

**IN DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA**

MICHAEL NAHOOM,

Appellant,

CASE NO. 1D23-1440

L.T. NO. 20-CA-0599

v.

**FLORIDA LEAGUE OF CITIES,
INCORPORATED,**

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL
CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

**ANSWER BRIEF OF APPELLEE,
FLORIDA LEAGUE OF CITIES, INCORPORATED**

JEFFREY D. SLANKER
Florida Bar No.: 0100391
E-mail: jslanker@sniffenlaw.com

MICHAEL P. SPELLMAN
Florida Bar No.: 937975
mspellman@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301
Phone: (850) 205-1996
Facsimile: (850) 205-3004

Counsel for Appellee, the Florida League of Cities

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

PRELIMINARY STATEMENTxii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS2

STANDARD OF REVIEW.....8

SUMMARY OF THE ARGUMENT 13

ARGUMENT 16

**I. Nahoom Cannot Prevail Under the Burden Shifting Framework
Applicable to his Retaliation Claim..... 16**

**II. The Circuit Court Properly Found Nahoom Failed to Establish a
Prima Facie Case of Whistleblower Retaliation Because he
Cannot Show he Engaged in Protected Whistleblowing Activity as
a Matter of Law..... 19**

**a. The Plain Language of the Whistleblower’s Act Requires an
Employee to Complain of or Oppose an Actual Violation of
the Law 19**

**b. Nahoom Failed to Establish he Engaged in Protected Activity
Under the Whistleblower’s Act by Complaining of or
Objecting to an Actual Violation of the Law..... 35**

**III. The Circuit Court Correctly Found that Nahoom Failed to
Establish a Genuine Issue of Material Fact as to Whether the
Legitimate Reasons for his Termination were Pretextual 42**

CONCLUSION..... 56

CERTIFICATE OF SERVICE.....57

**CERTIFICATE OF FONT AND FORMATTING COMPLIANCE AND
COMPLIANCE WITH WORD COUNT LIMITATIONS57**

TABLE OF AUTHORITIES

Cases

<i>Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment,</i> 288 So. 3d 1070 (Fla. 2020)	24
<i>Aery v. Wallace Lincoln-Mercury, LLC,</i> 118 So.3d 904 (Fla. 4th DCA 2013)	19, 20, 27
<i>Allum v. Valley Bank,</i> 970 P. 2d 1062 (Nev. 1998)	33
<i>Alvarez v. Royal Atlantic Developers, Inc.,</i> 610 F. 3d 1253 (11th Cir. 2010)	17
<i>Anderson v. Liberty Lobby, Inc.,</i> 477 U.S. 242 (1986)	10, 11, 12, 13
<i>Andujar v. Nat'l Prop. & Cas. Underwriters,</i> 659 So. 2d 1214 (Fla. 4th DCA 1995)	27
<i>Aronowitz v. Home Diagnostics, Inc.,</i> 174 So. 3d 1062 (Fla. 4th DCA 2015)	8
<i>Arrow Air, Inc. v. Walsh,</i> 645 So. 2d 422 (Fla. 1994)	26, 27
<i>Barnett v. Dep't of Fin. Servs.,</i> 303 So. 3d 508 (Fla. 2020)	24
<i>Barone v. Palm Beach Hotel Condo. Ass'n, Inc.,</i> 262 So. 3d 767 (Fla. 4th DCA 2018)	22
<i>Bechtel Constr. Co. v. Sec'y of Labor,</i> 50 F.3d 926 (11th Cir. 1997)	52
<i>Blankfeld v. Richmond Health Care, Inc.,</i> 902 So. 2d 296 (Fla. 4th DCA 2005)	34

<i>Briggs v. Quantitech Inc.</i> , 2022 WL 1308494 (11th Cir. June 2, 2022)	23
<i>Brooks v. Cty. Comm'n of Jefferson Cty.</i> , 446 F.3d 1160 (11th Cir. 2006)	48
<i>Bushendorf v. Freightliner Corp.</i> , 13 F.3d 1024 (7th Cir. 1993)	35
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	10, 12
<i>Chapman v. Al Transp.</i> , 229 F.3d 1012 (11th Cir. 2000)	46, 48
<i>Chaudhry v. Adventist Health System Sunbelt, Inc.</i> , 305 So. 3d 809 (Fla. 5th DCA 2020)	16, 18
<i>City of Hollywood v. Hogan</i> , 986 So. 2d 634 (Fla. 4th DCA 2008)	47
<i>Contract Courier Servs. v. Research & Spec. Programs Admin.</i> , 924 F.2d 112 (7th Cir. 1991)	35
<i>Crain v. State</i> , 79 So. 3d 11 (Fla. 1st DCA 2012)	31
<i>E.E.O.C. v. Yenkin-Majestic Paint Corp.</i> , 112 F. 3d 831 (6th Cir. 1997)	47
<i>Finney v. State</i> , 219 So. 3d 254 (Fla. 1st DCA 2017)	31
<i>Fox v. Bowling Green</i> , 668 N.E.2d 898 (Ohio 1996)	32
<i>Frost v. State</i> , 53 So. 3d 1119 (Fla. 4th DCA 2011)	22
<i>Frost v. State</i> , 94 So. 3d 481 (Fla. 2012)	22

<i>Garcia By & Through Garcia v. Cedars of Lebanon Hosp. Corp.</i> , 444 So. 2d 538 (Fla. 3d DCA 1984)	21
<i>Gogel v. Kia Motors Mfg. of Georgia, Inc.</i> , 967 F.3d 1121 (11th Cir. 2020)	45, 46, 48, 49
<i>Golf Channel v. Jenkins</i> , 752 So. 2d 561 (Fla. 2000)	26, 33
<i>Graddy v. Wal-Mart Stores East, LP</i> , 237 F.Supp.3d 1223 (M.D. Fla. 2017)	22
<i>Ham v. Portfolio Recovery Assocs., LLC</i> , 308 So. 3d 942 (Fla. 2020)	24
<i>Hawkins v. Ford Motor Co.</i> , 748 So. 2d 993 (Fla. 1999)	29
<i>Hinzman v. Winter Haven Facility Operations LLC</i> , 109 So. 3d 256 (Fla. 1st DCA 2013)	26
<i>Holl v. Talcott</i> , 191 So. 2d 40 (Fla. 1966)	8, 9
<i>Howard v. BP Oil Co.</i> , 32 F.3d 520 (11th Cir. 1994)	49
<i>In re Amendments to Fla. R. Civ. P. 1.510</i> , 309 So. 3d 192 (Fla. 2020)	8
<i>Jenkins v. Nell</i> , 26 F.4th 1243 (11th Cir. 2022)	54
<i>Kearns v. Farmer Acquisition Co.</i> , 157 So. 3d 458 (Fla. 2nd DCA 2015)	<i>passim</i>
<i>Knowles v. Beverly Enterprises-Fla., Inc.</i> , 898 So. 2d 1 (Fla. 2004)	33
<i>Lewis v. City of Union City</i> , 918 F.3d 1213 (11th Cir. 2019)	47, 53, 54

<i>Luna v. Walgreen Co.</i> , 575 F.Supp.2d 1326 (S.D.Fla. 2008)	27
<i>Maddox v. State</i> , 923 So. 2d 442 (Fla. 2006)	26
<i>Matamoros v. Broward Sheriff's Off.</i> , 2 F.4th 1329 (11th Cir. 2021)	28
<i>Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	13
<i>Mayfield v. Patterson Pump Co.</i> , 101 F.3d 1371 (11th Cir. 1996)	52, 56
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	16
<i>Mealing v. Georgia Dep't of Juv. Just.</i> , 564 F. App'x 421 (11th Cir. 2014)	17
<i>Miller v. State</i> , 980 So. 2d 1092 (Fla. 2d DCA 2008)	20
<i>Mitchell v. Young</i> , 309 So. 3d 280 (Fla. 1st DCA 2020)	16, 45
<i>Moore v. Jefferson Cty. Dep't of Human Res.</i> , 277 Fed.Appx. 857 (11th Cir. 2008)	51
<i>Morrissey v. ASD Shared Services, LLC</i> , 626 Fed. Appx. 946 (11th Cir. 2015)	52
<i>Nassau County v. Willis</i> , 41 So. 3d 270 (Fla. 1st DCA 2010)	30, 31
<i>Nix v. WLCY Radio/Rahall Comms.</i> , 738 F.2d 1181 (11th Cir. 1984)	46

<i>O'steen v. Florida Sports Found., Inc.</i> , 4:19CV106-MW/MAF, 2020 WL 13678740 (N.D. Fla. June 12, 2020)	23
<i>Overstreet v. State</i> , 629 So. 2d 125 (Fla. 1993)	30
<i>Pardo v. State</i> , 596 So. 2d 665 (Fla. 1992)	20
<i>Pennington v. City of Huntsville</i> , 261 F.3d 1262 (11th Cir. 2001)	44
<i>Phillips v. Aaron Rents, Inc.</i> , 262 Fed.Appx. 202 (11th Cir. 2008)	51
<i>Pierre v. AIDS Healthcare Foundation, Inc.</i> , No. 19-62556-CIV-SINGHAL, 2020 WL 6381557 (S.D. Fla. Oct. 30, 2020)	22
<i>R.N. v. State</i> , 257 So. 3d 507 (Fla. 4th DCA 2018)	26
<i>Raney v. Vinson Guard Serv., Inc.</i> , 120 F.3d 1192 (11th Cir. 1997)	46
<i>Scott v. Advanced Pharm. Consultants, Inc.</i> , 570 F.Supp.3d 1120 (N.D. Fla. 2021)	23
<i>Scott v. Harris</i> , 550 U.S. 372 (2007)	11
<i>Sierminski v. Transouth Fin. Corp.</i> , 216 F.3d 945 (11th Cir. 2000)	16, 27
<i>Sims v. MVM, INC.</i> , 704 F.3d 1327 (11th Cir. 2013)	18
<i>Springer v. Convergys Customer Mgmt. Grp. Inc.</i> , 509 F.3d 1344 (11th Cir. 2007)	48

