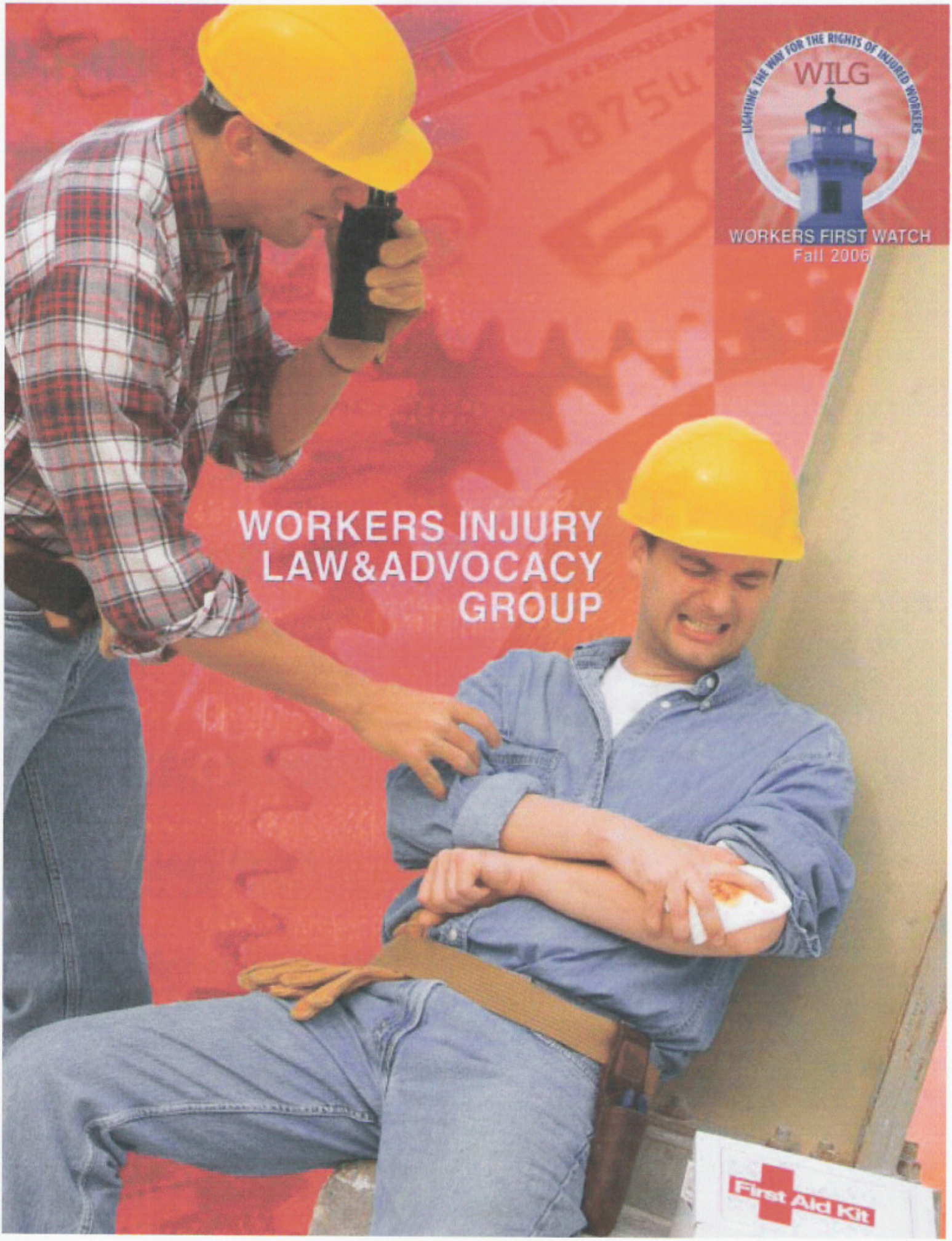
LIGHTING THE WAY FOR THE RIGHTS OF INJURED WORKERS
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First Aid Kit

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Thinking Out of the Box (or, How I Learned to Stop Worrying and to Love Workers' Comp)

by Mark L. Zientz, Esq.

