



**FLORIDA CORRUPTION
WILSON V FCHR
(THE FCHR'S CORRUPTION)**

{LAST UPDATE: 6/19/2024}

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FLORIDA CORRUPTION: WILSON V FCHR
CHAPTER I | ADMINISTRATIVE PHASE (FCHR)



FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 101 Whistleblower Charge

DATE: 12/14/2020

PAGES: 3

TRIBUNAL: Florida Commission on Human Relations, The

CASE NO: 2021-28179

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 21028179_COD_20201214_080000.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/COD



Date Stamp (FCHR Use Only)

FLORIDA COMMISSION ON HUMAN RELATIONS
4075 Esplanade Way, Room 110, Tallahassee, Florida 32399

**WHISTLE-BLOWER ACT RETALIATION
 CHARGE OF DISCRIMINATION**

A. PERSONAL INFORMATION		FCHR No.	
Name Michelle Wilson		E-Mail Address Michelle.wilson1991@yahoo.com	Date of Birth 02/03/1966
Mailing Address 9 Sparrow Path		Home Telephone Number (area code) 850-425-1997	
City, State, and Zip Code Crawfordville, FL 32327		Work (if possible to call you there) 850-425-1997	
B. LIST THE STATE AGENCY OR INDEPENDENT CONTRACTOR THAT DISCRIMINATED AGAINST YOU.			
Name	Contact Person Cheyanne Costilla	Telephone Number	
Florida Commission on Human Relations		850-488-7082	
Street Address 4075 Esplanade Way #110	City, State, and Zip Code Tallahassee, FL 32399	County Leon	
C. CAUSE OF DISCRIMINATION BASED ON – Check appropriate box (es)		DATE MOST RECENT DISCRIMINATION TOOK PLACE (month, day, year)	
☒ RETALIATION		October 15, 2020	

D. DISCRIMINATION STATEMENT

I believe that I have been discriminated against in violation of the Public Whistle-blower's Act, §§112.3187-112.31895, Florida Statutes for the following reasons:

The public whistleblower statute has three elements: (1) protected conduct, (2) adverse action; and (3) a connection between the protected conduct and the adverse action.

The "adverse action" element is easy. Charging party Wilson was fired as Executive Director of the Florida Commission on Human Relations on October 15, 2020, after 17 years' tenure with the agency.

Ms. Wilson also suffered numerous additional cognizable adverse actions. It is useful to discuss these additional adverse actions in connection with their nexus with the protected conduct rather than to discuss the three elements separately.

Beginning in 2018, two Commissioners, Jay Pichard and Latanya Peterson, began a campaign to either fire Ms. Wilson or make her life so unpleasant that she would quit. Mr. Pichard was antagonistic because his business had been the target of charges of discrimination to FCHR that he thought should have been processed differently. Section 760.11(3), Florida Statutes, requires that, "the commission shall investigate the allegations in the complaint," and that, "the commission shall determine if there is reasonable cause to believe that discriminatory practice has occurred" Mr. Pichard, smarting from the charges against his small company, felt aggrieved

FCHR Charge Form – Revised January 9, 2015

that Ms. Wilson would not violate the statute to the extent of dismissing certain "frivolous" charges without the appropriate administrative review. Ms. Wilson explained that procedural changes would require the legislature amending the statute and, following that, the agency amending the pertinent sections of the Florida Administrative Code. Mr. Pichard was unforgiving on this point and continued thereafter to seek replacement of Ms. Wilson. Ms. Wilson took FMLA leave from October, 2018, to January, 2019. This caused displeasure to Ms. Peterson and set in motion a course of hostility in which she joined Mr. Pichard's efforts to oust Ms. Wilson or to harass her into resigning.

Ms. Peterson had been disciplined for an ethics violation in the Clay County School District in 2014, an offense that was highly publicized in her 2018 losing campaign for Clay County school board. In the wake of that loss, Ms. Peterson appeared to be at professional loose ends. Some of her conduct as an FCHR Commissioner caused Ms. Wilson to believe that Ms. Peterson was seeking Ms. Wilson's job and using her position on the Commission to sabotage Ms. Wilson.

Mr. Pichard started going behind Ms. Wilson's back to get documents and oral information from the Human Resources Director, Jackie Steele - an employee with resentments and antagonisms against her supervisor, Ms. Wilson, whom Ms. Wilson eventually fired. FCHR recently settled a case with Ms. Steele about that firing, but the settlement is irrelevant to the point at issue here, which is that Mr. Pichard, as a Commissioner, violated formal policy by going around the Executive Director to seek information surreptitiously from a subordinate employee. Ms. Wilson's objections to that conduct are another example of protected conduct. The clandestine flow of information from Ms. Steele to Mr. Pichard continued. The information became part of Mr. Pichard's private archive that he could spin in support of his objective of firing Ms. Wilson.

Though Donna Elam and other Commissioners rebuked and admonished Mr. Pichard for his abuse of staff members, they never lived up to their obligations to take formal action to curb his misconduct.

An issue with FCHR's funding for housing discrimination from HUD straddled 2018 and 2019. In short, HUD dumped an unprecedentedly large workload on FCHR - a load the agency had neither the staff nor the budget to handle. Mr. Pichard seized on the opportunity to seek a finding of wrongdoing against Ms. Wilson, from Florida's Chief Inspector General, Melinda Miguel, whose report cleared Ms. Wilson. HUD issued a Performance Improvement Plan (PIP) that FCHR could not meet with current staffing levels. The agency sought help from the governor's office, but that office declined to recommend new positions to the legislature, so none were funded. The HUD Region IV Director Carlos Osegueda proposed a suspension of FCHR from federal funding for its housing unit. Mr. Pichard invited Mr. Osegueda to an FCHR committee meeting without notifying Ms. Wilson. Mr. Pichard, and Ms. Peterson communicated with Mr. Osegueda before his visit. Mr. Osegueda said he wanted the removal of Ms. Wilson, Chief of Investigations Jacquelyn Dupree, and longtime housing investigator Regina Owens. This caused Ms. Owens to file a charge against Mr. Osegueda with his superiors at HUD. In 2019, the Florida Legislature finally appropriated funding for the staffing necessary to clear the housing backlog. However, Mr. Osegueda still recommended that FCHR be removed from the federal/state partnership. Assistant HUD Secretary Farias issued a humiliating rejection of the recommendation by Mr. Osegueda. The HUD issues were substantially resolved.

However, during the HUD furor, Commissioners, especially Pichard and Peterson, continued the effort to undermine and displace Ms. Wilson. The Commission panel handling the HUD issue, consisting of Peterson, Pichard, and McCambry, voted "no confidence" in Ms. Wilson and sought to have the whole Commission affirm the vote, which would be tantamount to firing Ms. Wilson. Due to lack of quorum, this hung-over Ms. Wilson's head for several meeting dates and damaged her ability to manage the agency. When a quorum finally appeared in September 2020, the "no confidence" vote came out in Ms. Wilson's favor. This resulted, in part, from Mr. McCambry saying he no longer wanted to replace Ms. Wilson because the HUD matter had been resolved satisfactorily and now the firing issue being raised by Mr. Pichard was about employment cases, not housing cases. Mr. Pichard was pushing the vote in gratification of his long-standing grievance about not enough cases being processed within 180 days. Under § 760.11(7), if FCHR finds "no cause" on an employment case within 180

days, that charging party's only remedy is a hearing before the Division of Administrative Hearings (DOAH). At that hearing, the DOAH Administrative Law Judge (ALJ), may award reinstatement, back pay, and attorney's fees and costs, but no intangible or punitive damages. The employer may appeal that result to FCHR. If the employee prevails there, she may renounce her DOAH victory and appeal to the First District Court of Appeal for a jury trial *de novo*. That is the only way to get to court. In the 28 years of existence of the statute, that has never happened. So an FCHR "no cause" finding is a kiss of death to any possibility of a jury trial and anything but a fairly modest recovery in most cases.

It is for that reason that Mr. Pichard and others facing discrimination charges push so unremittingly for FCHR to close cases in fewer than 180 days and to close them with a "no cause" finding.

After rejecting the "no-confidence" motion against Ms. Wilson, the Commission voted to adopt a format and standards for evaluating her at the next meeting in October. In violation of the Agency's Governance Policy, the Commission had failed for three years to issue Ms. Wilson's annual evaluation, despite her requests. This is important to anyone in the executive director slot because it helps her keep her job and keep good relations with the governing board. The evaluation provides a clear statement of what the employee needs to change or correct and what new directions to pursue. It affords a more objective means of measuring performance. The last evaluation was in 2017 and it was unanimously favorable to Ms. Wilson.

Ms. Wilson's protests against not being evaluated are clearly protected conduct. The board's failure to evaluate for three years is plainly the sort of misfeasance, malfeasance, gross mismanagement expressly forbidden by the whistleblower statute. The malfeasance applies because the violation was willful and flagrant. Indeed, in 2019, in furtherance of her efforts to fire Ms. Wilson, Ms. Peterson, acting as Chair, removed Ms. Wilson's scheduled evaluation from the meeting agenda. In doing so, she asked Executive Assistant, Casey Snipes, not to tell Ms. Wilson. In 2018, the evaluation was again removed from the agenda at Mr. Pichard's behest because he wanted to establish a performance review methodology.

Governor DeSantis filled several long-vacant positions on the Commission. Ms. Wilson believes that Mr. Pichard contacted some or all of them in violation of the Sunshine law at Chapter 286 to poison them against Ms. Wilson. A "no confidence" vote on Ms. Wilson was not on the October agenda. Such a vote would have been an earthquake in the employment law community and would have fetched a large attendance at the meeting if lawfully noticed. What was noticed in compliance with Sunshine law was the decision scheduled at the previous meeting to establish an evaluation framework and standards for Ms. Wilson. The vote of "no confidence" was unlawfully taken up at the meeting of October 15, 2020. Ms. Wilson was fired illegally.

Ms. Wilson's additional protected conduct includes repeated objections to conversations about agency business among and between Commissioners against the advice of agency counsel; objections to individual Commissioners giving direction to staff in violation of Governance Policy; objecting to Commissioner Peterson calling for the firing of an employee; objecting to Commissioners retaliating to her FMLA leave. As stated above, the main adverse action was being fired in retaliation for refusal to violate the law on case investigations.

Ms. Wilson demands the full relief to which she is entitled by law.

I REQUEST TO BE AFFORDED FULL RELIEF TO WHICH I AM ENTITLED TO UNDER THE LAW(S).

E. VERIFICATION. Under penalties of perjury, I declare that I have read the foregoing complaint of discrimination and that the facts stated in it are true. I will advise the agency if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

SIGNATURE OF COMPLAINANT

DATE

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 102 Whistleblower Charge (Amended)

DATE: 5/18/2021

PAGES: 6

TRIBUNAL: Florida Commission on Human Relations, The

CASE NO: 2021-28179

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 21028179_COD_20210518_080000.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/COD-Amended



From: [Rick Johnson](#)
To: ["John Scotese"](#)
Cc: ["Kelly Thomas"; rick@rej-law.com](#)
Subject: 071: F.C.H.R. Case No. 202128179
Date: Friday, May 28, 2021 3:42:47 PM

Mr. Scotese:

Please accept this as the Amended Charge you requested, though we believe it could also (and perhaps more properly) be considered a response to an investigative inquiry arising from the original charge. We think investigations rather than amended charges are the proper vehicle for obtaining information that fills in the picture of a sequence of events described in a whistleblower charge.

You asked for more specifics on Michelle Wilson's protected conduct. A good example came near the end of her tenure on August 18, 2020.

A five-member panel of the Commission consisting of Jay Pichard (Chair), Donna Elam, Derrick McGhee, Dawn Hanson, and Al McCambry had been commissioned to review the HUD issue described in our original charge. The panel, at this meeting, was tasked with recommending performance measures after a discussion of the Commission's progress in meeting the HUD goals. FCHR had, by then, met HUD's standards, but not much about HUD came up at the meeting. Mr. Pichard steered the discussion to meeting the 180-day compliance deadline for completing investigations of employment discrimination claims. As he had made clear throughout his tenure, he wanted the 180-day deadline met consistently by issuing "no-cause" determinations on charges at intake, rather than after investigation.

One of FCHR's knowledgeable employees, Joe Cash, provided a breakdown of the 180 day issue and projected that the Commission would not only meet, but exceed, the performance goals if two additional positions were established.

After a lengthy discussion, Ms. Wilson passionately, but professionally, declared to the panel that she believed it was unfair to expect staff to meet performance measures without having the necessary staffing and resources. She pointed out that FCHR is bound by the Florida Statutes and the rules of the Florida Administrative Code to perform a fair and neutral investigation, not just go through the motions or dismiss cases at the very outset. She made it clear to the panel that she would not direct the staff to close an investigation prematurely just for the sake of meeting a 180-day standard. She specifically asked the panel to share with her exactly what their expectations were, given this challenging situation of not having the resources to process FCHR's caseload within 180-days. The law has an answer: finish the investigation in a longer time. She also asserted that demanding an employee to close a case prematurely was unfair to both parties and that it could be detrimental to the agency's core value of providing fair and impartial investigations as well as exposing FCHR to consequences for unlawful conduct. She said the answer is to provide the resources FCHR needs to meet the 180-day deadline or change the law. Otherwise, FCHR will have to go on taking longer in some cases. It is not an option to just break the law.

Mr. Pichard, as was his custom, demanded that FCHR finish the investigations in 180 days and dismiss some without investigation. Derrick McGhee supported that view. A "no-confidence" vote immediately followed:

1. Elam –No
2. McCambry –No
3. Hanson – Yes
4. Pichard- Yes
5. McGhee- Yes

The full commission did not sustain the 3-2 no-confidence vote against Ms. Wilson the first time. But the lines were drawn and the issues defined. The vote that fired Ms. Wilson on October 15, 2020, was over exactly the same issues.

Other protected conduct occurred on July 20, 2020, when Ms. Wilson called for compliance with the Governance Policy which called for establishment of performance measures. The Commission resisted compliance with that binding regulation. Ms. Wilson went unevaluated for several years and was fired without the existence of any current standards by which her performance could be measured. The commissioners wanted to fire her for not dismissing discrimination charges at the intake stage, but they obviously could not formalize that unlawful performance measure.

On 07/03/20, Jay Pichard specifically asked Ms. Wilson for “flexibility” to “save businesses.” By this he meant dismissing employment discrimination charges at intake, without investigation, issuing a “no cause” finding so charging parties could not go to court. Ms. Wilson declined, reiterating to Pichard and the board that the commission’s job, by law, was to investigate claims as a neutral fact finding agency and not to favor either party to a complaint. Pichard repeatedly asked the same question hoping to get a different response from the General Counsel. To our knowledge, he never did.

On 8/10/20, Ms. Wilson sought enforcement of the Governance Policy when she requested to know what evaluation process was being used to evaluate her so she could have an opportunity to meet/exceed expectations. Nothing was established during a panel discussion. Rule violations persisted despite these objections.

Please ask us specifically for any other information you need to process the charge.

Rick Johnson
Florida Bar Certified Labor & Employment Lawyer
Law Office of Richard E. Johnson
314 West Jefferson St.
Tallahassee, FL 32301
850-425-1997
850-561-0836 (fax)
rick@rej-law.com
<http://employee-rights.net>

From: John Scotese [<mailto:John.Scotese@fchr.myflorida.com>]

Sent: Tuesday, May 25, 2021 10:29 AM

To: Rick Johnson <rick@rej-law.com>

Subject: F.C.H.R. Case No. 202128179

Dear Mr. Johnson:

In response to your May 21, 2021 email relating to the above-referenced case, the alleged protected activity is not clear from the complaint. Please provide a clear and concise statement that contains a description of the alleged protected activity, including the pertinent date.

Sincerely

John Scotese

Senior Attorney

Florida Commission on Human Relations

4075 Esplanade Way, Room 110

Tallahassee, Florida 32399-7020

850-907-6823 – Office Line

850-487-1007 – FAX

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Correspondence made or received in connection with the transaction of official business by a state agency, unless exempt or made confidential by law, is considered a public record and may be subject to disclosure upon request.

From: Rick Johnson <rick@rej-law.com>

Sent: Friday, May 21, 2021 6:19 PM

To: John Scotese <John.Scotese@fchr.myflorida.com>

Cc: Costilla, Cheyanne <Cheyanne.Costilla@fchr.myflorida.com>; rick@rej-law.com; rick@rej-law.com

Subject: 071: F.C.H.R. Case No. 202128179

Mr. Scotese:

We have no idea what the defect is and would be most grateful to learn what it is. As you know, Michelle Wilson worked at FCHR for 17 years and headed the agency for many years. I was hired by FCHR to be an expert witness on its behalf in a case in Orlando because of my expertise in the laws the agency enforces. I have sued the agency many times with mixed results over what its regulations mean and been in that crucible many times. I drafted the certification questions on this

topic on the Florida Bar Labor & Employment Certification exam. I helped grade the tests.

So I hope it matters at least a little that neither of us has the slightest clue as to what we can amend in our current charge to meet the standard you seek. We have many years' experience in assessing FCHR charges and are genuinely baffled.

We will be happy to fix whatever needs repair. What is it?

Rick Johnson
Florida Bar Certified Labor & Employment Lawyer
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Tallahassee, FL 32301
850-425-1997
850-561-0836 (fax)
rick@rej-law.com
<http://employee-rights.net>

From: John Scotese [<mailto:John.Scotese@fchr.myflorida.com>]

Sent: Friday, May 21, 2021 5:13 PM

To: Rick Johnson <rick@rej-law.com>

Subject: F.C.H.R. Case No. 202128179

Dear Mr. Johnson:

I am in receipt of your May 13, 2021 email regarding the above-referenced case. At this point in the process, the Executive Director does consent to an amendment of the complaint to address the defect identified in the Notice of Right to Amend. Additionally, the amendment of the complaint to address the defect will not result in a new 180-day time period. As a reminder, the defect must be corrected by May 28, 2021.

Sincerely

John Scotese
Senior Attorney
Florida Commission on Human Relations
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-7020
850-907-6823 – Office Line
850-487-1007 – FAX

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From: Rick Johnson <rick@rej-law.com>
Sent: Thursday, May 13, 2021 10:39 AM
To: John Scotese <John.Scotese@fchr.myflorida.com>
Cc: 'Kelly Thomas' <kellyt@rej-law.com>; Costilla, Cheyanne <Cheyanne.Costilla@fchr.myflorida.com>; rick@rej-law.com
Subject: 873 Important Information from the F.C.H.R., Case No. 202128179

Mr. Scotese:

Please help us understand your undated letter attached to your email of May 7, 2021.

First, we do not understand what dates you see missing. We supplied the pertinent ones.

Second, we thought the information you want in an amended charge is the sort of detail that is supposed to be gathered in an investigation.

Third, you urge us to amend in the same letter in which you inform us that Rule 60Y-5.001(7) and Rule 60Y-11.005 do not allow amendments after 60 days from the filing date. Our charge was filed December 14, 2020. That was 144 days before your letter. We see that Rule 60Y-5.001(7) allows the executive director to allow an amended charge after the 60 days. Are we being given that permission? Rule 60Y-11.005 says nothing about any of this. Why is it mentioned?

Fourth, can you tell us what was happening with the charge in the 144 days between filing and your letter?

Fifth, if we file an amended charge does that start a new 180-day clock running?

We thank you for your attention to these questions and will be grateful to receive your prompt response.

Rick Johnson
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850-561-0836 (fax)
rick@rej-law.com
<http://employee-rights.net>

From: John Scotese [<mailto:John.Scotese@fchr.myflorida.com>]
Sent: Friday, May 7, 2021 5:02 PM
To: rick@rej-law.com
Subject: Important Information from the F.C.H.R., Case No. 202128179

Good day.

I am a Senior Attorney with the Florida Commission on Human Relations. Attached, please find an important letter relating to the above-referenced case. Please follow all directions written in the letter. If you have any questions, please contact me.

Sincerely,

John Scotese

Senior Attorney

Florida Commission on Human Relations

4075 Esplanade Way, Room 110

Tallahassee, Florida 32399-7020

850-907-6823 - Office Line

850-487-1007 – FAX

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FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 103 Notice of Determination

DATE: 10/1/2021

PAGES: 1

TRIBUNAL: Florida Commission on Human Relations, The

CASE NO: 2021-28179

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 21028179_NOD_20211001_080000.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/NOD





Ron DeSantis
Governor

State of Florida Florida Commission on Human Relations

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Mario Garza
Chair
Cheyanne Costilla
Executive Director

Michelle Wilson
c/o Richard E. Johnson, Esquire
Law Office of Richard E. Johnson
314 West Jefferson St.
Tallahassee, FL 32301

Re: Wilson v. Florida Commission on Human Relations
FCHR No. 202128179

NOTICE OF DISMISSAL

The Florida Commission on Human Relations (Commission) is in receipt of your complaint, alleging a violation of sections 112.3187-112.31895, *Florida Statutes*, the Whistle-blower's Act. The Commission previously notified you that the information contained within your complaint was insufficient for the Commission to begin its investigation. Pursuant to Rule 60Y-5.001(7), Florida Administrative Code, you were provided an opportunity to address the insufficiencies within 60 days. Considering all information received, the Commission does not have authority to investigate, and the complaint will be dismissed. Pursuant to the authority vested in me by the Florida Statutes and Rules 60Y-5.006 and 60Y-11.005, Florida Administrative Code, I hereby dismiss the above-referenced complaint on behalf of the Florida Commission on Human Relations.

FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Cheyenne Costilla
Cheyanne Costilla, Executive Director

DATED: Oct. 1, 20 21

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF DISMISSAL was filed at Tallahassee, Florida and served upon the above-named addressees this 1st day of October, 20 21, by U.S. Mail.

BY: Tammy Barton
Clerk of the Commission

RIGHT TO APPEAL: Pursuant to Rule 60Y-4.031, Florida Administrative Code, you have the right to seek judicial review of this decision. The Commission and the appropriate District Court of Appeal must receive your Notice of Appeal within 30 days of the date of this Notice. Explanation of the right to appeal is found in §120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure.

COMMISSIONERS

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FLORIDA CORRUPTION: WILSON V FCHR

CHAPTER II | APPEAL #1 (1DCA)



FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 201 Notice of Appeal

DATE: 11/9/2021

PAGES: 3

TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D21-3417

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 21003417_APP_20211109_145835.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/NoticeAppeal



FLORIDA COMMISSION ON HUMAN RELATIONS

MICHELLE WILSON,

Appellant,

v.

