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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 May25, 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

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