<i>St. Mary’s Honor Ctr. V. Hicks</i> , 500 U.S. 502 (1993)	49
<i>St. Pierre v. United Pacific Life Ins. Co.</i> , 644 So. 2d 1030 (Fla. 2d DCA 1994)	10
<i>Stokes v. Liberty Mut. Ins. Co.</i> , 213 So. 2d 695 (Fla. 1968)	33
<i>Sullivan v. Massachusetts Mutual</i> , 802 F.Supp. 716 (D.Conn. 1992)	33
<i>Sweet v. Josephson</i> , 173 So. 2d 444 (Fla. 1965)	21
<i>Texas Dep’t of Cmty. Affairs v. Burdine</i> , 450 U.S. 248 (1981)	17, 45, 47
<i>Univ. of Texas Sw. Med. Ctr. v. Nassar</i> , 570 U.S. 338 (2013).....	17, 18
<i>Usher v. Nipro Diabetes Sys., Inc.</i> , 184 So. 3d 1260 (Fla. 4th DCA 2016)	22
<i>Valenzuela v. GlobeGround North America, LLC</i> , 18 So. 3d 17 (Fla. 3d DCA 2009).....	17
<i>Virginia Ins. Reciprocal v. Walker</i> , 765 So. 2d 229 (Fla. 1st DCA 2000)	23
<i>Visingardi v. Tirone</i> , 193 So. 2d 601 (Fla. 1966)	9
<i>Vuolo v. MHM Health Professionals LLC</i> , 4:21-CV-473-AW-MAF, 2022 WL 2289129 (N.D. Fla. May 24, 2022)	23
<i>Washington v. Fla. Dep’t of Revenue</i> , 337 So. 3d 502 (Fla. 1st DCA 2022)	48, 53
<i>White v. Purdue Pharma, Inc.</i> , 369 F. Supp. 2d 1335 (M.D. Fla. 2005).....	31, 32

<i>Whitlow v. Tallahassee Mem'l Healthcare, Inc.</i> , 2023 WL 5255766 (Fla. 1st DCA Aug. 16, 2023)	12, 13
<i>Wichmann v. Bd. Of Trs. of S. Ill. Univ.</i> , 180 F. 3d 791 (7th Cir. 1999)	47
<i>Wilson v. B/E Aerospace, Inc.</i> , 376 F. 3d 1079 (11th Cir. 2004)	49
<i>Zaben v. Air Prods. & Chems., Inc.</i> , 129 F.3d 1453 (11th Cir. 1997)	51

Constitutional Provisions

Art. II, §3, <i>Fla. Const.</i>	30
Art. V, § 3, <i>Fla. Const.</i>	21

Statutes

26 U.S.C.A. § 132.....	36, 40
§ 112.3187, <i>Fla. Stat.</i>	25
§ 448.102, <i>Fla. Stat.</i>	14, 25, 26

Rules

Federal Rule of Civil Procedure 56	8, 9, 10
Fla. R. Civ. P. 1.510.....	8, 9, 11

Regulations

26 CFR § 1.132-6	37, 40, 41, 42
26 CFR § 1.61-21	40

Treatises

Peter D. Webster, <i>Berman's Florida Civil Procedure</i> § 1.510:5 (2020 ed.)	11
---	----

Other Authorities

Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012)	24, 35
Antonin Scalia, <i>Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law</i> (Amy Gutmann ed., 1997).....	34
<i>I.R.S. P.L.R. 201005014</i> (Feb. 5, 2010)	38
<i>I.R.S. P.L.R. 201135022</i> (Sept. 2, 2011)	39
<i>IRS CCA 201622031</i> (May 27, 2016).....	39
Joseph Story, <i>Commentaries on the Constitution of the United States</i> (1833)	24
<i>Publication 15b Employer's Tax Guide To Fringe Benefits</i> , 2021 WL 549537	42
<i>The Federalist No. 78</i> (C. Rossiter ed. 1961) (A. Hamilton)	29

PRELIMINARY STATEMENT

The parties are referred to by name. Citations to the Record on Appeal from the Circuit Court of Leon County, Florida, the Honorable Judge J. Lee Marsh presiding, are made by reference as “[R. p.]” (e.g., record reference [R. 1] would reference page 1 of the record).

STATEMENT OF THE CASE

The Circuit Court granted the Florida League of Cities' motion for summary judgment on the plaintiff's Florida Private Whistleblower's Act claim. The question in this case is whether the plaintiff advanced enough evidence to establish a reasonable juror could find the reason for his termination was that he engaged in whistleblowing activity. As detailed below, Nahoom failed to make that showing.

Specifically, Nahoom did not establish he engaged in whistleblowing activity when (1) he opined that certain novelty items the League gave its employees had to be included in their taxable income or (2) when he, without authorization and against clear direction by upper management, ordered his subordinate to add \$20 to only his income for the items.

This is not whistleblowing activity under the statute. Contrary to Nahoom's assertions, the statute's plain language requires employees object to or refuse to participate in *an actual violation* of the law. Nahoom cannot satisfy this standard. The novelty items constituted de minimis fringe benefits that employers do not have to include in an employee's taxable income under federal tax law and regulations given the value of the items was so small accounting for them was administratively impractical and unreasonable.

Even so, the League terminated Nahoom for a completely legitimate reason—his insubordination. The evidence is undisputed that League management told Nahoom to not do anything on this issue until further notice. He disobeyed that direct order by directing his subordinate to alter the League’s payroll and add money for the novelty items to only his pay. He acknowledged that direct order, but still went against it.

Procedurally, Nahoom brought a single count complaint against the League asserting a claim of whistleblower retaliation under the Florida Private Whistleblower’s Act. [R. 7-12]. The League answered the complaint. [R. 13-18]. After discovery, the League moved for summary judgment, which the Circuit Court granted, and this appeal followed. [R. 524-543, 1269-1285, 1297-1318].

STATEMENT OF THE FACTS

The League employed Nahoom as its Assistant Comptroller from July 2004 until December 2019, when it terminated his employment for insubordination after he disobeyed a direct order his superiors gave him. [R. 106, 113, 439, 513-523, Pltf. Resp. to RFA Nos. 1-2]. At the time the League fired Nahoom, it employed approximately 219 employees. [R. 500].

Nahoom reported to Scott Hamilton, the League’s Comptroller. [R. 116-117]. Hamilton reported to the League’s Executive Director, Mike Sittig.

[R. 116-117, 427-428]. One of Nahoom's direct reports was Rebecca Garrett who oversaw payroll. [R. 116-117, 120-121].

Although Nahoom contends he was "responsible for advising [the League] on the tax code IRS regulations, including [taxable fringe benefits]", and [he] relayed [taxable fringe benefits] values to the payroll accountant in order that the proper amount for the indicated [taxable fringe benefits] could be taxed to employees", his job description does not specifically provide as such. [R. 487-488]. And Nahoom conceded that at no time during his employment did he have the authority or responsibility to create, form, or modify any internal policies that affected all the League's employees. [R. 128].

The League annually hosts a retreat for its employees. [R. 500]. During the retreat, the League welcomes new employees, celebrates current employee milestones, and reinvigorates its team. [*Id.*]. At these retreats, the League customarily provides employees with "novelty items" such as t-shirts, insulated cups, or bags. [R. 152-153, 500].

In late October of 2019, the League held its annual retreat. [R. 500]. There, the League gave employees t-shirts and tote bags. [*Id.*]. Both items displayed the League's new logo, part of a rebranding effort. [*Id.*].

Earlier in the month, the vendor responsible for the design and

production of the tote bags and t-shirts invoiced the League. [R. 500-501, 503, 505]. For 500 tote bags, the vendor charged \$2,748.04, approximately \$5.50 per bag. [*Id.*]. The vendor invoiced \$2,504.00 for 220 t-shirts, with varying costs depending on the shirt's size. [*Id.*].

Prior to the retreat, Nahoom told the League's Human Resources Officer, Ann Hudgins, that he believed the novelty items constituted taxable fringe benefits and should be included in employees' taxable income. [R. 165-166, 496]. Hudgins immediately contacted her direct supervisor, Patti Graganella, the League's Chief Administrative Officer, and relayed Nahoom's belief. [R. 278-279, 496]. Graganella told Hudgins Nahoom needed to hold off taking any action until the issue was reviewed and decided upon by the League's upper management. [R. 297-298, 303, 497]. Within minutes of her initial conversation with him, Hudgins told Nahoom Graganella's direction to take no action until further notice. [R. 167-168, 172-173, 497]. Nahoom acknowledged this directive and appeared to understand. [*Id.*].

Indeed, on October 23, 2019, Nahoom emailed Hamilton, and shared his opinion that the t-shirts and tote bags were "taxable items," relaying:

I mentioned to Ann [Hudgins] who passed it on to Patti [Graganella]. **Patti is going to discuss with Mike [Sittig] and Jeannie [Garner] but told Ann to let us know to not do anything with this until we hear back.**

[R. 492 (emphasis added)]. In this e-mail, Nahoom acknowledged Graganella's directive. [*Id.*]. Hamilton asked Nahoom for the amount he thought should be added to each employee's W-2 form. [R. 490]. Nahoom responded, "\$15.50 for each shirt and \$5.00 per tote." [*Id.*].¹ Hamilton did not agree the items were taxable as they would be considered de minimis by the Internal Revenue Service ("IRS"). [R. 379-383].

Meanwhile, after speaking with Hudgins about Nahoom's belief that the novelty items were taxable, Graganella contacted Mark Shorstein, the League's Certified Public Accountant and auditor, and sought his guidance on the issue. [R. 293, 295, 307, 317-318, 402-403, 507]. Shorstein relayed his opinion to Graganella via e-mail stating:

I believe...that a one time giveaway of a T-shirt, cloth bag, and cup at the annual retreat which has a total value of less than \$30, would be considered de minimis, and therefore should be excluded from employee taxable income.

[R. 508, 510-512]. Shorstein attached to the e-mail research from a tax publication relied upon in his practice. [R. 402-404, 508, 510-512].

