O/a 1-8-87

IN THE
SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
By _____ Deputy Clerk

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| BROWARD COUNTY, a political subdivision of the State of Florida,<br><br>Petitioner,<br><br>vs.<br><br>JOHN LA ROSA,<br><br>Respondent. | CASE NO.: 68,649<br><br>FOURTH DISTRICT COURT OF APPEAL CASE NO.: 84-404 |

# BRIEF OF PETITIONER

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## EXPLANATORY STATEMENT

The Petitioner, Broward County, was the defendant in the trial court and the Appellant in the district court. The Respondent, JOHN LA ROSA was the the plaintiff in the trial court and Appellee in the district court. In this brief the parties will be referred to as "Broward County" and "LaRosa" but may where appropriate, be referred to alternately as "Petitioner" and "Respondent," respectively.

Additionally, by way of explanation:

(App. __) refers to the page number as identified in the Appendix accompanying this brief.

(R. __) refers to the page number as identified in the original record before the trial court and appellate court.

## STATEMENT OF THE CASE

Petitioner, Broward County, seeks review by this Court of a decision of the Fourth District Court of Appeal which expressly construes provisions of the Florida Constitution.

The case was commenced on August 31, 1981, when Respondent LaRosa filed a seven count complaint for declaratory and other relief in the Circuit Court of the Seventeenth Judicial Circuit, Broward County (R. 1-378), in which LaRosa sought the invalidation of certain sections of the Broward County Human Rights Ordinance (R. 14-38).

The complaint named as defendants Broward County, the individual members of the Board of County Commissioners and the individual members of the Broward County Human Rights Board Panel. On September 21, 1981, Broward County filed a motion to dismiss the action as to the individuals named in their official capacity (R. 381-386). The trial court granted the motion on June 12, 1982 (R. 388).

Count I of the complaint alleged that to the extent the ordinance purports to empower the Human Rights Board to impose money damages without compulsory attendance of witnesses, without permitting LaRosa to confront the adverse witnesses against him and cross-examine them under oath, and to base a finding of illegal racial discrimination upon the inadmissible hearsay testimony of the complaining party, the ordinance deprives LaRosa of property without due process of law in violation of the Fifth and Fourth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. Additionally, LaRosa alleged that

the ordinance thereby deprives him of his right to have compulsory process for witnesses and to confront at trial adverse witnesses under Article I, Section 16 of the Florida Constitution (R. 7).

Count II sought invalidation of those parts of the ordinance which empower the Broward County Human Rights Board to impose money damages, as violative of Article I, Section 18 of the Florida Constitution (R. 8).

Count III alleged that to the extent the ordinance empowers the Broward County Human Relations Division to investigate charges of racial discrimination, to hold quasi-judicial hearings on such charges and to impose awards of money damages without providing for a trial de novo in a court of competent jurisdiction and without according such persons the right of judicial review, and the right to trial by jury, the ordinance denies LaRosa access to the courts and thereby violates Article I, Sections 21 and 22 of the Florida Constitution as well as the Seventh Amendment of the United States Constitution (R. 9).

Count V[1] alleged that to the extent that the ordinance permits the complaining party to appeal a dismissal of the complaint to the circuit court, upon a finding by the Human Relations Division that no reasonable cause exists to believe an unlawful act of discrimination has occurred, that the ordinance denies LaRosa the equal protection of the laws in violation of

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1. There was no "Count IV" in the Complaint filed by LaRosa.

the Fourteenth Amendment of the United States Constitution; denies LaRosa due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 12 and 19 of the Florida Constitution; exceeds the legislative power of the Board of County Commissioners in violation of Article V, Section 15 [sic] of the Florida Constitution; denies the right of direct review of administrative action, as prescribed by general law in violation of Article V, Section 14 [sic] of the Florida Constitution and further violates Article V, Section 15(b) [sic] of the Florida Constitution as an attempt to confer jurisdiction solely on the Circuit Court in and for the Seventeenth Judicial Circuits. (R. 9-11.)

Count VI (paragraphs 32 and 33) alleged that the final order of the Human Rights Board entered on May 12, 1981, was based upon the Rules of Evidence contained in the ordinance thereby violating Article III, Section 11(3) of the Florida Constitution as an attempt to provide rules of evidence in a court proceeding. (R. 11.)