Introduction

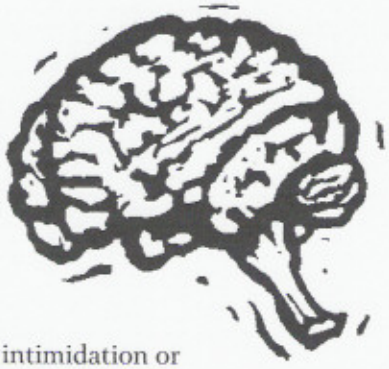
This article should be considered food for thought. Your clients deserve to have their situations looked at from every angle and have each possible avenue of recovery for an injury (or suspected injury) on the job evaluated.

Some areas of recovery will not be addressed, such as ADA, EEOC, Title VII actions, and other actions arising out of the employment relationship. Nevertheless, adverse employment action by the employer following an industrial injury may very well provide another avenue of recovery; these should be evaluated by competent counsel. Actions which are based upon rights granted by other laws may co-exist with workers' compensation remedies as long as the damages can be separated.[1]

The theme behind this article is that anytime an employee has the right to face an employer in an action before a jury, the likelihood of a good result is heavily weighted in favor of the plaintiff employee. **Remember, the real reason that workers' compensation laws exist** is to protect business from facing juries. It was the employers who sought the passage of compensation laws, not employees.

Retaliatory Discharge

A growing number of jurisdictions have created causes of action for retaliatory discharge (or



intimidation or coercion) related to a claim for compensation benefits. If your state statute contains language prohibiting certain employment activity following an injury on the job or the filing of a claim for benefits, what is the remedy? In Florida, the compensation law (Fla. Stat. §440.205) did not provide a remedy for a violation, so the Florida Supreme Court held that the remedy was in the courts of general jurisdiction.[2] Intimidation and coercion are specifically actionable as well.[3]

In recent years, a question has arisen in those states that recognize a cause of action for retaliation for filing a compensation claim. Even in right-to-work states, some protection is afforded those who

file compensation claims, or serve on juries, or serve in the military.[4] But, may a *subsequent employer* be liable for retaliation against an employee who filed a compensation claim against a *former employer*?

Between 1983 and 2005, seven states with laws similar to Florida's §440.205 have considered the issue. Six have held there is a cause of action against subsequent employers who discriminate against an employee who has a history of a prior compensation claim.[5]

Of course, proof of the reason for retaliation may be difficult. The *Bruner* case is a distinct departure from the norm. Bruner had a compensation claim pending when he was hired by a subsequent employer. After a short period of time, the subsequent employer discovered the pending claim and terminated the employee's services. Bruner filed for unemployment compensation. The subsequent employer denied U.C. benefits on the ground that the termination was because the employee had a propensity for filing compensation claims! Bruner filed a retaliation action which was dismissed in the trial court but reinstated in the appellate court.

The employer may have a lien against a recovery by the employee.

Employees' Third Party Action

Virtually all workers' compensation laws provide that the employer who provides compensation benefits may have a lien against a recovery by the employee in an action arising from the industrial accident filed against an outside third party. The theory is that the employer is liable for benefits if the employer was negligent in causing the injury, or if the employee was negligent in causing his own injury, but not if the injury was caused by an outside entity.

In Florida, the statute[6] not only allows for the lien, it also requires that the employer/carrier cooperate and assist the employee with the investigation of third party possibilities. This requirement sometimes causes friction between the employer and the employer's customers, which in turn works to the detriment of the employee seeking a third party recovery from an entity doing business with the employer. These situations give rise to causes of action for non-cooperation, or at the very least, form a basis to quash the lien[7].

A cause of action for "spoliation of evidence" has also come into vogue.

A cause of action for "spoliation of evidence" has also come into vogue. The employer may be liable for destroying the evidence the employee needs to prosecute a third party action. This is particularly true in products liability situations[8].

Actions Against the Employer/Carrier: Avoiding Exclusive Liability

Which entities may not enjoy the same immunity from suit that the employer enjoys?

Which entities may not enjoy immunity from suit?

First, the employer itself may lose its immunity from suit for various reasons. The obvious is for not keeping workers' compensation insurance or self insurance in effect, unless of course there is an uninsured employer fund from which to recover. The problem with these uninsureds is that if they do not have the resources to pay for compensation insurance, what resources will they have to pay a judgment?

