IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

NICHOLAS V. KLONIS,

Appellant,

v. Case No. 99-3736
L.T. No. 99-2980

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.
_____/

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

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

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SUMMARY OF ARGUMENT

The court below has held, without saying as much, that The Florida Civil Rights Act of 1992 is unconstitutional as applied to the State for failure to employ sufficiently specific terminology in waiving sovereign immunity.

A constitutional attack upon the Legislature's discretion in implementing constitutional rights is perhaps the toughest challenge in Florida constitutional jurisprudence. The exacting standard of review this Court applies is that (1) every presumption must be indulged in favor of constitutionality; (2) the challenger must negate every conceivable basis which might support the statute; (3) conflict with the constitution must be shown beyond a reasonable doubt; and (4) if possible, the statute must be construed in such a manner as to avoid conflict with the constitution. The ruling below fails to meet these standards. By defining the State as an employer, by limiting compensatory damages against the State, by barring punitive damages against the State, and by subjecting State actors to termination of employment for violation of the Act, FCRA more than adequately reflects a clear legislative intent to subject the State to suits for employment discrimination.

No "magic words" are required. A clear legislative intent to subject the State to suit is more than sufficient. Modern Florida jurisprudence goes so far as to recognize implied waivers of

sovereign immunity even absent specific language denoting waiver, but it is not necessary to go that far in this case because the language of FCRA meets even the most exacting juridical tests. A 1930 case heavily relied upon by many State defendants has been subsequently overturned, but not acknowledged as such by those relying upon it.

FCRA implements a provision of the state constitution prohibiting discrimination against certain classes of persons. As an extension and effectuation of a constitutional provision securing the rights of the people, FCRA would not be properly subject to the constraints of sovereign immunity even if its authors had omitted the language waiving sovereign immunity.

ARGUMENT

I. STANDARD OF REVIEW

The order below rests upon the hidden premise that the Florida Civil Rights Act of 1992, §§ 760.01-760.11 (hereinafter "FCRA"), is unconstitutional as applied to state entities. Neither the court below nor the State contends that the Legislature did not intend for the State to be sued under FCRA, nor can such an argument be made in good faith. Instead, the argument in this and numerous other cases throughout Florida has been that the Legislature failed to use the language "sovereign immunity is hereby waived" or similar words to that effect. As shown below, that contention rests upon a narrow interpretation of Article X, § 13, Florida

Constitution, which permits the Legislature, by general law, to make provision for suits against the state. This section of the Constitution makes no semantic prescription and requires no magic words.

Our courts lack the power to refuse to apply statutes except when those statutes are unconstitutional. Thus the only possible basis for the holding below is the purported unconstitutionality of FCRA's express provisions for suit against the state. It is thus beyond reasonable dispute that the principal issue in this case is whether the Legislature acted unconstitutionally in subjecting the State to suit under FCRA.

A constitutional attack upon the Legislature's discretion in fulfilling its constitutional duties is perhaps the heaviest burden in Florida jurisprudence. When the legislature exercises its power in this fashion, "every presumption in favor of the validity of its action is indulged." *Gallagher v. Motors Insurance Corporation,* 605 So. 2d 62, 68 (Fla. 1992). Only a clear and demonstrated usurpation of power will authorize judicial interference with legislative action in these areas. The burden is on the one attacking the legislative enactment "**to negate every conceivable basis which might support it.**" Id. at 68-69 (emphasis added).

A legislative enactment is "presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a

reasonable doubt that the statute conflicts with some designated provision of the constitution." *Metropolitan Dade County v. Bridges,* 402 So. 2d 411, 413-414 (Fla. 1981). Whenever reasonably possible and consistent with protection of constitutional rights, "courts will construe statutes in such a manner as to avoid conflict with the constitution." Id. *Florida Department of Education v. Glasser,* 622 So. 2d 944, 946 (Fla. 1993) applied this doctrine to a constitutional challenge to a tax statute, stating, "Statutes are presumed to be constitutional and courts must construe them in harmony with the constitution if it is reasonable to do so."

The holding below and the argument of the State fall far short of these exacting standards of review.

II. THE LEGISLATURE PROPERLY WAIVED SOVEREIGN IMMUNITY IN ENACTING FCRA

The Legislature adopted the Florida Civil Rights Act of 1992 to strengthen the ban on employment discrimination in the Human Rights Act of 1977, primarily by adding monetary damages to the previous range of remedies including back pay, front pay, reinstatement, injunctive relief, and attorney fees. The employment portions of the old Act were codified at §§ 760.01-10, Florida Statutes (1991); the present counterpart is codified at §§ 760.01-11, Florida Statutes (1999).

