IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT

KEVIN GABERLAVAGE,

Appellant,

v. CASE NO. 3D12-13
LT CASE NO. 08·11527 CA 10

MIAMI-DADE COUNTY,

Appellee.
_____/

BRIEF AMICUS CURIAE OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

BRIEF IN SUPPORT OF APPELLANT
ON APPEAL OF A FINAL ORDER FROM THE
CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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Identity And Interest of Amici Curiae and Statement of Consent

The 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. Instead of repeating that, the amicus offers this short summary.

The roughly 200 employment lawyers affiliated with Florida NELA and their thousands of public employee clients share an interest in having this court eliminate a trap for the unwary by reversing the decision below.

The court below penalized a common litigation practice in a way that substantially guts court access and remedies available in Florida law to public employees who suffer employment discrimination and retaliation. Under the holding at issue, employees who appeal a firing through the administrative process, including the circuit court, forfeit discrimination claims even if those claims never come up in the proceeding.

Affirming the court below would cripple the ability of public employees to bring claims to remedy employment discrimination. The decision nullifies meritorious claims in equal measure as unworthy ones.

Appellant has directly communicated consent to the amicus curiae brief in this case to undersigned counsel. Appellee has communicated consent through Appellant's counsel.

SUMMARY OF ARGUMENT

The court below erred in dismissing the employee's discrimination claims on a theory of preclusion based upon his failure to add those claims to a proceeding in which they did not properly belong and his failure to abort his administrative appeal of his firing before it reached the step of court review. The court below applied doctrines that a federal court might apply to these facts. In so doing the court overlooked the fact that federal courts reviewing state proceedings operate under strictures of comity, full faith and credit, and a statutory bar that do not bind this court. Moreover, even those disabling federal limitations do not preclude claims that merely could have been brought as opposed to those that actually were. Affirmation of the decision below will burden the courts with the cases of public employees fleeing the administrative process in light of the risks created by this decision.

ARGUMENT

Standard of Review

All questions presented for review in this brief 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).

The holding below contravenes the policy against allowing technical barriers to cripple enforcement of discrimination laws. It Misapplies law and burdens the courts.

The local government fired the employee after 23 years service. The employee pursued an internal appeal process in which a hearing officer conducts a hearing and makes a recommendation to the county manager. The employee may next go to the appellate division of the circuit court.

In this case, the employee exhausted that process while pursuing a separate remedy under state and federal discrimination law through the Equal Employment Opportunity Commission (EEOC). In that parallel proceeding, at the end of the EEOC processing, the employee may bring his discrimination claim in a jury trial, a completely de novo proceeding, in a state or federal court. The EEOC process satisfies the exhaustion requirements of both Title VII and the Florida Civil Rights Act (FCRA). In this case, the employee sued under FCRA alone.

In the internal appeal, an employee may win reinstatement with back pay if he proves the employer lacked just cause for the firing. In the court proceeding, the employee may win reinstatement, back pay, compensatory damages, injunctive relief modifying policies and procedures, and attorney's fees and costs if he can show by a preponderance of the evidence that the decision to fire him was motivated by unlawful discrimination.

Here the employee lost at all stages of his internal appeal. Upon completing his 180 days at EEOC, he filed suit in circuit court. The court dismissed his case on the theory that his loss in the internal process worked a preclusion[1] on his court case because he had taken that final step in the internal process, appealing to the appellate division of the circuit court. That decision is the occasion for this appeal.

The gravamen of the holding below is that the employee could not bring his discrimination suit to court because he could have raised those issues in his administrative appeal of his firing.

The court below affirmed without comment the "General Magistrate's Report and Recommendation Granting Defendant's Amended Motion for Summary Judgment" ("the R&R"). That document anticipated and assisted this court's inquiry by framing the issue starkly and unmistakably.

Two holdings of the R&R are particularly noteworthy:

- For the purpose of ruling on the County's Motion, the Magistrate finds that Mr. Gaberlavage did not raise his gender discrimination issue in his appeal from the adverse termination decision while he pursued his concurrent EEOC charge.

