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**IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA**

MICHELLE WILSON,

Plaintiff,

vs.

CASE NO.: 2023 CA 1569

**FLORIDA COMMISSION ON
HUMAN RELATIONS, and
CHEYANNE COSTILLA, in her
Official capacity, and
Individually,**

Defendants.

_____ /

DEFENDANTS' MOTION TO DISMISS

COME NOW, Defendants, FLORIDA COMMISSION ON HUMAN RELATIONS and CHEYANNE COSTILLA, and file this Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.140(b)(1). Plaintiff raised the same constitutional claims asserted in this action in a prior appeal to the First District Court of Appeal. Because the First DCA has already ruled on these issues, and because Plaintiff incorporated her appeal to the First DCA into her Complaint, her claims are barred by collateral estoppel. In support of this Motion, Defendants state the following:

I. FACTS ALLEGED

Plaintiff, Michelle Wilson, worked for Defendant, Florida Commission on Human Relations, and at the time of her separation served as its Executive Director. [Cmplt. ¶8]. Plaintiff was dismissed on October 15, 2020, and believed the cause of her dismissal was her "refusal to violate law, rules, ad [sic] regulations." [Cmplt. ¶13]. Plaintiff therefore

filed a whistleblower charge on December 14, 2020. [Cmplt. ¶14]. Plaintiff believes that her whistleblower charge “easily met all the requirements of a whistleblower charge under Florida Law” because she, “who had run the agency for nine years,” prepared it along with her counsel, “a board-certified labor and employment lawyer with more than 30 years’ experience before FCHR.” [Cmplt. ¶17]. FCHR disagreed and informed Plaintiff that the charge was inadequate, giving her an opportunity to amend. [Cmplt. ¶19]. Ultimately, FCHR did initiate an investigation into Plaintiff’s charge and did not issue a determination. [Cmplt. ¶23].¹ Plaintiff appealed FCHR’s action to the First District Court of Appeal, “challenging the authority of FCHR to withhold a determination under the operative statute, but also raising state and federal constitutional issues of separation of powers, conflict of interest, due process, access to courts, and right to trial by jury.” [Cmplt. ¶25]. The First DCA affirmed FCHR’s action, “even on rehearing, and found FCHR to have an ‘inherent’ power to decline jurisdiction over a whistleblower charge.” [Cmplt. ¶26].² Plaintiff now files this action asserting the same constitutional claims that she argued to the First DCA.

II. PLAINTIFF’S CLAIMS

Plaintiff brings claims against Cheyanne Costilla, Executive Director of FCHR, in her official and individual capacities (Counts I-III) and against FCHR (Counts IV-VII). Plaintiff’s claims here are not based on her dismissal. These are not wrongful termination

¹ For clarity, while not explicitly identified in Plaintiff’s Complaint, FCHR issued a Notice of Dismissal on October 21, 2021.

² *Wilson v. Florida Comm’n on Human Relations*, 351 So. 3d 109 (Fla. 1st DCA 2022), *reh’g denied* (Dec. 5, 2022).

or employment retaliation claims. Instead, Plaintiff raises seven (7) state and federal constitutional claims based on FCHR's dismissal of her whistleblower charge, asserting that FCHR is "required to issue a positive or negative determination on every charge." [Cmplt. ¶22].

Plaintiff asserts that FCHR's failure to issue a determination violated her First Amendment right to petition (Count I), her Fourteenth Amendment right to due process (Counts II and III), and her state constitutional rights of due process (Count IV), access to court (Count V), trial by jury (Count VI), and separation of powers (Count VII). These are claims Plaintiff argued to the First DCA. [Cmplt. ¶25].

III. WBA FRAMEWORK

Florida law provides that employees and former employees who believe they have been subjected to retaliation by an employer after making a disclosure protected by the Whistle-blower's Act (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. Thereafter, 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 form that a disclosure must take to invoke WBA protection is governed by section 112.3187(7), Florida Statutes. The substance requirement for a WBA disclosure is set forth at section 112.3187(5), Florida Statutes.

The First District Court of Appeal has repeatedly held that 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”).

Where the FCHR dismisses a whistleblower charge without making a determination, that decision is appealable to the First District Court of Appeal. Fla. Stat. § 120.68.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

Where a party challenges an administrative action by a state agency such as FCHR in state court and the state court renders a decision, that decision operates as res judicata and bars further constitutional claims challenging that administrative action. *Gorin v. Osborne*, 756 F.2d 834, 838 (11th Cir. 1985). Likewise, when a court “decides an issue necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.” *Barrington v. Florida Dept. of Health*, 112 F. Supp. 2d 1299, 1303 (M.D. Fla. 2000).

V. PLAINTIFF’S CLAIMS ARE BARRED

While res judicata and collateral estoppel are affirmative defenses that typically should not be raised by motion to dismiss, Plaintiff specifically referenced the appeal of

FCHR's dismissal of her whistleblower charge to the First DCA in her Complaint, noting the constitutional issues she raised and the First DCA's ruling. Thus, this Court may consider the First DCA's ruling in deciding this motion. *Duncan v. Prudential Ins. Co.*, 690 So. 2d 687, 688 (Fla. 1st DCA 1997)

Each claim in this action is based on Plaintiff's contention that FCHR's dismissal of her whistleblower charge was impermissible because every whistleblower charge FCHR receives must be investigated and result in a "determination giving the charging party a point of entry into court." [Cmplt. ¶30 (Count I), ¶38 (Count II), ¶49 (Count III), ¶59 (Count IV), ¶67 (Count V), ¶76 (Count VI), ¶85 (Count VII)].

Plaintiff is incorrect. She made this argument to the First DCA, which disagreed, citing its prior rulings that the FCHR has inherent authority to dismiss a whistleblower charge. Indeed, the First DCA has repeatedly held that FCHR may dismiss a whistleblower charge and is not required to investigate it or issue a determination where the charge does not describe a protected disclosure that would trigger the antiretaliation provisions of the WBA. Plaintiff explicitly referenced the First DCA's ruling in her Complaint. [Cmplt. ¶ 26].

Because an element necessary to each of Plaintiff's claims – that Plaintiff was entitled to an investigation and determination of her whistle-blower charge – has already been decided to the contrary by the First DCA, Plaintiff's claims are all barred by collateral estoppel. Plaintiff's Complaint is due to be dismissed, with prejudice.

Respectfully submitted June 26, 2023.

/s/ Jamie Ito
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all parties of record on June 26, 2023.

/s/ Jamie Ito
JAMIE ITO

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