Nahoom did not attend the retreat. [R. 179]. When Hudgins returned

¹ It is unclear how Nahoom arrived at this amount since the shirts cost \$2,504.00 total. [R. 505]. Dividing that amount by 220 (the number of League employees at the time), equals \$11.38 as an average cost per shirt. [*See id.*]. While the cost of the shirts varied by size, none cost \$15.50. [*See id.*].

from it on October 30, 2019, she brought him the t-shirt and tote bag he would have received had he attended. [R. 176, 494, 497]. Nahoom accepted the items and then emailed Garrett stating:

Please make sure you add \$20 of Taxable Fringe Benefit to my next pay for the t-shirt Ann [Hudgins] just gave me. **Continue to hold on the others until you hear from Scott [Hamilton].**

[R. 494 (emphasis added), see *also* 513-523, Pltf. Resp. to RFA No. 11].

Nahoom's pay stub reflects that Garrett, following the directive of her supervisor, added \$20 to his income, which was reflected in a separate line item on his pay stub designated as "gift card." [R. 654-655]. By ordering Garrett to add this amount to his pay, Nahoom altered the League's payroll without authorization. [R. 378-381]. And, it was contrary to the direct order he had been given by League management through Hudgins to await a decision of management.

As an employer, the League is responsible for listing income on a W-2 form; not the employee. [R. 154-155]. An employee does not have the authority to add an amount to a W-2. [R. 155, 351, 413]. An employer has until the end of the year to add income to an employee's W-2. [R. 150, 413-414; 513-523, Pltf. Resp. to RFA No. 7]. If an employee believed certain income was not captured on his W-2 he could report that income on his/her

own tax return. [R. 351, 412].²

Sittig learned Nahoom had altered the payroll despite being directed to await further notice. [R. 448-450]. When he became aware of Nahoom's action, Sittig called Hamilton to his office and told him that Nahoom's conduct was "totally unacceptable, [and] it was insubordination." [R. 438]. Sittig told Hamilton he intended to terminate Nahoom's employment and was prepared to do so immediately. [*Id.*]. Because the League's auditors were scheduled to be at the League the following week for an unrelated matter, Hamilton and Sittig agreed to wait until they were finished before terminating Nahoom's employment. [R. 438-439].

The League terminated Nahoom's employment on December 6, 2019, in a meeting attended by Nahoom, Sittig, Hamilton, and Graganella. [R. 196, 513-523, Pltf. Resp. to RFA No. 1]. Sittig showed Nahoom his pay stub reflecting the additional \$20 in income. [R. 196-198, 438-439, 447-448]. Nahoom acknowledged that he was responsible for the addition of income to his pay. [*Id.*]. Sittig then informed Nahoom that the League was terminating

² The initial brief claims Hamilton testified that it was "up to Nahoom" to determine if the items were taxable fringe benefits. See Appellant's Initial Br. at pp. 6-7. The suggestion Hamilton meant it was up to Nahoom to determine if the League should designate the items as taxable fringe benefits is not supported by the record. Hamilton testified that if Nahoom felt the items were taxable, he could designate them as such on his personal tax return. [R. 995-996].

his employment. [*Id.*]. Nahoom then told Sittig “this can be fixed.” [R. 196].

STANDARD OF REVIEW

De novo. See *Aronowitz v. Home Diagnostics, Inc.*, 174 So. 3d 1062, 1065 (Fla. 4th DCA 2015). Nahoom devotes a lengthy portion of his brief on the change to the summary judgment rule. See Appellant’s Initial Br. at pp. 10-18. Nahoom’s suggests that the proper way for a court to evaluate a summary judgment motion under the new rule is to require a movant to show “the non-existence of any genuine issues.” See *id.* at pp. 10-11 (citing *Holl v. Talcott*, 191 So. 2d 40, 45 (Fla. 1966)). This assertion is incorrect and is conclusively foreclosed by the revisions to the rule governing summary judgments, the Florida Supreme Court’s commentary in amending that rule, and in this Court’s recent interpretation of the revised rule.

The Supreme Court, in amending rule 1.510 noted that it was to conform the Florida standard to the federal summary judgment standard. See *In re Amends. to Fla. R. Civ. P. 1.510*, 309 So. 3d 192, 192 (Fla. 2020)(adopting the federal summary judgment standard); *In re Amends. to Fla. R. of Civ. P. 1.510*, 317 So. 3d 72, 74 (Fla. 2021)(largely replacing the text of existing rule 1.510 with the text of Federal Rule of Civil Procedure 56). While the language of the old Florida summary judgment rule and Federal Rule of Civil Procedure 56 was largely similar, over the years Florida courts

began to interpret the Florida rule more stringently than federal courts interpret the federal rule. This stringent interpretation is encompassed by two Florida Supreme Court decisions, *Holl v. Talcott*, 191 So. 2d 40, upon which Nahoom improperly relies, and *Visingardi v. Tirone*, 193 So. 2d 601 (Fla. 1966).

In *Holl*, the Florida Supreme Court held that the movant on summary judgment has the burden of conclusively “proving a negative, *i.e.*, the non-existence of a genuine issue of material fact.” 191 So. 2d at 43. As the Supreme Court explained “[t]he rule simply is that the burden to prove the non-existence of genuine triable issues is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden.” *Id.*

In *Visingardi*, the Florida Supreme Court held that summary judgment is appropriate only where “the record affirmatively showed that the plaintiff could not possibly prove her case, and not because she had simply failed to come forward with evidence doing so.” 193 So. 2d at 605. Thus, under the old rule, the movant had to “specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence...on which the movant relies” to negate the non-moving party’s claim. Fla. R. Civ. P. 1.510(c), (2020).

To the contrary, under the federal standard a movant is not required to negate the opposing party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Instead, "the burden on the moving party [could be] discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. As Rule 56(c) provides, the moving party may support its motion by citing to affidavits and evidence *or* by "showing that the materials cited do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact."

The change in the summary judgment standard in Florida also changed how courts interpret whether a "genuine" issue of material fact precludes summary judgment. Under Florida's prior standard, "[i]f the record reflect[ed]...the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raise[d] even the slightest doubt that an issue might exist, summary judgment is improper." *St. Pierre v. United Pacific Life Ins. Co.*, 644 So. 2d 1030, 1031 (Fla. 2d DCA 1994). Under the federal standard, however, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Hence, summary judgment will not lie only "if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248.

Florida’s adoption of the federal rule and manner of interpretation is reflected in the amended rule itself which provides that summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fla. R. Civ. P. 1.510(a)(2021). In applying the amended rule, “the correct test for the existence of a genuine factual dispute is whether ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d at 75 (quoting *Anderson*, 477 U.S. at 248 (1986)). As the Florida Supreme Court explained:

Under our new rule, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct 1769, 167 L. Ed. 2d 686 (2007). In Florida it will no longer be plausible to maintain that “the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the ‘slightest doubt’ is raised.” Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.510:5 (2020 ed.)(describing Florida's pre-amendment summary judgment standard).

Id. at 75-76.

This Court recently crystallized these issues in its recent decision in

Whitlow v. Tallahassee Mem'l Healthcare, Inc., --- So. 3d ----, 2023 WL 5255766 (Fla. 1st DCA Aug. 16, 2023). There, this Court explored the evolution of the summary judgment rule and explained how to apply it. Under the new rule it has become incumbent on the non-movant to come forward with evidence showing a “dispute about a material fact [that] is ‘genuine,’ or, in other words, demonstrate that ‘the evidence is such that a reasonable jury could return a verdict for the’ party opposing the motion.” *Id.* at *5 (quoting *Anderson*, 477 U.S. at 248). As this Court explained:

The non-movant's right to a jury trial extends only to “factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” If the trial court, upon review of the evidence produced by the party bearing the burden of proof at trial, concludes that there is no substantive evidence (rather than “merely colorable” or “not significantly probative”), from which a jury reasonably could “return a verdict for that party,” then it may grant summary judgment against the party without running afoul of the constitution's jury-trial guarantee.

Id. (internal citations omitted).

The burden on the non-moving party that bears the ultimate burden of proof at trial is to make a showing sufficient to establish the existence of each element essential to their case. *Celotex*, 477 U.S. at 322. There can be “no genuine issue as to any material fact” if there is “a complete failure of proof concerning [any] essential element of the non[-]moving party's case.” *Id.* at 323. “Where the record taken as a whole could not lead a rational trier of fact

to find for the non-moving party, there is no `genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(citation omitted).

As this Court held in *Whitlow*, the non-moving party must show a factual dispute that is both material and genuine. 2023 WL 5255766 at *7 (citing *Anderson*, 477 U.S. at 247, 248). A material dispute relates to the substantive law and a material fact dispute is genuine if the evidence is such that a reasonable jury could find for the non-movant. See *id.* (citing *Anderson*, 477 U.S. at 247, 248). And “[w]hile it is true that ‘inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion,’ the burden is on the non-movant to show that any such inference ‘is reasonable in light of [] competing inferences.’” *Id.* (quoting *Matsushita Elec.*, 475 U.S. at 587-88). Nahoom has not carried this burden.

SUMMARY OF THE ARGUMENT

Nahoom failed to create a genuine issue of material fact as to whether the League terminated his employment because of his alleged whistleblowing activity. First, Nahoom failed to establish he engaged in protected whistleblowing activity. Second, he failed to show that the League’s reason for terminating him was a pretext to engage in retaliation.

Nahoom is wrong he only needed to have a reasonable good faith belief he was opposing something that was a violation of the law to engage in whistleblowing activity under the statute. Section 448.102(3)'s plain language protects only employees that oppose or refuse to participate in an activity of their employer that is "in violation" of the law. This language demonstrates the Legislature's intent to only afford whistleblower protection to those that complain of an actual violation of the law.

Nahoom does not address the statute's plain language. Rather, he argues about what he believes the Legislature's purpose was when it enacted the statute and the consequences he believes would come about as a result of an interpretation faithful to the ordinary meaning of its plain language. This argument is an affront to basic notions of statutory construction. Indeed, Nahoom's interpretation of the statute flatly rejects its plain language, instead of recognizing its supremacy.