FCHR INTAKE NO. 202128179

**FLORIDA COMMISSION ON
HUMAN REALTIONS,**

Appellee.

_____ /

NOTICE OF APPEAL

PLEASE TAKE NOTICE that an appeal is being taken to the First District Court of Appeal from the final agency action of the Florida Commission on Human Relations on October 1, 2021, entitled "Notice of Dismissal," a copy of which is attached hereto. This final agency action disposes of all issues raised before the administrative tribunal. This appeal is the only relief that the administrative tribunal has identified, as set forth in the "Notice of Dismissal" to redress the dismissal of Petitioner's claims.

PLEASE GOVERN YOURSELF ACCORDINGLY.

RECEIVED, 11/09/2021 03:01:21 PM, Clerk, First District Court of Appeal

Respectfully submitted,

/s/ Richard E. Johnson

Richard E. Johnson

Florida Bar No. 858323

Law Office of Richard E. Johnson

314 West Jefferson Street

Tallahassee, Florida 32301

850/ 425-1997

rick@rej-law.com

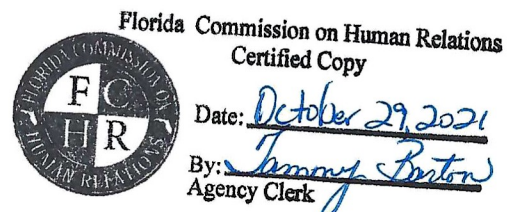
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal with a copy of the document referenced above have been furnished to the following by email this 29th day of October, 2021: Tammy Barton, Clerk, Florida Commission on Human Relations, tammy.barton@fchr.myflorida.com and to Cheyanne Costilla, Executive Director, Florida Commission on Human Relations, Cheyanne.Costilla@fchr.myflorida.com.

/s/ Richard E. Johnson

Richard E. Johnson





Ron DeSantis
Governor

State of Florida Florida Commission on Human Relations

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Mario Garza
Chair
Cheyanne Costilla
Executive Director

Michelle Wilson
c/o Richard E. Johnson, Esquire
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Tallahassee, FL 32301

Re: Wilson v. Florida Commission on Human Relations
FCHR No. 202128179

NOTICE OF DISMISSAL

The Florida Commission on Human Relations (Commission) is in receipt of your complaint, alleging a violation of sections 112.3187-112.31895, *Florida Statutes*, the Whistle-blower's Act. The Commission previously notified you that the information contained within your complaint was insufficient for the Commission to begin its investigation. Pursuant to Rule 60Y-5.001(7), Florida Administrative Code, you were provided an opportunity to address the insufficiencies within 60 days. Considering all information received, the Commission does not have authority to investigate, and the complaint will be dismissed. Pursuant to the authority vested in me by the Florida Statutes and Rules 60Y-5.006 and 60Y-11.005, Florida Administrative Code, I hereby dismiss the above-referenced complaint on behalf of the Florida Commission on Human Relations.

FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Cheyenne Costilla
Cheyanne Costilla, Executive Director

DATED: Oct. 1, 20 21

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF DISMISSAL was filed at Tallahassee, Florida and served upon the above-named addressees this 1st day of October, 20 21, by U.S. Mail.

BY: Tammy Barton
Clerk of the Commission

RIGHT TO APPEAL: Pursuant to Rule 60Y-4.031, Florida Administrative Code, you have the right to seek judicial review of this decision. The Commission and the appropriate District Court of Appeal must receive your Notice of Appeal within 30 days of the date of this Notice. Explanation of the right to appeal is found in §120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure.

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FLORIDA CORRUPTION: WILSON V FCHR

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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D21-3417

L.T. No.: 202128179

FLORIDA COMMISSION ON
HUMAN RELATIONS,

Appellee.

APPELLANT'S INITIAL BRIEF

Appeal of a Final Order of the Florida Commission on Human
Relations

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STATEMENT OF CASE AND FACTS

Appellant Michelle Wilson worked for seventeen years at the Florida Commission on Human Relations (FCHR). After starting in a low-ranking position, she worked her way up to Executive Director, the agency's chief executive position, serving in that capacity for the last nine years of her tenure. The Commission fired her on October 15, 2020.

Ms. Wilson filed a formal whistleblower charge on December 14, 2020, taking care to address it to both FCHR and the Office of the Chief Inspector General (OIG). R-3. The pertinent statute gives both agencies equal jurisdiction over receiving and processing whistleblower charges, though the OIG is mentioned first.¹ In the

¹ §112.31895(1)(a), Florida Statutes, provides “If a disclosure under s. 112.3187 includes or results in alleged retaliation by an employer, the employee or former employee of, or applicant for employment with, a state agency, as defined in s. 216.011, that is so affected may file a complaint alleging a prohibited personnel action, which complaint must be made by filing a written complaint with **the Office of the Chief Inspector General** in the Executive Office of the Governor or the Florida Commission on Human Relations, no later than 60 days after the prohibited personnel action.” (Emphasis added.)

cover email transmitting the charge, undersigned counsel, pointed out the conflict of interest in FCHR adjudicating its own conduct in firing Ms. Wilson:

Because of Ms. Wilson's former position, I do not believe FCHR will be able to process or investigate the case. The statute identifies FCHR and the office of the Chief Inspector General as the two places that may receive these charges. I am sending this to both in an abundance of caution . . .

R-3.

Nevertheless, FCHR kept the charge. Though the fact is not in this record, OIG rejects the statutory language that enables it as well as FCHR to process whistleblower complaints.

Appellant had no communication from FCHR for 144 days. Then, attached to a cover email dated May 7, 2021, from FCHR lawyer John Scotese (R-13), came an undated document titled "Notice of Right to Amend." R-7. The gist of the message was this, "The information you submitted in the complaint is insufficient for the Commission to begin its investigation for the reason stated below." *Id.* The "reason stated below" is "**Your complaint does not contain a sufficiently clear and concise statement of the facts, including**

pertinent dates, constituting retaliation under the Whistle-blower's Act.” *Id.* (Emphasis in original.) This was passing strange because the retaliation was the firing and the charge covered the date and all else surrounding that.

Ms. Wilson's charging document had some 1420 words of facts and analysis, starting with a recitation of the three elements of the whistleblower cause of action and proceeding through a detailed explanation of the persons, events, offenses, and dates that met each element. Ms. Wilson and her counsel were baffled by FCHR's demand for an amended charge.

Responding in an email of May 13, 2021, undersigned counsel noted the dates already stated and asked what others might be missing. He noted that the information sought seemed to be what FCHR is supposed to seek in an investigation, not the initial charge.² There followed some technical questions about the rules Mr. Scotese

² The discrimination and whistleblower charges FCHR investigates are designed to be initiated by unrepresented charging parties who may have limited literacy skills. Charges are meant to be bare-bones documents, sometimes co-authored by agency staff, and fleshed out by investigation.

had cited. R-12.

Mr. Scotese answered the technical questions in an email of May 21, 2021. R-11.

Ms. Wilson had, until her firing, run the agency for years and had determined what an adequate charge was. She knew the agency standards, perhaps better than anyone on earth. Her counsel was a board-certified employment lawyer of 30 years experience who had previously been hired by FCHR as its own expert on these statutes and had litigated the statutes many times. Her counsel had written the questions on the public whistleblower statute for the Florida Bar Labor and Employment board certification exam and was part of the group that graded those papers.

Counsel expressed his confusion in an email to Mr. Scotese on May 21, 2021, seeking what defect FCHR perceived in the original charge so corrections could be made. R-10-11.

Mr. Scotese replied, on May 25, 2021, stating that “the alleged protected activity is not clear from the complaint” and asking for “a clear and concise statement that contains a description of the alleged

protected activity, including the pertinent date.” R-10. This differed from the original communication which faulted alleged omissions on retaliation, not the protected conduct that caused the retaliation.

Ms. Wilson provided an amended charge on May 28, 2021. She provided a detailed description of being ordered to violate the Florida statute and the administrative rule that require charges of discrimination to be investigated. Commission members, including one, Jay Pichard, who was himself the Respondent in a number of discrimination charges involving a company he owned, directed Ms. Wilson to dismiss such charges at the outset without investigation. She was fired for her refusal to violate the law. R-8-9. She gave the dates and details of other protected conduct. *Id.*

After another 126 days of silence, FCHR issued a “Notice of Dismissal,” stating that, “the information contained within your complaint was insufficient for the Commission to begin its investigation.” And that, “Considering all information received, the Commission does not have authority to investigate, and the complaint will be dismissed.” R-14.

This timely appeal followed.

SUMMARY OF ARGUMENT

The Legislature ordered FCHR to investigate every whistleblower claim it receives and to make a determination on it. At that point, regardless of whether FCHR's determination is positive or negative, the claim may proceed to either circuit court or the Public Employee Relations Commission (PERC). However, FCHR arrogated to itself the power select certain charges, with no stated criteria, for annihilation. FCHR simply refuses to investigate these charges or make determinations on them. FCHR merely "dismisses" them. These claimants do not get a trial in an alternative forum as do the claimants in discrimination cases for whom FCHR finds "no cause." That class of discrimination claimants are denied access to circuit court, but get the alternative remedy of a full-dress bench trial before DOAH. By contrast, the disfavored whistleblower claimants get nothing. Their claims are simply extinguished.

This Court's handling of appeals from these annihilations evolved over four cases in 2012-2013. At the beginning, the Court took a very

stringent view of the latitude FCHR had to deviate from the statutory mandate. The Court allowed a pre-investigation dismissal of a claim that fell outside the statute of limitations. By the fourth case, however, the Court had adopted a highly deferential standard that allowed the agency to annihilate the claims of a charging party who had failed to plead her proof on a charge form designed to be filled out by pro se charging parties who might be, for example, grounds keepers at state buildings with limited education. The instant Appellant, however, filed a charge that meets even the most exacting standards. She is a former Executive Director of FCHR and is represented by a seasoned counsel with expertise in the field. FCHR could not explain where her charge fell short.

Though the terminology is different in the administrative process under discussion, FCHR was both the defendant and the judge in this case below. FCHR fired Michelle Wilson. She brought this proceeding to challenge that firing. The pertinent statute allows office of the chief inspector general to process these whistleblower charges instead of FCHR. The pertinent F.A.C. rule allows FCHR to outsource the

processing, usually to the office of the Florida Attorney General. Appellant dual filed with OIG and in a cover email pointed out FCHR's conflict of interest. Yet FCHR kept the charge and annihilated it instead of processing it so it could go to court.

Whatever FCHR staff worked on Appellant's charge did so under the authority of the officials who did the firing at issue. If they allowed Appellant to go to court, the statutory set of remedies allow reinstatement so Appellant might once again be their boss. The conflict of interest could not be more flagrant and gross.

Because the Legislature created a claim for unliquidated damages in the whistleblower act, controlling law holds that only a court may make the final disposition of that claim. FCHR trespassed on the prerogatives of the judicial branch in making the final determination on that cause of action. FCHR trespassed on the prerogatives of the legislative branch in functionally amending the whistleblower statute to allow itself to ignore the ironclad legislative mandate to investigate charges and make a determination on them. That is a double-barreled violation of the separation of powers

mandated by the Florida constitution.

Claimants under the whistleblower statute have a right to trial by jury. By extinguishing Appellant's case before it could go to court, FCHR violated that right. FCHR violated Appellant's rights to access to courts and due process by extinguishing her case on grounds that are both capricious and without discernable standards. There are no written guidelines nor even any set of oral traditions on the exercise of pre-investigation dismissal. Whatever happens to move the decision-maker at any given moment is the standard. That has created a system that is discriminatory and irrational. Moreover, another aspect of the florida constitutional right of access to courts is the requirement to substitute an alternative porcess and remedy whenever government takes away an existing cause of action. FCHR provides no alternative when it extinguishes a whistleblower's statutory rights.

STANDARD OF REVIEW

This Court reviews claims by the Florida Commission on Human Relations that it lacks jurisdiction under a *de novo* standard of review.

McGuire v. Peabody Hotel Group, 99 So. 3d 984 (Fla. 1st DCA 2012).

The violations of constitutional rights to due, process, access to courts, and trial by jury are subject to a “strict scrutiny” standard of review, which requires that the State prove that the offending action furthers a compelling state interest through the least intrusive means.

Chiles v. State Employees Attorneys Guild, 734 So.2d 1030, 1033 (Fla.1999). Separation of powers issues are reviewed de novo.

Broward County v. La Rosa, 505 So.3d 422 (Fla. 1987).

ARGUMENT

I. FCHR Had A Duty to Investigate the Charge and Make a Determination

The Florida Public Whistleblower’s Act, §§ 112.3187–31895, Florida Statutes (hereinafter “the Act”), requires FCHR to investigate public whistleblowers’ complaints, to make a determination on the validity of those claims, to conciliate them, and to advocate for the claimants in meritorious cases. FCHR violated its statutory mandate in this case by dismissing on jurisdictional grounds a charge that was both thorough and well within FCHR’s subject matter jurisdiction.

The Legislature has designated FCHR as an intermediary agency

that a whistleblower must pass through on the way to circuit court or the Public Employer Relations Commission (PERC). The law makes no allowance for FCHR to kill a whistleblower's complaint before that complaint advances to the next stage.

The Act provides a full-blown statutory cause of action for state employees such as Appellant who face adverse job action as a result of protected activities. §§ 112.3187(8)(a); 112.31895(4)(a). Employees of state agencies may seek the relief provided under the Act through either circuit court or the Public Employees Relations Commission (PERC). §§ 112.3187(8)(a); 112.31895(4)(a). However, the Act provides certain prerequisites to the filing of an action in either circuit court or with PERC. §§ 112.3187; 112.31895. *Robinson v. Dep't of Health*, 89 So.3d 1079, 1081 (Fla. 1st DCA 2012), *rev. den.*, 108 So.3d 656 (Fla. 2012). Before a public employee may seek relief in either forum, the Legislature has directed that the FCHR investigate the matter and take appropriate action, including attempting to "conciliate a complaint." §112.31895(3)(d), Florida Statutes (2020). The complainant may then elect to pursue judicial remedies or file for

relief with PERC.

Nothing in the statutes contemplates FCHR refusing to investigate a case and make a determination on it. For most of the life of the statute, charging parties, respondents, and the agency itself (headed by Appellant and others) operated on the assumption that an inadequate charge would simply earn a “no cause” determination. There was no such category as “not worth investigating” or “insufficient detail to qualify as a charge.” However, an informal and unwritten practice came together as a sort of agency-created “no-jurisdiction” basis for dismissal of a charge without investigation or determination.

The practice reached its crucible in 2013 when this Court handed down three cases treating the practice. In the first case, *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013), this Court excused FCHR’s failure to process the charge on the ground that the claim was insufficiently pled because there was no allegation as to when or to whom the complainant made the whistleblower disclosures. Next, this Court upheld the “dismissal-

without-processing” practice in *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013), finding the complaint was insufficiently pled because the allegations of retaliation were “conclusory” and it was unclear that the disclosure was made to a proper party. In the third case, *Caldwell v. Florida Dept. Of Elder Affairs*, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013), this Court found the charge inadequate to trigger investigation because it lacked sufficient detail of any act or suspected act of malfeasance or misfeasance that the charging party identified and suffered retaliation for reporting.

Caldwell drew a cogent dissent from Judge Benton that, though prescient in some respects, still failed to grapple with the underlying reason these “jurisdictional” dismissals were happening in the first place. One must wonder why FCHR did not just make the statutorily mandated determination of “no cause” on a case that had no merit. After all, that is how the Legislature set up the system and any reader of the statute can see that is how the situation was to be handled. There is no good reason to re-write the statute to invent a way to get

rid of a charge without processing it.

But there are two bad reasons. The first is that FCHR has always been notoriously lacking in staff and budget to handle its volume. The agency simply lacks the resources to fulfill its statutory mandate to investigate all the cases it receives and make determinations on them, even though the investigation in many of the less meritorious cases might be minimal. Second, each investigation ends with a determination that, whether it be positive or negative, creates a right to bring a suit in circuit court. Some of these charges are of a politically explosive nature that draws a media frenzy. FCHR has felt a need to abort some of these lest they come to life and wreak political havoc. Hence the “jurisdictional” dismissal that functionally amends the Act to keep from coming to court the cases that would cause political upheaval in high places..

The law would recognize application of the concept of a dismissal for lack of subject matter jurisdiction if FCHR threw out a request to dissolve a marriage or release a prison inmate. Such things are clearly outside the agency’s jurisdiction. But when FCHR receives a

complaint from a former state employee that certain named and otherwise identified officials fired her on a certain date for carefully described protected conduct occurring on specified dates in violation of clearly identified statutes and rules, that description is so squarely within the exact mission of FCHR that no reasonable person could say that it is outside the agency's jurisdiction or that it is too conclusory to investigate or that it fails to meet any prima facie test. That is where the instant case parts company with the trilogy of 2013 cases discussed above. For those cases, FCHR and the reviewing court had at least a plausible rationale for applying the stated test, even if it were the wrong test. On these facts, that is not even theoretically possible because the allegations of the charge are not arguably conclusory and could not credibly be claimed to fall short of a prima facie case. The charge recites the elements of the offense and discusses in detail how each element is met, including names, dates, incidents, laws and rules violated, etc.

FCHR's next maneuver is to make the agency's "jurisdictional" dismissal unreviewable by formulation of an "inherent power" to

dismiss the charge without the legislatively mandated investigation. A charge is not conclusory simply because FCHR says so. The review mechanism established by the Legislature was to move on to circuit court or PERC to challenge what FCHR determines. But the 2013 trilogy of cases in this Court nullified that corrective mechanism by reference to the agency's "inherent power" to keep cases from going on to court by killing them off at the pre-investigation stage. It is useful to take a look at the development of this "inherent power" as it has evolved in this court's jurisprudence.

The notion of FCHR's "inherent power" to refuse to investigate a charge found its first mention in *Robinson v. Department of Health*, 89 So.3d 1079, 1082–83 (Fla. 1st DCA 2012), where this Court grappled with FCHR's power to dismiss a charge filed outside the statute of limitations. Noting that there must be a statutory basis for the dismissal authority and finding none, this Court found a legislative grant of power to review timely complaints and from that inferred a power to decline to review untimely complaints. Notably, this timeliness issue had nothing to do with any subjective determination

or any assessment of the merits of the charge. It is a neutral rule that rains on friend and foe alike. Next, however, the *Tillery* court, 104 So.3d @ 1255, cited the inherent authority discussed in *Robinson* to find an inherent power to refuse investigation of a charge in which the claimant alleged retaliation for his disclosure of lying and covering up racial comments in the workplace because the complaint failed to name those who had received the internal complaints. This stretched beyond *Robinson*. The missing name in *Tillery*, depending on the fact scenario, could be the sort of thing the investigation is supposed to uncover, not something that prevents the investigation. An employee complaining on a toll-free phone to human resources might not know the name of the person who received her complaint. This is a step beyond dismissing a charge for being outside the statute of limitations. It is substantive and merits-based. Next this Court in *Stanton*, 129 So.3d @1084, cited the result in *Tillery* as a basis for moving substantially beyond it to find a charge properly dismissed a charge because it “fails to demonstrate that the ‘supervisor,’ to whom appellant disclosed the alleged unlawful behavior, possessed the

necessary authority to investigate the matter” So the needle has moved beyond the mere failure to name the pertinent official receiving the complaint. One must also “demonstrate” that person’s authority to investigate the matter. This “demonstration” is a matter of not just allegation, but proof. Finally, this Court’s opinion in *Caldwell*, 121 So.2d @ 1063-1064, cites *Robinson*, *Tillery*, and *Stanton*, in the course of finding that the whistleblower’s charge was too “conclusory” to warrant investigation. The charge said the claimant contacted a federal investigator “to alert him to the condition of the Ombudsman program and the gross misfeasance and malfeasance that were occurring within.” The failure to describe any act of malfeasance or misfeasance was fatal to the claim.

This evolution shows a remarkable drift over the course of a single year. The over-riding concern in *Robinson* was that the Legislature had ordered FCHR to investigate every case. One might imply from the provision imposing a duty to investigate those arriving at the office in 60 days, an implied duty not to investigate those arriving outside that time. That is a very small and tightly granted

exception to the legislative mandate, based on a plausible sort of logic. The exception also rests on an objective criterion – one may easily count 60 days. But this is hardly a basis for the *Caldwell* result. The analysis evolved from a duty of tight conformance to legislative mandate in *Robinson* to “the usual recognition of deference to an agency's interpretation of a statute it is charged to administer.” *Caldwell*, 121 So.3d @1063. Thus there was a shift from a grudging grant of an inch of deference in *Robinson*, based on statutory text, to a country mile of deference in *Caldwell*, based on a theory of plenary deference to an agency’s interpretation of a statute it is charged to administer.

This is a drift in the opposite direction of recent federal practice where courts from SCOTUS on down are cutting back on the deference granted to executive agencies in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this era of “textualist” theories of legal interpretation and “plain meaning” doctrines regarding reading statutes, this Court’s trend is against the wind, at least in this one area.

This Court had previously given short shrift to a similar effort by FCHR, in the public accommodations context, to abort its investigative duties prematurely. *Mena v. Lifemark Hospitals of Florida, Inc.*, 50 So.3d 759,761 (Fla. 1st DCA 2010). A sister court rejected FCHR's claim of a lack of subject matter jurisdiction in the discrimination context in *Mitchell v. Palm Beach County School Board*, 127 So. 3d 707 (Fla. 4th DCA 2013). This Court also rejected FCHR's premature claim of lack of subject matter jurisdiction when the agency assumed with investigation that an employer was not covered under the Act at issue here. *Schnebly v. G4S Youth Services, LLC*, 98 So.3d 1270 (Fla. 1st DCA 2012).

Appellant wishes to stress, however, that this Court's holdings in *Tillery*, *Stanton*, and *Caldwell* are binding precedent that no panel can overturn on the narrow issue of an "inherent power."³ Reversal of these cases on that ground is not what Appellant needs to win this

³This Court's prior jurisprudence has not considered the constitutional issues discussed *infra*. Thus the Court may reach on opposite result on those bases without running afoul of the prior panel rule.

appeal. This court should not extend its deference to FCHR any further. That is what this case turns on because Appellant satisfies everything that doomed the appellants who came before her. Appellant's charge, supplemented by her amended charge, in this case is not even arguably "conclusory" or lacking in any element of a prima facie case. One states a prima facie case under the Act by showing that (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) that the protected expression and the adverse action are not completely unrelated. *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003). Appellant was fired. That is undeniably an adverse action. She repeatedly stated her refusal to violate both a statute and an administrative rule requiring her agency to investigate allegations of employment discrimination. The agency has not even attempted to state a non-retaliatory reason for the firing. There is no doubt about the prima facie case. The charge states the details and dates of the protected conduct and the names and positions of the offenders and the dates and nature of the events making up the adverse actions.

