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STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEALS

ELIAS MAKERE,

)

Appellant/Petitioner,

)

)

Case No. 1D19-3236

vs.

)

LT No. (FCHR): 2017-01432

)

LT No. (DOAH): 18-000373

ALSTATE CORPORATION,

)

Appellee/Respondent

)

INITIAL BRIEF

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PREFACE

Appellant, Elias Makere, was the Complainant/Petitioner in the lower tribunal; and will be referred to in this brief as Appellant. Appellee, Allstate Corporation, was the Respondent below; and will be referred to as Appellee.

The following references will be used in this brief:

[R:_] Record on Appeal^{1/}

[T:_] Trial Transcript Excerpt^{2/}

[X:_] Exhibit in Evidence^{3/}

The following abbreviations will also be used:

ALJ Administrative Law Judge

DOAH Division of Administrative Hearings

FCHR Florida Commission on Human Relations

FS Florida Statute

SSC Similarly-Situated Comparators (different race and/or sex)

All statutory and rule references are made to their 2018 versions (unless otherwise indicated).

POINT ON APPEAL

- I. Whether the Lower Tribunal violated Appellant's due process rights when it based its final decision on an unpled defense.
- II. Whether the Lower Tribunal committed a material error in the proceedings that led to its final order.

STATEMENT OF THE CASE

This is an appeal from a final order of the Florida Commission on Human Relations (hereinafter "Agency"). The Agency ruled that Appellee did not commit employment discrimination against Appellant [R18:0005-0010].

Background

Appellant began his employment with Appellee on November 18, 2013 [R16:1088]. About 30 months later - on August 12, 2016 - Appellee terminated Appellant [R16:1095].

Procedural History

On June 30, 2017, Appellant filed his employment discrimination complaint with the Agency. Pursuant to §760.11(1), he alleged that Appellee had violated his civil rights on the basis of race and sex [R04:0172-0180] [R16:1082].

On September 8, 2017, Appellee denied both allegations.^{4/} Stating that it fired Appellant for a legitimate reason [XL3:0046]. Specifically, because he had failed an actuarial exam:

"Complainant was terminated solely because he failed his [FSA] exam."

- [XL3:0049] - Appellee's Position Statement

The investigation progressed, and both parties continued responding to the Agency's information requests [R05:0319-0433]. Appellant compiled his responses into the final form of his complaint. Thereby transmitting it on November 2, 2017 [R05:0461-0479] [R05:0524-0534].

On December 15, 2017, The Agency concluded its investigation. Notably affirming that race and sex were the basis of Appellant's complaint [R01:0238].

On January 19, 2018, Appellant filed his Petition for Relief with the Agency. Just as in his original charge, he listed only race and sex as the protected characteristics for his complaint [R01:0007]. Thus, pursuant to §760.11(7) FS and §120.569 FS, the Agency transmitted it to the Division of Administrative Hearings ("DOAH").

On May 18, 2018, DOAH struck the sex discrimination portion of Appellant's complaint [R05:0450-0457]. Appellant thereafter moved to vacate DOAH's order, on the grounds of improvidence [R05:0504-0523] [R05:0638-0650]. The following month, on June 6, 2018, DOAH modified its previous order [R06:0201-0203].

Nevertheless, on April 18, 2019, DOAH's Recommended Order ("RO") still excluded sex discrimination from the complaint [R16:1080-1082] (see §120.57(1)(k) FS). It also ruled in favor of Appellee. Moreover, DOAH adjusted the Appellee's defense in its RO (emphasis added).

"[Appellant] was terminated solely for failing [his exam], and for deficiencies in his job performance, as detailed herein, and for no other reason."

- [R16:1175] - DOAH ALJ

It is important to note that Appellee never changed its defense prior to the hearing. Despite having many months to try. Moreover, DOAH closed discovery on July 31, 2018; six months before the final day of the hearing (January 29, 2019).^{5/}

Seventy days later (June 27, 2019), the Agency issued its Final Order ("FO") [R18:0005] (see §120.57(1)(1) FS). In which it listed race as the only protected characteristic in Appellant's complaint; and adopted DOAH's ruling. Thereafter, Appellant filed this appeal (see §120.68 FS, Rule 9.190 Fla. R. App. P.).