On the facts, Nahoom says the League terminated his employment in retaliation for his report to his superiors that he believed the League-branded t-shirts and tote bags handed out at the League's annual retreat were taxable fringe benefits that should be included in employees' income. He also says he refused to participate in a violation of the law when he instructed his subordinate to add \$20 to his pay once he received the items. But he did not

engage in protected activity because the items' value was so low that accounting for it for the over 200 League employees would have been unreasonable and impractical. Nahoom again does not address the Internal Revenue Code and Treasury regulations stating as much, or even the IRS opinions that are directly on point, but rather baselessly asserts he complained of an actual violation of the law.

Regardless, the Circuit Court was also right to find that Nahoom could not establish a fact issue precluding summary judgment as to his ultimate burden to show that the reason for his termination was pretextual and the real "but for" reason for his termination was what he contends is whistleblowing activity. The fact is, the League terminated Nahoom's employment for disobeying a direct order to hold off on the matter of the taxability of the novelty items until further notice. He disregarded that direct order when he instructed his subordinate to add \$20 to his income once he accepted the items. The League fired Nahoom for insubordination and there is no evidence that this reason was a pretext to engage in whistleblower retaliation.

ARGUMENT

I. Nahoom Cannot Prevail Under the Burden Shifting Framework Applicable to his Retaliation Claim

Nahoom offers no direct evidence of retaliation in support of his claim, but rather relies on what he suggests is circumstantial evidence of retaliation. In reality, there is no evidence of retaliation at all, but in circumstances like this one, where the plaintiff does not have direct evidence of retaliatory intent, courts utilize the three-part burden-shifting framework developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Mitchell v. Young*, 309 So. 3d 280 (Fla. 1st DCA 2020). Whistleblower's Act claims are analyzed using this framework. *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000); *Chaudhry v. Adventist Health System Sunbelt, Inc.*, 305 So. 3d 809, 814 (Fla. 5th DCA 2020).

This framework requires plaintiffs to first establish a *prima facie* case of retaliation. "To establish a *prima facie* claim for retaliation under [the Whistle Blower's Act], ... a plaintiff must demonstrate: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there is a causal relation between the two events." *Chaudry*, 305 So. 3d at 813-14 (citation omitted).

If a plaintiff establishes a prima facie case, the burden shifts to the defendant to establish a legitimate non-retaliatory reason for its decision, but the burden in doing so is “exceedingly light.” *Valenzuela v. GlobeGround North America, LLC*, 18 So. 3d 17, 24 (Fla. 3d DCA 2009)(citation omitted). The burden is one of production, not persuasion, and defendants need only articulate a legitimate, non-retaliatory reason for the adverse action. See *Mealing v. Georgia Dep't of Juv. Just.*, 564 F. App'x 421, 427 (11th Cir. 2014); see also *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–55 (1981)(holding that burden on employer at this stage is not one of persuasion and that employer need not persuade the court it was actually motivated by the reason proffered, just articulate through admissible evidence a reason for the challenged decision).

Once such evidence is proffered, the burden shifts back to the plaintiff to show that the proffered reason is pretextual and that the real reason for the challenged action was to retaliate. *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1264 (11th Cir. 2010). Throughout this process, the ultimate burden of persuasion remains on the plaintiff. *Id.* This burden requires a plaintiff to show that “but-for” his protected activity, his employer would not have fired him. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)(determining that language of Title VII required plaintiffs claiming

retaliation show that “but for” their protected activity they would not have suffered the adverse action); *Chaudry*, 305 So. 3d at 817 (holding that “but for” causation applied to claims under the Whistleblower’s Act). There should be no dispute the “but for” standard applies, as the Whistleblower’s Act’s plain language prohibiting employers from taking a retaliatory personnel action against an employee “because” that employee engaged in certain prescribed conduct, is identical to the language in other statutes which courts have interpreted to place the burden of establishing “but for” causation on the plaintiff. See *Sims v. MVM, INC.*, 704 F.3d 1327, 1335-1337 (11th Cir. 2013)(distinguishing “motivating factor” language in Title VII from language in the ADEA which prohibits adverse employment actions taken against an individual “because of such individual’s age” and holding that “because of” language required individual to show “but for” causation); *Nassar*, 570 U.S. at 348-352 (distinguishing “motivating factor” language in Title VII’s anti-discrimination provisions with “because of” language in Title VII’s anti-retaliation provision).

Nahoom cannot establish evidence from which a jury could find he established a prima facie case or that the reason the League proffered for his termination was pretextual.

II. The Circuit Court Properly Found Nahoom Failed to Establish a Prima Facie Case of Whistleblower Retaliation Because he Cannot Show he Engaged in Protected Whistleblowing Activity as a Matter of Law

The Circuit Court properly found that Nahoom could not establish a prima facie case of whistleblower retaliation. This is because Nahoom cannot show that he engaged in whistleblowing activity protected by the statute. Contrary to Nahoom's arguments, only objections to employer conduct or activity constituting an actual violation of the law are protected under the statute. Nahoom did not meet this burden.

a. The Plain Language of the Whistleblower's Act Requires an Employee to Complain of or Oppose an Actual Violation of the Law

Nahoom argues the Circuit Court erred in holding he had to show he complained of an "actual violation" of the law to engage in whistleblowing activity that is protected under the statute. It is undisputed that this Court has not weighed in on this issue. Nahoom says the Circuit Court should have applied the Fourth District's holding and reasoning in *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 916 (Fla. 4th DCA 2013). There, the Fourth District held that a plaintiff need only show a reasonable good faith belief he was complaining of a violation of the law to engage in statutorily protected whistleblowing activity.

Nahoom acknowledges the Second District's contrary reasoning in *Kearns v. Farmer Acquisition Co.*, 157 So. 3d 458 (Fla. 2nd DCA 2015). There, the Second District engaged in an extensive analysis of the statute's language, finding that an employee only engages in statutorily protected activity when he or she complains of or opposes an *actual* violation of the law. See *id.* at 462-465.

Nahoom says the Second District's reasoning in this regard was dicta, and the Circuit Court should have applied *Aery*. See Appellant's Initial Br. at pp. 23-27. To be sure, the Circuit Court was authorized to disagree with the rationale in *Aery* and apply the reasoning of *Kearns*, irrespective of whether the analysis on this point in *Kearns* was dicta.

It is true that pursuant to *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992), in the absence of interdistrict conflict, decisions of the district courts represent the law of the state, binding all Florida trial courts. See also *Miller v. State*, 980 So. 2d 1092, 1094 (Fla. 2d DCA 2008)("[B]ecause the district courts of appeal in Florida are intended to be courts of final appellate jurisdiction, the opinion of a district court is binding on all trial courts in the state. If there is unresolved conflict between the district courts, the trial court is bound by the precedent in its own appellate district.")(citations omitted). But dictum is sufficient to create an interdistrict split.

The Florida Supreme Court held in *Sweet v. Josephson*, 173 So. 2d 444, 446 (Fla. 1965), that obiter dictum was sufficient to create an interdistrict conflict triggering the exercise of its discretionary jurisdiction under the Florida Constitution. See also *Garcia By & Through Garcia v. Cedars of Lebanon Hosp. Corp.*, 444 So. 2d 538, 539 (Fla. 3d DCA 1984) (“Interdistrict conflict for jurisdictional purposes may be based on dicta”). Concerning the Florida Supreme Court’s conflict jurisdiction, the Florida Constitution provides that the Supreme Court has jurisdiction to hear a decision of a district court of appeal “that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Art. V, § 3(b)(3), *Fla. Const.* If reasoning on a point of law expressed in dicta can create an interdistrict split triggering the constitutionally constrained jurisdiction of the Supreme Court, it can create a split such that the Circuit Court could apply *Kearns*’s reasoning.

Moreover, the reasoning in *Kearns* that a plaintiff proceeding under the Whistleblower Act must show he complained of an actual violation of the law to find protection under the statute is not just obiter dictum; it is “judicial dicta” entitled to more weight. The issue of whether the good faith belief or actual violation standard governed Whistleblower act claims was extensively analyzed in *Kearns* even though it might not have been necessary to the

ultimate disposition of the case. See *Frost v. State*, 53 So. 3d 1119, 1123-24 (Fla. 4th DCA 2011)(distinguishing obiter dictum from judicial dicta and relying on judicial dicta that “was not perfunctory, but reflected a considered and deliberate judgment by the court.”), *quashed on other grounds by Frost v. State*, 94 So. 3d 481 (Fla. 2012).

While Nahoom points to several federal district court cases that declined to apply the reasoning in *Kearns* because it was expressed in dicta, he cites to no state court cases, statutes, or rules for the suggestion that the Circuit Court was not authorized to find *Kearns’s reasoning* truer to the statute.³ Additionally, numerous other cases from Florida federal courts hold that one must object to an actual violation of the law to engage in whistleblowing activity under the statute. *Pierre v. AIDS Healthcare Foundation, Inc.*, No. 19-62556-CIV-SINGHAL, 2020 WL 6381557, *4-*6 (S.D. Fla. Oct. 30, 2020)(applying the “actual violation” standard discussed in *Kearns*); *Graddy v. Wal-Mart Stores East, LP*, 237 F.Supp.3d 1223, 1226-1228 (M.D. Fla. 2017)(same).

³ In fact, a Fourth District panel acknowledged the disagreement. See *Barone v. Palm Beach Hotel Condo. Ass’n, Inc.*, 262 So. 3d 767, 769 (Fla. 4th DCA 2018)(acknowledging conflict but refusing to reconsider *Aery* because neither party asked the court to). One judge of the Fourth District even called the contrary analysis in *Kearns* “thoughtful.” *Usher v. Nipro Diabetes Sys., Inc.*, 184 So. 3d 1260, 1262 (Fla. 4th DCA 2016)(Gross, J., concurring).