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[1]In the record of this case and in the literature on the doctrines governing these questions, the bar to litigation at issue here is variously described as res judicata, collateral estoppel, election of remedies, splitting a cause of action, bar and merger, and other terms depending on jurisdiction, facts, and choice of the writer. Here we use the generic term "preclusion" to sidestep the mostly irrelevant quibbles that attend the others.

R-I-85, n.1

- For the purpose of ruling on the County's Motion, the Magistrate finds that Mr. Gaberlavage was the victim of gender discrimination and that the infractions of the two female sergeants related to Level A inmates.

R-I-86, ¶ 5.

Thus there is no issue of the employee seeking a second bite at the apple. The court below stipulates, for sake of its order, that he never got the first bite. The court adds, again for purposes of the summary judgment order, that, if the employee had been allowed to try his gender discrimination case, he would have won it.

The bar, according to the court, is that he could have raised the gender discrimination issues in the administrative proceeding and he could have either forgone or abandoned the step of his administrative appeal involving the circuit court. The result requires both of those elements – that the discrimination claims *could* have been in the firing appeal and that a *court* was involved. If the firing appeals had all been before administrative tribunals, the employee could have later maintained his suit for discrimination. It was the mere touch of a judicial tribunal that turned his coach into a pumpkin.

The modern theory on which such results turn arose from two major decisions of the U.S. Supreme Court. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) and University of Tennessee v. Elliott, 478 U.S. 788 (1986). This writer was

surprised to see no mention of either of these cases in either party's briefing below nor in the court's opinion below, nor in the appellant's initial brief to this court. One case cited by the court below and both parties, Tuma v. Dade County Public Schools, 989 F. Supp. 1471 (S.D. Fla 1998), cites both precedents but conveys virtually nothing of the conflicting values that informed the opinions in those cases, particularly the 5-4 vote in Kremer.

The almost magical difference in preclusive effects between administrative decisions and judicial decisions is not much explored before being applied. In this case it should be, because the underlying principles have no application where one state court looks at the work of another. The Kremer/Elliott take-away is essentially that in statutory discrimination cases such as those arising under Title VII, federal courts will grant preclusive effect to decisions of state courts, but not state administrative tribunals. In cases under other federal civil rights laws, such as the Reconstruction Era acts (42 U.S.C. §§ 1981, 1983, 1985, etc.), federal courts will grant preclusive effect even to the decisions of state administrative tribunals. The asserted difference is that Title VII claims must pass through the EEOC before going on to court. That process is itself not preclusive and it would contravene the apparent intent of Congress to allow a state's administrative process to be preclusive. Congress intended a plaintiff to be allowed a trial de novo after the EEOC process.

Elliott, 478 U.S., at 795-6.

The additional policy and statutory reasons for granting preclusive effect in federal court to state court decisions (as opposed to state administrative decisions) are bound up in a web of considerations such as comity, deference, federalism, and the doctrine of full faith and credit as expressed in its common law form and in 28 U.S.C. § 1738. That, however, is a study that sheds little light on the present inquiry because none of those doctrines are applicable to a state court's application of preclusion to its own judgments, especially in a situation that involves a claim that could have been litigated rather than a claim that actually was, as is the situation here. Indeed, Kremer illustrates that a federal court should apply state rules of issue preclusion to determine if a matter actually litigated in state court may be re-litigated in a subsequent federal proceeding. See 456 U.S., at 467.

The Supreme Court weighed in on this question on another occasion:

> With respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts...." Restatement (Second) of Judgments § 26(1)(c)(1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts.

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382

(1985)(emphasis in original). In this case, the employee is vigorous in calling attention to the fact that the administrative tribunal lacked jurisdiction to consider the discrimination claims, making preclusion impossible. The employer and the court below relied mostly on the Kremer/Elliott line of authority, as expressed in Tuma, for the contrary proposition. The foregoing suggests that reliance may have been misplaced. See Carlisle v. Phenix City Bd. of Ed., 849 F.2d 1376, 1379-82 (11th Cir. 1988) (neither res judicata nor collateral estoppel barred § 1983 and Title VII claims; state law gives no preclusive effect to state administrative proceeding where issue of racial bias was not considered and arguably could not even have been raised).