A. STATE DEFINED AS EMPLOYER.

The definitional sections of FCRA pertinent to this appeal were incorporated verbatim from the prior Act. "Employer" and "person" are the operative terms.

> "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

§ 760.02(6), Florida Statutes (1991); § 760.02(7), Florida Statutes (1999).

> "Person" includes . . . the state; or any governmental entity or agency.

§ 760.02(5), Florida Statutes (1991); § 760.02(6), Florida Statutes (1999).

It is thus beyond reasonable dispute that the Legislature defined the State as a covered employer under both the old Act and the new Act. The new Act did not alter so much as a comma in the language of the earlier statute in these pertinent sections. Approximately twenty years elapsed with no serious dispute on this point. The Florida Supreme Court held:

> The Human Rights Act prohibits discrimination by **both public and private entities** . . . . As remedial legislation, Florida's act should be liberally construed to promote its intended purpose.

Morrow v. Duval County School Board, 514 So. 2d 1086, 1087 (Fla. 1987) (emphasis added).

It is not clear why the court below and the other courts which have found FCRA unconstitutional as applied to governmental entities for inadequate waiver of sovereign immunity do not find

this holding of the state's highest court to be binding authority. An earlier opinion had held this:

> [T]he 1977 act specifically includes as covered employers "any governmental entity or agency" which employs "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Given this specific language, we conclude that the 1977 act grants to the Commission on Human Relations at least concurrent jurisdiction with the Circuit court in regard to county and municipal employers.

Housing Authority of Sanford v. Billingslea, 464 So. 2d 1221, 1224 (Fla. 5th DCA 1985).

It can not be argued that the 1992 amendments provide a basis for reaching a different conclusion because those amendments left the pertinent language exactly intact. The argument of the State now is that, though the Legislature unmistakably provided for suits against governmental entities, such a waiver of sovereign immunity is such a grave undertaking that it will not satisfy the requirements of Article X, § 13, Florida Constitution, which permits the Legislature, by general law, to make provision for suits against the state, unless the waiver of sovereign immunity is accompanied by great ceremonial fanfare and some sort of magic words such as "sovereign immunity is hereby waived."

B. STATE SUBJECTED TO LIMITED COMPENSATORY DAMAGES BUT NO PUNITIVE DAMAGES

The 1992 amendments did make damages available against the State, but sovereign immunity, far from being ignored, received the Legislature's careful attention. The damages section of the Act

provides unlimited compensatory damages and punitive damages up to $100,000 against private employers, but accords special treatment to the State and other governmental entities:

> Notwithstanding the above, the state and its agencies and subdivisions shall not be liable for punitive damages. The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5).

§ 760.11(5), Florida Statutes (1999). Thus government employers are immune from punitive damages and subject to compensatory damages only up to the limits established in the § 768.28(5), $100,000 per person, $200,000 per occurrence.

It is difficult to conceive how the Legislature could have more carefully expressed its intention to waive sovereign immunity to subject the State to limited damages. Apart from the "magic words" argument, there has been some suggestion that the provisions pertaining to State liability are not an effective waiver of sovereign immunity because they appear in different subsections of the statute rather than being gathered into a single paragraph of consecutive sentences. As shown below, this would be analytically incorrect under the standards established by the Florida Supreme Court, even if it rested on an accurate premise. But more importantly, as may be gleaned from the arguments advanced in other cases on this issue, the underlying premise is false. The premise is that FCRA's waiver of sovereign immunity is fragmented into puzzle pieces which must be painstakingly assembled to see the

picture. But the plain fact is that either of the two provisions discussed thus far (defining the State as "employer" under the Act and specifying available damages) is sufficient, **standing alone**, to constitute an effective waiver of sovereign immunity. There are not two halves to be read *in pari materia* before a waiver is effectuated. There is instead a whole waiver of liability and a whole waiver of damages up to the dollar caps established elsewhere.

C. SPECIAL PENALTY FOR STATE EMPLOYEES VIOLATING ACT

As a final part of the evidence that the Legislature intended the State to be subject to suits under FCRA, Amicus offers the following:

> In any civil action or administrative proceeding brought pursuant to this section, a finding that a person employed by the state or any governmental entity or agency has violated s. 760.10 shall as a matter of law constitute just or substantial cause for such person's discharge.

§ 760.11(15), Florida Statutes (1999).

The only possible way for a state employee to suffer the penalty prescribed by this provision is for the State to be the defendant. This is so because suits may be maintained only against employers; individual supervisory employees are not permitted to be named as parties under the statute. Sanders v. Mayor's Jewelers, 942 F. Supp. 571, 573-4 (S.D. Fla. 1996). It follows necessarily that the Legislature contemplated the State's sovereign immunity being waived.