There is even disagreement amongst different judges within the same district. *Compare Vuolo v. MHM Health Professionals LLC*, 4:21-CV-473-AW-MAF, 2022 WL 2289129, at *2 (N.D. Fla. May 24, 2022)(Judge Winsor of the Northern District finding the actual violation standard applied as it was truer to the statute’s plain language), *aff’d*, 22-12059, 2023 WL 2669827 (11th Cir. Mar. 29, 2023), and *Scott v. Advanced Pharm. Consultants, Inc.*, 570 F.Supp.3d 1120, 1126 (N.D. Fla. 2021)(Judge Hinkle of the Northern District explaining that “[t]he better view, based on the statutory language, is that an employee must object to or refuse to participate in an actual violation”), *appeal dismissed*, 21-14214, 2023 WL 6817369 (11th Cir. Oct. 17, 2023), *with O’steen v. Florida Sports Found., Inc.*, 4:19CV106-MW/MAF, 2020 WL 13678740, at *3 (N.D. Fla. June 12, 2020)(Judge Walker of the Northern District following *Aery*). Plainly though, Florida’s appellate courts do not agree on the appropriate standard. *Briggs v. Quantitech Inc.*, No. 21-11448, 2022 WL 1308494, at *3 (11th Cir. June 2, 2022).

Obviously, this Court is not bound by the decision of any sister district. *Virginia Ins. Reciprocal v. Walker*, 765 So. 2d 229, 233 (Fla. 1st DCA 2000), *approved*, 842 So. 2d 804 (Fla. 2003). It can, and should, interpret the Whistleblower Act consistent with the Circuit Court and the Second District in *Kearns*. The only reasonable construction of the statute’s plain language

is that one must complain of an actual violation of the law to engage in protected activity under the statute.

In interpreting statutory language, courts follow the “supremacy-of-text principle”—namely, the principle that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946-47 (Fla. 2020)(quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). Courts are also to adhere to Justice Joseph Story's view that “every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.” *Advisory Op. to Governor re Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070, 1078 (Fla. 2020)(quoting Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), quoted in Scalia & Garner, *Reading Law* at 69)). In the absence of a statutory definition for a given word, the words of a statute are to be given their “plain and ordinary meaning.” *Barnett v. Dep't of Fin. Servs.*, 303 So. 3d 508, 513 (Fla. 2020).

Section 448.102(3) states that a plaintiff, to prevail on a Whistleblower Act claim for objecting or refusing to participate in an activity, policy, or

practice of the employer, must prove the activity, policy, or practice objected to *is*, in fact, in violation of a law, rule or regulation. See § 448.102(3), *Fla. Stat.* (prohibiting retaliation against an employee that has “[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.”). Nothing in this language suggests an employee can engage in protected whistleblowing activity merely for opposing what they reasonably believe is illegal activity. The Legislature could have easily included language making a good faith reasonable belief sufficient. It did so when it enacted Florida’s public Whistle-Blower Act. See § 112.3187, *Fla. Stat.* (making protected “[a]ny violation or suspected violation of any federal, state or local law, rule, or regulation.”). It did not include that language in Section 448.102(3).

In fact, the Legislature used more permissive language in Section 448.102 itself. In contrast to Section 448.102(3) which only makes objections to conduct that is “in violation” of a law, rule, or regulation protected, Section 448.102(2), specifically applies when an employee provides information to “any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an *alleged violation* of a law, rule, or regulation by the employer.” § 448.102(2), *Fla. Stat.* (emphasis added). It is generally accepted that if the Legislature uses one term in one part of the

statute, but not in another, this is evidence the legislature acted intentionally in not using that phrase again and intended a different meaning. See *Maddox v. State*, 923 So. 2d 442, 446-47 (Fla. 2006). This is also known as the presumption of consistent usage canon, which instructs that legislatures act intentionally when using different terms and that a word is presumed to have the same meaning throughout the text. See *R.N. v. State*, 257 So. 3d 507, 510 (Fla. 4th DCA 2018); see also *Hinzman v. Winter Haven Facility Operations LLC*, 109 So. 3d 256, 257 (Fla. 1st DCA 2013)(interpreting statute consistent with the presumption of consistent usage canon). Here, the legislature utilized language which envisioned a distinction between when opposition to an alleged violation of the law is sufficient to engage in protected activity and when more is required.

This plain-language reading is consistent with Florida Supreme Court cases characterizing protected activity under Section 448.102(3). Indeed, in *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 423 (Fla. 1994), the Supreme Court held that the Whistleblower Act “prohibits [retaliation] against employees who ‘blow the whistle’ on *employers who violate the law* or against employees who refuse to participate in *violations* of the law.” (emphasis added). And in *Golf Channel v. Jenkins*, 752 So. 2d 561, 562 (Fla. 2000), the Supreme Court noted that the statute was “designed ‘to protect private employees who report

or refuse to assist *employers who violate laws.*” (quoting *Arrow Air*, 645 So. 2d at 424)(emphasis added).

The Second District in *Aery*, like *Nahoom*, did not address the statute’s plain language. Rather, the Second District in *Aery* relied entirely on *Luna v. Walgreen Co.*, 575 F.Supp.2d 1326, 1343 (S.D. Fla. 2008), a federal district court case that applied Title VII standards to a Whistleblower Act claim. That district court relied on an Eleventh Circuit decision approving—in the absence of contrary state-court precedent—use of the Title VII burden-shifting framework and “substantial factor” test to analyze *causation*. See *Luna*, 575 F.Supp.2d at 1342 n.13 (citing *Sierminski*, 216 F.3d at 950 (“In the absence of any guiding case law, the district court correctly applied the analysis used in Title VII retaliation cases.”)). These cases did not concern whether Title VII standards should govern the *protected activity* prong.

Application of the Title VII burden shifting analysis does not alter the fact that this Court must apply the plain language of the Whistleblower Act when determining what constitutes statutorily protected activity before any burden shifting occurs. See *Andujar v. Nat’l Prop. & Cas. Underwriters*, 659 So. 2d 1214, 1216–17 (Fla. 4th DCA 1995)(“Whatever may be the similarities and differences between [Title VII of the Civil Rights Act and the Florida Civil Rights Act], it is clear that a claim made under the one statute is not the same

cause of action as a claim made under the other. They arise from separate rights recognized and protected by different sovereigns.”). Indeed, federal caselaw should not be applied to state employment discrimination and retaliation claims where there are meaningful differences between the pertinent text at issue. See *Matamoros v. Broward Sheriff's Off.*, 2 F.4th 1329, 1332-1335 (11th Cir. 2021)(holding that FCRA’s plain language did not permit claim for associational disability discrimination even though the federal Americans with Disabilities Act does).

Perhaps recognizing the statute’s language does not support his construction, Nahoom speculates that the Legislature’s purpose could not have been to require plaintiffs to oppose an actual violation of the law and that interpreting the statute consistent with its plain language would lead to, in his view, adverse consequences. These arguments are completely divorced from the statute’s text and do not compel reversal of the Circuit Court.

Nahoom argues that there is no reason or purpose to protect complaints of actual violations of law versus those based on a reasonable good faith belief. See Appellant’s Initial Br. at p. 24. He muses that requiring the report of an actual violation of the law would chill whistleblowing activity and impose a harsh burden on employees who might not be “lawyers trained

to know or at least advocate for a finding that a particular practice is a violation of law, rule or regulation.” *Id.* at pp. 24-25. He goes on to argue that the “balance of the equities and the purpose of the FWA” does not support a reading of the statute requiring employees to complain of an actual violation of the law. *Id.* at p. 25. In this regard, Nahoom says the purpose of the Whistleblower Act is to “encourage whistleblowing when an employee reasonably believes the employer’s conduct violates a rule, law or regulation” and that he believes an interpretation consistent with the statute’s plain language “add[s] permutations” to it that disincentivizes “the very activity the FWA seeks to encourage.” *See id.*

Nahoom’s assertions about what he believes is the statute’s purpose and how the “equities” should be “balanced” concern the duty of the Legislature and not of the judiciary which is to respect the will of the Legislature by interpreting the plain language of statutes the Legislature enacts. It is fundamental that judges have power to say what the law is, not what it should be. This is the basis for the separation of powers and the role of courts that should exercise “neither force nor will but merely judgment.” *The Federalist No. 78*, p. 465 (C. Rossiter ed. 1961)(A. Hamilton). Courts must not rewrite a statute in a manner contrary to its plain language. *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999). “If the

legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute.” *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993)(internal quotation marks and citation omitted). Otherwise, the courts encroach on the province of the Legislature and abrogate its power contrary to the strict provision for separation of powers in Florida’s Constitution. See Art. II, §3, *Fla. Const.*; *Nassau County v. Willis*, 41 So. 3d 270, 279 (Fla. 1st DCA 2010). Nahoom can ruminate about how he feels the equities should be balanced, but that is not his or the Court’s job.

And it is not true that there is no sensible rationale for a statute that requires in some instances opposition to conduct that actually violates the law. *Kearns* found that this interpretation makes sense from a policy perspective, stating:

[T]he expanded reading of the statute Plaintiff proposes would place an onerous burden on the employer to anticipate all of its conduct that an employee may reasonably believe is proscribed by a law, rule or regulation. Even if the employer knows the conduct is perfectly legitimate, it would be left with the Hobson's choice of terminating the employee and defending suit against the employee's reasonable belief or allow[ing] the employee to refuse to meet the requirements of the job with no consequence. In apparent recognition of this dilemma the legislature declined to include in the relevant section of the Act this protection for employees.

See 157 So. 3d at 465 (quoting *White v. Purdue Pharma, Inc.*, 369 F.Supp.2d 1335, 1338-39 (M.D. Fla. 2005)).

The closest Nahoom gets to addressing the statute's plain language is his argument that courts should interpret statutes in a way that produces a reasonable result. See Appellant's Initial Br. at p. 28. Nahoom essentially says that a reading of the statute's plain language to require employees to oppose an actual violation of the law is absurd. See *id.*

The absurdity doctrine though is only pertinent when "applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that [the legislative body] could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone." *Nassau County v. Willis*, 41 So. 3d at 279. As this Court has held:

Courts should exercise great caution before deviating from the plain text of a constitution, statute, or legislative document to purportedly avoid reaching what a court considers an "absurd result." When inappropriately utilized, the absurdity doctrine allows courts to substitute their judgment of how legislation should read, rather than how it does read, in violation of the separation of powers enshrined in Article II, section 3 of the Florida Constitution.