Other ways to avoid the exclusive remedy [bar] include suits against employers for intentional acts causing injury. In some states, gross negligence is enough to avoid exclusivity; in others, proof of acts that would intentionally cause injury or death is required. Once again, there may be no coverage for these types of actions due to the general public policy of not allowing a person to insure against one's own deliberate, injurious acts.

But there are actions against employers for which there likely is coverage. Not only does an employer have to provide coverage for injuries on the job to avoid tort liability, the employer also has to accept that the injury arose out of and in the course and scope of the employment. A denial of compensability may very well trigger the loss of immunity from suit.[9]

In *Byerley*, the employer stood prepared to pay compensation benefits, but the carrier denied the accident arose out of the employment. Byerley was injured in the employer's parking lot after clocking out at the end of her shift. The lot had an unsafe condition which caused her to fall. The Florida district court of appeal discussed the worker's "Hobson's Choice:" whether to proceed to try to prove entitlement to compensation benefits or to sue in tort. The court also concluded that

the carrier had the power to bind the employer to a "denial of compensability" position.

Beyerly shows that under some circumstances "Coverage B" (or Part II) of the compensation policy may really have some value, notwithstanding the difficulty the Iowa Supreme Court had in articulating what value that coverage has and under what circumstances it may be tapped.[10]

There are also some very interesting and potentially valuable conflicts which arise when a carrier denies compensation benefits and the employer is faced with a tort suit. Ordinarily, compensation coverage (Part I) has no dollar limits on the recovery, while Part II has dollar limits of liability. The carrier that exposes the policyholder employer to excess liability may very well be on the hook for all the excess judgment.

Many states allow the employee plaintiff to accept an assignment of the employer's bad faith rights as part of a settlement with the employer. Those are the rights held by the employer to recover against its own carrier for the bad faith denial of the compensation claim which led to the excess judgment. Many of those same states also have laws providing for attorney fees for the successful prosecution of a bad faith action against an insurer by an insured.

When the employee chooses the tort remedy, the employer is hard pressed to complain of carrier bad faith.

In some cases, it is the employer that demands that the carrier defend and deny the compensation claim. In those cases, when the employee chooses the tort remedy, the employer is hard pressed to complain of carrier bad faith. In Florida, employers can open themselves up to tort suits merely by telling the employee that he or she is not entitled to full compensation benefits or that there is coverage at all.[11]

The decision is worth reading, especially the citations to the Magna Carta!

Oregon passed legislation requiring that the industrial injury be the major contributing cause (MCC) of the need for medical care or disability. Florida followed suit. In *Smothers v. Gresham Transfer,*[12] the Oregon Supreme Court held that the employee whose claim is denied based upon MCC may sue in tort. The decision is worth reading, especially the citations to the Magna Carta!

The erosion of benefits by legislative "deform" may also be the source for tort actions. In 1990, Florida passed one of a long series of compensation reform acts to limit the scope of coverage and the benefits available to covered claims. A test of the constitutionality of the law resulted in approval by the Florida Supreme Court, but the opinion contained the following language:[13]

"Although ch.90-201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under pre-1990 workers' compensation law and now, as a result of ch. 90-201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances." *Martinez,* fn. 4.

Most state constitutions require a tort replacement remedy to be **adequate**.

In Louisiana, the legislature passed an occupational disease law that created a presumption that occupational diseases contracted by an employee employed less than 12 months were not work-related unless the employee overcame the presumption by an "overwhelming preponderance of the evidence," The Louisiana high court allowed a tort suit under these circumstances due to the failure of the legislature to guarantee an adequate compensation remedy in place of the tort remedy that was replaced by the compensation law.[14] The Louisiana legislature amended the law in 2001 and now the worker only need prove his occupational disease claim by a "preponderance of the evidence." As a result, the occupational disease claims of short-term employees are no longer presumptively tort actions.[15] Most state constitutions require a tort replacement remedy to be *adequate*.

