

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com

SELL YOUR OWN SAMPLES!

(help others get the justice that they deserve)

BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.

**STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEALS**

ELIAS MAKERE,

)

Appellant/Petitioner,

)

)

Case No. 1D19-3236

vs.

)

LT No. (FCHR): 2017-01432

)

LT No. (DOAH): 18-000373

ALLSTATE INSURANCE COMPANY,

)

Appellee/Respondent

)

APPELLANT'S MOTION FOR REHEARING

Appellant, ELIAS MAKERE, on this 27th day of July 2020, respectfully moves this Honorable Court to rehear/clarify/certify the decision/opinion it rendered on July 13, 2020. Appellant proffers the following in good faith, with gratitude, and only on the grounds permitted by Rule 9.330 Fla. R. App.

Key Points:

- | | | |
|-----|-------------|---|
| A.) | Grounds | Misapprehended/Overlooked Fact/Law. |
| B.) | Concise | This motion is <u>only 2 pages</u> in substance |
| C.) | No Argument | This motion does not re-argue the merits |
| D.) | Precedence | Florida DCAs have granted similar motions |

Table of Contents:

Context	2 nd Page
Motion	3 rd Page
Certificates	6 th Page
Exhibits	8 th Page

RECEIVED, 07/28/2020 02:36:30 PM, Clerk, First District Court of Appeal

Background: The Court entered a decision accompanied by an opinion
Problem: Appellant saw an important error in the decision
Request: The Court grants a rehearing of the appellate case
Alternative A: DCA clarifies its opinion with respects to the LT's basis
Alternative B: DCA certifies two questions of great public importance

9.330 | Fla R. App. P. | Rehearing

"...A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding."

9.330 | Fla R. App. P. | Clarification

"...A motion for clarification shall state with particularity the points of law or fact in the court's decision that, in the opinion of the movant, are in need of clarification"

9.330 | Fla R. App. P. | Committee Notes

"...[a motion for rehearing should not be used] to express mere disagreement with its resolution of the issues on appeal."

Stetson Law Review | Motion Practice in Florida Appellate Courts

"A motion for rehearing must address some error or omission in the resolution of an issue previously presented in the main argument."

Guidance | Whipple v State, 431 So. 2d 2011 (Fla. 2d DCA 1983)

"...[We recommend careful review of Green] prior to filing a motion for rehearing. We subscribe to [Green] and urge counsel to file a motion only where careful analysis indicates a point of law or a fact which the court has overlooked or misapprehended..."

Precedence

- | | |
|----------------------|---------------------------|
| • Case No. 1D10-3881 | - Florida 1DCA (6/24/11) |
| • Case No. 1D10-5645 | - Florida 1DCA (3/3/11) |
| • Case No. 4D06-2992 | - Florida 4DCA (10/24/07) |
| • Case No. 5D05-0571 | - Florida 5DCA (6/16/06) |
| • Case No. 5D09-0088 | - Florida 5DCA (12/13/10) |
- Florida Appellate courts have granted similar motions

MOTION

I. Preface

1. Appellant will not re-argue his points on appeal. Nor will he present any argument that was not previously proffered. Rather, Appellant's motion merely points out a fundamental, misapprehended point in this Honorable Court's rendered opinion (hereinafter "The Opinion").

II. Rehearing | Sex vs. No Sex

2. The Opinion stated that the Recommended Order ("RO") - from the record below - was based on race, sex, and retaliation (see **Exhibit A**).
3. This, unfortunately, is not true.
4. The record shows that the RO was based on race and retaliation only (see **Exhibit B**). It excluded Appellant's sex discrimination complaint (as did the [appealed] Final Order; see **Exhibit C**).^{1/}