Id. It "is a firmly established rule that Courts must apply a statute as they find it, leaving to the legislature the correction of assorted inconsistencies and inequalities in its operation." *Finney v. State*, 219 So. 3d 254, 256 (Fla. 1st DCA 2017)(quoting *Crain v. State*, 79 So. 3d 118, 121 (Fla. 1st DCA 2012)).

Contrary to Nahoom’s suggestion, it is not unreasonable or “quite impossible” that the Legislature intended to require employees to oppose an actual violation of the law to engage in protected activity pursuant to Section 448.102(3). The *Kearns* court gave a perfectly reasonable explanation for that decision. Indeed, as one federal district court put it: “requiring that a plaintiff prove an actual violation of a law, rule or regulation in order to prevail under the [Whistleblower Act] promotes the policies of the Act while adequately protecting the legitimate interests of private employers.” See *White*, 369 F.Supp.2d at 1338 (noting this was particularly true in light of the fact that the Whistleblower Act potentially covers objections to a wide array of conduct and that expansion of its plain language to protect complaints short of an actual violation of the law restricts employer discretion to take employment action even when it knows it did nothing wrong).

Nahoom’s assertion that “[c]ourts in other states interpreting similarly worded statutes have likewise interpreted whistleblower laws to only require a good faith belief that a violation occurred” is incorrect. See Appellant’s Initial Br. at p. 29. Nahoom first points to *Fox v. Bowling Green*, 668 N.E.2d 898, 901 (Ohio 1996), but in that case Ohio’s statute expressly provided that an employee’s reports need not be completely accurate so long as “the employee made a reasonable and good faith effort to determine the accuracy

of any information so reported.” See *id.* at 537-538. The other cases relied on by Nahoom, *Sullivan v. Massachusetts Mutual*, 802 F.Supp.716, 725 (D. Conn. 1992) and *Allum v. Valley Bank*, 970 P.2d 1062, 1068 (Nev. 1998), both involved common law claims for wrongful discharge recognized in Massachusetts and Nevada and not statutory claims as Nahoom argues. See *Sullivan*, 802 F.Supp. at 722-727 and *Allum*, 970 P.2d at 1064-1068.

Finally, Nahoom generally argues that because the statute is remedial it should be interpreted broadly. See Appellant’s Initial Br. at pp. 18-19.⁴ But even remedial statutes should not be interpreted to create rights of action not within the lawmakers’ intent as reflected by the language employed when aided, if necessary, by any applicable rules of statutory construction. *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695, 697 (Fla. 1968). Indeed, the remedial canon does not authorize a court to disregard the plain language of a statute. See *Knowles v. Beverly Enterprises-Fla., Inc.*, 898 So. 2d 1, 7 (Fla. 2004)(rejecting liberal interpretation of the statute advanced under the remedial canon because it would alter the statute’s plain language and provide new avenues of relief not contemplated by the language in the

⁴ Curiously, Nahoom relies on cases interpreting the Florida Public Whistleblower’s Act for this proposition. See Appellant’s Initial Br. at pp. 18-19. That said, the League does not dispute that the Private Whistleblower’s Act has been characterized as remedial. See *Golf Channel v. Jenkins*, 752 So. 2d at 566 n. 4.

statute). It does not permit courts to “rewrite the statute or ignore the words chosen by the Legislature so as to expand its terms.” *Id.* at 7.

Nahoom’s reliance on the canon to argue in favor of an interpretation inconsistent with the statute’s plain language is emblematic of the problems with this canon as an interpretative aid. As the former Chief Judge of the Fourth District Court of Appeals wrote in a concurrence criticizing reliance on the canon, it has “little real meaning.” *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 303–07 (Fla. 4th DCA 2005)(Farmer, C.J. concurring). All civil statutes can be deemed remedial. *Id.* at 304. Thus, reliance on the canon “is little more than a subjective rationalization for a particular outcome, a post hoc justification.” *Id.*

Justice Scalia criticized the remedial canon as a “dice-loading rule.” See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 27-8 (Amy Gutmann ed., 1997). Justice Scalia and Bryan Garner noted that the difficulty in determining what constitutes a remedial statute and a liberal construction, opens the door to purposive rather than textual interpretation rendering the canon either incomprehensible or superfluous. See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 364-66

(2012)(arguing against the liberal construction of remedial statutes because of the difficulty in determining what constitutes a remedial statute and a liberal construction); *Id.* at 391-96 (arguing that “further uses of intent in questions of legal interpretation [should] be abandoned”). Judge Posner formerly of the Seventh Circuit, called it “the hoary canon” and “one of the least persuasive.” *Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993). Seventh Circuit Judge Easterbrook called the canon “useless.” *Contract Courier Servs. v. Research & Spec. Programs Admin.*, 924 F.2d 112, 115 (7th Cir. 1991).

The simple fact is the statute’s plain language compels a finding that only opposition to actual violations of the law are protected. And Nahoom did not oppose an actual violation of the law.

b. Nahoom Failed to Establish he Engaged in Protected Activity Under the Whistleblower’s Act by Complaining of or Objecting to an Actual Violation of the Law

Nahoom contends he opposed an actual violation of the law when he reported to his superiors at the League that he believed the novelty items League employees received at the League’s annual retreat were a taxable fringe benefit. See Appellant’s Initial Br. at p. 20. He says he refused to participate in an actual violation of the law when he directed his subordinate to add what he believed to be the value of the items to his income. See *id.*

Nahoom did not object to or refuse to participate in an actual violation of the law because he cannot show that if the League had not adjusted employee's W-2 forms to include the value of the novelty items that it would have actually violated any law, rule, or regulation. Under federal tax law and regulations, the League-branded t-shirts and tote bags constituted de minimis fringe benefits that did not need to be included in an employee's taxable income. Under federal law, "gross income shall not include any fringe benefit which qualifies as a ... de minimis fringe." 26 U.S.C.A. § 132(a)(4).

Federal law defines de minimis fringe benefits thusly:

(1) In general. -- The term "de minimis fringe" means any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.

See 26 U.S.C.A. § 132(e)(1).

Treasury regulations provide additional guidance as to what is a de minimis fringe benefit and specifically relevant here is the determination concerning frequency of the benefit. In this regard, Section 1.132-6(b)(1) of the Treasury Regulations states:

Generally, the frequency with which similar fringes are provided by the employer to the employer's employees is determined by reference to the frequency with which the employer provides the fringes to each individual employee. For example, if an employer provides a free meal in kind to one employee on a daily basis, but not to any other employee, the value of the meals is not de

minimis with respect to that one employee even though with respect to the employer's entire workforce the meals are provided "infrequently."

26 CFR § 1.132-6(b)(1).

Under these provisions of the United States Code and the Treasury Regulations, the tote bags and the t-shirts were of such a low value that they qualified as a de minimis fringe benefit excludable from taxable income. The value of the tote bag and the t-shirt combined was at the very most some value less than \$25. The League provided the benefit to employees on a singular occasion.

The administrative burden on the League to account for the provision of the benefit and designate the fair market value of those items as taxable income is unreasonable and administratively impractical considering this low value. Indeed, the tote bag and shirt were branded with League insignia, meaning the value of the benefit would be hard to even calculate. Perhaps indicative of the difficulty in establishing a value for the items is the fact that it is unclear how Nahoom even reached the value he added to his taxable income for the items after he was told not to do anything until further notice.

Regardless, the League could not assess the amount of taxable income under this scenario until the shirts and totes were distributed because the income would only be incurred upon an employee's receipt of the shirt

and tote. The League would also be tasked with tracking and maintaining who received a shirt or tote bag, what size shirt they received to the extent the size of the shirt might affect its fair market value, assessing the total value as to the items that each employee received and then accounting for those values for each employee on their wage statements. Records of values would have to be maintained pursuant to normal record-keeping practices. This burden for items with an indeterminate total value of no more than \$25.00 per employee given one time is simply unreasonable. The IRS's official opinion supports this.

Indeed, the IRS ruled in an analogous situation that shirts provided by an employer were a de minimis fringe benefit. See *I.R.S. P.L.R. 201005014* (Feb. 5, 2010). Just like here, in that situation the employer provided employer branded shirts of a low value to employees. See *id.* The IRS noted the shirts' low value, the infrequency that the shirts were provided and the administrative inconvenience of accounting for the shirts to include the process of accounting for the shirts and determining the fair market value of the shirts given they were branded with employer insignias which would make determining the value of the shirts difficult. See *id.*⁵ The IRS has also

⁵ The League notes that this IRS Private Letter Ruling was subsequently revoked after the IRS received additional, unspecified, information from the

explicitly noted in a Chief Counsel Advisory issued in 2016 that a t-shirt is a de minimis fringe benefit. See *IRS CCA 201622031* (May 27, 2016)(Explaining, in the context of evaluating tax issues attendant to an employee wellness program that “[a] wellness program that provides employees with a de minimis fringe benefit, such as a tee-shirt, that would satisfy the requirements to be excluded under section 132(e) would provide a benefit that would be excluded from an employee's income”).

Nahoom does not address these provisions of the law and regulations or these opinions from the IRS which were cited by the League and the Circuit Court below. Rather, he baselessly asserts that the items were a taxable fringe benefit. See Appellant’s Initial Br. at pp. 20-21. He states, without explanation, that “the IRS reporting requirements do not carve out an exception for de minimis gifts” and thus he did report an actual violation of the law. See *id.* Nahoom does not address though why the value of the items is not so low as to make accounting for them unreasonable or administratively impracticable especially given that the items were given to employees on a singular occasion and have a low and even uncertain value.

taxpayer concerning the receipt and distribution of clothing items at issue by various departments. See *I.R.S. P.L.R. 201135022* (Sept. 2, 2011). That said, nothing suggests the analysis of the IRS in the private letter is any less persuasive.

The closest Nahoom comes to addressing the substance of the federal law for which he says he reported an actual violation, is his statement that the “IRS publication makes clear that there is no minimum dollar amount that determines whether items are de minimis.” See Appellant’s Initial Br. at p. 22. He claims that “de minimis is defined as an item not readily calculable.” *Id.* He says the items were calculable based on the invoice. *Id.* Nahoom’s arguments miss the mark.

