The dissent then referenced a series of cases illustrating the evolution of the cat's paw theory of liability extending to "scenarios once considered novel."[117] The compelling conclusion of this portion of the dissenting opinion is a citation to the Tenth Circuit Court of Appeals:

> Stripped of their metaphors, subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions. We see no reason to limit subordinate bias liability to situations that closely resemble the "cat's paw," "rubber stamp," "conduit," "vehicle," or other metaphors that imaginative lawyers and judges have developed to describe such claims.[118]

The dissent further pointed out that the majority overlooked the application of Title VII principles and authorities to whistleblower law,[119] and that the city cited not one Title VII case that held, "as a matter of law, a municipality may not be found vicariously liable under a cat's paw theory of liability."[120]

As Judge Ciklin explained, "the real issue presented here is whether cat's paw is a proper fit in a whistleblower or Title VII case where the actor with animus is *also one of the decisionmakers*."[121] Judge Ciklin referenced analyses from other courts that take into account the concerns presented in this Article: *Walsh v. Town of Millinocket*,[122] in which the court acknowledged "decision-making dynamics of local councils and commissions . . . can be influenced by the improper but unstated views of a member with a particular interest in a matter to whom other members may

116. *Id.* at 836–37 (citing Staub v. Proctor Hosp., 562 U.S. 411, 415 (2011) (describing a "cat's paw case" as one where the employee seeks "to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision")).

117. *Id.* at 837 (collecting cases).

118. *Id.* (quoting EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 488 (10th Cir. 2006)).

119. *Id.* at 838 (citing Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 419 (Fla. 4th Dist. Ct. App. 2015)).

120. *Id.*

121. *Id.*

122. 28 A.3d 610 (Me. 2011).

defer in collegial discussions."[123] Further, Judge Ciklin referenced that the cat's paw theory of liability was said to be applicable where "multiple decisionmakers . . . choose to put their collective heads in the sand" in deference to an influential official offering biased information to justify adverse action.[124]

Local government is frequently structured in Florida in such a way that the city manager, city clerk, or city attorney can be released from service for no reason at all. When political leadership changes, professional staff in upper management may be asked to move on. There are dignified ways elected officials can achieve these staffing changes. When a political body chooses to harm the future employment opportunities for the city's appointed leaders, questions of improper motivations are fairly posed.

Whether the theory of liability for causation in a retaliatory discharge case is described with the cat's paw metaphor or something else, the decision-making realities of local governments should be better understood by the judiciary or better explained in the applicable legislation. Otherwise, why should a demoralized employee living paycheck-to-paycheck speak up when a powerful person engages in conduct unworthy of the public trust?

IV. A NEW PERSPECTIVE

Having spent the last decade representing local governments and the last six years as an elected official, my perspective is often rooted in protecting taxpayer dollars. Proponents of reducing risk to governmental entities can celebrate the setting aside of a multi-million dollar verdict against the City of Hallandale Beach, but a jury verdict would never have been a part of Rosemond's story had he been allowed to leave employment with his reputation intact.[125] Limiting exposure for governmental entities from whistleblower claims may seem preferable on initial examination; however, if cronyism and corruption characterize governmental operations, good stewardship of taxpayer dollars is impossible. Rosemond's experience is a cautionary tale that suggests the safe play is to

123. *Rosemond*, 388 So. 3d at 838–39 (Ciklin, J., concurring in part and dissenting in part) (quoting *Walsh*, 28 A.3d at 617).

124. *Id.* at 839 (quoting Bledsoe v. Tenn. Valley Auth. Bd. of Dirs., 42 F.4th 568, 590 n.2 (6th Cir. 2022) (Nalbandian, J., dissenting)).

125. ROSEMOND, *supra* note 1, at 177–83 (describing his aversion to litigation and feeling he had no choice after the actions of Vice Mayor London and his majority).

refuse to participate in an investigation the employer had no reasonable choice other than to undertake.[126] Honest employees, doubtful of the protection of the law, will look the other way and likely leave government service.