The Court must not allow FCHR to rewrite a statute under the guise of “deference.”

Finally, the Legislature requires that any issue concerning a claimant’s access to the remedy, if at all reasonable, must be decided in favor of granting access. This is the doctrine of liberal construction. The act is remedial in nature and should be construed liberally in favor of granting access to the remedy so as not to frustrate the legislative intent. *Irven v. Dep’t of Health and Rehabilitative Servs.*, 790 So.2d 403, 406 (Fla.2001)(“The statute could not have been more broadly worded); *Martin County v. Edenfield*, 609 So.2d 27, 29 (Fla.1992).

II. FCHR Had an Unwaivable Duty of Disqualification

FCHR is in an awkward position when its own fired employee brings a charge against the agency for that firing. The agency has an obvious conflict of interest. A win by the employee will harm the agency’s already spare budget, generate unfavorable publicity that may endanger the roles of the agency’s leadership, and, perhaps, cause reinstatement of the fired employee to a position of authority

over those who aided in the unlawful firing. Florida's conflict of interest laws speak only obliquely and indirectly of conflict of interest by the agency itself as an institution. The main statutes, §§ 112.311-313, primarily address conflicts of individual state employees.

FCHR did not even respect the disqualification requirements relating to the individual employees involved in the disputed firing, let alone the entire agency. Nobody was disqualified, despite Appellant's notice at submission of the charge that FCHR was in conflict of interest.

Both the Legislature and FCHR anticipated the difficulties that would arise when FCHR must play an adjudicatory role in a case in which it is also a respondent. It is basic due process that one cannot be a judge in one's own case. Accordingly, the legislature provided for the Chief Inspector General to serve as an alternative processing agency for claims.

If a disclosure under s. 112.3187 includes or results in alleged retaliation by an employer, the employee or former employee of, or applicant for employment with, a state agency, as defined in s. 216.011, that is so affected may file a complaint alleging a prohibited personnel action, which

complaint must be made by filing a written complaint with **the Office of the Chief Inspector General in the Executive Office of the Governor** or the Florida Commission on Human Relations, no later than 60 days after the prohibited personnel action.

§112.31895(1)(a), Florida Statutes (2020) (emphasis added).

Appellant took the trouble to file with both the Chief Inspector General and FCHR to avoid any chance of suffering forfeiture by omitting either. Appellant's counsel explained this dual filing in a cover email, explaining the conflict, "Because of Ms. Wilson's former position, I do not believe FCHR will be able to process or investigate the case." Nevertheless, FCHR took the case itself.

There was still another alternative available. FCHR had anticipated years earlier the need to outsource complaints presenting conflict of interest, such as complaints by its own employees and former employees. Accordingly, the agency adopted and codified in the Florida Administrative Code, Rule 60Y-5.002 "Agreements of Referral of Complaints." The Rule provides details of which charges may be outsourced and how it is to be done. Through this Rule, FCHR outsourced investigation of complaints to the office of the Attorney

General. The record is void of any effort by FCHR to refer this case to the Attorney General, any of the state attorneys in Florida, the OIG, or any other agency with the investigative resources to handle the conflict overflow.

Instead, FCHR kept the case and processed it in the most biased and unlawful fashion imaginable, killing the charge with no plausible explanation. Investigating the charge and making a determination on it (positive or negative) would have allowed the case to go to court and resulted in discovery exposing a leading commissioner's numerous charges of discrimination against his businesses and his machinations to get Appellant fired; the processing misconduct of the agency; the bogus excuses for firing Appellant; the derelictions of replacement staff; and much more. The agency would have had to pay damages and possibly undergo reinstatement of Appellant. FCHR had every reason to contrive an excuse to kill Michelle Wilson's charge without letting it mature. And it did.

FCHR had no authority to keep the charge and, other than the instant appeal, Appellant had no means of divesting FCHR of

jurisdiction based on conflict. On remand, FCHR should be compelled to issue a prompt determination, allowing the case to proceed to circuit court.

III. FCHR's Dismissal Violates Constitutional Separation of Powers

Art. II, § 3, Fla. Const., provides that “[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

The Florida Supreme Court, in *Broward County v. La Rosa*, 505 So. 2d 422 (Fla. 1987), found a violation of this provision when a county administrative agency presumed to trespass into the judicial function by awarding unliquidated damages to a housing discrimination plaintiff. The court held that only the judicial branch may pass upon such damages and that the parties have a right to a trial by jury on such a question. In the instant case, the Legislature has created, in the public whistleblower act, a cause of action for,

among other things, unliquidated damages. In doing so, the Legislature created a role for FCHR to take certain actions before passing the case on to circuit court. The Legislature never granted, and under the Supreme Court's analysis in *La Rosa*, **never could have granted**, FCHR the authority to dispose completely of a case under the whistleblower act. Only a court has jurisdiction to make a final determination of whether a claimant is entitled to the liquidated damages remedy the statute grants.

Thus FCHR trespassed on the power of the Legislature in effectively amending the language of a statute to arrogate to itself the power to annihilate administratively cases which the statute allowed to go to circuit court.⁴ FCHR also trespassed on the power of the courts to make the determination of whether a claimant/plaintiff will get unliquidated damages. Critically, the regimen FCHR has created

⁴ Notably, in discrimination cases as opposed to whistleblower cases, the worst FCHR can do is relegate a party to a bench trial before the Division of Administrative Hearings (DOAH), a process that can eventually lead to a jury trial in circuit court. See § 760.11, Florida Statutes, setting out the DOAH process. By contrast, in whistleblower cases, FCHR, with its "jurisdictional" magic can strangle the whole case in its infancy.

for itself is subject only to the limited review of the District Court of Appeal, where no evidence may be received, no credibility determinations made, no inferences drawn, no jury seated. That is no substitute. As we see in *Tillery, Stanton, and Caldwell, supra*, the DCA's deferential review of FCHR's "jurisdictional" determination is not especially searching and in no case satisfies the separation of powers amendment.

Finally, plaintiffs under the whistleblower act are entitled to a trial by jury. *O'Neal v. Florida A & M University*, 989 So.2d 6 (Fla. 1st DCA 2008). Under *La Rosa*, no administrative agency such as FCHR can make the final determination of entitlement to that right. In acting to prevent that jury trial from ever happening, FCHR has also violated Art. I, § 22, Fla. Const., which states, "The right of trial by jury shall be secure to all and remain inviolate."

IV. FCHR's Failure to Issue a Determination Violates Appellant's Rights of Due Process, Access to Courts, and Trial by Jury

FCHR's violation of Appellant's right to trial by jury is covered at the end of the immediately preceding section and need not be

repeated here.

The rights of access to courts (Art. I, § 21, Fla. Const.) and due process (Art. I, § 9, Fla. Const.) Protect Appellant from what FCHR did here. The intersection of these two rights was the occasion of landmark holding of the Florida Supreme Court in *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980). That case concerned the allowable limits on pre-litigation burdens imposed on those seeking to bring cases to court. The *Aldana* court grappled with how many pre-suit steps and how long a delay the state could impose on a medical malpractice plaintiff before getting to court. The principles apply to this case with much stronger reason because in the instant case, the claimant NEVER gets the due process to exercise its constitutional right of access to courts.

The deprivation of due process and the right of access to courts in this case is capricious and without discernable standards. All we have is a sort of *Chevron* deference to the “inherent power” of FCHR to kill off whistleblower charges by refusing to investigate them or make the determinations that the Legislature has required FCHR to

make. The essential due process violation that the statute the court invalidated in *Aldana* shares with the statute at issue here is the randomness with which persons would either get through the system or be obstructed by it. The statute thus proves to be "intrinsically unfair and arbitrary and capricious in [its] application." *Aldana*, 381 So. 2d at 236. Neither FCHR in taking its actions nor this Court in reviewing has articulated any discernable standard under which a charging party might surely frame her charge to assure it will be investigated and be the subject of a determination. There is no list or other set of criteria that justify refusal to process a charge. FCHR's discretion is unlimited and apparently exercised according to who the charging party is, who her counsel is⁵, which official might be embarrassed or disadvantaged by processing the charge, and how overloaded the staff happen to be at the time. The loss of Appellant's

⁵ In all of the pertinent cases in which FCHR's refusal to investigate a whistleblower claim was at issue – *Robinson*, *Tillery*, *Stanton*, and *Caldwell*, Tallahassee attorney Marie Mattox is listed as counsel for the charging party. A simple Westlaw search shows the many times Ms. Mattox has sued FCHR for offenses against its own employees. She is not a favorite of FCHR.

statutory right of access to court is based on nothing more than bad luck.

It simply offends due process to countenance a law which confers a valuable legal right, but then permits that right to be capriciously swept away on the wings of luck and happenstance.

Id. at 236, *citing, Roth v. Board of Regents*, 408 U.S. 564, 577 (1972) (valuable property interests conferred by state law must not be "arbitrarily undermined"). In that sense, the conduct of FCHR in this case also violates Appellant's Fourteenth Amendment due process rights under the U.S. Constitution.

Moreover, the Florida right of access to courts (Art. I, § 21, Florida Constitution) holds as one of its central principles that no right to litigate may be abrogated without creating a replacement right. *Kluger v. White*, 281 So.2d 1, 4 (Fla.1973). The *Kluger* court cited the example of the replacement of the right to sue one's employer for work-related injuries with the system of worker's compensation law. That is also perhaps the saving grace for the anti-discrimination statute at §760.11, Florida Statutes. When FCHR issues a "no cause" determination that cuts off the right to sue in circuit court, the statute

allows a bench trial at DOAH that may eventually lead to a jury trial in circuit court. But when FCHR annihilates a perfectly good whistleblower charge with a “no jurisdiction” refusal to process, there is no alternative offered. As Judge Benton pointed out in his *Caldwell* dissent, FCHR is “judge, jury, and executioner.” *Caldwell*, 121 So.3d @ 1065. To be sure, there is an appeal such as this one, but that is far from an alternative proceeding on the merits such as a hearing before Judge of Compensation Claims (JCC) or a DOAH Administrative Law Judge (ALJ).

The law does not allow a bureaucrat at FCHR to kill a cause of action created by the Legislature for decision by a circuit court.

CONCLUSION

The Court should reverse the decision below and remand with instructions to enter a determination. The Court need not reverse any of its prior cases or rehear them en banc. The Court should simply decline to extend its deferential review of FCHR’s “jurisdictional” determinations any further. Extending that deference to this case would stretch the deference beyond all reason. The court is perfectly

free to find that it would have decided its prior cases differently had the parties in those cases raised the constitutional issues of separation of powers and the rights of due process, trial by jury, and access to courts in those cases. Indeed, the Court may and should find that FCHR is strictly bound by the statutory language to investigate and make a determination in every case when the question is considered from a constitutional angle that has never arisen in prior cases. The Court had no duty in the old cases to raise or consider *sua sponte* the constitutional issues the parties in those cases chose not to present.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record this 9th day of March, 2022, through the Court's e-service system.

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style, 14 point font.

/s/ Richard E. Johnson
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D21-3417
Lower Tribunal Case No. 202128179

MICHELLE WILSON,

Appellant,

vs.

FLORIDA COMMISSION ON HUMAN RELATIONS

Appellee.

ON APPEAL FROM A FINAL ORDER OF THE FLORIDA
COMMISSION ON HUMAN RELATIONS

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is an appeal of the dismissal of a Whistle-blower's Act ("WBA") Charge by the Florida Commission on Human Relations ("FCHR"). On December 14, 2020, Appellant Michelle Wilson submitted a WBA Charge to the FCHR. [R. 3-6]. On May 7, 2021, the FCHR issued Wilson a Notice of Right to Amend the Charge. [R. 6]. On May 28, 2021, Wilson submitted an Amended Charge. [R. 8]. On October 1, 2021, FCHR issued a Notice of Dismissal. [R. 14]. Wilson filed a Notice of Appeal on October 29, 2021.

II. STATEMENT OF FACTS

Wilson was employed as the Executive Director of the FCHR until October 15, 2020, when her employment was terminated. [R. 4]. On December 14, 2020, Wilson submitted a WBA Charge of Discrimination ("Charge") to the FCHR. In her Charge, Wilson alleged that she was subjected to "adverse actions" by FCHR after engaging in "protected conduct" and that the adverse actions were causally related to her protected conduct. [R. 4-6].

A. December 14, 2020, Charge

In her December 14, 2020, Charge, Wilson alleged that she engaged in protected conduct and as a result suffered “numerous cognizable adverse actions” including termination of her employment. [R. 4].

Wilson’s Charge included a narrative describing disagreements she had with two FCHR Commissioners: Jay Pichard and Latanya Peterson. [R. 4].

In her Charge Wilson wrote that Pichard “was antagonistic because his business had been the target of charges of discrimination to FCHR that he thought should have been processed differently.” [R. 4]. Wilson explained that Pichard believed the FCHR should dismiss certain “frivolous” charges and that she “explained that the procedural changes would require the legislature amending the statute and, following that, the agency amending the pertinent sections of the Florida Administrative Code.” [R. 5]. Wilson further wrote that Pichard sought information from FCHR’s Human Resources Director that he “could spin in support of his objective of firing Ms. Wilson” and that she objected to that conduct. [R. 5].

Wilson further alleged in her Charge that the United States Department of Housing and Urban Development (HUD) issued FCHR a Performance Improvement Plan that it could not meet because of a lack of staff, and that the FCHR was unsuccessful in efforts to obtain additional legislative funding to create new positions. [R. 5]. According to Wilson, Pichard invited the HUD Region IV Director, who had proposed suspending FCHR's HUD funding, to attend an FCHR committee meeting without notifying her, and the HUD Director stated he wanted Wilson and two other FCHR staff removed. Wilson wrote that a panel of the Commission voted "no confidence" in her and then at the September 2020 Commission meeting sought to have the full Commission affirm the vote but was unsuccessful. At that meeting, the Commission, which had not evaluated Wilson in three years despite her requests, adopted standards for evaluating Wilson. [R. 6]. A "no confidence" vote was then taken at the October 2020 meeting, even though it was not on the agenda, and Wilson's employment was terminated. [R. 6].

According to her Charge, Wilson engaged in protected conduct when she "objected" to Mr. Prichard seeking information about her from a subordinate; when she "protested" not being evaluated; and

when she “objected” to commissioners having conversations about agency business against the advice of counsel, to commissioners giving directions to staff, to a commissioner calling for an employee to be fired, and to being retaliated against for taking FMLA leave. [R. 6].

B. May 7, 2021, Notice of Right to Amend

On May 7, 2021, FCHR issued Wilson a Notice of Right to Amend because her “complaint [did] not contain a sufficiently clear and concise statement of the facts, including pertinent dates, constituting retaliation under the Whistle-blower’s Act.” [R. 7, 13].

On May 13 and 21, 2021, Wilson asked for clarification of the Notice of Right to Amend [R. 10-12], and on May 25, 2021, FCHR responded “the alleged protected activity is not clear from the complaint. Please provide a clear and concise statement that contains a description of the alleged protected activity, including the pertinent date.” [R. 10].

C. May 28, 2021, Amended Charge

Wilson submitted an Amended Charge on May 28, 2021. [R. 8-9]. Wilson wrote that during an August 18, 2020, Commission panel meeting she engaged in protected conduct when she told the panel

“she believed it was unfair to expect staff to meet performance measures without having the necessary staff and resources” and she “would not direct the staff to close an investigation prematurely just for the sake of meeting a 180-day standard.” [R. 8]. Wilson wrote that “other protected conduct occurred on July 20, 2020,” when she “called for compliance with the Governance Policy which called for establishment of performance measures.” [R. 9].

D. Notice of Dismissal

On October 1, 2021, FCHR issued a Notice of Dismissal explaining that it “previously notified [Wilson] that the information contained within [her] complaint was insufficient for the Commission to begin its investigation,” that “[she was] provided an opportunity to address the insufficiencies within 60 days,” and that “the Commission does not have authority to investigate, and the complaint will be dismissed.” [R. 14]. This appeal followed.

SUMMARY OF ARGUMENT

The FCHR has been delegated a gate-keeping function by the legislature which includes determining whether a claimant can sufficiently state a claim under the Florida Whistle-blower's Act (WBA). The WBA sets out what constitutes a protected disclosure and the FCHR permissibly requires a protected disclosure to be described in a charge in order to open an investigation. Florida law supports the ability of the FCHR to dismiss charges that do not include such a description. In this case, Wilson did not describe a protected disclosure, despite being given an opportunity to amend, and on appeal she has not shown that her Charge or Amended Charge sufficiently described any report or disclosure that met the requirements of the WBA.

The law did not require FCHR to disqualify itself from handling Wilson's Charge, and Wilson's due process rights were met because she was afforded the opportunity to amend her Charge to clearly identify a protected disclosure, and this appellate process to explain how the FCHR overlooked her description of a protected disclosure in her Amended Charge. Because the FCHR properly handled and

dismissed Wilson's Charge, her arguments that she was denied due process, access to court, and to a jury trial are unavailing.

The FCHR's dismissal of Wilson's Charge should be affirmed.

STANDARD OF REVIEW

The standard of review when a court reviews an administrative action is de novo. Art. V, 21, Fla. Const.

ARGUMENT

I. FCHR PROPERLY DISMISSED WILSON’S CHARGE BECAUSE IT DID NOT INVOKE THE AGENCY’S INVESTIGATIVE AUTHORITY UNDER THE WBA

A. The WBA sets forth a pleading requirement for WBA charges

Florida law provides that employees and former employees who have been subjected to retaliation by an employer after making a disclosure protected by the WBA may “file a complaint alleging a prohibit personnel action” ... with “the Office of the Chief Inspector General in the Executive Office of the Governor or the Florida Commission on Human Relations.” § 112.31895(1)(a), Fla. Stat.

The *form* that a disclosure must take to invoke WBA protection is governed by section 112.3187(7), Florida Statutes. This section states that in order to be protected, a disclosure must be written and signed, unless it is in the form of participating in an agency investigation; refusing to participate in an adverse action pursuant to the WBA; submitting a report through the Medicaid Whistle-blower’s hotline; or made to the Chief Inspector General, an agency inspector general, or the FCHR.

The *substance* requirement for a WBA disclosure is set forth at section 112.3187(5), Florida Statutes, which provides that protected disclosures include reports of

(a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor which creates and presents a substantial and specific danger to the public's health, safety, or welfare[, or]

(b) Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of an agency or independent contractor.

When the FCHR finds that a charge does not adequately describe either a protected disclosure or a prohibited personnel action, it “should expressly address a complainant's right to amend,” and provide the complainant “a chance to remedy any technical deficiencies in their otherwise potentially valid complaints.” *Johnson v. Florida Dept. of Corr.*, 190 So. 3d 259, 261 (Fla. 1st DCA 2016).

B. The FCHR is authorized to dismiss a charge that does not describe a disclosure of the nature set out in § 112.3187(5), Fla. Stat.

This Court has repeatedly held that the FCHR has no statutory authority to investigate and may dismiss a charge if it “does not meet the *prima facie* elements necessary to initiate the operation of the

Act.” *Stanton v. Florida Dept. of Health*, 129 So. 3d 1083, 1084 (Fla. 1st DCA 2013) (affirming FCHR’s dismissal of a Charge because it did not describe a disclosure that would trigger the protection of the WBA); *Tillery v. Florida Dept. of Juvenile Justice*, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013) (affirming FCHR’s dismissal of a charge because it did not assert “when or to whom” a disclosure was made); *Caldwell v. Florida Dept. of Elder Affairs*, 121 So. 3d 1062, 1063 (Fla. 1st DCA 2013) (affirming dismissal of charge by FCHR because allegations in the charge that the complainant contacted a federal investigator “to alert him to the condition of the Ombudsman program and the gross misfeasance and malfeasance that were occurring within” were conclusory and did not describe any act or suspected act of misfeasance or malfeasance”).

It is well settled that FCHR may dismiss, and is not required to investigate, a charge that does not describe a protected disclosure as defined by the WBA.

C. The FCHR properly dismissed Wilson’s Charge

Wilson argues that “FCHR violated its statutory mandate in this case by dismissing on jurisdictional grounds a charge that was both thorough and well within FCHR’s subject matter jurisdiction.” [Initial

Brief, p 11]. Wilson further suggests that her charge “carefully described protected conduct occurring on specified dates in violation of clearly identified statutes and rules,” unlike those in the “trilogy of 2013 cases discussed above.” [Initial Brief, p. 16].

The FCHR disagrees. Wilson in her Initial Brief did not identify this “carefully described protected conduct.” Indeed, the Charge offers little more than a rambling backstory of the conflicts between Wilson and the Commissioners, troubles within the agency, and Wilson’s disagreements with the actions and votes of the Commissioners. Her references to policy violations were vague, and her purported whistle-blower disclosures were merely “requests” for a performance evaluation and “objections” to Commissioner actions, which do not amount to disclosures or reports as defined in Florida Statutes section 112.3187(7).

This Court has recently examined what a protected disclosure looks like under the WBA. For example, in *Nazzal v. Florida Dep’t of Corr.*, 267 So. 3d 1094, 1097 (Fla. 1st DCA 2019), *review denied*, 2019 WL 6248307 (Fla. Nov. 22, 2019) this Court reiterated that to be protected under the WBA, a report or disclosure must demonstrate that a law, rule, or regulation has been violated,

presenting a substantial and specific danger to the public's health, safety, or welfare; or describe an action of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty by an agency employee or independent contractor. In *Nazzal*, an employee's alleged protected disclosure was an incident report identifying three acts of unprofessional conduct by her supervisor and claiming that she was discriminated against in violation of the Civil Rights Act, but not elaborating on how or by whom she was treated disparately. This Court found the report in *Nazzal* insufficient to invoke the protection of the WBA.

Similarly, in *Pickford v. Taylor County Sch. Dist.*, 298 So. 3d 707, 711 (Fla. 1st DCA 2020), this Court found that a substitute teacher's letter to his principal asserting that his pay should be that of a full-time teacher was insufficient to invoke the protection of the WBA because it did not identify any violation of law, rule, or policy that would present a "substantial and specific danger to the public's health, safety, or welfare," or identify any act of misfeasance, malfeasance, or other gross conduct.