In short, Appellant worked for Appellee for roughly three years. Upon termination, he charged Appellee with race & sex discrimination. The Agency investigated both factors before transmitting his case to DOAH. From there, DOAH removed one factor, and 'acquitted' Appellee. The Agency adopted DOAH's findings, and Appellant appealed.

Statutory Framework

The Agency (FCHR) is an administrative agency in Florida. As is DOAH.

Florida uses the Burdine Formula to adjudicate employment discrimination.^{6/} As follows:

"First, [Appellant] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Appellant] sufficiently establishes a prima facie case, the burden shifts to [Appellee] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Appellee] satisfies this burden, [Appellant] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Appellant] are in fact mere pretext."

- *HUD v. Blackwell*, 908 F. 2d 864, 870 (11th Cir. 1990)
- *Valenzuela v. GlobeGround*, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)

The prima facie element is further explained in Burdine:

"The Prima Facie element serves to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection."

- *Texas DCA v. Burdine*, 450 US 248, 253-54 (1981)

"...it requires only that the plaintiff establish facts adequate to permit an inference of discrimination"

- *Holifield v Reno*, 115 F. 3d at 1562

The key part of a prima facie proof is explained below:

"[Appellant] must show that...

- (a) he was treated less favorably than similarly-situated persons outside of his protected class.; OR, alternatively
- (b) [Appellee] kept Petitioner's position open while seeking other applicants (see Evans v. McClain of Georgia, Inc. 131 F.3d 957, 964 (11th Cir. 1997)); OR, alternatively
- (c) [Appellee] replaced him with someone outside his protected class (see Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002)).

- *Burdine*

To put it briefly, Appellant needed to present an inference of Appellee's discriminatory conduct, then show that Appellee's rebuttal was a pretext. This will frame the abbreviated facts contained herein.

STATEMENT OF THE FACTS

Appellant is an actuary. He attained his first actuarial credential (ASA) while employed by Appellee [R16:1089].

At the outset of Appellant's employment, Appellant's manager asked him to join her for "dinner-and-a-movie" [R16:1061]. Appellant declined.

Appellant's manager continued the date requests for the remainder of Appellant's employment. Totaling approximately 100 requests [T09:1191-1192] [R16:1140-1141]. Appellant continued to decline.

In July 2015, Appellant's SSC placed a racist doll on Appellant's desk. It stayed there for months [R16:1107-1109].

In May 2016, Appellee made Appellant pay for his ninth actuarial exam. Appellee, however, never made Appellant's SSCs do the same [R16:1146-1147].

Throughout Appellant's employment, Appellee prohibited him from working from home. A privilege it granted Appellant's SSCs [R16:1135-1139].

In August 2016, Appellee fired Appellant because he failed his ninth actuarial exam. An "adverse employment action" that it never subjected Appellant's SSCs to [R16:1151-1157]. As mentioned *supra*, exam failure was the sole reason for Appellee's action [XL3:0049].

Appellee subsequently hired two non-actuaries to replace Appellant [R16:1097]. Neither of whom had passed any of the eight actuarial exams that Appellant had passed. Neither of whom matched Appellant's demographics.

Eighteen months after Appellant's termination, Appellee still had not hired an actuary into Appellant's former position. A position that it kept open [R16:1097].

In short, Appellee fired Appellant after three years of disparate treatment. For a reason that it never used on its *other* employees.

ISSUE I

DUE PROCESS VIOLATION

UNPLED DEFENSE

SUMMARY OF ARGUMENT I

The Lower Tribunal departed from the essential requirements of law when it ruled on an unpled defense. An act that violated Appellant's due process rights. Resulting in a miscarriage of justice which this Court has the power to fix (pursuant to §120.68(7)).

STANDARD OF REVIEW I

The standard of review for Issue I is de novo.

"Those portions of the ALJ's conclusions that rest on findings of fact are subject to a competent substantial evidence standard of review; however, those portions which are interpretations of law are subject to a de novo standard." See Southwest Florida WMD. v Save the Manatee Club, Inc., 773 So. 2d 594, 597 (FL 1st DCA 2000). ...Id at 253.

- *Bd of Med v Acad. Of Cosm. Surg.*, 808, So. 2d 243 (Fla 1st DCA 2002)

Thus, since Issue I revolves around the Agency's interpretation of a provision of law, this Court must review it de novo (also see §120.68(7) FS, *Perdue v TJ Palm Associates*, 775 So. 2d 660, 668 (Fla. 4th DCA 1999)).