Scrutiny is known to deter undesirable conduct. Yet, the PWA is not so simple as "see something, say something." Layers of meaning have been litigated to achieve clarity on what an employee must report, how the report is made, to whom it is made, when the employee is obligated to act to preserve their rights, how the remedial process works, and what relief is available.[127] Rosemond avoided the pitfalls other parties have discovered over the years in litigation of the PWA's meaning and application—other than the evidence considered sufficient for jury review of the facts of the retaliation case. Although Rosemond's jury concluded that Vice Mayor London's retaliatory animus had tainted the decision-making process, the appellate court set aside the jury's verdict and imposed a restricted view of how the evidence must be developed as to each decision-maker's motivations for a whistleblower to obtain relief.[128]

With respect, a new perspective is required for the PWA to be effective. An unreasonable expectation is built into the PWA: that the whistleblower will have the financial means to survive years of litigation and pay for discovery designed to elicit proof of the motivations of people who have been accused of violating a law—without the help of a law enforcement organization. Assuming the whistleblower can afford the long road of litigation, the decision-makers may be disingenuous or dishonest in discovery. Even honest decision-makers may have both legitimate and biased reasons for acting—does that preclude recovery by the employee? Decades of decisions support summary judgment dismissal of an employee's claim because of an employer's "legitimate, non-

126. When an employee asserts a violation of discrimination law, the employer must complete an internal investigation. *See generally Handling Internal Discrimination Complaints About Disciplinary Action*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/small-business/handling-internal-discrimination-complaints-about-disciplinary-action (last visited Mar. 19, 2025). Rosemond cooperated in that investigation, and according to the jury, he paid for it with his career. *Rosemond*, 388 So. 3d at 831.

127. *See, e.g.*, Fla. Standard Jury Instructions (Civ.) § 418.13 (2024) (informing the jury how to calculate monetary damages for a claimant prevailing in an unlawful retaliation suit).

128. *Rosemond*, 388 So. 3d at 831–34.

retaliatory" reason for adverse actions.[129] The hope is that judges will follow the best jurisprudence to preserve the parts of the PWA that can effectively encourage whistleblowers to have confidence in a fair day in court if they are faced with litigating to restore their reputations and rebuild their lives.[130]

A. What Report is Protected Activity?

Many decisions have addressed whether a communication is protected under the PWA;[131] only a few are included here for purposes of this Article. In *Rosa v. Department of Children & Families*, the agency unsuccessfully argued the employee had done no more than "rant" about distribution of job duties and so the protections of the PWA had not been triggered by the content of her communication.[132] The court construed the PWA broadly, as should be done for a remedial statute,[133] and noted that a report of misfeasance was one of the reasonable inferences to be drawn from the evidence presented at trial.[134]

B. Is the Whistleblower Reporting to the Correct Authority?

For a local government employee, the "chief executive officer" is identified in the statute[135] as the person to whom a report should be made, but what if the employee does not trust the city manager or the strong mayor or other "chief executive officer" of a local agency as understood within the PWA? A report made to the

129. *See, e.g.*, Long v. Eastfield Coll., 88 F.3d 300, 304–08 (5th Cir. 1996).

130. For example, courts properly reject efforts to restrict from protected status an employee who makes a disclosure as part of their job duties, which employers are arguing is not a "voluntary" disclosure but required as part of the job the employee is to perform, thereby removing a segment of the public workforce out of one of the categories of protected persons in FLA. STAT. § 112.3187(7) (2024). *See, e.g.*, Igwe v. City of Miami, 208 So. 3d 150, 155 (Fla. 3d Dist. Ct. App. 2016) (rejecting employer's argument to restrict the group of employees protected based on job function requirements to make certain disclosures).

131. *See, e.g.*, Shaw v. Town of Lake Clarke Shores, 174 So. 3d 444, 446 (Fla. 4th Dist. Ct. App. 2015) (finding that the expression was vague and unsigned, therefore not protected); Walker v. Fla. Dep't of Veterans' Affs., 925 So. 2d 1149, 1150 (Fla. 4th Dist. Ct. App. 2006) (holding that the invoice used as the basis for the action was not a "written and signed complaint" and therefore the employer was entitled to summary judgment on the claim).

132. Rosa v. Dep't of Child. & Fams., 915 So. 2d 210, 211 (Fla. 1st Dist. Ct. App. 2005).

133. *Id.* at 211–12 (citing Irven v. Dep't of Health & Rehab. Servs., 790 So. 2d 403, 405 (Fla. 2001)).

134. *Id.* at 212.

135. *See* FLA. STAT. § 112.3187(6) (2024).

individual or group with the authority to investigate the alleged wrongdoing is made to the correct authority. In *Igwe v. City of Miami*, for example, the auditor submitted financial transaction information to the city commission which had the authority to investigate based on the express wording of the city charter; thus, a disclosure to that body as to official acts and conduct of city officials was a disclosure to an "other appropriate local official."[136]

C. Sufficient Evidence for a Jury?

Surviving summary judgment is one of the toughest hurdles for an employee to obtain any relief. Developing in discovery a record of sufficient evidence to raise a question of material fact for resolution by the jury is critical. In *Competelli v. City of Belleair Bluffs*, the Belleair city council voted to terminate employment of the fire chief shortly after he had requested additional time to resolve safety concerns he had identified with regard to a fast-tracked contract with a separate fire department to merge provision of services.[137] The city argued that the fire chief's failure to follow direction on the merger plan was the legitimate, non-retaliatory reason; however, the court noted that competing inferences included the reasonable conclusion that the fire chief's expression of unresolved safety concerns prompted the governing body to conclude the fire chief was not following direction.[138]