III. SOVEREIGN IMMUNITY MAY BE WAIVED WITHOUT "MAGIC WORDS"

Much of the error that has attended the debate on this issue around Florida has arisen from a confusion of the very different doctrines in play regarding state immunity from state law and state immunity from federal law. The decision of the court below rests wholly upon a failure to grasp this elemental distinction. The brief opinion below cited but three authorities, none of them apposite to the issue before the court. *Alden v. Maine*, 119 S.Ct 2240 (1999), dealt with states sued in state court under federal law, as did *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987). The third case cited below, *Gamble v. Florida Department of Health & Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986), dealt with a state sued under federal law in federal court, decided wholly upon the 11th Amendment to the United States Constitution, which has no possible application to a state sued under its own law in its own courts. Where either the cause of action or the forum is federal, every presumption will be indulged in finding that the state has not consented to be sued under that cause of action or in that forum absent explicit language indicating such consent. If this were a case about the state being sued under FCRA in federal court, these doctrines would apply to bar the suit. *Haynes v. Florida Department of Insurance*, 1998 WL 271462 (S.D. Fla. 1998).

But where both the cause of action and the forum are domestic,

the separation of powers doctrine prohibits Florida courts from restricting the latitude of the Legislature in waiving sovereign immunity, so long as the intent to do so is plain. Courts may not oversee the Legislature's choice of words any more than the Legislature may prescribe the terminology of judicial opinions.

Indeed, the current state of Florida law is that waivers of sovereign immunity may actually be implied by statute, even where not specifically provided. The leading case in this regard, *Pan-Am Tobacco Corporation v. Department of Corrections,* 471 So. 2d 4 (Fla. 1985), found an implied waiver of sovereign immunity for breach of contract in several statutes permitting the state to enter into contracts. The court held this sufficient to meet the requirements of the constitutional provision at issue here, which states:

> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

Article X, § 13, Florida Constitution.

In so holding the Supreme Court receded from a prior line of cases which have formed the centerpiece of the arguments of the proponents of sovereign immunity for the state under FCRA:

> We recognize that in so holding we recede from a line of cases holding that the state may not be sued in contract without express consent to the suit. See, e.g., *Gay v. Southern Builders, Inc.*, 66 So. 2d 499 (Fla. 1953); *Bloxham v. Florida Central and Peninsular Railroad,* 35 Fla. 625, 17 So. 902 (1985). Nonetheless, we note that this is not the first time this court has looked to legislative intent in general law to find a sovereign

> amenable to suit. *Manatee County v. Town of Longboat Key*, 365 So. 2d 143 (Fla. 1978) (where the legislature has clearly intended the county to participate in resolution of taxation dispute and the county ignored its statutory duty, courts had jurisdiction to fashion a remedy in equity).

Id. at 5-6. See also, *Broward County v. Finlayson*, 555 So. 2d 1211 (Fla. 1990) (sovereign immunity does not exempt state agencies from pre-judgment interest even where no statute authorizes such recovery).

It is important to note that the line of cases overturned by *Pan Am Tobacco* included *State v. Love*, 126 So. 374 (Fla. 1930), which addressed exactly the same issue (sovereign immunity in contract actions) and which sought to hamstring the Legislature with onerous requirements permitting not even the slightest degree of inference or implication, requiring that the title as well as the text of a statute explicitly state a waiver of sovereign immunity, and that a law waiving sovereign immunity deal with no other subject but the waiver of sovereign immunity. This case apparently first found its way into the FCRA sovereign immunity debate in some 1998 pleadings in South Florida courts by the Office of the Attorney General, which has subsequently abandoned the position that sovereign immunity protects the State against suit under FCRA. After the court in *Meister v. Broward County*, Case No. 97-6196 CIV-ROETTGER, (S.D. Fla. Jan. 8, 1999) (unpublished, attached hereto in Appendix), relied upon *Love* to apply sovereign immunity against FCRA, the case has become the fulcrum of several

later memoranda and orders.[1] These lawyers and judges have apparently been unaware that *Love* has not even arguably been good law in the sixteen years since *Pan Am Tobacco*, and with its heavy reliance on the pre-Enlightenment notion that "the King can do no wrong," was wrongly decided in the first place. But the greater irony is that the waiver of sovereign immunity in FCRA is, under any reasonable construction, clear and unmistakable enough to meet the strict linguistic test of *Love* even without the implied waiver by legislative intent later permitted by *Pan Am Tobacco*.