ARGUMENT I

A. Due Process Definition

Florida's appellate courts define due process as such:

"The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, §9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As this Court explained in Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla.1991), "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard."

- *Keys Citizens v Florida Keys Aqueduct*, 795 So.2d 940, 948 (Fla. 2001)

B. Administrative Due Process

Administrative agencies (eg, the FCHR), must afford all parties due process:

"The Administrative Procedure Act is intended to afford due process to parties whose legal rights, duties, privileges or immunities may be determined by administrative action on agency level. Florida Peach Orchards, Inc. v. State, Fla. App. 1966, 190 So. 2d 796."

- *Wilson v Pest Control Commiss.*, 199 So. 2d 777, 780 (Fla. 4th DCA 1967)

Appellate case law emphasizes further:

"[Due process] is specifically required by Chapter 120... ...[it sets] the minimum requirements of law applicable to the commission's actions in this case. Its failure to apply and faithfully adhere to these administrative principles constituted a departure from the essential requirements of law."

- *Dusseau v Metro Dade County*, 794 So. 2d 1270, 1277 (Fla. 2001)
- *Schram v. DPR*, 603 So. 2d 1307, 1310 (Fla. 1st DCA 1992)
- *Highsmith v. DPR*, 499 So.2d 19 (Fla. 1st DCA 1986)

C. Plaintiff's Due Process Rights

Furthermore, Plaintiffs (eg, Appellant) and defendants (eg, Appellee) are afforded due process alike. See *Saunders v Shaw*, 244 US 317 (37 S. Ct. 638, 61 L. Ed. 1163).

D. Unpled Defenses Violate Due Process Rights

When an agency rules on an unpled charge/defense it violates the opposing party's due process rights:

"We find that the ALJ, who sua sponte raised and decided the issue of default after the final hearing without giving the parties an opportunity to present evidence and/or argument, departed from the essential requirements of law by denying DFS due process"

- *DFS v Mistretta*, 946 So. 2d 79, 80 (Fla. 1st DCA 2006)

In fact, this Court has been in this position before. *Conklin Center v Williams*, 519 So. 2d 38 (Fla. 5th DCA 1998) featured an employment discrimination complaint. One which was appealed on the grounds of an unpled charge/defense. The 5th DCA reversed and remanded; stating the following:

"It is elementary that parties to civil and criminal proceedings, whether judicial or administrative, are entitled to notice of the issues, as a matter of due process. At no time was Conklin charged with having "a discriminatory work environment," and that issue was not litigated before the hearing officer. Hence, it could not be [used in the Agency's determination]"

- *Conklin Center v Williams*, 519 So. 2d 38 (Fla. 5th DCA 1998)

In Chrysler, not only did the 1st DCA find an unpled defense to be a due process violation, it also prescribed a remedy: reversal and remand (emphasis added):

"[Movant] raises five issues on appeal, the first of which is whether the Board denied him due process of law in considering matters not charged in the administrative complaint. We reverse and remand on this issue. Chrysler argues that the Board's consideration of the Nebraska allegations denied him due process as they were not raised in the complaint, and he was not given notice that such allegations would form part of the administrative proceeding..." "...We agree with Chrysler, and find the Board improperly considered matters not formally charged in the complaint in imposing Chrysler's penalty. The Board's improper consideration of this evidence violated Chrysler's due process rights and does not constitute harmless error. Although the Second District in Decola applied a competent substantial evidence test to determine whether the agency's error was harmless, we believe the more appropriate test for an alleged violation of one's due process rights to a fair hearing would appear to be the harmless error test generally applied in civil cases. An error is harmful where there is a reasonable probability

a different result would have been reached but for the error committed. Katos v. Cushing, 601 So.2d 612 (Fla. 3d DCA 1992); Damico v. Lundberg, 379 So.2d 964 (Fla. 2d DCA 1979) (citing Stecher v. Pomeroy, 253 So.2d 421, 422 (Fla. 1971)), cert. denied, 389 So.2d 1108 (Fla. 1980)."