Even more recently, this Court found that an employee's written rebuttal to a disciplinary action did not invoke the protection of the WBA because it did not identify any violations of any law or policy or any incident of misfeasance, malfeasance, or gross misconduct. *Washington v. Florida Dep't of Revenue*, 2022 WL 1101346, at *6 (Fla. 1st DCA Apr. 13, 2022).

That *Nazzal*, *Pickford*, and *Washington* were appeals of summary judgments does not change the analysis. The trial court in those cases applied sections 112.3187(5) and (7) to the Plaintiffs' disclosures and found they did not identify a violation of law, rule, or regulation creating a substantial and specific danger to the public's health, safety, or welfare; or any incident of misfeasance, malfeasance, or gross misconduct. While *Nazzal*, *Pickford*, and *Washington* each submitted some type of written report or complaint, the information therein did not meet the substantive requirements of the WBA.

As in the authorities cited above, Wilson's Charge did not describe a protected disclosure. She was given the opportunity to amend her Charge, and she did. Yet notwithstanding FCHR's explanation that her original Charge did not clearly describe

protected activity, her Amended Charge offered little more, alleging only that she “declared” the unfairness of expecting staff to meet performance measures without inadequate staffing, “made it clear” she would not direct staff to close investigations prematurely in order to meet FCHR’s 180-day standard, and “called for” establishment of performance measures in compliance with the Governance Policy. Wilson did not, in her Amended Charge, identify a single violation of law, rule, or regulation that created a substantial and specific danger to the public’s health, safety, or welfare. Nor did she identify any incident of misfeasance, malfeasance, or gross misconduct. Wilson has pointed to no legal authority to suggest that the statements she described in her Charge or Amended Charge met the WBA’s definition of protected disclosure.

Accordingly, FCHR’s dismissal of Wilson’s Charge was proper, and the decision below should be affirmed.

II. THE FCHR DID NOT HAVE AN UNWAIVABLE DUTY OF DISQUALIFICATION BECAUSE IT IS THE ONLY ENTITY AUTHORIZED BY THE WBA TO INVESTIGATE WHETHER A PROHIBITED PERSONNEL ACTION HAS OCCURRED IN RETALIATION FOR A PROTECTED DISCLOSURE

Wilson next argues that “FCHR had no authority to keep the charge” and was required to “refer this case to the Attorney General,

any of the state attorneys in Florida, the OIG, or any other agency with the investigative resources to handle the conflict overflow. [Initial Brief, p. 26]. Wilson is mistaken.

The WBA accords investigative power to the FCHR “to determine whether reasonable grounds exist to believe that a prohibited action or a pattern of prohibited action has occurred, is occurring, or is to be taken.” § 112.31895(2)(a), Fla. Stat. The statute does not grant this power to any other entity or agency.

While Wilson argues that the Office of the Chief Inspector General (CIG) is “an alternative processing agency for claims,” she is mistaken. Florida Statutes section 112.3189 describes what the CIG or an agency inspector general (IG) is required to do in response to receiving a whistle-blower report. They must determine (1) whether the conduct described is a violation of law, rule, or regulation or an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty; (2) whether the whistle-blower is an employee of a state agency, and (3) whether the report demonstrates reasonable cause that the agency employee actually “violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a

substantial and specific danger to the public's health, safety, or welfare, or has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty." § 112.3189(3), Fla. Stat. If the answer to any of these three inquiries is no, the CIG or IG must notify the complainant. § 112.3189(4), Fla. Stat. If the answer to all three inquiries is yes, the CIG or IG must conduct an investigation, unless otherwise unnecessary based on a list of factors recited in the statute. § 112.3189(5), Fla. Stat.

However, section 112.3189 does *not* provide that the CIG or an IG is to investigate whether *a prohibited personnel action has taken place* in retaliation for making a protected disclosure. That authority is reserved to the FCHR as provided in Florida Statutes section 112.31895, which provides that a report of a *retaliatory* action in violation of the WBA may be made to either the FCHR or the CIG, but that the fact finding, or investigation, *shall be conducted by the FCHR*. § 112.31895, Fla. Stat. This statute does not give the CIG, or any entity other than the FCHR, any authority to investigate whether a prohibited personnel action has occurred in retaliation for a protected disclosure.

In other words, while the CIG or an IG may investigate the *underlying disclosure* that is described in a whistle-blower charge, only FCHR has the authority to investigate the alleged *prohibited personnel action* taken in retaliation for making the disclosure.

Wilson cites no authority in support of her argument that another entity should have investigated her Charge. Moreover, the authority to investigate a charge, or forward it elsewhere for investigation, presupposes that a charge adequately describes a prohibited personnel action taken in retaliation for a protected report. As described above, Wilson's Charge did not. The FCHR is not required to investigate a charge that does not sufficiently describe protected activity and is likewise not required to forward it elsewhere for investigation. Moreover, though not a part of the record, FCHR did hire outside counsel to review Wilson's Charge and provide a legal analysis of its sufficiency.

Accordingly, FCHR did not have an unwaivable duty to disqualify itself and the decision below should be affirmed.

III. THE FCHR’S DISMISSAL OF WILSON’S CHARGE DID NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS BECAUSE IT PROPERLY EXERCISED A QUASI-JUDICIAL POWER DELEGATED TO IT BY THE FLORIDA LEGISLATURE

Wilson next argues on appeal that FCHR does not have “the authority to dispose completely of a case under the whistleblower act.” [Initial Brief, p. 28].

In support of her separation of powers argument, Wilson relies upon *Broward Cnty. v. La Rosa*, 505 So. 2d 422 (Fla. 1987). *Broward* is inapposite. The question there was whether “a county ordinance may constitutionally empower a local administrative agency to award actual damages, including compensation for humiliation and embarrassment, to victims of race discrimination.” *Id.* at 422. The question was not whether administrative agencies can serve any gate-keeping function at all. Or even whether an administrative agency can award “quantifiable damages” like back pay. *Id.* at fn5. The issue was narrow, and the holding of *Broward* does not apply to this case.

Moreover, though Wilson argues that FCHR has “trespassed on the power of the courts” [Initial Brief, p. 28], the “separation of powers does not mean that every governmental activity is classified as

belonging exclusively to a single branch of government.” *Simms v. State, Dept. of Health & Rehab. Services*, 641 So. 2d 957, 960 (Fla. 3d DCA 1994). Indeed, the Florida Constitution explicitly provides that “[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices.” Art. V, § 1, Fla. Const. The Florida Supreme Court in *Broward* explained that “the legislature can create administrative agencies with quasi-judicial powers,” so long as they do not “exercise powers that are fundamentally judicial in nature.” *Broward*, 505 So. 2d at 423.

In dismissing Wilson’s Charge, FCHR exercised only those powers that have been delegated to it by the Florida Legislature and the decision below should be affirmed.

IV. FCHR’S DISMISSAL OF WILSON’S CHARGE DID NOT VIOLATE WILSON’S RIGHTS OF DUE PROCESS, ACCESS TO COURTS, OR TRIAL BY JURY

A. Wilson was afforded due process

Wilson argues that FCHR’s ability to dismiss a charge and prevent an employee from filing a WBA claim in state court violates her rights of due process. [Initial Brief, p. 30].

In support of her due process argument, Wilson relies upon *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980), in which the medical mediation act was held unconstitutional. However, the holding in *Aldana* was not based on the mere fact that the act served as a gatekeeper to a civil action, but “because application of its rigid jurisdictional periods has proven arbitrary and capricious in operation, yet the act cannot be remedied by enlarging the jurisdictional periods or permitting continuances or extensions of time, for to do so would constitute a denial of access to the courts.” *Aldana*, 381 So. 2d at 238.

Wilson did not explain how requiring a claimant to factually describe both a protected disclosure and a prohibited personnel action in a charge is arbitrary or capricious. Moreover, the deficiency in Wilson’s Charge was explained and she was given the opportunity to amend. If Wilson indeed disclosed a violation of law, rule, or regulation in accordance with the WBA, she should have identified in her Charge what law, rule, or regulation was at issue, explained how it was violated, and described how she disclosed it. She did not. Instead, she wrote that she told the Commission that its performance

measures were unfair, asked for the establishment of performance measures, and asked for an explanation of her evaluation process.

Though she argues repeatedly that FCHR “killed,” “annihilated,” and “strangled” her case, Wilson was afforded this appellate review process as yet another chance to explain how her Charge or Amended Charge were sufficient. She has not. Wilson was afforded due process and the decision below should be affirmed.

B. Wilson was not unlawfully denied access to court

Wilson similarly argues that the ability of FCHR to dismiss a Charge and prevent an employee from filing a WBA claim in court violates her right to access the courts. She relies on *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), in which the Florida Supreme Court held unconstitutional a law abolishing tort actions for property damage claims arising from auto accidents and requiring injured persons to seek compensation from their auto insurer.

Here, though, Wilson’s right to sue FCHR for her dismissal was not abolished. Other causes of action were available to her, for example she could have filed a § 1983 claim for First Amendment retaliation, a claim which has no administrative prerequisite. And to the extent that she obliquely referenced FMLA retaliation in her

Charge, Wilson could have filed a retaliation claim under the Family Medical Leave Act.

Wilson was given an opportunity to amend her Charge and she nevertheless failed to sufficiently describe protected activity. Though her Charge was dismissed, she still had other avenues to court. Accordingly, FCHR's dismissal of Wilson's Charge did not unlawfully deprive her of access to court and the decision below should be affirmed.

C. The right to a jury trial is not absolute

Wilson next argues that because the Florida Constitution provides "the right of trial by jury," FCHR's dismissal of her Charge violated her Constitutional rights. [Initial Brief, p. 29-33].

By Wilson's logic, every trial court that dismisses a complaint that fails to plead a WBA claim, and every judge who grants summary judgment for an employer because an employee fails to show a *prima facie* case of retaliation, violates a litigant's Constitutional right to a jury trial. But The Eleventh Circuit has held that the grant of summary judgment is not a deprivation of the right to a jury trial. *See Jackson v. Hartford Life & Acc. Ins. Co.*, 543 Fed. Appx. 977, 979 (11th Cir. 2013). Likewise, the dismissal of an action before trial does

not usurp the role of a jury. *Yeyille v. Miami Dade Cnty. Pub. Sch.*, 643 Fed. Appx. 882, 885 (11th Cir. 2016).

Wilson's Charge was properly dismissed because it did not state a claim and the decision below should be affirmed.

CONCLUSION

The FCHR properly found that Wilson's charge did not adequately describe a protected disclosure. FCHR then properly exercised its authority to dismiss the charge after affording Wilson an opportunity to amend. Wilson has not identified any error in FCHR's action. Accordingly, this Court should affirm the FCHR's dismissal of Wilson's Charge.

Respectfully submitted,

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I certify that this brief is prepared in Bookman Old Style 14-point font and contains 4,764 words.

CERTIFICATE OF SERVICE

I certify that a copy of this brief was filed with the Florida Courts E-Portal which furnished a copy to all parties of record on June 3, 2022.

/s/ Jamie Ito
Jamie Ito

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 204 Reply Brief

DATE: 7/5/2022

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TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D21-3417

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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D21-3417

L.T. No.: 202128179

FLORIDA COMMISSION ON
HUMAN RELATIONS,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal of a Final Order of the Florida Commission on Human
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STATEMENT OF CASE AND FACTS

The principal reason FCHR fired Michelle Wilson was her refusal to violate § 760.11(3), Florida Statutes, which requires that, "the Commission shall investigate the allegations in the complaint," and that, "the Commission shall determine if there is reasonable cause to believe that discriminatory practice has occurred" FCHR twists and turns every way to pretend that is not in the charge, though it is the first thing in the charge after some introductory language. This was also the centerpiece of the Amended Charge, along with Wilson's complaints of other violations that would also qualify. She disobeyed illegal instructions to dismiss charges without investigation. That cost her job.

As shown in the Initial Brief, at 5, FCHR could not decide quite why the original charge needed to be amended. FCHR's first email said the charge lacked something on retaliation, while the next explanation faulted the charge for an omission on protected conduct. Efforts to pin FCHR down on what was lacking in the charge were fruitless. The agency just seemed to be looking for an excuse not to investigate. This

Court, in *Johnson v. Florida Dept. of Corrections*, 190 So.3d 259 (Fla. 1st DCA 2016), faulted FCHR for a dismissal notice that “fails to provide a specific reason for dismissing Appellant's complaint; instead it vaguely states ‘[c]onsidering all information received, the Commission does not have authority to investigate.’” *Id.*, 262. Given the complete finality of this refusal to investigate, due process demands a clear and detailed explanation of what is missing that would suffice. That is absent here.

ARGUMENT

I. FCHR Had A Duty to Investigate the Charge and Make a Determination

The Florida Public Whistleblower’s Act, §§ 112.3187–31895, Florida Statutes (hereinafter “the Act”), requires FCHR to investigate public whistleblowers’ complaints, to make a determination on the validity of those claims, to conciliate them, and to advocate for the claimants in meritorious cases. Neither that statute nor any other authorizes FCHR to try a case. With stronger reason, FCHR may not make a trial-like determination on a case pre-investigation. The Initial Brief and the Answer Brief both give attention to three cases in which

this Court, in dicta, spoke of a charging party's duty to make a prima facie case as a precondition to having a charge investigated. *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013); *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013); and *Caldwell v. Florida Dept. Of Elder Affairs*, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013).

This Court had previously given short shrift to a similar effort by FCHR, in the public accommodations context, to abort its investigative duties prematurely. *Mena v. Lifemark Hospitals of Florida, Inc.*, 50 So.3d 759,761 (Fla. 1st DCA 2010). A sister court rejected FCHR's claim of a lack of subject matter jurisdiction in the discrimination context in *Mitchell v. Palm Beach County School Board*, 127 So. 3d 707 (Fla. 4th DCA 2013). This Court also rejected FCHR's premature claim of lack of subject matter jurisdiction when the agency assumed without investigation that an employer was not covered under the Act at issue here. *Schnebly v. G4S Youth Services, LLC*, 98 So.3d 1270 (Fla. 1st DCA 2012).

After the Initial Brief in this case, but before the Answer Brief,

this Court handed down *Abadi v. Walt Disney World Parks & Resorts*, --- So.3d ---- , 2022 WL 1652782 (Fla. 1st DCA 2022). That case provides good analysis disclaiming the need for a prima facie case at the FCHR stage. “We simply note that a plaintiff is not required to establish a prima facie case of discrimination in the complaint, but must plead sufficient facts in the complaint to set forth a plausible claim.” *Id.*, *2. That has been federal law for twenty years in discrimination cases and employment cases in general, not only at the pre-suit investigative stage, but at the post-suit motion-to-dismiss stage. *Swierkiewicz v. Sorema NA*, 534 US 506 (2002). Lack of a prima facie case becomes a ground for dismissal only at the summary judgment stage, and even then not where there is otherwise a “convincing mosaic” of evidence of liability. *Smith v. Lockheed-Martin*, 644 F.3d 1321, 1328 (11th Cir.2011).

This Court has firmly recognized, as shown above, that FCHR may not require a charging party to make a prima facie case in discrimination cases nor in public accommodation cases. There is no cognizable basis for the dicta requiring a prima facie case in

whistleblower cases. The applicable rule further provides that “a complaint is sufficient if it is in writing, signed by the Complainant, verified, and sufficiently precise to identify the parties and to describe generally the action or practice complained of.” Fla. Admin. Code R. 60Y-5.001(6)(b).¹ This ought to decide the matter. FCHR is bound by its own rules.

Indeed the prima facie case requirement is cruel and arbitrary by comparison in whistleblower cases because the refusal to investigate in a whistleblower case, unlike the others, works a forfeiture. It is the end of the road, whereas in the other cases, the charging party can go on to the next stage.

FCHR whistleblower charges are meant to be filed by, for example, a groundskeeper with a sixth-grade education who is fired for refusal to dump toxic chemicals into a waterway. The administrative process is designed to be a rudimentary process in which investigators probe for enough information to get things started. The Answer Brief,

¹ This is the Rule for discrimination cases, but It is specifically adopted for whistleblower cases as well by Fla. Admin. Code 60Y-11.005.

at 13, cites three cases in which the appeals court affirmed summary judgments in cases in which FCHR actually performed investigations, plaintiffs filed complaints, and discovery was conducted, as precedents supporting this dismissal without investigation. That comparison ought to be stunning. At the time of summary judgment, a case is ready for trial. The facts are assembled, discovery is complete, the witnesses known, the documents assembled. By then, lack of a prima facie case is sometimes dispositive, though never so at the pre-discovery motion-to-dismiss stage, as held by SCOTUS in *Swierkiewicz*. And, with stronger reason, lack of a prima facie case is never dispositive at the pre-suit stage.

FCHR dismissals based on “jurisdiction” should never be based on the alleged strength of a case. That is why the legislature created the “no cause” determination. “Jurisdiction” is no excuse for FCHR just not wanting to do its job.

II. FCHR Had an Unwaivable Duty of Disqualification

FCHR failed to address the two alternative tribunals that could have processed Wilson’s charge. First, the legislature provided for the

Chief Inspector General to serve as an alternative processing agency for claims.

If a disclosure under s. 112.3187 includes or results in alleged retaliation by an employer, the employee or former employee of, or applicant for employment with, a state agency, as defined in s. 216.011, that is so affected may file a complaint alleging a prohibited personnel action, which complaint must be made by filing a written complaint with **the Office of the Chief Inspector General in the Executive Office of the Governor** or the Florida Commission on Human Relations, no later than 60 days after the prohibited personnel action.

§112.31895(1)(a), Florida Statutes (2020) (emphasis added). FCHR in its answer Brief left that statutory provision unaddressed, opting instead on a tortuous excursion through other statutes, extracting questionable conclusions to the effect that the legislature did not really mean what it said when the Office of the Chief Inspector General could process whistleblower complaints. But the statute, quoted immediately above, is not ambiguous in the least and thus must be obeyed without efforts at interpretation. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (“Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so

would be an abrogation of legislative power.”).

FCHR did not even mention the reliance of the Initial Brief on Florida Administrative Code, Rule 60Y-5.002, “Agreements of Referral of Complaints.” The Rule provides details of which charges may be outsourced and how it is to be done. Through this Rule, FCHR outsourced investigation of complaints to the office of the Attorney General.

FCHR had no authority to keep the charge and, other than the instant appeal, Appellant had no means of divesting FCHR of jurisdiction based on conflict. On remand, FCHR should be compelled to issue a prompt determination, allowing the case to proceed to circuit court.

III. FCHR’s Dismissal Violates Constitutional Separation of Powers

The Initial Brief showed that the Legislature never granted, and never could have granted, FCHR the authority to dispose completely of a case under the whistleblower act. Only a court has jurisdiction to make a final determination of whether a claimant is entitled to the liquidated damages remedy the statute grants.

Thus FCHR trespassed on the power of the Legislature in effectively amending the language of a statute to arrogate to itself the power to annihilate administratively cases which the statute allowed to go to circuit court. FCHR also trespassed on the power of the courts to make the determination of whether a claimant/plaintiff will get unliquidated damages.

One searches the Answer Brief in vain for something that fairly meets or engages either of these separation-of-powers trespasses.

IV. FCHR's Failure to Issue a Determination Violates Appellant's Rights of Due Process, Access to Courts, and Trial by Jury

FCHR distinguishes the facts of *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980), from the facts of this case. But the differences are not material. Appellant cited the case for the legal principles it articulates, not its facts. FCHR completely ignores the principles. These principles are the constitutional bar on onerous pre-suit procedures that impair access to court and the due process bar on a randomness and lack of standards that is intrinsically unfair and arbitrary and capricious in its application,

Also, plaintiffs under the whistleblower act are entitled to a trial by jury. *O'Neal v. Florida A & M University*, 989 So.2d 6 (Fla. 1st DCA 2008). FCHR may not prevent a case from getting to a court that has the power to conduct a jury trial. It is irrelevant that the circuit court might not let a case get to a jury. The point is that, unlike FCHR, the circuit court has the power to conduct a jury trial and the power to dismiss a case before it goes to a jury – facts known to the Legislature when it passed the law allowing liquidated damages to whistleblower plaintiffs.

CONCLUSION

The Court should reverse the decision below and remand with instructions to enter a determination. The Court need not reverse any of its prior cases or rehear them en banc. The Court should simply decline to extend its deferential review of FCHR's "jurisdictional" determinations any further. Extending that deference to this case would stretch the deference beyond all reason. The court is perfectly free to find that it would have decided its prior cases differently had the parties in those cases raised the constitutional issues of separation

of powers and the rights of due process, trial by jury, and access to courts in those cases. Indeed, the Court may and should find that FCHR is strictly bound by the statutory language to investigate and make a determination in every case when the question is considered from a constitutional angle that has never arisen in prior cases. The Court had no duty in the old cases to raise or consider *sua sponte* the constitutional issues the parties in those cases chose not to present.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record this 5th day of July, 2022, through the Court's e-service system.

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style, 14 point font.

/s/ Richard E. Johnson
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 205 Opinion (PCA)

DATE: 10/26/2022

PAGES: 1

TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D21-3417

CAPTION: *Wilson v FCHR, et al.*

FILENAME: *

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ITEM 205 | OPINION (PCA)

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

MICHELLE WILSON	)	
Appellant,	)	
	)	
v.	)	L.T. No.: 202128179
	)	Case No.: 1D21-3417
FLORIDA COMMISSION ON HUMAN	)	
RELATIONS,	)	
Appellee.	)	
	)	

Richard E. Johnson of Law Offices of Richard E. Johnson, Tallahassee,
for Appellant.
Jamie Ito of Ito Law, PLLC, Tallahassee,
for Appellee.

Per Curiam

AFFIRMED.

See *Stanton v. Fla. Dep't of Health*, 129 So. 3d 1083 (Fla. 1st DCA 2013) (reaffirming that when a whistle-blower complaint does not meet the prima facie elements necessary to initiate operation of the Whistle-blower's Act, the Florida Commission on Human Relations has no authority to proceed with a fact-finding investigation); *Washington v Fla. Dep't of Revenue*, 337 So.3d 502 (Fla. 1st DCA 2022) (holding that a protected disclosure must be a written and signed complaint in order to trigger the protections of the Whistle-blower's Act when a complainant has not claimed to have participated in an investigation or to have made a complaint through a hot-line).

Osterhaus, Bilbrey, and Nordby, JJ., concur.



FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 206 Motion for Rehearing

DATE: 11/10/2022

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TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D21-3417

CAPTION: *Wilson v FCHR, et al.*

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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D21-3417

L.T. No.: 202128179

FLORIDA COMMISSION ON
HUMAN RELATIONS,

Appellee.

