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

MICHELLE WILSON,

Appellant,

v.

Case No.: 1D21-3417

L.T. No.: 202128179

FLORIDA COMMISSION ON
HUMAN RELATIONS,

Appellee.

APPELLANT'S REPLY BRIEF

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

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STATEMENT OF CASE AND FACTS

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

II. FCHR Had an Unwaivable Duty of Disqualification

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

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

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

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

would be an abrogation of legislative power.”).

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

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

III. FCHR’s Dismissal Violates Constitutional Separation of Powers

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

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

/s/ Richard E. Johnson
Richard E. Johnson

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