Count VI (paragraphs 34 and 35) alleged that to the extent the ordinance permits the entry of an enforceable order imposing money damages upon a determination by an administrative agency, without any effective right of judicial scrutiny or review or trial by jury, the ordinance constitutes an invalid legislative usurpation of the judicial authority of the courts of this state in violation of Article II, Section 3 of the Florida Constitution (R. 11-12).

Count VII alleged that Section 16½-65(a) of the ordinance is invalid in that it can be read so as to empower the Broward County Human Rights Board to enter a final order of discrimination without any proof of a

purposeful intent by LaRosa to discriminate against complainant for any improper reason; permits the introduction of hearsay testimony and permits the Broward County Human Rights Board panel to enter a final order imposing money damages on LaRosa after the complainant (Smith) in the administrative proceedings had rested his case without introducing any evidence as to damages thereby depriving LaRosa of due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution (R. 12-13).

Broward County filed its Answer and Affirmative Defenses on June 24, 1982 (R. 389-390). One year later, on June 17, 1983, LaRosa served a Notice of Trial (R. 391) which by order of court entered on September 19, 1983, was set for nonjury trial for February 1, 1984 (R. 396-397).

On October 11, 1983, LaRosa filed a Motion for Summary Judgment (R. 398-405). The legal grounds upon which LaRosa asserted his entitlement to summary judgment essentially included the theories of recovery set forth in Counts I through VII. Hearing on the motion was held on December 21, 1983. On February 1, 1984, the court entered final summary judgment in favor of LaRosa, on the singular ground that the grant of power to the Human Rights Board Panel to award payment of money damages, expenses and attorney's fees is violative of Article I, Section 18 of the Florida Constitution. Accordingly, the court declared those provisions of Section 16½-67(b) of the Broward County Code of Ordinances to be unconstitutional. (R. 410-411).

On February 21, 1984, Broward County timely filed a Notice of Appeal, perfecting jurisdiction in the Fourth District Court of Appeal (R. 412). The sole issue on appeal was whether Section 16½-67(b)(8) and (9) of the Broward County Code of Ordinances violates Article I, Section 18 of the Florida Constitution and is otherwise unconstitutional in that it authorizes an administrative agency to issue a final order which requires a party to cease and desist discriminatory acts and orders other affirmative action including damages, expenses and attorney's fees. Briefs of counsel were filed in due course and on October 3, 1984, the Fourth District Court of Appeal heard oral argument on the merits. On October 5, 1984, the court ordered counsel to serve supplemental briefs on the constitutional issues raised by the court at oral argument on October 3, 1984 (App. Tab A).

On March 19, 1986, the Fourth District Court of Appeal, issued its opinion, holding that Section 16½-67(b)(8) of the Broward County Code of Ordinances violates Article I, Section 22 of the Florida Constitution insofar as it deprives a person of his inalienable right to a trial by jury when a party is tried before a tribunal with the power to award unliquidated damages for humiliation and embarrassment (Appendix to Petitioner's Brief on Jurisdiction, Tab B). The opinion also held that the award of such damages pursuant to a county ordinance is violative of Article I, Section 18 of the Florida Constitution which provides that no administrative agency shall impose a sentence of imprisonment nor shall it impose any other penalty except as provided by law, and further held that said provision violates Article II, Section 3 of the Florida Constitution in that the powers exercised by the Human Rights Board are basically and fundamentally judicial.

Broward County seeks review of the construction of the foregoing constitutional provisions by the Fourth District Court of Appeal, and accordingly has timely filed its Notice to Invoke the Discretionary Jurisdiction of the Supreme Court. Briefs on jurisdiction were submitted in due course by the parties and, on September 4, 1986, the Supreme Court accepted jurisdiction of this case.

## STATEMENT OF THE FACTS

Petitioner, Broward County, is a political subdivision of the State of Florida operating under a charter form of government which was adopted by the voters of Broward County on November 5, 1974. Pursuant to such voter approval, charter government went into effect in Broward County on January 1, 1975 (App. Tab B, pp. 1-24).

Article I, Section 1.06E of the Broward County Charter requires that Broward County establish provisions, pursuant to state and federal law, for the protection of its citizens' human rights from discrimination based upon religion, political affiliation, race, color, age, sex or national origin. Pursuant to this charter directive, on June 21, 1978, Broward County Ordinance No. 78-29 (codified as Sections 16½-1 to 16½-86, Broward County Code of Ordinances), commonly referred to as the "Broward County Human Rights Ordinance," went into effect (R. 14-38). That part of the Ordinance which was declared unconstitutional by the trial court and the Fourth District Court of Appeal is Section 16½-67(b)(8), which provides that if the Broward County Human Rights Board, or Panel, determines that the respondent has engaged in a discriminatory practice it may order the respondent to take such affirmative action as in the judgment of the board or panel will carry out the purposes of that chapter. Affirmative action may include payment to the complainant of actual damages for injury including compensation for humiliation and embarrassment suffered as a direct result of a discriminatory practice and any expense incurred by the complainant as a direct result of such discriminatory practice.