_____ /

**APPELLANT'S MOTION FOR REHEARING OR CLARIFICATION,
FOR CERTIFICATION, AND FOR REHEARING EN BANC**

Appeal of a Final Order of the Florida Commission on Human
Relations

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**APPELLANT’S MOTION FOR REHEARING OR CLARIFICATION,
FOR CERTIFICATION, AND FOR REHEARING EN BANC**

Appellant MICHELLE WILSON, by and through undersigned counsel and pursuant to *Fla.R.App.P.* 9.330 and 9.331, respectfully moves for rehearing or clarification, for certification, and for rehearing en banc.

In submitting these motions, Appellant is cognizant that such motions are not intended for routine use.

MOTION FOR REHEARING OR CLARIFICATION

This Court relied upon *Stanton v. Florida Department of Health*, 129 So.3d 1083 (Fla. 1st DCA 2013), one of a line of cases that appellant distinguished by pointing out that the parties in those cases had not raised, and therefore the Court had not decided, a number of constitutional issues that would have, or at least should have, mandated a different outcome had they been raised. The Court simply ignored those constitutional issues as though they had not been raised. That is a court’s prerogative, but in the slightly different

context of an unwritten opinion, *Fla.R.App.P.* 9.330(a) speaks of a request for the Court to address an issue in writing to provide a basis for seeking Supreme Court review. Even a few words on these unaddressed issues would provide a basis for such review on a number of questions including the following:

- Separation of powers violations arise from the Florida Commission on Human Relations (FCHR) arrogating to itself the legislative power to change the words of a statute to excuse itself from the legislative mandate to investigate and issue a determination in every whistleblower case and arrogating to itself the judicial power to make final disposition of a case involving a right to a jury trial and a possibility of unliquidated damages;
- ▶ Federal and state due process violations arise from FCHR's breach of the long-standing constitutional principle that, "No man is allowed to be a judge in his own cause," *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009), when FCHR undertook review of its own conduct in

a firing it had performed, despite Appellant's objection to that conflict of interest.

- Further due process violations arise from the fact that FCHR's refusal to obey its statutory mandate to investigate and make a determination on every case is capricious and without any rules, policies, or standards at all. Whatever moves the agency at the moment or reduces its workload is the practice.
- Right-to-trial-by-jury violations arise from FCHR's final and dispositive determination administratively of a cause of action on which Appellant has a right to trial by jury.
- Federal and state access-to-court violations arise from FCHR imposing insuperable burdens on a person seeking to work through the statutory pre-requisites to litigation, such that access to any remedy is extinguished with no grant of an alternate remedy.

An additional due-process concern is embedded in the Catch-22 arising from the Court's citation to *Washington v. Florida Department*

of Revenue, 337 So.3d 502 (Fla 1st DCA 2022), concerning a requirement for a written and signed complaint. Like most persons fired from state employment, Appellant was not allowed to gather documents to take home. Hence, she was unable to collect her many documents that fit the stated description. She had no idea that Appellee, who had all these documents, would cite her failure to cite those papers as one of the excuses not to conduct the investigation that would force production of the disputed documents. Appellant's whistleblower charge document and her amended charge are laden with references to her numerous complaints and the context unmistakably shows that many of them had to be written, even if that word is not used. Appellant had no idea that she would be denied the mandatory investigation that would yield the documents and then be faulted for not having the documents handy to assist in writing the charge. One does not prepare for a stratagem of this sort. In any case, this Court is required to draw inferences in favor of the charging party, including the inference that a complaint lacking express description of its written or oral status is assumed to be written.

FCHR identified no such alleged defect in its call for amendment.

WHEREFORE Appellant respectfully moves for rehearing and clarification.

II. MOTION FOR CERTIFICATION

Question of Great Public Importance

This case deals with a question of great public importance. The Florida Supreme Court has noted the intent of the legislature to give the whistleblower statute the broadest scope to accomplish its remedial purpose to combat waste, fraud, and corruption in government. *Irven v. Dep't of Health & Rehab. Servs.*, 790 So.2d 403, 406 (Fla.2001) (“The statute could not have been more broadly worded.”) No Florida court has ever considered the “inherent” power of FCHR to dispose of a whistleblower charge without investigation or determination in light of the constitutional implications of that “inherent” power. Appellant therefore respectfully moves for certification of the following question:

WHETHER THE PROVISIONS OF THE CONSTITUTIONS OF THE U.S. AND FLORIDA REGARDING SEPARATION OF POWERS, DUE PROCESS, ACCESS TO COURTS, AND TRIAL BY JURY PERMIT THE FLORIDA COMMISSION ON

HUMAN RELATIONS TO EXERCISE AN “INHERENT” POWER TO MAKE EXCEPTIONS TO THE STATUTORY MANDATE THAT FCHR INVESTIGATE AND MAKE A DETERMINATION IN EVERY CASE.

WHEREFORE Appellant respectfully requests that this Court certify to the Supreme Court as a question of great public importance the issue stated above.

III. MOTION FOR REHEARING EN BANC

Issue of Great Public Importance

As Florida experiences decades of one-party rule, accountability to citizens and taxpayers becomes more attenuated and difficult as checks and balances shrink. The whistleblower statute is a key mechanism the legislature provided those citizens and taxpayers to preserve and protect government accountability, without regard to which party is in power. The statute relies on government employees, those necessarily in a position to observe wrongdoing, to come forward and to be protected from retaliation. That legislative purpose is undermined when the very government the whistleblower law seeks to hold accountable can convert its ministerial processing role into an adjudicative role that usurps the functions of both the legislature and

the courts by killing *in utero* whistleblower complaints that the legislature has destined for court adjudication. This is a question of great public importance.

Maintenance of Uniformity

The panel opinion cannot be reconciled with this Court's holding in *Johnson v. Florida Dept. of Corrections*, 190 So.3d 259 (Fla. 1st DCA 2016), a whistleblower case in which this Court faulted FCHR for a dismissal notice that "fails to provide a specific reason for dismissing Appellant's complaint; instead it vaguely states '[c]onsidering all information received, the Commission does not have authority to investigate.'" *Id.*, 262. As shown in the Initial Brief, at 5, FCHR could not decide quite why the original charge needed to be amended. FCHR's first email said the charge lacked something on retaliation, while the next explanation faulted the charge for an omission on protected conduct, with neither excuse specified. Efforts to pin FCHR down on what was lacking in the charge were fruitless. The agency just seemed to be looking for an excuse not to investigate. The panel opinion took no cognizance of this in the course of citing a failure to

specify that Appellant's complaints were written – something that could have easily been included in the amendment if needed. The notice of right to amend should not be a game of “hide the ball” in which the charging party must guess at what is lacking. FCHR never said a thing at the pre-suit stage about a failure to assert a written complaint. The uniformity of the Court's opinions demands that Appellant go forward with her case.

A second conflict of decision with the panel opinion comes from *Abadi v. Walt Disney World Parks & Resorts*, 338 So.3d 1101 (Fla. 1st DCA 2022). That case disclaims the need for a prima facie case at the FCHR stage. “We simply note that a plaintiff is not required to establish a prima facie case of discrimination in the complaint, but must plead sufficient facts in the complaint to set forth a plausible claim.” *Id.*, 1105. The panel opinion *ad litem* required the prima facie case that *Abadi* abjures. True, *Abadi* is a public accommodation case, not a whistleblower case. But that is not a material distinction. *Abadi* grounds its authority in a few generic federal cases that embody the standard sorts of due process protections that take cognizance of

rights to save merits determinations for, at least, a post-court-filing time and, usually until summary judgment – certainly not at pre-suit or even at the motion-to-dismiss stage in court. See, e.g., *Swierkiewicz v. Sorema NA*, 534 US 506 (2002). Lack of a prima facie case becomes a ground for dismissal only at the summary judgment stage, and even then not where there is otherwise a “convincing mosaic” of evidence of liability. *Smith v. Lockheed-Martin*, 644 F.3d 1321, 1328 (11th Cir.2011).¹

Mena v. Lifemark Hospitals of Florida, Inc., 50 So.3d 759,761 (Fla. 1st DCA 2010), is a third case that conflicts with the panel opinion,

¹ Florida courts adopted the Title VII retaliation prima facie case for the Florida Public Whistleblower Act: “(1) [she] engaged in statutorily protected expression; (2) [she] suffered an adverse employment action; and (3) there is some causal relation between the two events.” *Rice-Lamar v. City of Ft. Lauderdale*, 853 So.2d 1125, 1132-3 (Fla. 4th DCA 2003). A plethora of Florida courts in every circuit have used that exact language or something close to it to define a prima facie case under the Act. Not a one has included a word about a requirement that protected expression be written. Where that comes up it is after discovery and certainly not at the pre-suit stage. FCHR did not make such a claim in its dismissal, but the panel opinion apparently assumes it must have been in the mind of the FCHR actors back then. It is error, whatever its provenance.

in that it demands that FCHR do enough investigation to determine whether the subject Respondent was actually a public accommodation, i.e., perform the duty to investigate that is the same in whistleblower claims as it is in all other claims FCHR processes.

In a fourth conflict case, *Schnebly v. G4S Youth Services, LLC*, 98 So.3d 1270 (Fla. 1st DCA 2012), arising under this same whistleblower statute, this Court reversed FCHR's summary dismissal of a charge, with no investigation or determination, on the basis that a private contractor could not be covered, though the statute provides coverage in certain circumstances.²

Two of these four cases arose under the whistleblower act.

Standing in apparent conflict with the four cases discussed above is a trilogy of cases, *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013); *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013); and *Caldwell v.*

² Though not on point for en banc maintenance of uniformity, a sister court rejected FCHR's refusal to investigate in the discrimination context in *Mitchell v. Palm Beach County School Board*, 127 So. 3d 707 (Fla. 4th DCA 2013).

Florida Dept. Of Elder Affairs, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013), that give FCHR plenipotentiary power to dispose of whistleblower claims as it sees fit, with or without investigation of determination. The wings of luck, happenstance, and whim determine the outcome a whistleblower gets in this Court after FCHR unlawfully declines to investigate her case or make a determination in it. It is past time to resolve the disparity.

The principle is the same whether FCHR is refusing to investigate a whistleblower case or an employment discrimination case or a public accommodations case or a housing discrimination case. The conflict has even worse impact where the charges are meant to be filed *pro se* by persons of limited education. The dereliction is most cruel in the whistleblower context, because in all other contexts, the charging party can go forward despite the inaction of FCHR. In the whistleblower context, FCHR's dereliction works a forfeiture and aborts the whole case before it emerges from the womb of FCHR and enters its life in litigation.

WHEREFORE Appellant respectfully moves that this Court

rehear en banc the matters identified above.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court and that a consideration by the full court is necessary to maintain the uniformity of decisions in this Court: *Johnson v. Florida Dept. of Corrections*, 190 So.3d 259 (Fla. 1st DCA 2016); *Abadi v. Walt Disney World Parks & Resorts*, 338 So.3d 1101 , 2022 WL 1652782 (Fla. 1st DCA 2022); *Mena v. Lifemark Hospitals of Florida, Inc.*, 50 So.3d 759,761 (Fla. 1st DCA 2010); *Schnebly v. G4S Youth Services, LLC*, 98 So.3d 1270 (Fla. 1st DCA 2012).

RELIEF SOUGHT

The Court should grant rehearing or clarification, should reverse FCHR, and mandate entry of a determination so Appellant can proceed to circuit court. Alternatively or additionally, the Court should certify the question stated to the Florida Supreme Court as a

question of great public importance. Failing that, the Court should grant rehearing en banc.

Respectfully submitted,

/s/ Richard E. Johnson

Richard E. Johnson

Florida Bar No. 858323

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850/ 425-1997

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rick@rej-law.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record, this 10th day of November, 2021, through the Court's e-service system.

/s/ Richard E. Johnson

Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this motion was prepared using proportionately spaced Bookman Old Style 14 point font.

/s/ Richard E. Johnson
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR
CHAPTER III | TRIAL COURT (LEON COUNTY)



FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 301 Cover Sheet

DATE: 5/25/2023

PAGES: 3

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_CS_20230525_123916.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/CoverSheet



FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained in it neither replace nor supplement the filing and service of pleadings or other documents as required by law. This form must be filed by the plaintiff or petitioner with the Clerk of Court for the purpose of reporting uniform data pursuant to section 25.075, Florida Statutes. (See instructions for completion.)

I. CASE STYLE

IN THE CIRCUIT/COUNTY COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

MICHELLE WILSON
Plaintiff

Case # 2023 CA 001569
Judge _____

vs.

FLORIDA COMMISSION ON HUMAN RELATIONS, CHEYANNE COSTILLA
Defendant

II. AMOUNT OF CLAIM

Please indicate the estimated amount of the claim, rounded to the nearest dollar. The estimated amount of the claim is requested for data collection and clerical processing purposes only. The amount of the claim shall not be used for any other purpose.

- ☐ \$8,000 or less
☐ \$8,001 - \$30,000
☐ \$30,001- \$50,000
☐ \$50,001- \$75,000
☐ \$75,001 - \$100,000
☒ over \$100,000.00

III. TYPE OF CASE (If the case fits more than one type of case, select the most definitive category.) If the most descriptive label is a subcategory (is indented under a broader category), place an x on both the main category and subcategory lines.

CIRCUIT CIVIL

- ☐ Condominium
- ☐ Contracts and indebtedness
- ☐ Eminent domain
- ☐ Auto negligence
- ☐ Negligence—other
 - ☐ Business governance
 - ☐ Business torts
 - ☐ Environmental/Toxic tort
 - ☐ Third party indemnification
 - ☐ Construction defect
 - ☐ Mass tort
 - ☐ Negligent security
 - ☐ Nursing home negligence
 - ☐ Premises liability—commercial
 - ☐ Premises liability—residential
- ☐ Products liability
- ☐ Real Property/Mortgage foreclosure
 - ☐ Commercial foreclosure
 - ☐ Homestead residential foreclosure
 - ☐ Non-homestead residential foreclosure
 - ☐ Other real property actions
- ☐ Professional malpractice
 - ☐ Malpractice—business
 - ☐ Malpractice—medical
 - ☐ Malpractice—other professional
- ☒ Other
 - ☐ Antitrust/Trade regulation
 - ☐ Business transactions
 - ☒ Constitutional challenge—statute or ordinance
 - ☐ Constitutional challenge—proposed amendment
 - ☐ Corporate trusts
 - ☐ Discrimination—employment or other
 - ☐ Insurance claims
 - ☐ Intellectual property
 - ☐ Libel/Slander
 - ☐ Shareholder derivative action
 - ☐ Securities litigation
 - ☐ Trade secrets
 - ☐ Trust litigation

COUNTY CIVIL

- ☐ Small Claims up to \$8,000
- ☐ Civil
- ☐ Real property/Mortgage foreclosure

- ☐ Replevins
☐ Evictions
 ☐ Residential Evictions
 ☐ Non-residential Evictions
☐ Other civil (non-monetary)

COMPLEX BUSINESS COURT

This action is appropriate for assignment to Complex Business Court as delineated and mandated by the Administrative Order. Yes ☐ No ☒

IV. REMEDIES SOUGHT (check all that apply):

- ☒ Monetary;
☒ Nonmonetary declaratory or injunctive relief;
☒ Punitive

V. NUMBER OF CAUSES OF ACTION: []
(Specify)

 7

VI. IS THIS CASE A CLASS ACTION LAWSUIT?

- ☐ yes
☒ no

VII. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?

- ☒ no
☐ yes If “yes,” list all related cases by name, case number, and court.

VIII. IS JURY TRIAL DEMANDED IN COMPLAINT?

- ☒ yes
☐ no

IX. DOES THIS CASE INVOLVE ALLEGATIONS OF SEXUAL ABUSE?

- ☐ yes
☒ no

I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief, and that I have read and will comply with the requirements of Florida Rule of Judicial Administration 2.425.

Signature: s/ Richard E Johnson Johnson
Attorney or party

Fla. Bar # 858323
(Bar # if attorney)

Richard E Johnson Johnson
(type or print name)

05/25/2023
Date

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 302 Civil Complaint

DATE: 5/25/2023

PAGES: 15

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_C_20230525_123916.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/Complaint



**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023 CA 001569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

_____ /

COMPLAINT

Plaintiff sues Defendants and states:

JURISDICTION, VENUE, PARTIES

1. This action for monetary damages, for declaratory and injunctive relief, and for other equitable and ancillary relief is brought under the Florida Constitution, Article I §§ 9 (due process), 21 (access to courts), 22 (jury trial); Article II, § 3 (separation of powers); and the First (right to petition) and Fourteenth (due process) Amendments of the United States Constitution, pursuant to 42 U.S.C. §1983. These claims are, individually, valued in excess of Fifty Thousand Dollars (\$50,000.00), exclusive of costs, interest, & attorney's fees.

2. Plaintiff Michelle Wilson is a female citizen of the United States and a

citizen and resident of the State of Florida and has so resided at all times material hereto.

3. Defendant Florida Commission on Human Relations (FCHR) is a department of the State of Florida with its principal place of business in Tallahassee, Florida. FCHR is a public body corporate, appointed by the Governor, which, collectively, has authority to hire and fire the executive director. It is sued under the Florida Constitution for equitable relief.

4. Defendant Cheyanne Costilla is Executive Director of the Florida Commission on Human Relations and, as such, is that agency's chief executive officer. She is sued for prospective equitable relief in her official capacity and for monetary damages in her individual capacity under 42 U.S.C. §1983. Her principal place of business is in Leon County, Florida.

5. Substantially all the transactions and occurrences herein occurred in Leon County, Florida.

CONDITIONS PRECEDENT

6. All conditions precedent have been fulfilled, waived, or excused.

FACTUAL ALLEGATIONS

7. Plaintiff Michelle Wilson worked for seventeen years for Defendant FCHR, beginning in 2003.

8. After starting in a low-ranking position, Plaintiff worked her way up to

Executive Director, the agency's chief executive position, serving in that capacity for the last nine years of her tenure.

9. There came a point at which members of the Commission itself, which was, collectively, Plaintiff's boss, began demanding that Plaintiff perform illegal acts.

10. For example, and without limitation, members of the Commission, including one who had more than a score of discrimination charges against his business, began demanding that Plaintiff issue "no-cause" determinations against employment discrimination claims that had not yet been investigated.

11. Both a Florida Statute and a binding administrative rule required that a charge be investigated before being given a "cause" or "no cause" determination. Even so, these Commissioners, instead of seeking amendments to the statute and the rule, simply demanded that Plaintiff act in violation of them.

12. Plaintiff insisted on following the law.

13. FCHR fired Plaintiff on October 15, 2020, because of her refusal to violate laws, rules, ad regulations.

14. Plaintiff filed a formal Whistleblower Charge on December 14, 2020, taking care to address the charge to both FCHR and the Office of the Chief Inspector General (OIG). The pertinent statute gives both agencies equal jurisdiction over receiving and processing whistleblower charges. §112.31895(1)(a), Florida Statutes.

15. In the email transmitting the Charge, Plaintiff pointed out FCHR's obvious conflict in passing judgment on its own firing decision and noted the authority of OIG to act instead of FCHR.

16. Even so, FCHR kept the charge itself.

17. The Charge was drafted by Plaintiff, who had run the agency for nine years, and by a board-certified labor and employment lawyer with more than 30 years' experience before FCHR. It easily met all the requirements of a whistleblower charge under Florida law.

18. Plaintiff had no communication from FCHR for 144 days.

19. At that time, FCHR wrote Plaintiff, saying that the Charge was not adequate and that she had an opportunity to amend.

20. Plaintiff's team sought details concerning what FCHR thought to be wrong or inadequate, but was able to extract only contradictory, vague, and senseless comments for guidance on what to amend.

21. It became apparent that FCHR was not going to be able to rise above its conflict of interest in processing the Charge.

22. That would be disappointing, but still workable, because under the controlling statutory framework, FCHR was required to issue a positive or negative determination on every charge, and, unlike discrimination charges, a negatively determined whistleblower charge could still go on to circuit court.

23. But rather than making a determination of any kind, FCHR chose not to process or investigate Plaintiff's charge and thus to issue no determination, positive or negative.

24. Without a determination, Plaintiff lacked a "ticket" to get into court.

25. Plaintiff filed an appeal in the First District Court of Appeal, challenging the authority of FCHR to withhold a determination under the operative statute, but also raising state and federal constitutional issues of separation of powers, conflict of interest, due process, access to courts, and right to trial by jury.

26. The appeals court failed to acknowledge or address any of the constitutional issues, even on rehearing, and found FCHR to have an "inherent" power to decline jurisdiction over a whistleblower charge.

27. Accordingly, Plaintiff brings this plenary action to force consideration of her constitutional claims.

28. Plaintiff has had to retain counsel to vindicate her rights in this matter and owes a reasonable attorney's fee.

COUNT I
U.S. CONSTITUTION
FIRST AMENDMENT – RIGHT TO PETITION
42 U.S.C. § 1983
(Against Costilla, official and individual capacities)

29. Plaintiff realleges paragraphs 1-28.

30. Defendant Costilla violated Plaintiff's First Amendment right to

petition the government for redress of grievances by refusing to honor Plaintiff's right to a determination on her whistleblower charge when such a determination serves as Plaintiff's ticket to her statutorily guaranteed judicial proceeding on that whistleblower charge.

31. Plaintiff's rights to petition government through judicial proceedings were clearly established.

32. The acts of Costilla as described herein were taken under color of state law, custom, or usage.

33. The acts of Costilla as described herein were purposeful and arise from an official policy or custom.

34. The Fourteenth Amendment of the United States Constitution guarantees that no state shall deprive any person of liberty without due process of law. The First Amendment of the United States Constitution, applicable to the states under the Fourteenth Amendment, guarantees the right of access to courts as part of the right to petition government for the redress of grievances—a right which stands at the very apex of constitutional protection when exercised, as here, in political speech aimed at protesting the restrictive conduct of government on matters of the gravest public concern.

35. The acts of Costilla violated the First Amendment, 42 U.S.C. § 1983.

36. Plaintiff has suffered damages because of the Defendant's unlawful

actions.

COUNT II
U.S. CONSTITUTION
FOURTEENTH AMENDMENT – DUE PROCESS – NEUTRAL TRIBUNAL
42 U.S.C. § 1983
(Against Costilla, official and individual capacities)

37. Plaintiff realleges paragraphs 1-28

38. Defendant Costilla violated Plaintiff's right to due process of law by causing FCHR to review and pass upon the propriety of its own decision to fire Plaintiff, thereby denying Plaintiff a neutral tribunal, which is an essential element of due process.