Although some decisions reflect analysis respectful of legislative intent and the province of juries to resolve competing reasonable inferences to be drawn from the evidence presented at trial, whistleblowers cannot be guaranteed a particular judge. Numerous decisions suggest a limiting perspective on how the statute should be interpreted and how theories of liability should be applied.[139] To fulfill the mission of integrity in government,

136. Igwe v. City of Miami, 208 So. 3d 150, 154–55 (Fla. 3d Dist. Ct. App. 2016) (construing Section 112.3187(6)).

137. Competelli v. City of Belleair Bluffs, 113 So. 3d 92, 94–95 (Fla. 2d Dist. Ct. App. 2013) (reversing summary judgment because the fire chief created genuine issues of material fact for the jury).

138. *Id.*

139. *Compare Igwe*, 208 So. 3d at 156 (emphasizing that the PWA should be liberally construed to protect those who report governmental misconduct), *with* Harris v. Dist. Bd. of Trs., 9 F. Supp. 2d 1319, 1328 (M.D. Fla. 1998) (applying a functional approach to determining compliance with the PWA, rather than merely relying on a broad interpretation).

more can be done, even without reliance on the legislature to amend the statutory scheme.

V. REPAIRING THE WHISTLE

Supporting whistleblowers as an initial matter requires demonstrated commitment by elected and appointed officials in building a culture of integrity and trustworthiness; in other words, those who work for governmental agencies should maintain their focus on what is in the public interest, not their own private interest. Elected officials should take the lead and empower staff to dedicate time to developing improved policies, procedures, and training on compliance with applicable laws. Additionally, engaged citizens can volunteer time to develop improvements in these areas.[140]

To incentivize conduct that more closely fulfills the legislative intent of the PWA, I suggested public sector employers take the following steps:

- Review and update mission statements to include language that acknowledges compliance with all applicable laws and maintaining that high ethical standards are values of the organization.
- Develop policy guidance that specifies an encouragement to whistleblowers to report internally and a prohibition against retaliation.
- Develop a procedure for making reports that is in compliance with the PWA.
- Invest in a process for reporting and investigation that employees will trust, possibly with reliance on engaged volunteer stakeholders and a safe means for employees to contribute ideas to the development of these procedures.
- Implement a training schedule with qualified instructors to educate officials and employees on the PWA and the employer's mission, policies, procedures, and training requirements.
- Ensure employees understand their rights under the PWA and provide them with resources to contact authorities

140. *See generally* Julie Meadows-Keefe, *From Rumblings to Reality: One City's Story of Ethics Reform*, 46 STETSON L. REV. 589 (2017) (exploring the details of how citizen engagement, and other factors, impacted governmental ethics in Tallahassee).

outside of the organization for further assistance in understanding the processes required to exercise those rights under the PWA.

- Ensure contractors covered by the PWA are made specifically aware of their obligations consistent with agency standards, procedures, and policies.

Additionally, advocating for better legislation is necessary to support whistleblowers and therefore compliance generally by governmental agencies, officials, and employees. For example, there is no individual liability; thus, a bad actor with a retaliatory motive and the power to act on it has no "skin in the game" because the agency is liable if the claim is proven.[141] Further, the effort to protect a whistleblower with confidentiality, as provided in the PWA,[142] cannot protect an employee from a biased individual receiving the report.[143] Florida's private whistleblower statute provides for a longer statute of limitations period.[144] Procedural requirements in the public sector framework may be impediments or a compliance challenge.[145] Theories of liability, burdens of proof, and remedies could be addressed with specific statutory fixes that shift the leverage, normally with employers, to the employee side, not to promote big verdicts local agencies cannot afford to pay, but to codify incentives that promote compliance in the first instance, so that whistleblowing becomes rare.

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141. *Harris*, 9 F. Supp. 2d at 1328 (holding that suing in official capacity is correct based on facts alleged on disclosures made pursuant to Section 112.3187(6)).

142. *See* FLA. STAT. § 112.3188 (2024) (providing for maintaining as confidential the identity of a whistleblower). Detailed procedures for investigating reports are set forth in Section 112.3189. *Id.* § 112.3189.

143. To illustrate, if the employee of a local government makes a protected disclosure to a city manager who is effectively captured by a council or commission majority led by a biased elected official who is accused of malfeasance, for example, a job-scared city manager may be incentivized to participate in scapegoating the whistleblower to appease the voting bloc that could terminate the city manager's employment.

