IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

JAMES W. BRUNER,

Appellant,

v.

Case No. 1D03-3775
L. T. No.: 98-4382

GC-GW, INC., d/b/a
JACKSON-COOK,

Appellee.
_____/

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

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BRIEF IN SUPPORT OF APPELLANT
ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

_____

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TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

FLORIDA STATUTES CITED (2002)

SUMMARY OF ARGUMENT

The court below erred in rewriting the statute to import into it a qualification that substantially changes the law's meaning and coverage. Under the plain language of the statute, "no employer" may retaliate against an employee because that employee has filed a claim for worker's compensation. Under the interpretation of the court below, any later or concurrent employer may so retaliate -- just not the employer against whom the claim was filed. This violates established principles of statutory construction. Courts are not free to add words to statutes that were not placed there by the Legislature.

Part of the motivation for the court to rewrite the statute was the stated conviction that the law is in derogation of the common law and therefore must be read in as restrictive a manner as possible. This is plain error. Employment statutes barring retaliation are remedial and must therefore be construed in the manner that best allows access to the remedy. This principle trumps the countervailing notion that laws in derogation of the common law are to be strictly construed.

Though not controlling in disposing this case, the principles customarily applied around the nation in employment retaliation cases are persuasive and useful. Those applications, almost without exception, operate on the premise that a new employer is barred from retaliating against an employee who filed a claim or charge

against a prior employer. The U.S. EEOC has made a national policy to that effect in discrimination cases and several federal circuits have adopted those principles.

ARGUMENT

STANDARD OF REVIEW

All question presented for review in this brief are issues of statutory interpretation. They are pure-law issues, reviewed in this court under the de novo standard. See, e.g., Ocala Breeders' Sales Co. v. Florida Gaming Centers, 731 So. 2d 21 (Fla. 1st DCA 1999).

I. THE TRIAL COURT ERRED IN REWRITING THE STATUTE

The employer/Appellee in this case fired the employee/Appellant upon learning that he had filed a worker's compensation complaint against a previous employer. The court below held that this firing does not violate § 440.205, Florida Statutes, because the employer who fired the employee for filing the claim was not one against whom the claim was filed. The court held that a later or concurrent employer may fire an employee with impunity for filing a worker's compensation complaint. The statute itself makes no such exception:

> No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Worker's Compensation Law.

§ 440.205, Florida Statutes.

The court below read that statute as including a ghostly amendment providing a concluding clause saying words to the effect, "provided that such claim was filed against the same employer taking the adverse action." Courts may not do this. Seagrave v. State, 802 So.2d 281, 287 (Fla.2001) ("[I]t is a basic principle of statutory construction that courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.' "); Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 899 (Fla. 2002) (same).

In statutory interpretation, courts must first look to the actual language used in a statute. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). If there is no ambiguity, that ends the inquiry. Here, there is no possible way for "no employer" to be rendered as "some employers" or "no employer other than those not named in the worker's compensation claim." Where there is no linguistic ambiguity, there is no room for the sort of creative interpretation in which the court below indulged. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

Further, one must be concerned at the Orwellian twist of expression whereby the trial court repeatedly purports fidelity to judicial restraint by declining to "expand" the statute or create a new cause of action. The court below could not possibly reach the conclusion it did without doing violence to the plain language of the statute. That this was done in the name of deference to the Legislature is an irony

that should not pass unnoted.

II. THE STATUTE REQUIRES CONSTRUCTION PROMOTING ACCESS TO THE REMEDY

The court below relied heavily on the doctrine that statutes in derogation of the common law must be construed narrowly. Because of its belief that there were no prohibitions against retaliatory discharge at common law, the court apparently concluded that the statute at issue must be read to confer as few additional rights as possible. Therefore, a right to sue the employer against whom one claimed worker's benefits seems a narrower construction than an additional right to sue a later employer who retaliates for that same claim. In the instant case, this point is complicated by the court's rewriting of the statute -- a measure that exceeds common notions of narrow construction.

But it is not necessary to reach the court's grafting additional language onto the statute because the principle of narrow construction does not apply here in the first place. In retaliatory discharge cases in employment law in Florida, our Supreme Court has noted the tension between the canon of strict construction for statutes in derogation of the common law and the opposing canon of liberal construction of remedial statutes to promote access to the remedy provided by those statutes. The Supreme Court has definitively resolved that tension in favor of retaliatory discharge statutes being remedial and therefore trumping all countervailing principles of narrow

construction. The prevailing principle is that such laws must be construed in a fashion that promotes access to the remedy provided in the statute. It matters not a whit whether the remedy is in derogation of the common law. The law will be read to favor the remedy. The Golf Channel v. Jenkins, 752 So. 2d 561, 565-66 (Fla. 2000); Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).

III. PROTECTION AGAINST RETALIATION BY LATER EMPLOYERS IS THE STANDARD PRACTICE

Though the way courts commonly enforce other statutes barring retaliatory discharge is not controlling on the outcome of this case, that jurisprudence is an established body of law to which one might repair for guiding principles common to all such inquiries. Sometimes several such statutes are used in the same case. It furthers the interests of uniformity and predictability to apply the same principles to all retaliation claims whether they arise from discrimination statutes, whistleblower statutes, or worker's compensation statutes. The underlying policies are the same. The Appellant's brief discusses worker's compensation retaliation statutes in other states. That need not be duplicated here.

As a matter of national policy for retaliation under discrimination statutes, the U.S. Equal Employment Opportunity Commission (EEOC) has adopted a doctrine contrary to that espoused by the court below:

> An individual is protected against retaliation for participation in employment discrimination proceedings even if those proceedings involved a different entity. **For example, a violation would be found if a respondent refused to hire the charging party because it was aware that she filed an EEOC charge against her former employer**.

EEOC Compliance Manual § 8-II(C)(4) (Dec. 5, 2000)(emphasis added) (quoted with approval in McMenemy v. City of Rochester, 241 F.3d 279, 283-84 (2d Cir.2001)); see also, Christopher v. Stouder Memorial Hosp., 936 F.2d 870, 873-74 (6th Cir.), cert. denied, 502 U.S. 1013 (1991) (reporting trial court's finding that defendant's frequent reference to plaintiff's sex discrimination action against prior employer warranted inference that defendant's refusal to hire was retaliatory).

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this 8th day of December, 2003, to Michael C. Rayboun, Esq., WHIBBS & WHIBBS, 105 East Gregory Square., Pensacola, Florida 32501; and to Vernon T. Grizzard, Esq., 3384 Barrow Hill Trail, Tallahassee, Florida 32312.

_____
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 Times New Roman 14 point font.

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Richard E. Johnson