39. Plaintiff had warned Costilla at the outset upon submitting her charge that FCHR had a conflict of interest in passing upon its own decision and even suggested one of several places (Chief Inspector General) to which FCHR could have referred the charge for processing and determination.

40. FCHR has previously outsourced similar determinations to the Florida Attorney General to avoid conflicts of interest.

41. Plaintiff's right to a neutral tribunal was clearly established.

42. The acts of Costilla as described herein were taken under color of state law, custom, or usage.

43. The acts of Costilla as described herein were purposeful and arise from

an official policy or custom.

44. The Fourteenth Amendment of the United States Constitution guarantees that no state shall deprive any person of life, liberty, or property without due process of law. There can be no due process where the officers of a tribunal judge their own conduct.

45. The acts of Costilla violated the Fourteenth Amendment, 42 U.S.C. § 1983.

46. Plaintiff has suffered damages because of the Defendant's unlawful actions.

COUNT III
U.S. CONSTITUTION
FOURTEENTH AMENDMENT – DUE PROCESS
42 U.S.C. § 1983
(Against Costilla, official and individual capacities)

47. Plaintiff realleges paragraphs 1-28.

48. Defendant Costilla violated Plaintiff's right to due process of law by capriciously and without standards sweeping away Plaintiff's valuable right to proceed in court on her whistleblower claim.

49. The Legislature established a duty for FCHR to issue a determination on every whistleblower charge presented to that agency. That determination serves as the charging party's ticket to court. There is no access without it. FCHR arrogated to itself the power to rewrite the statute to give itself power to refuse to

investigate or process a charge FCHR in its sole discretion deems inadequate.

50. FCHR has no objective criteria nor any sort of standards written – the agency merely operates on unarticulated, subjective feelings, whims, and prejudice in determining which charges not to investigate and thus to strangle in infancy.

51. Plaintiff's right to due process was clearly established.

52. The acts of Costilla as described herein were taken under color of state law, custom, or usage.

53. The acts of Costilla as described herein were purposeful and arise from an official policy or custom.

54. The Fourteenth Amendment of the United States Constitution guarantees that no state shall deprive any person of life, liberty, or property without due process of law. There can be no due process where rights are “capriciously swept away on the wings of luck and happenstance.” *Roth v. Board of Regents*, 408 U.S. 564, 577.

55. The acts of Costilla violated the Fourteenth Amendment, 42 U.S.C. § 1983.

56. Plaintiff has suffered damages because of the Defendant's unlawful actions.

COUNT IV
FLORIDA CONSTITUTION
Article I, § 9 – DUE PROCESS
(Against FCHR)

57. Plaintiff realleges paragraphs 1-28.

58. Defendant FCHR violated Plaintiff's right to due process of law by capriciously and without standards sweeping away Plaintiff's valuable right to proceed in court on her whistleblower claim.

59. The Legislature established a duty for FCHR to issue a determination on every whistleblower charge presented to that agency. That determination serves as the charging party's ticket to court. There is no access without it. FCHR arrogated to itself the power to rewrite the statute to give itself power to refuse to investigate or process a charge FCHR in its sole discretion deems inadequate.

60. FCHR has no objective criteria nor any sort of standards written – the agency merely operates on unarticulated, subjective feelings, whims, and prejudice in determining which charges not to investigate and thus to strangle in infancy.

61. Plaintiff's right to due process was clearly established.

62. Article I, § 9 of the Florida Constitution guarantees that, "No person shall be deprived of life, liberty, or property without due process of law."

63. The acts of FCHR violated Article I, § 9 of the Florida Constitution.

64. Plaintiff is entitled to relief because of the Defendant's unlawful actions.

COUNT V
FLORIDA CONSTITUTION
Article I, § 21 – Right of Access to Court

(Against FCHR)

65. Plaintiff realleges paragraphs 1-28.

66. Defendant FCHR violated Plaintiff's right of access to court by placing illegitimate and insuperable obstacles in her path to vindication of her rights to litigate her whistleblower claims in circuit court.

67. The Legislature established a duty for FCHR to issue a determination on every whistleblower charge presented to that agency. That determination serves as the charging party's ticket to court. There is no access without it. FCHR arrogated to itself the power to rewrite the statute to give itself power to refuse to investigate or process a charge FCHR in its sole discretion deems inadequate.

68. FCHR has no objective criteria nor any sort of standards written – the agency merely operates on unarticulated, subjective feelings, whims, and prejudice in determining which charges not to investigate and thus to strangle in infancy.

69. Plaintiff's right to access to court was clearly established.

70. Article I, § 21 of the Florida Constitution guarantees that, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

71. The acts of FCHR violated Article I, § 21 of the Florida Constitution.

72. Plaintiff is entitled to relief because of the Defendant's unlawful actions.

COUNT VI
FLORIDA CONSTITUTION
Article I, § 22 – Trial by Jury
(Against FCHR)

73. Plaintiff realleges paragraphs 1-28.

74. Defendant FCHR violated Plaintiff's right to trial by jury by capriciously and without standards sweeping away Plaintiff's valuable right to proceed in court on her whistleblower claim.

75. As an administrative agency of the executive branch, FCHR is not authorized to resolve any determination of a party's right to the monetary damages for emotional distress that the whistleblower statute provides. By blocking Plaintiff's access to a court that could pass on such issues, FCHR violated Plaintiff's right to trial by jury.

76. The Legislature established a duty for FCHR to issue a determination on every whistleblower charge presented to that agency. That determination serves as the charging party's ticket to court. There is no access without it. FCHR arrogated to itself the power to rewrite the statute to give itself power to refuse to investigate or process a charge FCHR in its sole discretion deems inadequate.

77. FCHR has no objective criteria nor any sort of standards written – the agency merely operates on unarticulated, subjective feelings, whims, and prejudice in determining which charges not to investigate and thus to strangle in infancy.

78. Plaintiff's right to due process was clearly established.

79. Article I, § 22 of the Florida Constitution guarantees that, “The right of trial by jury shall be secure to all and remain inviolate.”

80. The acts of FCHR violated Article I, § 22 of the Florida Constitution.

81. Plaintiff is entitled to relief because of the Defendant’s unlawful actions.

COUNT VII
FLORIDA CONSTITUTION
Article II, § 3 – SEPARATION OF POWERS
(Against FCHR)

82. Plaintiff realleges paragraphs 1-28.

83. Defendant FCHR violated the Florida Constitution’s mandate of separation of powers, under which no branch of government may exercise the powers reserved to the others.

84. The language of Article II, § 3, is, “[t]he powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein. “

85. By effectively amending the public whistleblower statute to grant itself an unlimited and undefined exception to the mandate to issue a determination in every case to allow each case to go to court, FCHR unlawfully exercised the powers of the legislative branch.

86. By effectively amending the whistleblower statute, the Florida

Constitution, and the common law to allow itself to make final determinations on claims for emotional distress damages and other unliquidated damages, FCHR arrogated to itself the powers of the judicial branch.

87. FCHR has no objective criteria nor any sort of standards written – the agency merely operates on unarticulated, subjective feelings, whims, and prejudice in determining which charges not to investigate and thus to strangle in infancy.

88. The acts of FCHR violated Article II, § 3 of the Florida Constitution. Plaintiff is entitled to relief because of the Defendant's unlawful actions.

PRAYER OF RELIEF

WHEREFORE, Plaintiff prays for the following relief:

- a) that process issue and this Court take jurisdiction over this case;
- b) award a declaratory judgment against Defendants and for the Plaintiff;
- c) award judgment for damages against Defendant Costilla and for the Plaintiff;
- d) award Plaintiff compensatory damages for garden variety emotional distress in an amount to be determined by the enlightened conscience of the jury;
- e) award Plaintiff punitive damages against Costilla, individually, in an amount to be determined by the enlightened conscience of the jury;
- f) enter an injunction for the Plaintiff, compelling FCHR to issue a determination on Plaintiff's whistleblower claim;

- g) judgment against Defendant and for Plaintiff permanently enjoining Defendant from future violations of law enumerated herein;
- h) award Plaintiff prejudgment interest;
- i) award Plaintiff reasonable attorney's fees, expenses, and costs of litigation;
- j) award Plaintiff such other and further relief as is appropriate.

JURY DEMAND

Plaintiff demands trial by jury on all issues so triable.

Respectfully submitted this 25th day of May 2023,

Respectfully submitted,

/s/Richard E. Johnson

Richard E. Johnson, Bar No 858323

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FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 303 Summons (Cheyanne Costilla, FCHR Agency Head)

DATE: 6/5/2023

PAGES: 1

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_s_20230605_134233.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/Summons-Costilla



**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023 CA 001569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

Summons

THE STATE OF FLORIDA:

To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on Defendant:

**CHEYANNE COSTILLA
FLORIDA COMMISSION ON HUMAN RELATIONS
4075 Esplanade Way,
Unit 110,
Tallahassee, FL 32399**

Each defendant is required to serve written defenses to the complaint or petition on **Richard E. Johnson**, Plaintiff's attorney, whose address is **314 West Jefferson St., Tallahassee, FL 32301**, within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the clerk of this court, either before serve on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on June ~~X~~ 2023.



CLERK OF THE CIRCUIT COURT

By: Stephanie E. Clark 06/06/2023

Deputy Clerk

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 304 Summons (Department of Financial Services)

DATE: 6/5/2023

PAGES: 1

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_s_20230605_134234.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/Summons-DFS



**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023 CA 001569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

Summons

THE STATE OF FLORIDA:

To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on Defendant:

**DIVISION OF RISK MANAGEMENT
Department of Financial Services
200 East Gaines Street
Tallahassee, FL 32399**

Each defendant is required to serve written defenses to the complaint or petition on **Richard E. Johnson**, Plaintiff's attorney, whose address is **314 West Jefferson St., Tallahassee, FL 32301**, within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the clerk of this court, either before serve on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on June ~~6~~ 2023.



CLERK OF THE CIRCUIT COURT

By: Stephanie E. Clark 06/06/2023

Deputy Clerk

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 305 Summons (FCHR)

DATE: 6/5/2023

PAGES: 1

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_s_20230605_134235.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/Summons-FCHR



**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023 CA 001569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

Summons

THE STATE OF FLORIDA:

To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on Defendant:

**FLORIDA COMMISSION ON HUMAN RELATIONS
4075 Esplanade Way,
Unit 110,
Tallahassee, FL 32399**

Each defendant is required to serve written defenses to the complaint or petition on **Richard E. Johnson**, Plaintiff's attorney, whose address is **314 West Jefferson St., Tallahassee, FL 32301**, within 20 days after service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the clerk of this court, either before serve on plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

DATED on June ~~X~~ 2023.



CLERK OF THE CIRCUIT COURT

By: Stephanie E. Clark 06/06/2023

Deputy Clerk

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 306 Defendants' Motion to Dismiss

DATE: 6/26/2023

PAGES: 6

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_GMOT_20230626_132446.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/MotionDismiss



**IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

vs.

CASE NO.: 2023 CA 1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
Official capacity, and
Individually,**

Defendants.

_____ /

DEFENDANTS' MOTION TO DISMISS

COME NOW, Defendants, FLORIDA COMMISSION ON HUMAN RELATIONS and CHEYANNE COSTILLA, and file this Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.140(b)(1). Plaintiff raised the same constitutional claims asserted in this action in a prior appeal to the First District Court of Appeal. Because the First DCA has already ruled on these issues, and because Plaintiff incorporated her appeal to the First DCA into her Complaint, her claims are barred by collateral estoppel. In support of this Motion, Defendants state the following:

I. FACTS ALLEGED

Plaintiff, Michelle Wilson, worked for Defendant, Florida Commission on Human Relations, and at the time of her separation served as its Executive Director. [Cmplt. ¶8]. Plaintiff was dismissed on October 15, 2020, and believed the cause of her dismissal was her "refusal to violate law, rules, ad [sic] regulations." [Cmplt. ¶13]. Plaintiff therefore

filed a whistleblower charge on December 14, 2020. [Cmplt. ¶14]. Plaintiff believes that her whistleblower charge “easily met all the requirements of a whistleblower charge under Florida Law” because she, “who had run the agency for nine years,” prepared it along with her counsel, “a board-certified labor and employment lawyer with more than 30 years’ experience before FCHR.” [Cmplt. ¶17]. FCHR disagreed and informed Plaintiff that the charge was inadequate, giving her an opportunity to amend. [Cmplt. ¶19]. Ultimately, FCHR did initiate an investigation into Plaintiff’s charge and did not issue a determination. [Cmplt. ¶23].¹ Plaintiff appealed FCHR’s action to the First District Court of Appeal, “challenging the authority of FCHR to withhold a determination under the operative statute, but also raising state and federal constitutional issues of separation of powers, conflict of interest, due process, access to courts, and right to trial by jury.” [Cmplt. ¶25]. The First DCA affirmed FCHR’s action, “even on rehearing, and found FCHR to have an ‘inherent’ power to decline jurisdiction over a whistleblower charge.” [Cmplt. ¶26].² Plaintiff now files this action asserting the same constitutional claims that she argued to the First DCA.

II. PLAINTIFF’S CLAIMS

Plaintiff brings claims against Cheyanne Costilla, Executive Director of FCHR, in her official and individual capacities (Counts I-III) and against FCHR (Counts IV-VII). Plaintiff’s claims here are not based on her dismissal. These are not wrongful termination

¹ For clarity, while not explicitly identified in Plaintiff’s Complaint, FCHR issued a Notice of Dismissal on October 21, 2021.

² *Wilson v. Florida Comm’n on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), *reh’g denied* (Dec. 5, 2022).

or employment retaliation claims. Instead, Plaintiff raises seven (7) state and federal constitutional claims based on FCHR's dismissal of her whistleblower charge, asserting that FCHR is "required to issue a positive or negative determination on every charge." [Cmplt. ¶22].

Plaintiff asserts that FCHR's failure to issue a determination violated her First Amendment right to petition (Count I), her Fourteenth Amendment right to due process (Counts II and III), and her state constitutional rights of due process (Count IV), access to court (Count V), trial by jury (Count VI), and separation of powers (Count VII). These are claims Plaintiff argued to the First DCA. [Cmplt. ¶25].

III. WBA FRAMEWORK

Florida law provides that employees and former employees who believe they have been subjected to retaliation by an employer after making a disclosure protected by the Whistle-blower's Act (WBA) may "file a complaint alleging a prohibit personnel action" ... with "the Office of the Chief Inspector General in the Executive Office of the Governor or the Florida Commission on Human Relations." § 112.31895(1)(a), Fla. Stat. Thereafter, the WBA accords investigative power to the FCHR "to determine whether reasonable grounds exist to believe that a prohibited action or a pattern of prohibited action has occurred, is occurring, or is to be taken." § 112.31895(2)(a), Fla. Stat.

The form that a disclosure must take to invoke WBA protection is governed by section 112.3187(7), Florida Statutes. The substance requirement for a WBA disclosure is set forth at section 112.3187(5), Florida Statutes.

The First District Court of Appeal has repeatedly held that FCHR has no statutory authority to investigate and may dismiss a charge if it "does not meet the *prima facie* elements necessary to initiate the operation of the Act." *Stanton v. Florida Dept. of*

Health, 129 So. 3d 1083, 1084 (Fla. 1st DCA 2013) (affirming FCHR’s dismissal of a Charge because it did not describe a disclosure that would trigger the protection of the WBA); *Tillery v. Florida Dept. of Juvenile Justice*, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013) (affirming FCHR’s dismissal of a charge because it did not assert “when or to whom” a disclosure was made); *Caldwell v. Florida Dept. of Elder Affairs*, 121 So. 3d 1062, 1063 (Fla. 1st DCA 2013) (affirming dismissal of charge by FCHR because allegations in the charge that the complainant contacted a federal investigator “to alert him to the condition of the Ombudsman program and the gross misfeasance and malfeasance that were occurring within” were conclusory and did not describe any act or suspected act of misfeasance or malfeasance”).

Where the FCHR dismisses a whistleblower charge without making a determination, that decision is appealable to the First District Court of Appeal. Fla. Stat. § 120.68.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

Where a party challenges an administrative action by a state agency such as FCHR in state court and the state court renders a decision, that decision operates as res judicata and bars further constitutional claims challenging that administrative action. *Gorin v. Osborne*, 756 F.2d 834, 838 (11th Cir. 1985). Likewise, when a court “decides an issue necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.” *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000).

V. PLAINTIFF’S CLAIMS ARE BARRED

While res judicata and collateral estoppel are affirmative defenses that typically should not be raised by motion to dismiss, Plaintiff specifically referenced the appeal of

FCHR's dismissal of her whistleblower charge to the First DCA in her Complaint, noting the constitutional issues she raised and the First DCA's ruling. Thus, this Court may consider the First DCA's ruling in deciding this motion. *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687, 688 (Fla. 1st DCA 1997)

Each claim in this action is based on Plaintiff's contention that FCHR's dismissal of her whistleblower charge was impermissible because every whistleblower charge FCHR receives must be investigated and result in a "determination giving the charging party a point of entry into court." [Cmplt. ¶30 (Count I), ¶38 (Count II), ¶49 (Count III), ¶59 (Count IV), ¶67 (Count V), ¶76 (Count VI), ¶85 (Count VII)].

Plaintiff is incorrect. She made this argument to the First DCA, which disagreed, citing its prior rulings that the FCHR has inherent authority to dismiss a whistleblower charge. Indeed, the First DCA has repeatedly held that FCHR may dismiss a whistleblower charge and is not required to investigate it or issue a determination where the charge does not describe a protected disclosure that would trigger the antiretaliation provisions of the WBA. Plaintiff explicitly referenced the First DCA's ruling in her Complaint. [Cmplt. ¶ 26].

Because an element necessary to each of Plaintiff's claims – that Plaintiff was entitled to an investigation and determination of her whistle-blower charge – has already been decided to the contrary by the First DCA, Plaintiff's claims are all barred by collateral estoppel. Plaintiff's Complaint is due to be dismissed, with prejudice.

Respectfully submitted June 26, 2023.

/s/ Jamie Ito
JAMIE ITO
Florida Bar No. 13553
Jamie@itolaw.net
Ito Law, PLLC

411 Wilson Ave.
Tallahassee, FL 32303
(850) 284-9517

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all parties of record on June 26, 2023.

/s/ Jamie Ito
JAMIE ITO

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 307 Plaintiff's Response to Motion to Dismiss

DATE: 7/12/2023

PAGES: 9

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_GRSP_20230712_153058.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/ResponseDismiss



**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023-CA-1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

_____ /

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

The gravamen of this motion to dismiss is that Plaintiff seeks an improper second bite at apple in violation of res judicata and/or collateral estoppel. That claim is in error because Plaintiff, even now, has still not had her first bite at the apple. No court has ruled on the issues raised in the instant suit. That is the dispositive factor. It is of no consequence that the issues were raised in a prior proceeding in which the tribunal declined to reach them.

I. PRIOR PROCEEDING

The prior proceeding, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), (rehearing denied, December 5, 2022), was an appeal from the dismissal, without processing or investigation, of Plaintiff's

whistleblower complaint by the Florida Commission on Human Relations (FCHR). The public whistleblower statute, at § 112.31895(3)(d), Florida Statutes, requires FCHR to investigate and make a determination on every whistleblower complaint. The FCHR determination, regardless of outcome, amounts to a ticket for the charging party to bring a case in circuit court. In this regard, a whistleblower charge differs from a charge of discrimination in that, for the latter, a timely negative finding by FCHR can block access to court. A whistleblower charge goes to court regardless of FCHR's determination.

FCHR sought a means to escape the statutory mandate to investigate and make a determination in every case. The agency hit upon an “inherent power” to dismiss cases without investigation or determination if those cases appeared to be untimely, appear to fail to state a prima facie case, or to fall short in whatever other way FCHR determined to be fatal. Charging parties challenged these dismissals in a quartet of cases, all originating in Tallahassee and all filed by attorney Marie Mattox. *Robinson v. Department of Health*, 89 So.3d 1079, 1082–83 (Fla. 1st DCA 2012); *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013); *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013); and *Caldwell v. Florida Dept. Of Elder Affairs*, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013).

These cases seemed legally erroneous and result-oriented to the team bringing the present action. But the losses also seemed to be at least in part the fault of the previous appellants, who had never raised any of the salient constitutional violations that marred FCHR's dismissals without determination. Accordingly, the present Plaintiff did not stop at showing that her whistleblower charge met all previous known standards of acceptability for investigation and determination on the merits of the charge. She went on to show that the FCHR dismissal without determination violated the numerous constitutional rights set forth in the Complaint in the instant case. Under the constitutions of the United States and the State of Florida, every charging party under the whistleblower statute is entitled to a day in court.

However, the First District Court of Appeal declined to reach any of the constitutional issues in its opinion disposing the case. Indeed, that court declined even to mention the constitutional issues, let alone decide them. The opinion stuck strictly to interpretation of the whistleblower statute, as decided in that court's old cases. This spurred Plaintiff to file a motion for rehearing, which, among other things, pointed out that the DCA's silence on the constitutional issues deprived Plaintiff of her jurisdiction to have the Florida Supreme Court consider the constitutional issues. The Supreme Court could not take up those issues where the DCA did not decide them. The court denied rehearing without comment.

Thus, Plaintiff is here to litigate the constitutional issues for the first time. Accordingly, no res judicata or collateral estoppel is even theoretically possible. These forms of preclusion require that a point be actually decided by the prior court. It is not enough that one or more parties mentioned it.

II. BOTH RES JUDICATA AND COLLATERAL ESTOPPEL REQUIRE AN ACTUAL DECISION, NOT A BARE MENTION

In *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952), the Florida Supreme Court held that the test in determining whether judgment by estoppel applies to a case is “whether the evidence in both cases is in essence the same” and whether “‘every point and question’ presented in the second action was actually litigated and decided in the first.” 59 So.2d at 45. For res judicata or collateral estoppel to apply, there must also exist in the prior litigation a “clearcut former adjudication” on the merits. *Dep’t of Health & Rehab. Servs. v. LaPlante*, 470 So.2d 832, 834 (Fla. 2d DCA 1985); see also *R.D.J. Enters., Inc. v. Mega Bank*, 600 So.2d 1229, 1231 (Fla. 3d DCA 1992) (holding that collateral estoppel prevents re-litigation of issues that have been fully litigated and which resulted in a final decision of a court of competent jurisdiction).