Hawaii has amended its exclusive remedy provision to read:

"Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in either of the following

circumstances: ...(2) An injured employee has reached Maximum Medical Improvement, as defined in section 386-1, and the payment of all benefits authorized under this chapter has been terminated."[16]

Rhode Island's Supreme Court has held that the exclusive remedy for injuries on the job does not protect the employer from actions for *defamation*. The court found the true gist of a defamation claim is not personal injury.[17]

There are limits to what carriers (and employers) can do with regard to "handling" a workers' comp matter.

Actions Arising Out of Laws Protecting Vulnerable Adults

Many states have laws that are designed to protect "vulnerable persons" such as children, the mentally ill, and "vulnerable adults." One can easily recognize some clients as meeting the definition of a vulnerable adult. In Florida, the law defines *vulnerable adult* as a person over the age of 18 whose ability to perform the normal activities of daily living, or to provide for his or her own care or protection, is impaired due to: (1) a mental, emotional, long-term physical, or developmental disability; (2) or dysfunctioning; (3) brain damage; or (4) the infirmities of aging.

Parties who may violate a vulnerable adult's rights include "caregivers." This term is defined broadly enough to include adjusters, managed care nurses, and others who are responsible for the authorization of reasonable and necessary medical care. "Neglect" is prohibited. A caregiver violates the law by neglecting the physical and mental needs of the vulnerable adult.

Civil actions are permitted against the violator. Recovery of actual and punitive damages is allowed, plus attorney fees and costs. The law further states that "the remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to the vulnerable adult."[18]

A Quick Primer On "Master-Servant" Responsibility

The Master owes a very high degree of care to the Servant. The duties include but are not limited to:

(A) To provide a safe place to work. (If an accident happens, could the workplace have been safe?);

(B) To provide adequate training;

(C) To provide adequate equipment;

(D) To provide the appropriate number of qualified workers to do the job safely;

(E) To provide competent supervision;

(F) To avoid hiring known dangerous co-employees.[19]

The Tort of Outrage aka Intentional Infliction of Emotional Distress

The Florida Supreme Court has recognized that there are limits to what the compensation carriers (and employers) can do with regard to "handling" a workers' compensation matter.

What I am suggesting is consideration of an action for **Malicious Defense**...

Some actions which would offend any rational member of society are considered outrageous and will not be tolerated by a civilized community.

Those boundaries were exceeded when the compensation carrier and its managed care coordinator allowed an injured worker to urinate feces for 10 months following a crushing injury while they sent him from doctor to doctor to try to find who would not recommend surgery! The opinion of the court recounts a number of other outrageous acts and omissions that the court agreed were actionable: outside the workers' compensation immunity afforded the carrier.[20]

...outrageous acts and omissions that the court agreed were actionable: outside the workers' comp immunity afforded the carrier.

Actions Against Opposing Counsel

Never popular, but sometimes in the background, are thoughts of suing opposing counsel. We are all aware of the sanctions that can be imposed for discovery violations and other violations of the rules. What I am suggesting is consideration of an action for *Malicious Defense*, under the proper circumstances, of course. The New Hampshire courts have fashioned a cause of action for Malicious Defense, making it a tort akin to malicious prosecution. The New Hampshire Supreme Court said that in appropriate

circumstances, there may be ample reason to extend the reach of sanctions to counsel for fostering of unfounded defense or pursuit of a defense for improper purposes.[21]

Another action was filed in Florida against an attorney hired by the carrier to put an end to an injured worker's long-term palliative care. That lawyer engaged in tactics described by the Judge of Compensation Claims (JCC) as threatening the doctor, causing the doctor to withdraw from the case.

The carrier had hired this particular attorney, who "specializes" in "overutilization." That attorney typically performs a cursory review of the medical care and advises the authorized doctor that he or she has overtreated, will be reported to the Agency for Health Care Administration (ACHA-Florida), will have to repay all the money received for treating the injured worker, and may be barred from ever treating a workers' compensation patient again, and probably be fined. The doctor likely will have to hire a lawyer and attend a hearing in Orlando related to the charges that will be filed if he does not resign from treatment of the patient.

Think about the wrongs that may have been perpetrated against your injured worker client. Explore all avenues of recovery.

The attorney involved has been sued for, among other things, tortious interference [with the doctor/patient relationship] and civil RICO violations.