Notably, even the most stringent test of sovereign immunity waivers known to American law – involuntary waivers by Congress of state 11th Amendment immunity – do not require any particular words to be used in any particular part of a statute. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (language sufficient if it "leaves no doubt as to the identity of the defendant" even absent express waiver); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (designation of states as parties under Title VII sufficient to abrogate state immunity); *Kimel v. Florida Board of Regents*, 139 F.3d 1426, 1433 n.15 (11th Cir. 1998) (no "magic words" must be used to abrogate immunity).

IV. SOVEREIGN IMMUNITY IS INAPPLICABLE WHERE

[1] Other courts have held that the Legislature properly waived sovereign immunity under FCRA, including another judge of the court below, *Boettcher v. Board of Regents*, Case No., 99-860 (Cir. Ct. of Leon County, Oct. 27, 1999) (Appendix hereto).

A STATUTE ENFORCES A CONSTITUTIONAL RIGHT

In subjecting the State to suit under FCRA, the Legislature effectuated the mandate of Article I, § 2, Florida Constitution, which provides:

> No person shall be deprived of any right because of race, religion, national origin, or physical disability.

This provision of the constitution applies only to government, not private entities. *Schreiner v. McKenzie Tank Lines,* 408 So. 2d 711 (Fla. 1st DCA 1982), *aff'd*, 432 So. 2d 567 (Fla. 1983). Thus in subjecting the State to suit under FCRA for employment discrimination, the Legislature implemented what the constitution requires. That FCRA also prohibits discrimination by private employers is irrelevant to this portion of the analysis, for all that is at issue here is its application to government entities.

Sovereign immunity is completely inapplicable where a constitutional right is at issue or where an act of the Legislature implements or effectuates a constitutional right. The leading case is *State Road Department of Florida v. Tharp,* 1 So. 2d 868 (Fla. 1941). This delightful and oft-neglected gem from two generations ago remains the controlling authority for the proposition that sovereign immunity does not bar a suit for violation of a constitutional right:

> Immunity of the State from suit does not afford relief against an unconstitutional statute or against a duty imposed on a State officer by statute, nor does it afford a State officer relief for trespassing on the rights of an individual even if he assume to act under legal

authority.

Id. at 869.

Tharp squarely rejects the claim that a protection against discrimination by government entities requires any particular statutory waiver of sovereign immunity for a lawsuit:

> [I]t has no application to the case at bar, and if it did, it should be read in connection with Section 4 of the Bill of Rights [now Article I, § 21] providing that all courts be open in order that every person may seek redress for injury done to his lands, goods, person, or reputation.

Id.

Vindication of a constitutional right must trump sovereign immunity in order that our most fundamental rights remain more than "the tinkling of empty words." To do otherwise would "raise administrative boards above the law and clothe them with an air of megalomania" that would jeopardize the rights of citizens and "reverse the order of democracy in this country and head it into a blind alley." Therefore, "in the administration of constitutional guarantees, the State cannot afford to be other than square and generous." All this is "as evident as the rouge on a flapper's face." Id. at 870.[2]

Since FCRA implements rights expressly granted by the Florida Constitution, it may reasonably be regarded as an extension of the

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[2] The Florida Supreme Court has more recently acknowledged the constitutional rights exception to sovereign immunity in *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah,* 468 So. 2d 912, 918-919 (Fla. 1985), albeit without quite the sparkle of 1941.

constitutional rights it effectuates. Viewed in this light, it is not necessary for FCRA to address sovereign immunity at all, let alone in any particular talismanic formulation.

Claims of sovereign immunity have not fared well in Florida jurisprudence in recent years for suits regarding state constitutional rights. The Supreme Court's reasoning is instructive in a modern case regarding a state impact fee on vehicles brought from other states, *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). The state vigorously argued that its sovereign immunity and the statutory gantlet it had established for aggrieved taxpayers to run would preclude the suit. The Court disagreed, both as to sovereign immunity and as to the need to exhaust administrative procedures:

> Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns. Sovereign immunity does not exempt the state from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.

Id. at 721 (emphasis in original).

In short, the law will not permit one section of the Constitution to be extravagantly interpreted to negate the enforcement of another section of the Constitution.

CONCLUSION

FCRA is not unconstitutional as applied to the State. The waiver of sovereign immunity in FCRA is sufficient to meet any known

tests. No magic words are required. Further, as a statute implementing constitutional rights, FCRA does not require any waiver of sovereign immunity in the first place. The decision of the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was served by U.S. Mail this 6th day of January, 2000, to John C. Cooper, Esq., COOPER, COPPINS & MONROE, P.O. Drawer 14447, Tallahassee, Florida 32317, and to Marie A. Mattox, Esq., MATTOX & HOOD, 310 East Bradford Road, Tallahassee, Florida 32303.

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Richard E. Johnson