144. Dahl v. Eckerd Fam. Youth Alts., Inc., 843 So. 2d 956, 958–60 (Fla. 2d Dist. Ct. App. 2003) (discussing interplay of similar remedial statutes and contrasting availability of various defenses); Fox v. City of Pompano Beach, 984 So. 2d 664, 667–68 (Fla. 4th Dist. Ct. App. 2008) (reversing dismissal of public sector whistleblower claim although questions of whether he acted timely to preserve his rights were raised).

145. An employee asserting retaliation must submit a written complaint pursuant to FLA. STAT. § 112.31895 (2024). The statute details an accelerated timeline for administrative agency review and resolution as compared to an employee who is asserting discrimination or retaliation under state or federal employment law statutes. *Id.* Misunderstandings on procedural requirements and the exhaustion of administrative remedies can lead to results inconsistent with the purpose of the statute. *See, e.g.*, Univ. of Cent. Fla. Bd. of Trs. v. Turkiewicz, 21 So. 3d 141, 145 (Fla. 5th Dist. Ct. App. 2009).

Statutory amendment recommendations include:

- Expand the jurisdiction of the Attorney General, the Ethics Commission, or both to provide immediate support to all whistleblowers covered by the PWA for purposes of reporting confidentially and ensuring good faith investigations of reports are conducted.
- Specify a relaxed burden of proof for whistleblowers to obtain immediate injunctive relief to prevent termination of employment that could be caused by a retaliatory motive of any person with authority to vote for termination, recommend termination, or investigate the employee for alleged misconduct.
- Specify a burden of proof on the employer to establish by a preponderance of the evidence that its legitimate, non-retaliatory basis for adverse action is not tainted by any retaliatory animus.
- Clarify in express terms that adverse action includes a hostile work environment.
- Add a basis for relief that specifies the availability of emotional distress damages.

Regarding this last recommendation, the *Rosemond* case briefly references an argument by the FLC in its amicus brief that questioned whether the Florida PWA authorizes non-economic compensatory damages.[146] Yet, the brief is significant in that the FLC argues against a form of relief that would promote more reporting of illegal or unethical conduct. The FLC, an insurance provider, understandably takes the position briefed in the *Rosemond* case. Nonetheless, whistleblowers experience emotional distress from retaliatory and hostile conduct directed at them by decisionmakers, employees, and members of the public who do not believe the whistleblower is truthful or acting in good faith. A recent illustration of the kind of harm experienced can be found in the experience of Dr. Rayme Edler, named Whistleblower of the Year for 2024 by The Anti-Fraud Coalition.[147] The additional

146. City of Hallandale Beach v. Rosemond, 388 So. 3d 826, 836 (Fla. 4th Dist. Ct. App. 2024).

147. *2024 Whistleblower of the Year*, *supra* note 52 (describing types of retaliatory and damaging conduct directed at Dr. Edler and noting she experienced physical illness and required FMLA leave).

liability risk is worth taking to promote the ethical operation of government processes.

Finally, I recommend that local leaders organize focus groups of volunteer stakeholders to discuss methods and means of promoting compliance with the law and empowering whistleblowers to safely assist in compliance goals.[148] The cost of corruption is prohibitively high; leaders should inspire citizens to engage in developing ethical norms and means of enforcing compliance with those norms to ensure transparent and accountable government. Such leadership will promote public trust so long as leaders are not compromised by influencers focused on their private interest. Rather, engagement is needed from concerned citizens who will act as good stewards of the political process. Future generations should have a chance to inherit a trustworthy government served by ethical leaders and employees. Each citizen has a part to play in that mission.

VI. CONCLUSION

Frequently, it seems to me, challenging problems are left to the voters to resolve through future elections of "better" leaders. Some seem to believe that some other person will step forward to work for a transparent and accountable government. Potential leaders reject encouragement to take those steps forward because "politics is dirty." Yes, politics can be dirty because selfish, prideful people seek positions of power and abuse the power they hold. Expecting that to change with elections is not a good strategy because people with hearts for service will look for other ways to help their community. Governmental institutions, only as strong as their leaders, will continue to be degraded. Each citizen has a civic responsibility to support building and maintaining trustworthy governmental institutions. Protecting whistleblowers must be a priority because unscrupulous people will continue to seek power for their private interest. Supporting ethical public sector employees, and that includes advocacy for improved legislation as well as cooperating with each other at a local level to develop healthy workplace cultures focused on compliance with the law and protecting the public interest.

148. I again recommend to the reader a study of the experience of Tallahassee, Florida, documented in Meadows-Keefe, *supra* note 140.