No issue in this case was previously litigated to conclusion. Thus there is no preclusion under Florida law. *Dep’t of Health & Rehab. Servs. v. B.J.M.*, 656 So.2d 906, 910 (Fla.1995) (noting that Florida courts have emphasized that judgment by estoppel “precludes re-litigation of issues *actually litigated* in a prior proceeding”)

(court's emphasis). It is never enough that an issue was presented and not decided. That seems to escape Defendants, who (Motion at 4-5), claim it is enough that Plaintiff, in her Complaint, mentioned (a) that she raised constitutional issues and (b) that the First DCA made a ruling. That sweep of legerdemain omits the fact that the ruling made by the First DCA had nothing to do with the constitutional issues. This is a dispositive fact that makes irrelevant the Defendants' reliance on *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000). *Barrington* is a case in which an employee who litigated and lost her discrimination claim at the Public Employee Relations Commission (PERC) was barred by res judicata or collateral estoppel from relitigating the same race discrimination in federal court. Though the statutory regimen was different and the employee was on the offense in federal court but on the defense at PERC, there was still a determination of the exact same issue – whether her termination was because of race discrimination. Moreover, the employee in *Barrington* had a full due process hearing, whereas in the instant case Plaintiff has had no opportunity to present documents or witnesses nor to cross examine anyone, nor even to be informed of the grounds for her termination. That, in itself, would be enough to prevail on this motion because it is well-settled that preclusion will not apply where it would result in a manifest injustice. See, e.g., *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 608 (Fla. 1953); *Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965);

Flesche v. Interstate Warehouse, 411 So. 2d 919, 924 (Fla. 1st D.C.A. 1982); see also *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003).

III. MOTION IS NOT COGNIZABLE

Res judicata and collateral estoppel are affirmative defenses. Fla. R. Civ. P. 1.110(d). These defenses may not be used in a motion to dismiss. *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408 (Fla. 4th DCA 2007). They must be pled first in an answer. *Palmer v. McCallion*, 645 So.2d 131, 133 (Fla. 4th DCA 1994).

Although the defense of res judicata can look jurisdictional in character, it is an affirmative defense, see Fed.R.Civ.P. 8(c)(1), and therefore is not a per se jurisdictional bar to court review as contemplated by Federal Rule of Civil Procedure 12(b)(1) (and thus the Florida rule which is based on that federal rule.). *Youngin's Auto Body v. District of Columbia*, 775 F.Supp.2d 1,6 (D.D.C. 2011); and see, *Hemphill v. Kimberly-Clark Corp.*, 605 F.Supp.2d 183, 186 (D. D.C.2009) (observing that “res judicata is an affirmative defense that is generally pleaded in a defendant's answer, but is also properly brought in a pre-answer Rule 12(b)(6) motion”).

Though it is true that there is an exception that permits res judicata and collateral estoppel to support a motion to dismiss where the facts that establish such defenses are stated on the face of the Complaint, this is not such a case. Indeed, the refutation of res judicata and collateral estoppel is set forth in the Complaint, which

stated at Paragraph 26, “The appeals court failed to acknowledge or address any of the constitutional issues, even on rehearing, and found FCHR to have an “inherent” power to decline jurisdiction over a whistleblower charge.” Thus, according to the Complaint, the First DCA did not decide anything that is advanced in this case, so its decision can have no preclusive impact.

The Defendants have compounded the error by purporting to rest the motion to dismiss on jurisdictional grounds, Rule 1.140(b)(1), instead of the more common “failure-to-state-a-cause-of-action” basis, Rule 1.40(b)(6). There are two apparent reasons for the latter error. First, there is a body of law, already referenced, barring res judicata and collateral estoppel from serving as bases for that sort of motion to dismiss. Second, a motion under Rule 1.40(b)(6) must stay within the confines of the four corners of the Complaint, while a motion under Rule 1.140(b)(1), to dismiss for lack of subject matter jurisdiction, may bring in extraneous evidence. But the very idea of affirmative defenses defeating subject matter jurisdiction is fatally flawed both legally and logically. Subject matter jurisdiction can never be waived. *United States v. Cotton*, 535 U.S. 625 (2002); *Page v. Deutsche Bank Trust Company Americas*, 308 So.3d 953 (Fla. 2020). By contrast, “res judicata is an affirmative defense which must be pled, and may be waived, by the defendant.” *Norfolk Southern Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004).

Thus the motion is not cognizable under the procedural vehicle on which it rides in because it in no way implicates the Court's subject matter jurisdiction.

CONCLUSION

The motion to dismiss should be denied. The motion is substantively incorrect in that it purports to find preclusion in a prior proceeding that did not address the constitutional issues that form the basis of the instant Complaint. The motion also suffers from fatal procedural infirmities in that it seeks to conscript res judicata and collateral estoppel into service as bases for lack of subject matter jurisdiction when they are affirmative defenses that are subject to waiver and thus can never support a finding of lack of subject matter jurisdiction.

Respectfully submitted,

/s/ Richard E. Johnson

Richard E. Johnson

Florida Bar No. 858323

Law Office of Richard E. Johnson

314 West Jefferson St.

Tallahassee, FL 32301

850-425-1997

850-561-0836 (fax)

rick@rej-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the foregoing to all counsel of record through the Court's portal, this 12th day of July, 2023.

/s/Richard E. Johnson
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 308 Order of Dismissal

DATE: 12/29/2023

PAGES: 4

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_OGEN_20231229_131907.pdf

WEBPAGE: TextBookDiscrimination.com/Cases/Misc/FCHRCorruption/OrderDismissal



Filing # 188837322 E-Filed 12/29/2023 01:19:07 PM

**IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023-CA-1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE is before the Court on Defendants' Motion to Dismiss. Having reviewed the motion and Plaintiff's response in opposition, and having heard arguments of the parties on December 6, 2023, the Court grants the Defendant's Motion to Dismiss for the reasons set forth below.

The Plaintiff, Michelle Wilson, was dismissed from her employment in October 2020, and believed that her dismissal was retaliation for reporting wrongdoing by her employer in violation of the Florida Whistle-blower's Act (WBA). Florida law provides that employees and former employees who believe they have been subjected to retaliation by an employer after making a disclosure protected by the WBA may file a complaint, or "whistle-blower charge," with the Florida Commission on Human Relations (FCHR), § 112.31895(1)(a), Fla. Stat. Thereafter, the WBA accords investigative power to the FCHR "to determine whether reasonable grounds exist to believe that a prohibited action or a pattern of prohibited action has occurred, is occurring, or is to be taken." §

112.31895(2)(a), Fla. Stat. Upon receipt of a determination, the employee or former employee may file a claim under the WBA in circuit court. Where the FCHR dismisses a whistleblower charge without making a determination, that decision is appealable to the First District Court of Appeal. § 120.68, Fla. Stat.

Here, the FCHR concluded that Plaintiff's whistle-blower charge was inadequate and, after giving Plaintiff an opportunity to amend, dismissed it without making a determination. Because FCHR dismissed Plaintiff's whistle-blower charge without making a determination, she was unable to exhaust the administrative prerequisite for bringing a civil claim under the WBA in circuit court. She appealed the dismissal to the First DCA.

On appeal, Plaintiff challenged the authority of FCHR to dismiss a whistle-blower charge without making a determination, argued that its failure to do so violated her state and federal constitutional rights, and raised issues of separation of powers, conflict of interest, due process, access to courts, and right to trial by jury. After briefing and oral argument, the First DCA affirmed the dismissal of Plaintiff's whistle-blower charge, but in its order did not explicitly address the merits of Plaintiff's constitutional arguments.

Plaintiff then filed this action, asserting seven (7) state and federal constitutional claims "to force consideration of her constitutional claims." [Complaint, ¶27]. Plaintiff's claims are based on her contention that "FCHR was required to issue a positive or negative determination on every charge." [Complaint, ¶22]. Plaintiff argues that though her constitutional claims were raised and argued on appeal, the failure of the appeals court "to acknowledge or address any of the constitutional issues, even on rehearing" [Complaint, ¶26] means that this Court can now consider them without relitigating issues that have already been decided.

Defendants moved to dismiss this action based on collateral estoppel and argue that the First DCA's affirmance of FCHR's dismissal of Plaintiff's whistle-blower charge precludes Plaintiff's constitutional claims here.¹ The First DCA has repeatedly held that FCHR may dismiss a charge if it "does not meet the *prima facie* elements necessary to initiate the operation of the Act." *Stanton v. Florida Dept. of Health*, 129 So. 3d 1083, 1084 (Fla. 1st DCA 2013) (affirming FCHR's dismissal of a Charge because it did not describe a disclosure that would trigger the protection of the WBA); *Tillery v. Florida Dept. of Juvenile Justice*, 104 So. 3d 1253, 1255 (Fla. 1st DCA 2013) (affirming FCHR's dismissal of a charge because it did not assert "when or to whom" a disclosure was made); *Caldwell v. Florida Dept. of Elder Affairs*, 121 So. 3d 1062, 1063 (Fla. 1st DCA 2013) (affirming dismissal of charge by FCHR because allegations in the charge were conclusory and did not describe any act or suspected act of misfeasance or malfeasance").

For each of her claims, Plaintiff would have this Court conclude that FCHR had no authority to dismiss her whistle-blower charge, contrary to the judgment of the First DCA.

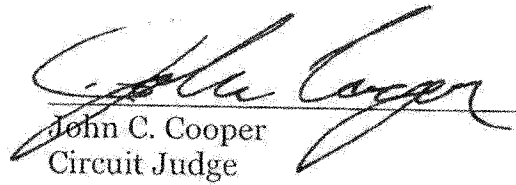
Defendants are correct. When a court "decides an issue necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000).

¹ While collateral estoppel is an affirmative defense that typically should not be raised by motion to dismiss, Plaintiff specifically referenced the appeal of FCHR's dismissal of her whistle-blower charge to the First DCA in her Complaint, noting the constitutional issues she raised and the First DCA's ruling. Thus, this Court may consider the First DCA's ruling in deciding this motion. *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687, 688 (Fla. 1st DCA 1997).

Because the First DCA previously found, in an action between these parties, that dismissal of Plaintiff's whistle-blower charge was appropriate, Plaintiff's claims are barred by collateral estoppel.

Accordingly, Plaintiff's Complaint is dismissed, with prejudice.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 29th day of December, 2023.


John C. Cooper
Circuit Judge

Copies to:
Jamie Ito
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 309 Judgment

DATE: 1/23/2024

PAGES: 1

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_JDG_20240123_134827.pdf

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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

v.

Case No.: 2023-CA-1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

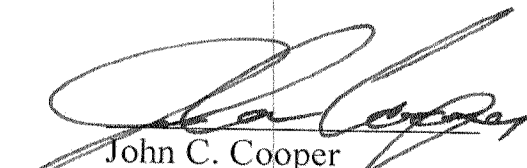
FINAL JUDGMENT

THIS COURT granted Defendant's Motion to Dismiss on December 29, 2023. All judicial labor has been completed on this case.

It is **ORDERED** and **ADJUDGED**:

That **Final Judgment** is entered for Defendant Florida Commission on Human Relations, that Plaintiff shall take nothing by her action and that Defendant shall go hence without day.

DONE and **ORDERED** in Chambers at Tallahassee, Leon County, Florida this 23rd day of January, 2024.


John C. Cooper
Circuit Judge


Attorney of Record

E-Filed and E-Served
by JA on JAN 23 2024

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 310 Notice of Appeal

DATE: 2/22/2024

PAGES: 3

TRIBUNAL: Leon County Court | FL | 2nd Judicial Circuit Court

CASE NO: 37-2023-CA-001569-XXXX-XX

CAPTION: *Wilson v FCHR, et al.*

FILENAME: 23001569_APP_20240222_100737.pdf

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**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

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v.

Case No.: 2023-CA-1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
official capacity, and
individually,**

Defendants.

_____ /

NOTICE OF APPEAL

NOTICE IS GIVEN that, Plaintiff/Appellant, Michelle Wilson, appeals to the First District Court of Appeal the order of this court rendered on January 23, 2024, and attached hereto. The nature of the order is a final order entering judgment for Defendants.

Respectfully submitted,

/s/ Richard E. Johnson

Richard E. Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the foregoing to Jamie Ito Jamie@itolaw.net, this 22d day of February, 2024, through the court's electronic filing system.

/s/Richard E. Johnson
Richard E. Johnson

Filing # 190344242 E-Filed 01/23/2024 01:48:27 PM

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

MICHELLE WILSON,

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Case No.: 2023-CA-1569

**FLORIDA COMMISSION ON
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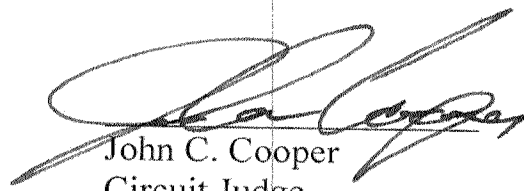
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John C. Cooper
Circuit Judge


Attorney of Record

E-Filed and E-Served
by JA on JAN 23 2024

FLORIDA CORRUPTION: WILSON V FCHR

CHAPTER IV | APPEAL #2 (1DCA)



FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 401 Initial Brief

DATE: 5/2/2024

PAGES: 21

TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D24-0476

CAPTION: *Wilson v FCHR, et al.*

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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D2024-0476

L.T.No.: 2023-CA-1569

FLORIDA COMMISSION ON
HUMAN RELATIONS and
CHEYANNE COSTILLA,
in her official capacity, and
individually,

Appellees.

_____/

APPELLANT'S INITIAL BRIEF

Appeal of a Final Order of the Circuit Court of the Second Judicial
Circuit of Florida, Honorable John C. Cooper presiding

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STATEMENT OF CASE AND FACTS

The Complaint in this case, R-004-018, states that the Florida Commission on Human Relations (FCHR) violated several of Appellant's state and federal constitutional rights by refusing to issue a determination on a whistleblower charge Appellant had filed against FCHR itself upon being dismissed by that agency.

FCHR moved to dismiss for lack of subject matter jurisdiction. R-019-024. Wilson opposed the motion. R-025-033. The circuit court dismissed the Complaint for lack of subject matter jurisdiction. Order at R-034-037 and Judgment at 038.

Appellant had brought the issue of FCHR's failure to issue a determination before this Court in a prior appeal of an agency decision, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), (rehearing denied, December 5, 2022). The main point of that case was that the public whistleblower statute, at § 112.31895(3)(d), Florida Statutes, requires FCHR to investigate and make a determination on every whistleblower complaint. The FCHR determination, regardless of outcome, amounts to a ticket for the

charging party to bring a case in circuit court. In this regard, a whistleblower charge differs from a charge of discrimination in that, for the latter, a timely negative finding by FCHR can block access to court. By contrast, a whistleblower charge goes to court regardless of FCHR's determination.

For years, FCHR sought a means to escape the statutory mandate to investigate and make a determination in every case. The agency hit upon an "inherent power" to dismiss cases without investigation or determination if those cases appeared to be untimely, appear to fail to state a prima facie case, or to fall short in whatever other way FCHR determined to be fatal. Charging parties challenged these dismissals in a quartet of cases. *Robinson v. Department of Health*, 89 So.3d 1079, 1082–83 (Fla. 1st DCA 2012); *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So.3d 1253, 1255 (Fla. 1st DCA 2013); *Stanton v. Florida Department of Health*, 129 So.3d 1083, 1084 (Fla. 1st DCA 2013); and *Caldwell v. Florida Dept. Of Elder Affairs*, 121 So.3d 1062, 1063 (Fla. 1st DCA 2013).

These cases seemed legally erroneous to the team bringing the present action. But the losses also seemed to be at least in part the

fault of the previous appellants, who had never raised any of the salient constitutional violations that marred FCHR's dismissals of cases without determination. Accordingly, the present Appellant did not stop at showing that her whistleblower charge met all statutory standards of acceptability for investigation and determination on the merits of the charge. She went on to show that the FCHR dismissal without determination violated the numerous constitutional rights set forth in the Complaint in the instant case. Under the constitutions of the United States and the State of Florida, every charging party under the whistleblower statute is entitled to a day in court.

However, this Court declined to reach any of the constitutional issues in its opinion disposing the case. Indeed, this Court declined even to mention the constitutional issues, let alone decide them. The opinion stuck strictly to interpretation of the whistleblower statute, as decided in this Court's old cases. This spurred Appellant to file a motion for rehearing, which, among other things, pointed out that the DCA's silence on the constitutional issues deprived Appellant of her jurisdiction to have the Florida Supreme Court consider the constitutional issues. The Supreme Court could not take up those

issues because the DCA did not decide them. This Court denied rehearing without comment.

Thus, Plaintiff brought the instant case to litigate the constitutional issues for the first time. Accordingly, no collateral estoppel is even theoretically possible. That form of preclusion requires that a point be actually decided by the prior court. It is not enough that one or more parties mentioned it.

The gravamen of the Judgment now appealed is that Appellant seeks an improper second bite at the apple in violation of collateral estoppel. That holding is in error because Appellant, even now, has still not had her first bite at the apple. No court has ruled on the issues raised in the instant suit. That is the dispositive factor of this appeal. It is of no consequence that the issues were raised in a prior proceeding in which the tribunal declined to reach them.

The court below signed FCHR's proposed order of dismissal, R-034-037, and then entered judgment, R-038. This timely appeal follows.

SUMMARY OF ARGUMENT

The court below misapplied the doctrine of collateral estoppel by

holding that a non-decision on an issue by a prior court bars consideration of that issue by a later court. But collateral estoppel applies only to decisions, not non-decisions. For the bar to apply, the issue must have been actually litigated and resulted in a clearcut adjudication on the merits. It is never enough that an issue was presented and not decided.

The motion to dismiss that ended this case in the court below was not properly cognizable. This is so because the stated basis of the motion was a lack of subject matter jurisdiction based on collateral estoppel. But there is no such thing. It is not even a theoretical possibility. Subject matter jurisdiction may be raised at any time and is not capable of waiver. By contrast, collateral estoppel is waived if not timely asserted and must be raised in a pleading as an affirmative defense, not in a motion. There is an exception when a complaint puts the prior ruling in the record, but the exception does not apply here because the complaint did not say there was an affirmative decision on the contested issues, but only a non-decision.

The decision below violates the access-to-courts provision of the Florida Constitution. That right is a right to have one's case heard on

the merits. The right is not one that can be circumvented by procedural sophistry. A trial court has the duty to decide the cases before it on the merits. An appeals court may pick and choose what to address and what to ignore when presented with multiple issues. A trial court does not have that luxury.

STANDARD OF REVIEW

An order determining subject matter jurisdiction resolves an issue of law and is therefore reviewed *de novo*. *Point Conversions, LLC v. Omkar Hotels, Inc.*, 321 So. 3d 326 (Fla. 1st DCA 2021). The Order and Judgment on appeal grant a motion to dismiss for lack of subject matter jurisdiction. However, the stated basis for the lack of subject matter jurisdiction is collateral estoppel, which can never implicate subject matter jurisdiction because collateral estoppel can be waived while subject matter jurisdiction cannot be waived. This is discussed below. Nevertheless, even if a “tipsy coachman” analysis finds that the better vehicle for dismissal would have been failure to state a cause of action, the standard of review is still *de novo*. *Palm Beach County School Board v. Doe*, 210 So. 3d 41 (Fla. 2017).

ARGUMENT

I. COLLATERAL ESTOPPEL REQUIRES AN ACTUAL DECISION, NOT A BARE MENTION

In *Gordon v. Gordon*, 59 So.2d 40 (Fla. 1952), the Florida Supreme Court held that the test in determining whether judgment by estoppel applies to a case is “whether the evidence in both cases is in essence the same” and whether “every point and question” presented in the second action was actually litigated and decided in the first. *Id.*, 59 So.2d at 45. For collateral estoppel to apply, there must also exist in the prior litigation a “clearcut former adjudication” on the merits. *Dep’t of Health & Rehab. Servs. v. LaPlante*, 470 So.2d 832, 834 (Fla. 2d DCA 1985); see also *R.D.J. Enters., Inc. v. Mega Bank*, 600 So.2d 1229, 1231 (Fla. 3d DCA 1992) (holding that collateral estoppel prevents re-litigation of issues that have been fully litigated and which resulted in a final decision of a court of competent jurisdiction).

No issue in this case was previously litigated to conclusion. Thus there is no preclusion under Florida law. *Dep’t of Health & Rehab. Servs. v. B.J.M.*, 656 So.2d 906, 910 (Fla.1995) (noting that Florida

courts have emphasized that judgment by estoppel “precludes re-litigation of issues *actually litigated* in a prior proceeding”) (court’s emphasis). It is never enough that an issue was presented and not decided. The court below misapprehended that point in finding it is enough that Appellant (Plaintiff below), in her Complaint, mentioned that she raised constitutional issues and that this Court made a ruling. That sweep of misapprehension omits the fact that the ruling made by this Court had nothing to do with the constitutional issues. This is a dispositive fact that makes irrelevant the dismissal order’s reliance on *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000). *Barrington* is a case in which an employee who litigated and lost her discrimination claim at the Public Employee Relations Commission (PERC) was barred by collateral estoppel from relitigating the same race discrimination in federal court. Though the statutory regimen was different and the employee was on the offense in federal court but on the defense at PERC, there was still a determination of the exact same issue – whether her termination was because of race discrimination. Moreover, the employee in *Barrington* had a full due process hearing, whereas in the instant case Plaintiff has had no

opportunity to present documents or witnesses nor to cross examine anyone, nor even to be informed of the grounds for her termination. That, in itself, would be enough to prevail on this motion because it is well-settled that preclusion will not apply where it would result in a manifest injustice. See, e.g., *Beverly Beach Properties, Inc. v. Nelson* , 68 So. 2d 604, 608 (Fla. 1953); *Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965); *Flesche v. Interstate Warehouse*, 411 So. 2d 919, 924 (Fla. 1st D.C.A. 1982); see also *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003).

Though it may be fair enough that a plaintiff who litigated and lost the merits of a race discrimination claim in one forum does not get to relitigate it in another, it does not follow that a claimant who had her constitutional claims ignored in one forum must also have them ignored in every subsequent forum. It is not as though she lost those issues in the prior proceeding.

II. DISPOSITIVE MOTION WAS NOT COGNIZABLE

Defendants moved to dismiss under Fla.R.Civ.P. 1.140(b)(1), for lack of subject matter jurisdiction, based on collateral estoppel. R-019-024.

Collateral estoppel is an affirmative defense. Fla. R. Civ. P. 1.110(d). This defense may not be used in a motion to dismiss. *Garnac Grain Co., Inc. v. Mejia*, 962 So. 2d 408 (Fla. 4th DCA 2007). It must be pled first in an answer. *Palmer v. McCallion*, 645 So.2d 131, 133 (Fla. 4th DCA 1994). The court below erred in even taking cognizance of the issue.