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Another Quick Primer – Qui Tam Actions

Qui Tam actions are brought on behalf of the state against entities that have managed to cheat the state out of money. The Federal False Claims Act (as *Qui Tam* laws are called) was first enacted to allow private citizens to police those doing business with and cheating the North during the Civil War. The law became known as "Lincoln Laws." A number of states have passed similar laws.[22] Similar statutory provisions should be considered in those states with state funds that pay compensation benefits.

Conclusion

Having now eaten this food for thought, start digesting! Think about the wrongs that may have been perpetrated against your injured worker client. Explore all avenues of recovery. Maybe the injured worker's right to privacy has been invaded, maybe his credit ruined, maybe...you get the idea.

Footnotes

1. *Moniz v. Reitano Enterprises*, 709 So. 2d 150 (Fla. 4 DCA 1998)
2. *Smith v. Piezo Technology*, 427 So. 2d 182 (Fla. 1983)
3. *Chase v. Wallgreen Co.*, 750 So. 2d 93 (Fla. 5 DCA 2000)
4. *Jones v. The Toro Co.*, El Paso County Court of Law, Number 3, Case # 2000-2429, November 1, 2001 (30.48 million dollar verdict for firing employee who then managed to get a new job in 2 weeks).
5. *Nelson Steel Co. v. McDaniel*, 898 S.W. 2d 66 (Ky.1995), *Bruner v. GCGW, Inc.*, 880 So. 2d 1244 (Fla. 1 DCA 2004), *Darnell v. Impact Industries, Inc.* 457 N.E 2d 125 (Ill. 1983), *Goins v. Ford Motor Co.*, 347 N.W. 2d 184 (1983), *Gonzalez-Centeno v. North Central Kansas Regional*, 101 P. 3d 1170 (Kansas Sup. Ct. 2004), *Hayes v. Computer Sciences Corp.*, 2003 WL 113457 (Tenn. Ct. App), *Nelson Steel Corp. v. McDaniel*, 898 S.W. 2d 66 (Ky. 1995), *Taylor v. Cache Creek Nursing Center*, 891 P. 2d 607 (Okla. 1994).
6. §440.39(7) Fla. Stat.
7. *General Cinema Beverages v. Mortimer*, 689 So. 2d 276 (Fla. 3 DCA 1995)
8. *Yates v. Publix Supermarkets*, __So. 2d__ (2006), 31 Fla. L. Weekly D749 (Fla. 1 DCA 2006), *Schusse v. Pace Suburban Bus Div.*, 2002 WL 1832230 (Ill. App. Ct.)
9. *Beyerly v. Citrus Publications*, 725 So. 2d 1230 (Fla. 5 DCA 1999)
10. *Selkirk Seed Co. v. State Insurance Fund*, 135 Id 434, 18 P. 2d 956 (Idaho 2000)
11. *Francoeur v. Pipers, Inc. d/b/a Club Pink Pussycat*, 560 So. 2d. 244 (Fla. 3 DCA 1990), *Quality Shell Homes v. Roley*, 186 So. 2d 837 (Fla. 1 DCA 1966)
12. 332 Or. 83, 23 P. 2d 333 (Or. 2001)
13. *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 (Fla. 1991)
14. *O'Regan v. Preferred Enterprises, Inc.* 758 So. 2d 124 (La. 2000)
15. *Hardy v. Ducote*, 246 F. Supp. 2d 509 (W.D.La. 2003)
16. H.B. 1776 (amending Haw. Rev. Stat. §386-5)
17. *Nassa v. Hook-SupeRx, Inc.*, 790 A. 2d 368 (R.I. 2002)
18. Fl. Stat. §415.101 et. seq.
19. *Prisock v. International Agricultural Co.*, 144 S.E. 579 (Sup. Ct. S.C. 1928)xx. *Aguilera v. InServices, et. al*,905 So. 2d 84 (Fla. 2005), Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936)
21. *Aranson v. Schroeder*, 671 A. 2d 1023 (N.H. 1995)
22. Florida False Claims Act, Fla. Stat. §68.081 et. seq., California False Claims Act, Calif Govt. Code §§ 12650-12655 (1992), Illinois Whistleblower Reward and Protection Act, §175 et. seq., Tenn. Health Care False Claims Act, §56-26-401 et seq. WIG