IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

MARIAN L. BRYANT,

Appellant,

v. CASE NO. **1D10-853**
LT CASE NO. 09-2842

FLORIDA SCHOOL FOR THE DEAF
AND BLIND,

Appellee.
_________________________________/

BRIEF AMICUS CURIAE BY NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

BRIEF IN SUPPORT OF APPELLANT
ON APPEAL OF A FINAL ORDER OF THE
FLORIDA COMMISSION ON HUMAN RELATIONS

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Identity And Interest of Amicus Curiae and Statement of Consent

Amicus Curiae National Employment Lawyers Association, Florida Chapter (Florida NELA), has set forth its interest and identity in the accompanying motion for leave to file this brief.

The roughly 200 employment lawyers in Florida NELA and their thousands of employee clients share an interest in having this court reverse the judgment of the agency below.

Florida NELA addresses the issues of this case as a friend of the court rather than a friend of the Appellant. The points raised in this brief and Appellant's brief overlap only slightly. The principal concern of florida NELA is that the doctrine adopted by the agency below wastes the time and money of employment lawyers and their clients and burdens the courts and the taxpayers with premature filings of administrative charges and lawsuits, many of which are about only the single issue of the filing deadline.

Reversing the decision below is a matter of substantial concern to the amicus curiae and their clients.

Both parties have consented to the amicus curiae brief in this case.

SUMMARY OF THE ARGUMENT

FCHR erred in applying the Ricks doctrine to the Public Whistleblower Act. That doctrine was flawed from the start and has now been abrogated by an act of Congress. The doctrine wreaks havoc on court and agency dockets by spurring premature charges and suits. Even before the statutory abrogation, 40% of the states considering the Ricks doctrine refused to apply it to their counterpart statutes. The doctrine of liberal construction to effectuate access to the remedy of the Whistleblower Act forbids application of Ricks to that Act.

ARGUMENT

Standard of Review

_____All questions 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.*, Maggio v. Florida. Department of Labor & Employment Security, 899 So. 2d 1074, 1076 (Fla. 2005).

I. Introduction

Amicus curiae National Employment Lawyers Association, Florida Chapter (Florida NELA) supports reversal of the dismissal of Appellant's claim by the Florida Commission on Human Relations (FCHR). FCHR dismissed the claim on timeliness grounds, though appellant filed the charge within 60 days of her termination date.

The filing was more than 60 days after Appellant first learned of a hearing on her proposed termination. The Florida Public Whistleblower Act requires a charge to be filed with FCHR within 60 days of the adverse action. FCHR did not explain the rationale of its holding other than to identify timeliness as the basis. In the context of the pleadings, it is obvious that FCHR accepted Appellee's suggestion to apply the doctrine of Delaware State College v. Ricks, 449 U.S. 250 (1980). Under that doctrine, the clock begins to run on the date that an employee learns of an upcoming termination, not the last day of work, when the termination takes effect.

Appellant has ably argued that, even under this doctrine, her charge is timely because the hearing on her termination was not in the nature of a reconsideration or an appeal, but was itself the initial termination decision. She filed within 60 days of the announcement of the result of that hearing, thus making the charge timely whether or not Ricks applies.. This amicus does not repeat that argument, but instead addresses broader concerns.

II. The Ricks Doctrine Has Been Superseded By Statute

Ricks is a case arising from Title VII of the Civil Rights Act of 1964, prohibiting discrimination based on race, sex, religion, color, and national origin. The case came in a bitterly contested 5-4 decision. It has always been controversial. However, courts have applied the doctrine arising from the case to a variety of federal

and state statutes, as FCHR did in this state whistleblower case. The Supreme Court built upon Ricks in Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (holding time-barred the pay discrimination claims of a female employee because the discriminatory decisions were made years before she knew of them). That too was a bitterly contested 5-4 decision, but this time public outrage spurred Congress to act in a way that abrogated both Ricks and Ledbetter, at least to the extent that the doctrine of those cases applied to decisions affecting compensation.

On January 29, 2009, President Barack Obama signed into law the "Lilly Ledbetter Fair Pay Act of 2009" ("the Act"). The Act amends Title VII – specifically, 42 U.S.C. § 2000e-5(e) – by adding the following provision:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6.[1] The

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[1] The Act also amends the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Rehabilitation Act of 1973. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 6-7.

Act is retroactive and applies "to all claims of discrimination in compensation under Title VII ... that are pending on or after" May 28, 2007. Id. § 6.