Nahoom cites no authority for the proposition that “de minimis” is defined as an item not “readily calculable.” That language is nowhere in the Internal Revenue Code or Treasury Regulations concerning de minimis fringe benefits. Nevertheless, the items were not even “readily calculable” as Nahoom claims.

Nahoom confuses *cost* with *value*. The Internal Revenue Code does not refer to the cost of the items, but rather their value. See 26 U.S.C.A. § 132(e)(1)(making exception for fringe benefits of a small *value*); accord 26 CFR § 1.132-6(c). Federal regulations speak to the inclusion of the fair market value of the fringe benefits in employee income. See 26 CFR § 1.61-21(b)(1). “Fair market value” is “the amount that an individual would have to pay for the particular fringe benefit in an arm's-length transaction.” See 26 CFR § 1.61-21(b)(2). Moreover, the Treasury regulations state that “an

employee's subjective perception of the value of a fringe benefit is not relevant to the determination of the fringe benefit's fair market value nor is the cost incurred by the employer determinative of its fair market value." *Id.*⁶

The fact value and not cost underlies the determination of whether a fringe benefit is de minimis is reflected in the IRS opinion letter cited earlier herein and which is equally applicable to this case. Even if one could technically determine the cost of the t-shirt and tote bag provided to League employees, it is harder to determine what the fair market value is for these items which carry League branding. Such branding surely impacts the value of the items and in a way that makes ascertaining the fair market value difficult.

In contrast, the IRS regulations specifically state that cash and cash equivalent fringe benefits, such as gift cards, are not considered de minimis. See 26 CFR § 1.132-6(c)(providing that cash and cash equivalent fringe

⁶ It should be noted that Nahoom claims that the League's auditor based his opinion that the items were not taxable on the dollar amount of the items alone. See Appellant's Initial Br. at p. 22. That is not what the League's auditor said, however. What he said was that he believed a one-time give away of the novelty items given their low value would be considered de minimis and therefore excludable from employees' taxable income. [R. 508]. In fact, the publication that the League's auditor indicated he relied on in providing this guidance to the League, and which he attached to his e-mail correspondence to Graganella concerning this issue, even states there is no dollar amount threshold at which point any item is considered de minimis. [R. 511-512].

benefits are never excludable); see also *Publication 15b Employer's Tax Guide To Fringe Benefits*, 2021 WL 549537, at *12 (same). Of note, the value of cash or a gift card is never in question — it is the amount of cash, or its equivalent given.

Nahoom's belief that any item given to an employee with a readily calculable cost is taxable is internally inconsistent with, and undercut by, IRS regulations and guidance. Indeed, federal regulations state that gifts of property of a low value for holidays or birthdays are not taxable because they are de minimis. 26 CFR § 1.132-6(e)(1). Indeed, the IRS publication that Nahoom filed in support of his opposition to the motion for summary judgment provides the example of an employer-provided turkey for the holidays as not taxable because it is de minimis. [R. 681]. Under Nahoom's rule, this would not be the case because an employer need only look at its receipt for the turkeys to determine the cost and then add that to each employee's taxable wages.

The t-shirts and tote bags were of a low value that is hard, if not impossible, to calculate. This was not a regular benefit but a gift to employees at the League's annual retreat with a value less than \$25. Even assuming for argument's sake that the items' cost was their value, Nahoom has not established the cost was not so small as to make accounting for it,

which would require the League to keep track of who received a tote bag and t-shirt and the size of the shirt, determine the items' value, account for that value for its employees, and maintain records supporting the same in accord with generally accepted business and accounting practices, unreasonable or administratively impracticable. Nahoom simply did not establish he objected to or refused to participate in an actual violation of the law such that he engaged in protected whistleblowing activity.

III. The Circuit Court Correctly Found that Nahoom Failed to Establish a Genuine Issue of Material Fact as to Whether the Legitimate Reasons for his Termination were Pretextual

Nahoom says he presented sufficient evidence to show that the reason proffered by the League for his termination was pretextual and the real reason was what he contends is protected whistleblowing activity. He is mistaken.

Before getting to the pretext inquiry though, Nahoom's objections to the Circuit Court finding he failed to show that his purported whistleblowing activity was the "but for" cause of his termination are without merit. He says he established a causal connection at the prima facie stage, based on the closeness in time between his alleged protected activity and his termination which he says shows that the two were not "completely unrelated." See Appellant's Initial Br. at pp. 31-37. But the Circuit Court did not find that

Nahoom failed to establish a causal connection at the prima facie stage. Rather, it found that Nahoom failed to show that a reasonable juror could find that the “but for” reason of his termination was his alleged protected activity. [R. 1282-1283]. This is part of Nahoom’s pretext burden and his ultimate burden in the case. Indeed, at the final stage of the burden-shifting analysis, the plaintiff’s burden of showing pretext “merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination.” *Burdine*, 450 U.S. at 256; see also *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001)(“The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff.”).

In this regard, Nahoom is incorrect that the “but for” causation standard does not apply at the summary judgment stage. See Appellant’s Initial Br. at pp. 36-37. While there is some dispute in state and federal courts concerning whether the “but for” causation standard applies at the prima facie stage of the burden shifting analysis in addition to the pretext stage, there is no dispute that courts are to apply the “but for” causation standard to evaluate whether summary judgment is appropriate. See *Gogel v. Kia Motors Mfg. of Georgia, Inc.*, 967 F.3d 1121, 1136, n. 13 (11th Cir. 2020)(en

banc)(acknowledging dispute as to whether “but for” standard applies to the plaintiff’s burden to show a causal connection at the prima facie stage, but confirming that it applies to the pretext burden on summary judgment); *Mitchell*, 309 So. 3d at 285, n. 2 (same).

As for the reason for the termination, the League has more than carried its minimal burden of setting forth a legitimate non-retaliatory reason for its action. See *Burdine*, 450 U.S. at 253–55. After Nahoom relayed that he believed the t-shirt and tote bags were taxable fringe benefits, his superiors directed him to hold off on doing anything further until the matter was reviewed and decided upon by the League’s upper management. [R. 297-298, 303, 497]. Nahoom acknowledged this directive in an e-mail to his supervisor, the League’s Comptroller. [R. 492]. Despite that directive, when he accepted the novelty items, he directed his subordinate to add \$20 just to his income, acknowledging the directive from management to hold off on doing anything on the matter until further notice by telling her to “continue to hold on the others.” [R. 494]. The League terminated Nahoom’s employment for insubordination for failing to abide by the directive given to him by management. He cannot show this reason is pretextual.

In making his pretext showing, Nahoom must show that “but for” his alleged whistleblowing activity he would not have been fired. *Mitchell*, 309

So. 3d at 285, n. 2. To show pretext, he must demonstrate “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.” *Gogel*, 967 F.3d at 1136. In this regard, he may not “recast” an employer’s proffered reason or substitute his own judgment. Instead, he “must meet that reason head on and rebut it, and . . . cannot succeed by simply quarreling with the wisdom of that reason.” *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000); *see also Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997)(“A plaintiff must present more than ‘mere curious timing coupled with speculative theories.’”).

Employment laws do not require employer needs and expectations to be objectively reasonable; it simply prohibits employers from discriminating based on a protected class. *Chapman*, 229 F.3d at 1030. Courts do not sit as a “super-personnel department,” and it is not the role of the courts to second-guess the wisdom of an employer’s business decisions if those decisions were not made with an illegal motive. *Id.* Indeed, an “employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, [just] not for a [retaliatory] reason.” *Nix v. WLCY Radio/Rahall Comms.*, 738 F.2d 1181, 1187 (11th Cir. 1984),

overruled on other grounds by, Lewis v. City of Union City, 918 F.3d 1213, 1218 (11th Cir. 2019)(en banc).

Nahoom seems to argue that this Court should reject this well-established precedent. See Appellant's Initial Br. at pp. 40-41. The cases he relies on, however, do not support the notion that a court can substitute its judgment for the employer's in evaluating pretext in a retaliatory termination case adjudicated on summary judgment. *E.E.O.C. v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831 (6th Cir. 1997), did address pretext, but in the context of a determination that the employer's reason was pretextual in a non-jury trial. *Id.* at 833. Similarly, *Wichmann v. Bd. Of Trs. of S. Ill. Univ.*, 180 F.3d 791 (7th Cir. 1999), involved a defendant's challenge to the failure to include language relating to the employer's business judgment in jury instructions. *Id.* at 804-805. These opinions thus involved a question of whether a factfinder appropriately found an improper reason motivated a challenged employment action, not whether there was sufficient pretext evidence to preclude summary judgment lest a court substitute its judgment for the employer's. And *Burdine*, involved a hiring decision and the qualifications of candidates, a different scenario than here as in failure to hire cases courts evaluate differences in qualifications. See 450 U.S. 248, 259; see also *City of Hollywood v. Hogan*, 986 So. 2d 634, 645 (Fla. 4th DCA 2008)(explaining

relevancy of qualification comparisons in failure to hire context). In any event, this Court has at least implicitly held that the business judgment rule governs the pretext analysis. See *Washington v. Fla. Dep't of Revenue*, 337 So. 3d 502, 514 (Fla. 1st DCA 2022)(citing *Chapman*, for the proposition that an employee cannot meet his or her pretext burden by simply quarrelling with the wisdom of the employer's decision).

In terms of establishing sufficient evidence from which a jury could find that the "but for" standard has been met, the Eleventh Circuit has instructed:

"[A] reason is not pretext for [retaliation] 'unless it is shown both that the reason was false, and that [retaliation] was the real reason.'" *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007)(quoting *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006)). And to repeat, in determining whether the plaintiff has met her burden to show pretext, we remain mindful that **it is the plaintiff's burden to provide evidence from which one could reasonably conclude that but for her alleged protected act, her employer would not have fired her.**

Gogel, 967 F.3d at 1136 (emphasis added)(evaluating burden in context of summary judgment adjudication). Nahoom has not met the League's reason for his termination head on and has not rebutted it.