- *Chrysler v DPR*, 627 So. 2d 31 (Fla. 1st DCA 1993)

The preceding rationale fits the instant case well ((also see *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So. 2d 920, 923); (*Goldberger v. Regency Highland Condo. Ass'n*, 452 So. 2d 583, 585); (*JoJo's Clubhouse, Inc. v. DBR Asset Management, Inc.*, 860 So. 2d 503); (*Udell v. Udell*, 950 So. 2d 528 (Fla. 4th DCA 2007)); (*Todaro v. Todaro*, 704 So. 2d 138, 139)).

E. Application to the facts in the instant case

As outlined *supra*, the lower tribunal ruled on an unpled defense. Additionally - considering the prima facie elements and pretext elements - a very good chance existed for a different outcome. Thus, constituting a harmful error; worthy of reversal.

"We find merit in [Movant]'s argument that the trial court improperly determined matters that were not the subject of the pleadings. Under Florida law, a trial court is without jurisdiction to "hear and determine matters which are not the subject of appropriate pleadings and notice.""

"..."

"Without such notice, she would have no reason to prepare to dispute [Non-Movant's unpled defense]"

"..."

"REVERSED IN PART; AND REMANDED"

- *Todaro v. Todaro*, 704 So. 2d 138, 139

ISSUE II

DUE PROCESS VIOLATION

MATERIAL ERROR

SUMMARY OF ARGUMENT II

The Lower Tribunal erred and departed from the essential requirements of law. It did so by wrongfully changing the legal basis of Appellant's case. A material error that violated Appellant's due process rights; one which this Court has the power to fix (pursuant to §120.68(7)(e)4).

STANDARD OF REVIEW II

The standard of review for Issue II is also de novo.

"Our review is governed by section 120.68(7)(c), Florida Statutes (2009), which provides that a reviewing court may set aside agency action when it finds that the action is dependent on a material error in procedure. See also Big Bend Hospice, Inc. v. Agency for Health Care Admin., 904 So. 2d 610, 611 (Fla. 1st DCA 2005). Guided by this standard, as well as by the concept of procedural due process"

- *Withers v Blomberg*, 41 So. 3d 398, 400 (Fla. 2d DCA 2010)

More specifically, §120.68(7) FS states that the inquiry is whether *"the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure..."*

"Due Process in essence means fundamental fairness..."

- *Hampton v United States*, 425 US 484, 494 (1976)

So, since due process is equal to fundamental fairness, this Court may review the lower tribunal's actions de novo.

ARGUMENT II

A. Appropriate Test for Due Process

This Court can test how material the error was by examining the likelihood of a different outcome:

"[T]he more appropriate test for an alleged violation of one's due process rights to a fair hearing would appear to be the harmless error test generally applied in civil cases. An error is harmful where there is a reasonable probability a different result would have been reached but for the error committed."

- *Mills v State*, 177 So. 3d 984

B. Substantive Jurisdiction

The Agency (FCHR) had substantive jurisdiction over the case below (ie, DOAH did not). Thus, it had sole authority to determine the legal basis for Appellant's case.

"The [Agency] is established pursuant to the Human Rights Act of 1977, as amended by the Florida Civil Rights Act of 1992, Chapter 760, F.S., to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, disability, or marital status and thereby to protect their interests in personal dignity..."

- 60Y-2.001 FAC

Its rules also describe the format of a complaint:

"The complaint must be in writing and shall be signed by the complainant."

- 60Y-5.001(5) FAC

Moreover, the Agency states that complaint amendments/fixes refer back to the complaint's filing date. As if the error had never existed:

"A complaint may be amended to cure technical defects, or omissions, including verification, or to clarify and amplify allegations made therein. Such amendments and amendments which describe an additional unlawful employment practice related to or growing out of the subject matter of the original complaint will relate back to the date the complaint was first received."

- 60Y-5.001(5) FAC

Thus, all of the additional information that Appellant supplied the Agency (during the investigation) dated back to his original filing date (6/30/17).

C. Scope of Discrimination Complaint

Upon exhausting the Agency's administrative remedies, the discrimination complaint must remain in tact:

"A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec. Inc., 19 F.3d 586, 589 n. 8 (11th Cir.)"

- *Ward v. Florida DJJ, 212 F. Supp 2d 1349 (N.D. Fla. 2002)*

Wherein the subsequent hearing officer can properly operate. In the instant case, that person was DOAH's ALJ. Whom - as mentioned *supra* - did not have the authority to change the legal basis.