(i) see Florida Power v Canal Authority, 423 So. 2d 421 (FL 5DCA 1982)^{2/}
5. This is crucial, because the legal basis of the case below was the focus of Appellant's second point on appeal (see **Exhibit D**).
6. Appellant asserts that this Court overlooked/misapprehended this error; and contends that - without it - it is reasonably probable that The Opinion's outcome would have been different.
7. In Jackson v NICA (5D05-0571), the Fifth DCA granted rehearing upon recognizing that it erred in reading the lower tribunal's record. An act identical to the instant act; thereby lending precedence for Appellant's requested relief.^{3/}

III. Clarification | Was "Sex" A Legal Basis in the Case Below?

8. As an alternative to rehearing, Appellant asks this Honorable Court to clarify (a) whether sex discrimination was a legal basis in the Lower Tribunal; and/or (b) how Appellant's case is different from "The Seminal Case".^{4/} Moreover - and perhaps more broadly received - is whether findings outside of an RO's "statement of issues" constitutes *dictum* (see Bunn v Bunn, 311 So. 2d, 387, 389 Fla. 4th DCA 1975; which proclaimed gratuitous observations/remarks to be *orbiter dictum*).
9. The Opinion introduced confusion/ambiguity on the matter; as it listed sex as a basis of the RO (in error; see ¶2-4, *supra*). A listing contradicted by the prevailing declaration in the appealed Final Order.
10. In the event of remand, clarification would be instructive to the Lower Tribunal. Plus, since this immediate matter is central to all Florida discrimination cases, clarification would give practitioners guidance. Last, clarification would also provide a basis for supreme court review.

IV. Certification | Authorized Changes

11. This Court's decision impacts all Floridians, because (a) the FCRA protects everyone; and (b) this decision is based on due process rights.^{5/}
12. Thus, based on their novel and wide-ranging effects, Appellant asks this Court to certify to the Florida Supreme Court the following questions of great public importance:^{6/}

"1. CAN THE FCHR CHANGE THE LEGAL BASIS
OF A CASE UPON DOAH'S RECOMMENDATION?"

"2. CAN AN FCRA RESPONDENT CHANGE ITS
TERMINATION RATIONALE AFTER TRIAL?"

CONFERRAL

On July 27, 2020, Appellant asked Appellee (via phone, via email) if it had any opposition to this motion. Although Appellee replied that it opposed this motion (including clarification), it stated that the lower tribunal excluded Appellant's sex discrimination complaint (see **Exhibit E**).

Thereby highlighting the confusion surrounding The Opinion.

CONCLUSION

WHEREFORE, based upon the foregoing - and after careful consideration (including placing himself in the shoes of the decision-maker) - Appellant respectfully asks this Court for an order granting rehearing/clarification/certification pursuant to Rule 9.330(a) Fla. R. App. P..

Dated this 27th day of July 2020.

Respectfully submitted,

ELIAS MAKERE

s/ Elias Makere, Pro Se
3709 San Pablo Rd. S # 701
Jacksonville, FL 32224
Tel: (904) 294-0026
E-mail: justice.actuarial@gmail.com

CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July 2020, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

^{1/} Moreover - and for the sake of wholeness - the Final Order was the appealed order.

^{4/} "The Seminal Case" = *McDonnell Douglas v Green*, 463 F. 2d 338 (8th Cir. 1970); and *McDonnell Douglas v Green*, 411 US 792 (1973).

^{2/} holding that matters outside of the statement of issues are outside the subject matter jurisdiction of the trial court

^{5/} FCRA = Florida Civil Rights Act of 1992, as amended.

^{3/} NICA = Florida's Birth-Related Neurological Injury Compensation Association. See the motion (4/18/16) and the second authored opinion (6/16/06).

^{6/} Novel in the sense that no Florida appellate case has addressed the questions. A Fact which is based on 18 months of research; and supported by the absence of precedential citation in The Opinion. In other words, 'novel' because "there is no controlling precedent of the Supreme Court of Florida."

