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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

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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 10th day of November, 2021, through the Court's e-service system.

/s/ Richard E. Johnson

Richard E. Johnson

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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

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