We are not concerned here with the wing of preclusion law that forbids re-litigation of facts or issues or claims already decided. The issue here is about the wing of preclusion that bars claims that were not brought in an earlier proceeding but could have been. If the employee, in addition to his firing claim, had been bitten by one of the tracking dogs at the correctional facility where he worked, there would be no question of preclusion of that claim by leaving it out of the appeal of the employee's firing. The basis for preclusion is not that there was another claim available at the time, but that the administrative firing appeal and the sex discrimination action are both in the general ballpark of the firing, whereas the dog bite would not be.

The question then becomes what state policy on access to courts is and should be in this employee's circumstance when we put aside the strictures and mandates federal courts must observe in their review of state-court action. It is common, for example, to grant no preclusive effect in later proceedings to determinations regarding unemployment compensation, no matter who makes them. In this case, the record is silent on unemployment compensation, but if there was a proceeding, it is undeniably in the ballpark of the termination, just as the firing appeal and the sex discrimination suit are. And the outcome is undeniably not preclusive. This is not just because § 443.0315, Florida Statutes, prohibits preclusive effect. After all, separation of powers excuses courts from being influenced by legislative attempts to dictate judicial procedural decisions. And that lack of preclusion applies even in places such statutes do not reach. Cooper v. City of North Olmsted, 795 F.2d 1265, 1268-70 (6th Cir. 1986) (no estoppel of Title VII claim created by state court affirmance of adverse ruling in unemployment case where discrimination was not directly ruled on). The point is that, though all three proceedings are about the firing, the unemployment is about whether there was employee misconduct, the administrative appeal is about whether there was just cause for the firing, and the sex discrimination suit is about whether the employee would have suffered termination had he been female. Though not as removed from each other as the hypothetical dog

bite, these claims and the evidence and burdens required to make each case are different enough that no one of them should bar either of the other two, especially when that preclusion is based on an absence of decision rather than presence of one.

The court below conceded that state law has not yet developed in this situation and so followed federal law as expressed in Tuma and another case following it. As shown above, that was not really federal doctrine where (a) the case is in a state court, and (b) the preclusion is not based on an actual decision but a plaintiff's failure to forgo a stage in the administrative process or failure to raise a claim in an administrative proceeding.

This court is free to follow the common-sense doctrines that would be more fully operational in federal law absent full faith and credit, comity, deference, and the other strictures that are irrelevant here.

The proper resolution of the preclusion depends on the character of the judicial review to which the administrative decision is subjected. In Florida employment proceedings, that ranges from de novo review (or something approaching it) to something cynics describe as a reviewing court sprinkling holy water on an administrative outcome. The exact level of depth of review in this case is not apparent, but one thing is clear: "judicial review" in this situation is simply the end of the state administrative process, the last step in administrative review even though

conducted by a court. We must not be blind to the reality that this sort of judicial review is but a secondary part of the administrative process.

Preclusion in this exact context, as the court below notes, is not developed yet in Florida law. But Florida has a mature and complex body of general preclusion law that the parties have competently laid out below and in the employee's initial brief in expressing their disagreement over applying it.

One purpose of internal administrative proceedings in the wake of a firing or other adverse action against a government employee is to avoid burdening the courts with claims that agencies can handle competently internally. Affirming the decision below would cause employees with discrimination claims to abort administrative appeals before they reach the judicial review step or to avoid the administrative process altogether to avoid preclusion of discrimination cases. Either alternative results in more court cases, which is a perverse consequence of an administrative process aimed at not burdening the courts with more employment cases.

CONCLUSION

The decision below misapprehends and misapplies both the substance and the purpose of federal doctrines regarding preclusion of discrimination suits because of prior administrative proceedings. This court should reverse the trial court .

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 26th day of March, 2012, to Assistant County Attorney William Candela, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128.

/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