D. Striking Discrimination Complaints Constitutes Reversible Error

In Sanchez, the appellant/"complaining party" appealed her lower judge's order. An order which struck one of her legal bases (national origin) because of a technical defect. Upon review, the US Court of Appeals reversed her judge's ruling:

"Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act. Consequently, courts confronted with procedural ambiguities... have, with virtual unanimity, resolved them in favor of the complaining party"

- *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir.1970)

Thereby establishing the precedent for handling material errors in lower tribunal strikes/dismissals.

E. Precedent

Perhaps, one of the most compelling examples is in Wilson. Where the appellant appealed his lower tribunal's order of dismissal. The appellate court ruled in his favor despite his failure to (a) state the legal basis; and (b) disclose his own demographics:

"The complainant failed to identify his race and that his complaint was about race discrimination. He later fixed the technical defect. His opponent moved to dismiss/strike his complaint on the grounds of a "new" allegation. The US District Court of Appeals denied that motion; stating that complainant's omission was just a technical defect."

...

"In a letter dated February 10, 1969, he wrote 'To whom it may concern' explaining that he had applied for a job with defendant, had passed all tests given to him, but had not been hired. He did not state that he was Negro or that he had been denied employment because of his race. His letter was received by the EEOC and date-stamped on February 24, 1967. Thereafter, on June 30, 1967, pursuant to [29 C.F.R.] § 1601.11(b) plaintiff transferred his allegations to an official EEOC charge form. At that time he cured the technical defects of his original charge by verifying the charge and by formally stating that he believed that the denial of employment was due to his race"

- *Wilson v. Monsanto Co.*, E.D. La., Jan. 5, 1970, 315 F. Supp. 977

In a different example, an appellate court was incredulous with a lower court's order to strike a claim that the defendant - itself - had already acknowledged (during its investigation phase).

"It is thus wholly specious for the [defendant] to argue that the charges concerning the Gardner position could not reasonably be expected to grow out of the "promotion" complaint when its own EEOC counselor clearly considered the filling of this position an integral part of Bess' original complaint."

- *Turner v. Orr*, 804 F.2d 1223, 1226-27 (11th Cir.1986)

An appellate decision that applies to the instant case.

F. Application to the facts in the instant case

As outlined *supra*, the lower tribunal erred when it excluded the sex discrimination charge from Appellant's complaint.

For starters, Appellant listed it in his original charge (consistent with 60Y-5.001 FAC). Said complaint served to notify both parties of the matter at hand (emphasis added):

"The purpose of these requirements is to notify the employer of discriminatory practices and to provide the FCHR with "the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." See Gregory v. Ga. Dept. of Human Res., 355 F.3d 1277, 1279 (11th Cir.2004); Buzzi v. Gomez, 62 F.Supp.2d 1344, 1351 (S.D.Fla.1999)."

- *Sunbeam v Mitzel*, 83 So.3d 865

Appellee acknowledged such when it listed both race and sex discrimination in its position statement. Logically - and statutorily - the Agency based its investigation on both factors. Thereby confirming such in its Notice of Determination [R01:0238].

DOAH, however, removed sex discrimination from the complaint. A material error that (a) it did not have the authority to commit; (b) violated Appellant's due process rights; and (c) impacted the outcome of the case. Unfortunately, the Agency failed to mend DOAH's mistake.

This Court, however, can:

"Reversal is mandated when a procedural error is material to the fairness of the proceedings."

- *Schrimsher v Palm Beach County*, 694 So. 2d 856, 861 (Fla. 4th DCA 1997)

CONCLUSION

WHEREFORE, based on a violation of due process rights, Appellant asks this Court to reverse and remand the lower tribunal's Final order.

Dated this 30th day of November 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November 2019, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the following:

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(agency)

CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this document is Times New Roman 14-point Font (caption) and Courier New 12-point Font (contents); thus complying with the font requirements of Rule 9.210(a)(2) Fla. R. App. P.

/s/ Elias Makere

^{1/} [R04:0210] means page 210 from the 4th volume of the record. ^{2/} [T09:1235-1239] means pages 1235 through 1239 from the 9th volume of the transcript.

^{3/} [XL1:0001] means page 1 within exhibit L-1. ^{4/} Appellee confirmed that charge was based on race and sex (see ¶2 of [XL3:0046]).

^{5/} And 9 months before DOAH changed Appellant's defense. ^{6/} "Burdine Formula" is also referred to as the McDonnell-Douglas analysis.

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