On June 23, 1980, Clifton G. Smith filed a complaint against John LaRosa with the Broward County Human Relations Division alleging discriminatory practices in connection with the refusal of John LaRosa to lease an apartment to Mr. Smith on grounds of race. The complaint was investigated by the Broward County Human Relations Division which in turn found reasonable cause to believe that a discriminatory practice had occurred in violation of the Broward County Human Rights Ordinance and issued an "Order of Determination." (R. 39-41.) The matter was presented to a panel consisting of five members of the Broward County Human Rights Board on February 24, 1981 and April 23, 1981. At the conclusion of the hearing the panel found that John LaRosa had committed a discriminatory practice in connection with the rental of housing units and ordered, inter alia, that within six months from date of the final order, John LaRosa either pay Clifford G. Smith $4,000.00 representing compensation for humiliation and embarrassment, or make available to Clifton G. Smith the same or similar apartment (R. 376-378). The order was signed by the chairman of the panel on May 12, 1981. Respondent LaRosa did not seek administrative or judicial review of the order.

On June 9, 1983, Chapter 83-380, Laws of Florida, a special act known as the "Broward County Human Rights Act" became a law without the governor's approval (App. Tab C. pp. 78). On November 6, 1984, this special act was approved by a majority of the electors voting in said election (App. Tab D). Each of the provisions which were declared unconstitutional by the courts below are present, in identical form, in the special act currently in effect in Broward County. Subsequently, Broward

County Ordinance No. 85-8, effective March 5, 1985, repealed Chapter 16½-1 to 16½-86 as it existed prior to the enactment of Chapter 83-380, Laws of Florida (App. Tab E).

Notwithstanding the repeal of the ordinance whose constitutionality was the subject of this suit, Broward County will show that the issues presented in this appeal are by no means moot.

## QUESTION PRESENTED FOR REVIEW

WHETHER, UNDER THE FLORIDA CONSTITUTION, A DULY CONSTITUTED ADMINISTRATIVE PANEL WHOSE PURPOSE IS TO ELIMINATE THE EFFECTS OF A DISCRIMINATORY PRACTICE, MAY ORDER THE AWARD OF ACTUAL DAMAGES AS COMPENSATION FOR HUMILIATION AND EMBARRASSMENT SUFFERED AS A RESULT OF AN UNLAWFUL DISCRIMINATORY PRACTICE.

## SUMMARY OF ARGUMENT

This case involves the construction of three distinct constitutional provisions which have been applied to that section of the Broward County Human Rights Ordinance which allows the Broward County Human Rights Board to order affirmative relief, upon a finding of unlawful discrimination, which may include the award of actual damages for injury, including compensation for humiliation and embarrassment suffered as a direct result of a discriminatory practice. The application by the Fourth District Court of Appeal of Article I, Section 18 of the Florida Constitution to the award of such damages was incorrect in that the affirmative relief which may be awarded pursuant to the ordinance in question does not constitute a penalty. Additionally, the overall purpose of the ordinance is remedial as opposed to penal.

The three factors to be applied in determining whether the ordinance involved is penal or remedial in nature are first, whether the purpose of the ordinance is to redress individual wrongs or more general wrongs to the public; second, whether recovery authorized by the ordinance runs to the harmed individual or to the public; and third, whether the recovery authorized by the ordinance is wholly disproportionate to the harm suffered. Application of these factors to the Broward County Human Rights Ordinance establishes that the ordinance is remedial in nature. Article I, Section 18 of the Florida Constitution therefore has no application.

As to the construction of Article II, Section 3 of the Florida Constitution, the district court has misapplied the doctrine of separation of the powers of the three branches of government to Broward County. The real issue is whether the ordinance provides for a permissible exercise of quasi-judicial functions within the limitations set forth in Article V, Section 1 of the Florida Constitution.