It thus no longer matters when an employer makes a discriminatory decision affecting pay, so long as the employee files her charge within the limitations period as counted from the last day the employee is affected by the decision, usually the last day on the job. A termination of employment is indisputably a decision affecting compensation.

Ledbetter, at least arguably, took a step beyond Ricks in time-barring the claim of an employee who was completely in the dark about the long-ago decision to pay her less than her male counterparts. Under most readings of Ricks, the clock would run from the employee's discovery of the discrimination rather than the date of decision. Thus Ledbetter counts the limitation period from the day of the decision; Ricks from the day the employee learns of the decision; and the Act from the day compensation ends. The language of the Fair Pay Act abrogates the doctrine of Ricks as well as that of Ledbetter, as a number of courts have recognized. See, e.g., Groesch v. City of Springfield, Ill., 635 F.3d 1020, 1026 (7th Cir. 2011); Klebe v. University of Texas System, 649 F.Supp.2d 568, 570 (W.D. Tex. 2009).

The time is not ripe for this Court to enter the debate on whether the language of the Fair Pay Act regarding the extent to which a "discriminatory compensation

decision or other practice" implicates decisions such as transfer or demotion that have no effect on compensation. See "Raising the Dead?: the Lilly Ledbetter Fair Pay Act," 84 Tul. L. Rev. 499 (February 2010), for the opening volley in the debate over how far the Fair Pay Act may go beyond merely abrogating cases like Ricks and Ledbetter.

No court has applied Ricks to the Florida Public Whistleblower Act. The fact that Congress has superseded that doctrine militates against applying it where it has never reached before.

Two decades back, one court applied Ricks to what has now become the Florida Civil Rights Act, §§ 760.01-760.11, Florida Statutes. St. Petersburg Motor Club v. Cook, 567 So.2d 488, 489 (Fla. 2d DCA 1990). That is of little consequence. First, the limitations period for filing a charge under the Public Whistleblower Act is only 60 days. The Florida Civil Rights Act allows 365 days. That is a material difference for an employee still employed but fearing discharge, seeking counsel, and not knowing anything about statutory limitations periods.

Second, recent developments discussed above have so undermined the intellectual and precedential foundations of Ricks that cases applying it mechanically in the manner of Cook must be regarded as suspect. At least two federal courts have declined to apply Ricks to state law. In Klebe v. University of Texas System, 649

F.Supp.2d 568 (W.D. Tex. 2009), for example, the court decided that the Texas courts that had previously applied Ricks to state statutes would not have done so had they had the benefit of more recent developments. In the same vein, in Janikowski v. Bendix Corp., 823 F.2d 945 (6th Cir.1987), a decision before the Fair Pay Act, the court applied Ricks as binding precedent to the federal claim, but refused to apply it to a counterpart state law claim because of the court's assessment that the Michigan Supreme Court would start the limitation period from the date of termination. As will be shown below, the same could be said of the Florida Supreme Court.

III. Applying Ricks Wastes Scarce Court Resources

From the beginning, critics of Ricks focused on the wasteful litigation the doctrine necessarily spawns. In the instant case, the litigation is largely over whether the hearing was to make the original termination decision or to affirm it. Employees represented by experienced counsel and employees otherwise aware of an affirmance in this case would have to file a charge with FCHR at the earliest hint of adverse action like a firing. That tends to monkey-wrench whatever efforts would have been made at internal conciliation. Relations sour when an employee brings a charge. Conciliations fail. Litigation becomes more likely.

As Justice Brennan observed in a dissent to one of the progeny of Ricks:

The effect of this ruling will be to increase the number of unripe and

> anticipatory lawsuits in the federal courts – lawsuits that should not be filed until some concrete harm has been suffered, and until the parties, and the forces of time, have had maximum opportunity to resolve the controversy.

Chardon v. Fernandez, 454 U.S. 6, 9 (1981) (Brennan, J., dissenting).

That point is especially acute in a case like this one where the limitations period is a mere 60 days and the administrative charging process is commonly begum by lay employees struggling with the abstruse procedural regimen of §§ 112.3187 and 112.31895, Florida Statutes. A cautious employee has little choice but to file a charge that may be premature. The more premature charges, the more premature suits when those charges ripen. Moreover, as this case illustrates, the timeliness issue may be the entire basis of the case that is taking the court's time. Starting the limitations period at termination eliminates the confusion and eliminates that whole class of cases.