Nahoom suggests that it is sufficient to show that an employer's reasons for an employment decision are unreasonable to survive summary judgment at the pretext stage. See Appellant's Initial Br. at p. 38. However, Nahoom relies on cases involving discrimination claims, not retaliation

claims. See *id.* (citing *Howard v. BP Oil Co.*, 32 F.3d 520, 526 (11th Cir. 1994), *St. Mary's Honor Ctr. V. Hicks*, 500 U.S. 502 (1993), and *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004)). As discussed, retaliation claims are governed by the “but for” causation standard, not the “motivating factor” standard which governs discrimination claims. See *supra* p. 18. This Court should follow the *Gogel* decision, issued en banc by the Eleventh Circuit and involving a retaliation claim, and require Nahoom to show that the reason proffered was false and that retaliation was the real reason and that but for Nahoom’s alleged protected activity, the League would not have fired him. See *Gogel*, 967 F.3d at 1136.

Nahoom cannot even establish that the reason for his termination is not believable or false. Curiously, Nahoom argues that the reason proffered by the League is pretextual because the League’s Executive Director, Mike Sittig, who made the decision to terminate Nahoom’s employment, did not personally deliver or witness delivery of the directive to Nahoom that he hold off on doing anything further on the taxable fringe benefit issue until further notice. See Appellant’s Initial Br. at pp. 38-39. The record is undisputed that Ann Hudgins relayed the directive to Nahoom. [R. 497]. Nahoom even acknowledges in his brief that she relayed him this directive. See Appellant’s Initial Br. p. 39. And the record is undisputed that Sittig was aware that

Nahoom was told to hold off on doing anything on the issue until further notice. [R. 434-439].

Nahoom admits that at the time that he received the items and directed his subordinate to alter the payroll to add \$20 to his income that no one had followed up with him on the issue. See Appellant's Initial Br. at p. 39. He claims no one prohibited him from doing what he did. See *id.* at pp 39-40. But the League had already prohibited him from doing what he did when it directed him to take no action until further notice. Nahoom completely disregarded this directive from League management and the League was fully within its rights to terminate Nahoom for insubordination. Nahoom was free to designate the income on his personal tax return, but he had no authority to alter the League's payroll.

Nahoom claims he presented enough of a fact issue to avoid summary judgment, arguing that the League's reasons for his termination have shifted or been inconsistent. See *id.* at 41-43. That is not true and the factual inference Nahoom asks this Court to draw is unreasonable.

Nahoom says that insubordination was never mentioned in his termination meeting. He says Sittig showed him his pay statement with the additional \$20 of income noted and asked if he was responsible for it. When Nahoom affirmed he was, he claims Sittig said it cost Nahoom his job. Even

assuming this is how the events of the termination meeting transpired, the League's reasons for Mr. Nahoom's termination have never shifted. Under Mr. Nahoom's version of events, Sittig essentially told him the League was terminating his employment because he disregarded the directive to hold off on doing anything on the taxable fringe benefits issue until further notice. That is, because he was insubordinate.

Under these facts, the record does not support the assertion that the reasons for Nahoom's termination ever shifted or were fundamentally inconsistent. *See Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1558-59 (11th Cir. 1997)(reasons must be fundamentally inconsistent to support finding of pretext). The reasons proffered for an employment action can change slightly, and so long as the reasons are not fundamentally inconsistent, this is not evidence of pretext. *See Moore v. Jefferson Cty. Dep't of Human Res.*, 277 Fed.Appx. 857, 860 (11th Cir. 2008)(finding that although reasons cited for promoting female candidates in EEOC position statement differed slightly from deposition testimony, that alone did not establish pretext as none of the reasons were inconsistent with one another); *Phillips v. Aaron Rents, Inc.*, 262 Fed.Appx. 202, 210 (11th Cir. 2008)(finding no evidence of pretext where reasons were not fundamentally inconsistent, among other reasons).

Even if one could say the reason for Nahoom's termination got more specific, that does not mean the reasons were inconsistent. *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1377 (11th Cir. 1996)(finding nothing inconsistent between written reason and more specific, detailed reasons for termination). In short, the League has not given two different explanations for Nahoom's termination sufficient to create an inference of pretext. Compare *Morrissey v. ASD Shared Services, LLC*, 626 Fed. Appx. 946, 952 (11th Cir. 2015)(holding that employer that first offered "business needs" as reason for termination and later specifying during the litigation that there was not enough work did not offer inconsistent reasons for the termination) with *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1997)(finding evidence of pretext due to shifting explanations where employer explicitly denied in district court employee's job performance was basis for termination but on appeal argued employee's layoff was solely due to poor performance).

Finally, Nahoom claims there was evidence from which a reasonable juror could find the League's reason for his termination was pretextual because individuals similarly situated to him were treated differently. See Appellant's Initial Br. at pp. 43-45. Nahoom claims that one employee sold illegal narcotics out of a League-owned vehicle and was rehired after being

released from prison. *Id.* at 44. He claims that another had an intimate relationship with a subordinate in violation of League policy. *Id.* He claims that another damaged an employee vehicle while driving under the influence. *Id.* And he claims that another sent inappropriate messages to a female employee, with the League ultimately finding that someone hacked his cell phone. *Id.* He says these individuals were not disciplined for this alleged conduct and thus treated better than him. Nahoom's reliance on these supposed comparators fails because none of the proffered comparators are similarly situated.

A comparator must be similarly situated in all "material respects." *Lewis*, 918 F.3d at 1224; *see also Washington*, 337 So. 3d at 511–12. A similarly situated comparator:

- will have engaged in the same basic conduct (or misconduct) as the plaintiff;
- will have been subject to the same employment policy, guideline, or rule as the plaintiff;
- will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff; and
- will share the plaintiff's employment or disciplinary history.

Id. at 1227–28 (footnote and citations omitted). To be sure, Nahoom's assertions about the misconduct of his supposed comparators are largely speculative. He also failed to put forward any evidence as to whom supervised his alleged comparators and the nature of their employment and

disciplinary history. The burden of identifying comparators and explaining how they are similarly situated is Nahoom's. *Lewis*, 918 F.3d at 1222, 1224. Regardless, he cannot establish his comparators are similarly situated to him because they did not engage in the "same basic conduct" as him.

None of Nahoom's alleged comparators was accused of insubordination. None is alleged to have disobeyed a direct order, of which they were aware. Thus, they did not engage in the same basic conduct. See *Jenkins v. Nell*, 26 F.4th 1243, 1250 (11th Cir. 2022)(comparators not accused of insubordination like the plaintiff were not similarly situated because they did not engage in the same basic conduct).

The record undercuts Nahoom's argument that the reason for his termination was pretextual. League management gave Nahoom a clear directive—take no action on the issue until further notice. Nahoom had no individual authority to alter League payroll by adding additional income to any employee's pay in the first place and he personally acknowledged that League management told him to hold off until further notice. He disobeyed that directive, and used his unique position of authority over Garrett, who oversaw payroll at the League, to instruct her to add income to his W-2.

Nahoom says no one told him he should not act as he did, but he acknowledged several times that League management in fact gave him the

directive to do nothing further. He understood that directive. He said as much in his e-mail to Garrett when he told her to “hold off” on the other 200-plus employees of the League. And Nahoom directed his subordinate to add an amount to his income even though there were two months remaining in the calendar year and thus two months in which the League could add the income to each employee's W-2. Nahoom did not bother to follow up with Hudgins, Graganella, or anyone else, to press the question of whether the items were taxable.

Nahoom claims that he was worried about his certified public accountant credentials and claims he genuinely believed the items were taxable. If that was the case, Nahoom could have always added the amount of income to his personal tax filing. He was not authorized though to alter the League payroll, and yet he did so prematurely and in direct contravention to a management directive. That said, Nahoom’s own words suggest he did not genuinely believe the items were taxable. At his termination meeting, when confronted with the evidence of his insubordination, Nahoom told League management that “this can be fixed.” If Nahoom was truly opposing and refusing to participate in an actual violation of the law, what was there to be fixed?

The truth is that Nahoom was not opposing or refusing to participate in

an actual violation of the law. *He was and is not a whistleblower.* He was an employee of the League that flagrantly disregarded a management directive that the evidence shows he was aware of and understood. That is why he is a *former* employee of the League. Nahoom's protestations otherwise are nothing more than conclusory allegations of retaliation, insufficient to create a disputed issue of material fact precluding summary judgment. *See Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376–77 (11th Cir. 1996).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted this 20th day of November 2023.

By: /s/ Jeffrey D. Slanker
JEFFREY D. SLANKER
Florida Bar No.: 0100391
jslanker@sniffenlaw.com
MICHAEL P. SPELLMAN
Florida Bar No.: 937975
mspellman@sniffenlaw.com

SNIFFEN & SPELLMAN, P.A.
123 N. Monroe Street
Tallahassee, Florida 32301
Telephone: (850) 205-1996
Facsimile: (850) 205-3004

*Counsel for Appellee, the Florida
League of Cities*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November 2023 a true and correct copy of the foregoing was furnished by the Florida Court's E-filing Portal, to counsel of record for Appellant:

Marie Mattox
Ashley Richardson
MARIE A. MATTOX, P.A.
203 North Gadsden Street
Tallahassee, FL 32301
(850) 383-4800 (telephone)
(850) 383-4801 (facsimile)

Attorneys for Appellant

/s/ Jeffrey D. Slanker
JEFFREY D. SLANKER

**CERTIFICATE OF FONT AND FORMATTING COMPLIANCE AND
COMPLIANCE WITH WORD COUNT LIMITATIONS**

I HEREBY CERTIFY that this brief complies with the font and word count limit requirements set forth in the Florida Rules of Appellate Procedure, and specifically Florida Rules of Appellate Procedure 9.045 and 9.210(a), because it has been prepared in arial 14-point font and because it contains 12,940 words, excluding the words in the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, and signature block, which is less than the maximum number of words permitted in the Rules.

/s/ Jeffrey D. Slanker
JEFFREY D. SLANKER