SERVICE LIST

Gina M. Cadogan, Esquire
Kathy Sand
E: gina@cadoganlaw.com
E: kathy@cadoganlaw.com

300 S. Pine Island Rd, Ste 107
Plantation, FL 33324
(*appellee's appellate lawyers*)

Zascha Blanco-Abbott, Esquire
Stephani Koutsodendris, Esquire
Christine Manzo, Esquire
Carmen Rodriguez, Esquire
E: zba@lgplaw.com
E: sk@lgplaw.com
E: cmm@lgplaw.com
E: cr@lgplaw.com

Liebler, Gonzalez & Portuondo
44 West Flagler Street
Courthouse Tower 25th Floor
Miami, FL 33130
(*appellee's trial lawyers*)

Tammy S. Barton, Agency Clerk
tammy.barton@fchr.myflorida.com

Florida Commission on Human Relations
Room 110
4075 Esplanade Way
Tallahassee, Florida 32399-7020
(*agency*)

EXHIBIT A

'THE OPINION'

FLORIDA | 1DCA

1D19-3236

July 13, 2020

{ 'sex' was included }

[excerpt]

1st Page

[marked]

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3236

ELIAS MAKERE,

Appellant,

v.

ALLSTATE INSURANCE COMPANY,

Appellee.

On appeal from the Florida Commission on Human Relations.

July 13, 2020

PER CURIAM.

Appellant, Elias Makere, appeals the final order of the Florida Commission on Human Relations (FCHR) adopting the administrative law judge's findings of fact and conclusions of law and dismissing his petition for relief from an unlawful employment practice. *See* §§ 760.01–760.11, Fla. Stat. (2016). Appellant's claim pertained to his termination from employment by Allstate Insurance Company. The ALJ found that the decision to terminate Appellant's employment was not because of his race or sex or as retaliation. The ALJ also determined certain claims were time-barred. FCHR adopted the recommended order and denied each of Appellant's exceptions to the recommended order.

EXHIBIT B

THE RECOMMENDED ORDER

FLORIDA | DOAH (LT)

18-0373

April 18, 2019

{ 'sex' was not included }

[excerpt]

1st & 2nd Pages

[marked]

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIAS MAKERE,

Petitioner,

vs.

Case No. 18-0373

ALLSTATE INSURANCE COMPANY,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard in Jacksonville, Florida, on July 31, 2018, before Lawrence P. Stevenson, and on November 28 through 30, 2018, and January 29, 2019, before E. Gary Early, designated Administrative Law Judges of the Division of Administrative Hearings ("DOAH").

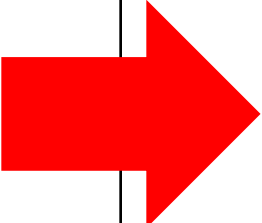
APPEARANCES

For Petitioner: Elias Makere, pro se
No. 701
3709 San Pablo Road South
Jacksonville, Florida 32224

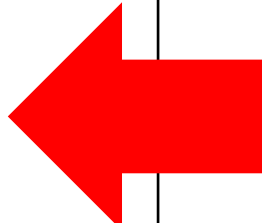
For Respondent: Carmen Rodriguez, Esquire
Law Offices of Carmen Rodriguez, P.A.
Suite 411
15715 South Dixie Highway
Miami, Florida 33157

STATEMENT OF THE ISSUE

Whether Petitioner, Elias Makere, was subject to an unlawful employment practice by Respondent, Allstate Insurance



Company ("Respondent" or "Allstate"), on account of his race or due to retaliation for his opposition to an unlawful employment practice in violation of section 760.10, Florida Statutes.



PRELIMINARY STATEMENT

On June 30, 2017, Petitioner filed an eight-page complaint of discrimination ("Complaint of Discrimination") with the Florida Commission on Human Relations ("FCHR") which alleged that Respondent violated section 760.10 of the Florida Civil Rights Act of 1992 ("FCRA"), by discriminating against him on the basis of his race or as retaliation.

On December 15, 2017, the FCHR issued a Determination: No Cause, and a Notice of Determination: No Cause, by which the FCHR determined that reasonable cause did not exist to believe that an unlawful employment practice occurred.