The United States Supreme Court itself acknowledged that point, noting that "the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." Delaware State College v. Ricks, *supra*, 449 U.S. at 262 n. 16.

IV. Other States Rejected Ricks Even Before Its Statutory Abrogation

No state court has adopted the Ricks doctrine as applicable to a state statute

since the Fair Pay Act passed. Before that time, 15 states had applied the Ricks doctrine to state law while 10 had declined.[2] Within the context of those cases it is worthy of note that most states have more than a single employment statute. The statutory regimens may vary in material ways. As noted above, the Florida Civil Rights Act allows 365 days to file a charge while the Florida Public Whistleblower Act allows only 60 days. It is thus quite plausible that the court that adopted Ricks in St. Petersburg Motor Club v. Cook, 567 So.2d 488, 489 (Fla. 2d DCA 1990), might have reached a contrary result if faced with the 60-day limitation period.

State courts applying Ricks have done so mechanically. As one court recently observed:

> Of the states that adopted [the] Ricks/ Chardon [rule] ... many have done so with little analysis or discussion... . These cases ... following Ricks/ Chardon, appear to us to adopt the rule out of convenience because their state provisions are sufficiently similar to Title VII and [because] the Supreme Court has spoken on the federal side of the issue.

Haas v. Lockheed Martin Corp., 396 Md. 469, 487-88, 914 A.2d 735 (2007).

It is, in any case notable that some 40% of the states addressing the Ricks doctrine have refused to apply it to their counterpart state law. Not one other example

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[2] Vollemans v. Wallingford, 103 Conn.App. 188, 194, 928 A.2d 586, nn. 17, 18 (2007), *aff'd*, 289 Conn. 57, 956 A.2d 579 (2008), collects, respectively, the 15 pro-Ricks decisions and the 9 anti-Ricks decisions (Vollemans itself is the 10th). This amicus wishes to spare us all those two tedious 25-case string cites.

of that level of disagreement with a U.S. Supreme Court ruling comes to mind.

V. Florida Jurisprudence Forbids Application of Ricks To The Public Whistleblower Statute

The Florida Supreme Court has established that the Florida Public Whistleblower Act is a remedial statute that must be liberally construed to effectuate its purpose and to grant access to the remedy. Martin County v. Edenfield, 609 So.2d 27, 29 (Fla.1992) ("[W]e believe it clear that the [public employee] Whistle-Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.' As a remedial act, the statute should be construed liberally in favor of granting access to the remedy."); Irven v. Department of Health and Rehabilitative Services, 790 So.2d 403, 404 (Fla. 2001) (same).

On various occasions, this Court has cited and applied those precedents. Rosa v. Department of Children & Families, 915 So.2d 210, 212 (Fla. 1st DCA 2005); Florida Dept. of Educ. v. Garrison, 954 So.2d 84, 86 (Fla. 1st DCA 2007).

In this case, the Appellant had good reason to believe she was not fired when her employer alerted her that she was charged with offenses, that the employer did not wish to make a decision based on false information, and that Appellant would have a hearing to present her case. Accordingly, Appellant filed her charge with FCHR on

the day her termination took effect, one day after the hearing. If the termination date starts the 60-day clock running, the charge is timely and the case goes forward on the merits. If the notification of an upcoming hearing starts the clock, the charge is untimely and the case will never be heard on the merits.

There is no doubt about which of these two approaches fulfils the mandate to construe the statute liberally in favor of granting access to the remedy. The dismissal for untimeliness should be reversed.

CONCLUSION

The court should reverse dismissal of the FCHR charge.

FCHR erred in applying the Ricks doctrine to the Public Whistleblower Act. That doctrine was flawed from the start and has now been abrogated by an act of Congress. The doctrine wreaks havoc on court and agency dockets by spurring premature charges and suits. Even before the statutory abrogation, 40% of the states considering the Ricks doctrine refused to apply it to their counterpart statutes. The doctrine of liberal construction to effectuate access to the remedy of the Whistleblower Act forbids application of Ricks to that Act.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Damon Kitchen, Esq., Constangy, Brooks & Smith, P.A., Post Office Box 41099, Jacksonville, Florida 32203, and to T.A. Delegal, III and Wendy E. Byndloss, 424 East Monroe Street, Jacksonville, Florida 32202 this 24th day of October, 2011.

/s/ Richard E. Johnson
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.100(*l*), I hereby certify that this petition was prepared using proportionately spaced Times New Roman 14 point font.

/s/ Richard E. Johnson
Richard E. Johnson