Although the defense of collateral estoppel can look jurisdictional in character, it is an affirmative defense, see Fed.R.Civ.P. 8(c)(1), and therefore is not a per se jurisdictional bar to court review as contemplated by Fed.R.Civ.P. 12(b)(1) (and thus the Florida rule which is based on that federal rule, Fla.R.Civ.P. 1.140(b)(1)). *Youngin's Auto Body v. District of Columbia*, 775 F.Supp.2d 1,6 (D.D.C. 2011); and see, *Hemphill v. Kimberly-Clark Corp.*, 605 F.Supp.2d 183, 186 (D. D.C.2009) (observing that “res judicata is an affirmative defense that is generally pleaded in a defendant's answer, but is also properly brought in a pre-answer Rule 12(b)(6) motion”).¹

¹ In the motion and response in the court below, collateral estoppel and res judicata were used interchangeably. By the time of the order, all concerned realized that res judicata was out of the question because there were two different suits. But there is no place in this case where the law differs on the two concepts.

Though it is true that there is an exception that permits collateral estoppel to support a motion to dismiss where the facts that establish such defenses are stated on the face of the Complaint, this is not such a case. Indeed, the refutation of collateral estoppel is set forth in the Complaint, which stated at Paragraph 26, “The appeals court failed to acknowledge or address any of the constitutional issues, even on rehearing, and found FCHR to have an “inherent” power to decline jurisdiction over a whistleblower charge.” Thus, according to the Complaint, this Court did not decide anything that is advanced in this case, so its decision can have no preclusive impact. If the Complaint had said the DCA considered and expressly rejected the constitutional claims, that would have opened the door to the defense gambit of arguing that assertion of collateral estoppel need not be held back until the answer.

The Defendants compounded the error by purporting to rest the motion to dismiss on jurisdictional grounds, Rule 1.140(b)(1), instead of the more common “failure-to-state-a-cause-of-action” basis, Rule 1.40(b)(6). There are two apparent reasons Defendants chose that erroneous path. First, there is a body of law, already referenced,

barring collateral estoppel from serving as bases for the sort of motion to dismiss that was used in this case. Second, a motion under Rule 1.40(b)(6) must stay within the confines of the four corners of the Complaint, while a motion under Rule 1.40(b)(1), to dismiss for lack of subject matter jurisdiction, may bring in extraneous evidence. But the very idea of affirmative defenses defeating subject matter jurisdiction is fatally flawed both legally and logically. Subject matter jurisdiction can never be waived. *United States v. Cotton*, 535 U.S. 625 (2002); *Page v. Deutsche Bank Trust Company Americas*, 308 So.3d 953 (Fla. 2020). By contrast, “res judicata is an affirmative defense which must be pled, and may be waived, by the defendant.” *Norfolk Southern Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1289 (11th Cir. 2004).

Thus the motion was not cognizable under the procedural vehicle on which it rode in because it in no way implicated the Court’s subject matter jurisdiction.

III. DISMISSAL VIOLATES RIGHT OF ACCESS TO COURTS

Article I, section 21 of the Florida Constitution expressly provides that “[t]he courts shall be open to every person for redress of any injury,

and justice shall be administered without sale, denial, or delay.” The right to go to court to resolve our disputes is one of our fundamental rights. *Psychiatric Assocs. v. Siegel*, 610 So.2d 419, 424 (Fla.1992), receded from on other grounds in *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239 (Fla.1996) "While article I, section 21 may not give a litigant a particular remedy, the right of access does guarantee the litigant a forum in which to be heard.")

Under Defendants’ calculus, Appellant’s constitutional claims can never be heard. One court’s refusal to hear them must be copied by all later courts. But the Constitution demands a decision on the merits, at least where a plaintiff has committed no fatal error in pleading, such as missing a statute of limitation, splitting actions, or suing immune entities. This is not a case in which Plaintiff held back claims from the DCA to be presented later in another court, thus running afoul of the doctrine that the ruling would be preclusive “not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.” *Kimbrell v. Paige*, 448 So. 2d 1009, 1012 (Fla. 1984). Plaintiff had no control over the DCA decision not to

address the constitutional claims.

The proposed order wrongly assumes that Plaintiff is seeking a second bite at the apple. In fact, Plaintiff is seeking her first substantive decision.

One should recoil instinctively from the notion that, because a DCA decided nothing about an issue, a later circuit court must also decide nothing. Billy Preston sang, “Nothing from nothing leaves nothing.” Those are words of wisdom, but they do not compel the conclusion that a DCA saying nothing on a subject requires a circuit court to say nothing on the same subject. We get similar sagacity from the ancient legal maxim “*ex nihilo nihil fit*,” translated as “from nothing nothing comes,” in Black’s Law Dictionary, Fifth Edition, West 1979. That tells us that nothing comes from the absence of a ruling from this Court in a prior case, let alone a bar on consideration of the same issues by a different court in a later case.

The decision on appeal makes “nothingness” into an absurd rule holding that the first court presented with the constitutional claims in this case refused to reach them, therefore collateral estoppel dictates that no court can ever reach them. Collateral estoppel would become

not just issue preclusion on claims already decided affirmatively, but also a bar on hearing claims a prior court refused.

In a nobler time, that would have been called frivolous.

CONCLUSION

The Court should reverse the decision below and remand for discovery and trial. The decision is substantively incorrect in that it purports to find preclusion in a prior proceeding that did not address the constitutional issues that form the basis of the instant case. The decision also suffers from fatal procedural infirmities in that it seeks to conscript collateral estoppel into service as a basis for lack of subject matter jurisdiction when it is an affirmative defense that is subject to waiver and thus can never support a finding of lack of subject matter jurisdiction. The decision below also violates the right of access to courts under the Florida Constitution.

Respectfully submitted,

/s/ Richard E. Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record this 2d day of May, 2024, through the Court's e-service system.

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style, 14-point font.

/s/ Richard E. Johnson
Richard E. Johnson

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 402 Answer Brief

DATE: 5/18/2024

PAGES: 17

TRIBUNAL: Florida's First District Court of Appeal

CASE NO: 1D24-0476

CAPTION: *Wilson v FCHR, et al.*

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D24-0476
Lower Tribunal Case No. 2023 CA 1569

MICHELLE WILSON,

Appellant,

vs.

FLORIDA COMMISSION ON HUMAN RELATIONS, and CHEYANNE
COSTILLA, in her official capacity, and individually

Appellee.

ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT OF FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This is an appeal of the dismissal of a complaint brought by Appellant, Michelle Wilson (“Wilson”) against the Florida Commission on Human Relations (“FCHR”) and its Executive Director, Cheyanne Costilla (“Costilla”), in both her official and individual capacity. [R4—R18].

Wilson filed a seven-count Complaint on May 25, 2023, alleging her state and federal constitutional rights were violated when the FCHR failed to issue a determination on a Whistle-blower Charge she filed on December 14, 2020. [R4—R18].

Costilla and FCHR moved to dismiss Wilson’s complaint on June 26, 2023. [R19—R24]. Wilson filed her response in opposition on July 12, 2023. [R25—R33]. A hearing was held on December 6, 2023, and on December 29, 2023, the court issued an order granting the motion to dismiss with prejudice, concluding that Wilson’s claims were barred by collateral estoppel. [R34—R37].

This appeal followed.

II. STATEMENT OF FACTS

Wilson was employed as Executive Director of the FCHR until October 15, 2020, when her employment was terminated. [R64]. On December 14, 2020, she submitted a Whistle-blower's Act (WBA) Charge of Discrimination ("Charge") to the FCHR, which she contends "easily met all the requirements of a whistleblower charge under Florida Law." [R7]. The FCHR disagreed, notified Wilson that the Charge was inadequate, and gave her an opportunity to amend. [R7]. The FCHR ultimately dismissed Wilson's Charge without an investigation, meaning that Wilson did not receive a right to sue FCHR under section 112.3187, Florida Statutes. [R8].

Wilson sought judicial review with this Court under section 120.68, Florida Statutes. On appeal, Wilson disputed "the authority of FCHR to withhold a determination under the operative statute [and raised] state and federal issues of separation of powers, conflict of interest, due process, access to courts, and right to trial by jury." [R8].

This Court affirmed FCHR's dismissal of Wilson's Charge and denied her motion for rehearing. [R8]. *Wilson v. Florida Comm'n on*

Human Relations, 351 So. 3d 109 (Fla. 1st DCA 2022), *reh'g denied* (Dec. 5, 2022).

In its decision, this Court cited to its opinion in *Stanton v. Fla. Dep't of Health*, 129 So. 3d 1083 (Fla. 1st DCA 2013), which reaffirmed “that when a whistle-blower complaint does not meet the prima facie elements necessary to initiate operation of the Whistle-blower’s Act, the Florida Commission on Human Relations has no authority to proceed with a fact-finding investigation,” and *Washington v. Fla. Dep't of Revenue*, 337 So. 3d 502 (Fla. 1st DCA 2022), which held that in order to receive WBA protection, “a protected disclosure must be a written and signed complaint ... when a complainant has not claimed to have participated in an investigation or to have made a complaint through a hot-line.”

After her unsuccessful appeal of FCHR’s dismissal of her Charge, Wilson filed the subject Complaint, asserting that by “refusing to honor Plaintiff’s right to a determination on her whistleblower charge,” Costilla violated her First Amendment right to petition the government for redress of grievances” (Count I) [R8-9]; that by “review[ing] and passing[ing] upon the propriety of its own decision to fire Plaintiff,” Costilla violated her due process rights

under the Fourteenth Amendment (Count II) [R10]; that by “sweeping away Plaintiff’s valuable right to proceed in court on her whistleblower claim,” Costilla and FCHR violated her due process rights under the Fourteenth Amendment and the Florida Constitution (Counts III and IV) [R11—R13]; that by “placing illegitimate and insuperable obstacles in her path to vindication of her rights to litigate her whistleblower claims in circuit court,” FCHR violated her right of access to court and trial by jury under the Florida Constitution (Counts V and VI) [R13—R15]; and that by “amending the public whistleblower statute to grant itself an unlimited and undefined exception to the mandate to issue a determination in every case to allow each case to go to court,” FCHR violated the Florida Constitution’s mandate of separation of powers. (Count VII) [R16—R17].

FCHR and Costilla moved to dismiss Wilson’s complaint based on collateral estoppel because this Court had already ruled on the issue dispositive to all of her claims: whether FCHR was required to investigate Wilson’s Charge and issue a determination giving her a point of entry to court. [R23].

The trial court concluded that because this Court previously found that FCHR's dismissal of Wilson's Charge was appropriate, and because each of her claims depended on that one issue, her claims were barred by collateral estoppel.

SUMMARY OF ARGUMENT

Wilson raises claims here that all stem from her belief that FCHR is required to investigate and issue a determination on every Whistle-blower Charge that it receives. This Court has repeatedly explained that FCHR has inherent authority to dismiss a Charge that does not meet the prima facie elements necessary to trigger the protections of the Whistle-blower's Act. Applying that precedent, this Court affirmed FCHR's dismissal of Wilson's Charge. With the question of the correctness of the dismissal already answered, Wilson's constitutional claims cannot succeed, and the trial court's order dismissing Wilson's Complaint should be affirmed.

STANDARD OF REVIEW

The standard of review when a court reviews an order granting a motion to dismiss based on collateral estoppel is de novo. *Felder v. State, Dept. of Mgmt. Services, Div. of Ret.*, 993 So. 2d 1031 (Fla. 1st DCA 2008).

ARGUMENT

I. COLLATERAL ESTOPPEL APPLIES BECAUSE THIS COURT PREVIOUSLY RENDERED A DECISION ON THE ISSUE DISPOSITIVE TO ALL OF WILSON’S CLAIMS

Wilson argues that collateral estoppel does not preclude her claims because “[n]o issue in this case was previously litigated to conclusion.” [Initial Brief, p. 7].

This Court has explained that the doctrine of collateral estoppel “prevents identical parties from relitigating the same issues that have already been decided.” *Johnson v. State*, 311 So. 3d 203, 205 (Fla. 1st DCA 2020). *See also Brown v. Dep’t of Prof’l Regulation, Bd. of Psychological Examiners*, 602 So. 2d 1337, 1341 (Fla. 1st DCA 1992)(explaining that the doctrine applies when the parties are identical or privies.).

The issue that is central to and necessary for all Wilson’s claims—whether FCHR had the authority to and properly dismissed her Whistle-blower Charge—was the issue on appeal in *Wilson v. Florida Comm’n on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022). Wilson’s claim that Costilla violated her First Amendment right is based on Costilla “refusing to honor Plaintiff’s right to a determination on her whistleblower charge.” [R8-9]. Her claim that

that Costilla violated her due process rights under the United States Constitution is based on Costilla “passing[ing] upon the propriety of its own decision to fire Plaintiff.” [R10]. Her claim that Costilla and FCHR violated her due process rights under the Fourteenth Amendment and the Florida Constitution is based on their “sweeping away Plaintiff’s valuable right to proceed in court on her whistleblower claim.” [R11—R13]. Her Claim that FCHR violated her right of access to court and trial by jury under the Florida Constitution is based on FCHR “placing illegitimate and insuperable obstacles in her path to vindication of her rights to litigate her whistleblower claims in circuit court.” [R13—R15]. And her claim that FCHR violated the Florida Constitution’s mandate of separation of powers is based on FCHR “amending the public whistleblower statute to grant itself an unlimited and undefined exception to the mandate to issue a determination in every case to allow each case to go to court.” [R16—R17].

To find in Wilson’s favor on any of these issues would contradict this Court’s prior decision affirming FCHR’s dismissal of her Charge.

Because this Court has already decided that FCHR had the authority to and appropriately dismissed Wilson’s Charge, and

because to succeed on the constitutional claims she now raises would require a contradictory decision on that issue, the trial court correctly dismissed Wilson’s complaint based on collateral estoppel.

II. THE MOTION TO DISMISS WAS COGNIZABLE

Wilson next argues that because collateral estoppel is an affirmative defense, it was not appropriately raised by a motion to dismiss. [Initial Brief, p. 10].

Wilson concedes in her brief, however, that collateral estoppel may support a motion to dismiss “where the facts that establish such defenses are stated on the face of the Complaint.” [Initial Brief, p. 11]. The facts establishing the defense of collateral estoppel are indeed stated on the face of Wilson’s Complaint. As noted above, Wilson’s Complaint alleged that the action giving rise to each of her claims is FCHR’s alleged improper dismissal of her Charge. Likewise, she alleged on the face of her Complaint that this Court affirmed FCHR’s dismissal of her Charge.

This single issue that underlies each of Wilson’s claims—whether FCHR appropriately and lawfully dismissed her Charge foreclosing her right to sue—was decided and concluded, and this is all apparent on the face of Wilson’s Complaint. The trial court was

not required to look outside of the four corners of Wilson’s Complaint to determine that collateral estoppel applied and therefore the defense was properly raised by motion to dismiss.

Wilson then argues that the motion erroneously rested on jurisdictional grounds, rather than on the grounds of failure to state a claim. The trial court did not address whether its order was based on subject matter jurisdiction or the failure to state a claim. Regardless, if this Court finds that the motion to dismiss should have been brought under Rule 1.40(b)(6), it should affirm based on the tipsy coachman doctrine because Wilson’s Complaint, on its face, did not state a claim for which she could recover in light of her allegations of this Court’s prior decision on the central issue. *See Jones v. Grace Healthcare*, 320 So. 3d 191, 192–93 (Fla. 1st DCA 2021)(affirming decision below but “via a slightly different analytical route.”).

III. DISMISSAL DOES NOT VIOLATE WILSON’S RIGHT OF ACCESS TO COURTS

Finally, Wilson argues that the trial court’s dismissal of her Complaint violated her fundamental right to go to court and contends that this Court “decided nothing” about her constitutional claims in the prior appeal. [Initial Brief, p. 14].

A party asserting that her right to access courts must be able to show “an underlying cause of action the vindication of which is prevented by the denial of access to the courts.” *Cromartie v. Shealy*, 941 F.3d 1244, 1258 (11th Cir. 2019).

Contrary to Wilson’s argument, this Court did “decide something” in the prior appeal. Namely, that FCHR was not required to issue a determination on her Charge—the issue that is dispositive for all of Wilson’s claims.

Moreover, Wilson was not barred from the courts. She could have asserted other claims related to the termination of her employment that did not depend on the lawfulness of FCHR’s dismissal of her Charge. For example, she could have filed a § 1983 claim for First Amendment retaliation, a claim which has no administrative prerequisite. But she chose only to go the Whistle-blower Act route.

FCHR dismissed Wilson’s Charge because she failed to sufficiently describe activity that would trigger the protections of the Whistle-blower’s Act, and this Court agreed. The trial court’s dismissal of Wilson’s claims, all of which depended on an issue that

has already been decided, did not infringe upon her right to access the courts. The decision below should be affirmed.

CONCLUSION

The Trial court properly found that Wilson's claims all relied on a dispositive issue that was previously decided by this Court, and that her claims were therefore barred by the doctrine of collateral estoppel. Accordingly, this Court should affirm the trial court's order of dismissal and judgment for FCHR and Costilla.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief is prepared in Bookman Old Style 14-point font and contains 2,319 words.

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I certify that a copy of this brief was filed with the Florida Courts E-Portal which furnished a copy to all parties of record on May 18, 2024.

/s/ Jamie Ito
Jamie Ito

FLORIDA CORRUPTION: WILSON V FCHR

ITEM: 403 Reply Brief

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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D2024-0476

L.T.No.: 2023-CA-1569

FLORIDA COMMISSION ON
HUMAN RELATIONS and
CHEYANNE COSTILLA,
in her official capacity, and
individually,

Appellees.

_____/

APPELLANT'S REPLY BRIEF

Appeal of a Final Order of the Circuit Court of the Second Judicial
Circuit of Florida, Honorable John C. Cooper presiding

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ARGUMENT

I. COLLATERAL ESTOPPEL REQUIRES AN ACTUAL DECISION, NOT A BARE MENTION

FCHR casts its argument at such a high and abstract level of generality that it misses everything important in this case. FCHR's argument is that this court ruled that Michelle Wilson is not entitled to a determination on her public whistleblower charge in a prior case, so that precludes forever any relief on Wilson's whistleblower on any theory or authority.

But down here on the ground, other things matter.

The prior opinion addressed only the whistleblower statute. It carefully avoided ruling on the constitutional issue. It is quite possible that FCHR's dismissal of Wilson's charge is legal under the whistleblower statute, but illegal under the various constitutional doctrines asserted in this case. Since the whistleblower statute is not reasserted here, the prior decision on that statute has no preclusive impact on this case. It is not enough to say that Michelle Wilson lost in a prior case, so she must lose in this case. That is too high a level of generality.

In that prior case, FCHR had been both a party and judge in the events leading up to the appeal. FCHR fired Wilson on October 15, 2020. After that date, FCHR, acted as a quasi-judicial agency processing Wilson's whistleblower claim and sitting in judgment of its own actions, despite Wilson's protest of conflict of interest. Thus, for the events up to October 15, 2024, FCHR acted as Wilson's employer; for events after that date, FCHR was an adjudicative agency.

In the prior case before this Court, Wilson appealed FCHR's dismissal of her whistleblower charge. To do so, she made statutory arguments and constitutional arguments. The statutory arguments were mostly about FCHR's violations as an employer. None of the constitutional arguments were about the merits of the whistleblower claim – only about Wilson's rights to receive the determination of “cause” or “no cause,” that serves as a ticket to court. This Court's opinion made no reference to the constitutional arguments. The opinion, *Wilson v. Florida Commission on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), stuck strictly to what FCHR could do under the whistleblower statute.

FCHR now (Answer Brief at 9) gets to the bare essence of its

argument: “To find in Wilson’s favor on any of these [constitutional] issues would contradict this Court’s prior decision affirming FCHR’s dismissal of her Charge.” But when a statute contradicts a constitutional provision, the statute must fall. That is the most fundamental doctrine in constitutional law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

It is only by operating at such a high level of generality that FCHR can make so bold an assertion. It should go without saying that an interpretation of a statute, no matter how correct an interpretation, says nothing about that law’s constitutionality. And that a prior court’s silence on whether a law is constitutional can never serve as an outcome that works collateral estoppel on a future claim.

II. DISPOSITIVE MOTION WAS NOT COGNIZABLE

FCHR chose to frame its motion to dismiss around jurisdiction, using Fla.R.Civ.P. 1.140(b)(1) as its vehicle, instead of the more common “failure to state a cause of action” under Fla.R.Civ.P. 1.140(b)(6). This allows wandering outside the four corners of the Complaint to reference other documents that are mentioned in the Complaint. Here, that reference is a statement from Paragraph 26, “The

appeals court failed to acknowledge or address any of the constitutional issues, even on rehearing, and found FCHR to have an “inherent” power to decline jurisdiction over a whistleblower charge.” With no small audacity, FCHR claims that this recites a holding of this Court in the prior case on the constitutional issues that works collateral estoppel on everything in this case. That is self-refuting. An absence of a holding cannot be a holding.

In the Answer Brief, FCHR suggests that the Court use the “tipsy coachman” doctrine to convert the motion below into one under Rule 1.140(b)(6). That does not help FCHR’s case. Such a conversion would merely put a claim of collateral estoppel in its proper place – an affirmative defense that cannot serve as a basis for a motion to dismiss. So it hardly helps a motion to dismiss.

III. DISMISSAL VIOLATES RIGHT OF ACCESS TO COURTS

FCHR now claims that Wilson was derelict in not filing a First Amendment claim when FCHR foreclosed her whistleblower claim. This assertion ignores the main authority in recent First Amendment employee law, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which stripped

First Amendment protection from public employees for speech that is made in the course and scope of their jobs. Indeed, *Garcetti, id.*, at 425, points out that taking First Amendment protection away from public employees will not be so bad because those employees have state whistleblower laws that they can still use.

The result in this case is a total strangulation of a right because there is no avenue for redress. FCHR refused to investigate Wilson's claim or issue a determination on it. This Court, in the prior case, refused to consider the constitutional challenge. So now, FCHR holds out that refusal as a preclusion on any other court's consideration of those claims. That leaves Wilson no point of entry. That is a textbook case of a right without a remedy, as prohibited by Article 1, section 21, of the Florida Constitution.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served to all counsel of record this 19th day of June, 2024, through the Court's e-service system.

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Bookman Old Style, 14-point font.

/s/ Richard E. Johnson
Richard E. Johnson

APPENDIX



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