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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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CERTIFICATE OF COMPLIANCE

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

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