On January 19, 2018, Petitioner filed a 231-page Petition for Relief (the "Petition") with the FCHR. The Petition included allegations of racial discrimination for which there is no evidence of their having been presented to FCHR or having been part of the FCHR investigation. The Petition also, for the first identifiable time, alleged that Allstate, and in particular Lisa Henry, engaged in sexually provocative and inappropriate behaviors, which Petitioner alleged to be "sexual harassment and discrimination." He alleged that "[t]he FCHR ignored these events."

EXHIBIT C

THE FINAL ORDER (ie, the appealed order)

FLORIDA | FCHR (LT)

2017-01432

June 27, 2019

{ 'sex' was not included }

[excerpt]

1st Page

[marked]

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

ELIAS MAKERE,

EEOC Case No. None

Petitioner,

FCHR Case No. 2017-01432

v.

DOAH Case No. 18-0373

ALLSTATE INSURANCE COMPANY

FCHR Order No. 19-044

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Elias Makere filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2016), alleging that Respondent, Allstate Insurance Company, committed unlawful employment practices by harassing and terminating Petitioner on the basis of Petitioner's race (Black). Petitioner also alleged that Respondent unlawfully retaliated against Petitioner.

The allegations set forth in the complaint were investigated, and on December 15, 2017 the Executive Director issued a determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Jacksonville, Florida, on July 31, 2018, before Administrative Law Judge Lawrence P. Stevenson, and on November 28 through 30, 2018, and January 29, 2019, before Administrative Law Judge E. Gary Early.

Judge Early issued a Recommended Order, dated April 18, 2019, recommending that the Commission dismiss the Petition for Relief.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

EXHIBIT D

INITIAL BRIEF (POINT ON APPEAL)

FLORIDA | 1DCA

1D19-3236

November 25, 2019

{sex vs no sex}

[excerpt]

20th & 25th Pages

[marked]

1D19-3236 | Makere v Allstate | 001 | Initial Brief | 11/8/2019

SUMMARY OF ARGUMENT II

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

STANDARD OF REVIEW II

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

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

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

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

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

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

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

1D19-3236 | Makere v Allstate | 001 | Initial Brief | 11/8/2019

F. Application to the facts in the instant case

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

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

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

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

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

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

This Court, however, can:

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

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

EXHIBIT E

PHONE CALL
WRITTEN RECITATION
(PERTINENT PART)

JULY 27, 2020

4:12 PM EST

APPELLANT & APPELLEE

{sex vs no sex}

Source: Appellant's contemporaneous notes during conversation

Caller: 904.294.0026 | Appellant (Elias Makere)
Recipient: 954.606.5891 | Appellee's Attorney of Record
Date: 7/27/2020
Time: 4:12 PM EST
Subject: Motion for Rehearing | Sex vs No Sex

{phone ringing}

Appellee (B): Cadogan Law. This is Gina.

Appellant (A): Hey, good afternoon, Gina. This is Elias on the Allstate case.
How is life treating you?

B: Good. How are you?

A: Not so bad. Well, I'm just calling to follow-up. I'm going to
be filing a *Motion for Rehearing*... do you have any objection?

B: Yes, we object. We'll respond in opposition.

A: Also, [my filing will include a] *Motion for Clarification* and
a *Motion for Certification*... Have you read the opinion?

B: Yes, I have.

A: Did you see that it said race, sex, and retaliation?

B: I read the opinion [(ie, "yes")].

Appellant (A): In the Lower Tribunal case, **was sex involved?**

Appellee (B): **No, and the judge didn't hear evidence on that.**

...

BUY™

SELL™

SHOP™



Downloaded From
www.TextBookDiscrimination.com

SELL YOUR OWN SAMPLES!

(help others get the justice that they deserve)

BUY™

SELL™

SHOP™

www.TextBookDiscrimination.com

Get ***Booked Up*** on Justice!

© TBD Corporation. All Rights Reserved.