Florida courts and the courts of other states recognize that where the constitution expressly allows, administrative agencies unquestionably possess certain judicial powers and functions which are termed "quasi-judicial" which generally means that the exercise of this power by an administrative agency does not make it a part of the judiciary and distinguishes the powers exercised by such agencies from those exercised by the judicial branch. Most significantly, the orders of these agencies sitting in a quasi-judicial capacity are not self enforcing but are dependent upon the judiciary for enforcement. The guarantee of judicial review is why the courts of Florida and many of Florida's sister states have allowed legislative purposes and intent to be carried out by administrative agencies, even where these agencies are empowered to award compensatory damages which in several states include damages for humiliation and embarrassment suffered as a result of an unlawful discriminatory practice.

Finally, the right to trial by jury as guaranteed by Article I, Section 22 of the Florida Constitution is not violated by the award of compensatory damages for embarrassment and humiliation suffered as a direct result of a discriminatory practice. The guarantee of the right to trial by jury preserved by the Florida Constitution applies only to those actions

triable by a jury at common law or pursuant to statute at the time the first Florida Constitution became effective in 1845. Neither common law nor state statute provided a remedy for an action at law for discrimination in 1845.

Applying these principles, states with substantially identical constitutional preservation of the right to trial by jury in deciding cases involving the very same issue have held that the award of compensatory damages for humiliation and embarrassment suffered as a result of a discriminatory act by administrative agencies do not violate the right to trial by jury. To date, no state when confronted squarely with this issue has held otherwise.

## ARGUMENT

### A DULY CONSTITUTED ADMINISTRATIVE AGENCY WHOSE PURPOSE IS TO ELIMINATE THE EFFECTS OF A DISCRIMINATORY PRACTICE MAY, UNDER THE FLORIDA CONSTITUTION, ORDER THE AWARD OF COMPENSATORY DAMAGES FOR HUMILIATION AND EMBARRASSMENT SUFFERED AS A DIRECT RESULT OF AN UNLAWFUL DISCRIMINATORY PRACTICE.

A. The award of such damages by an administrative agency does not violate Article I, Section 18 of the Florida Constitution.

Both the district court and the circuit court held that Section 16½-67(b)(8), Broward County Code of Ordinances, which allows for the award of actual damages as compensation for humiliation and embarrassment suffered as a direct result of a discriminatory practice, violates Article I, Section 18 of the Florida Constitution. Notwithstanding the fact that this provision of the ordinance has subsequently been replaced by enactment of the legislature[2], the issue remains viable on two grounds. First, the provisions of Article I, Section 18 of the Florida Constitution should not have been applied to the issue of the award of actual damages as opposed to

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2. The provisions of Chapter 83-380, Laws of Florida (App. Tab D, pp. 52-78), approved by the voters in November 1984 have replaced Ordinance No. 78-29, codified as Chapter 16½-1 through 16½-86 of the Broward County Code (R. 14-38). Broward County Ordinance No. 85-8 effective March 5, 1985 repealed Chapter 16½-1 through 16½-86 as it existed prior to the enactment of Chapter 83-380, Laws of Florida. (App. Tab E.) Section 16½-67(b)(8) has been carried forward into Chapter 83-380, Laws of Florida in identical form. (App. Tab D p.77).

imposition of a penalty. Therefore, misapplication of a state constitutional provision should be corrected by the Florida Supreme Court. Second, the outcome of this case may have a direct impact upon the complainant Clifton G. Smith and his right to the award ordered by the Broward County Human Rights Panel for the humiliation and embarrassment he suffered as a result of the discriminatory actions of John LaRosa.

There is a distinction between a "penalty" for the purposes of Article I, Section 18 of the Florida Constitution, and "damages" within the context of the Broward County Human Rights Ordinance. The Florida Constitution and the Florida Statutes establish the "penalty" for violation of a county ordinance. Article VIII, Section 1(j) of the Florida Constitution provides that:

> "Persons violating county ordinances shall be prosecuted and punished as provided by law."

General law provides for a specific penalty as set forth in Section 125.69, Florida Statutes, as follows:

> Violations of county ordinances shall be prosecuted in the same manner as misdemeanors are prosecuted. Such violations shall be prosecuted in the name of the state in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days or by both such fine and imprisonment.

Therefore, if the award of compensatory or actual damages upon a finding of a discriminatory practice is a "penalty," in order to prevail on this issue Broward County must demonstrate that as a charter county, Broward County

may enact an ordinance which provides for the award of actual damages provided that such an enactment is not deemed to conflict with Article VIII, Section 1(j) or Section 125.69, Florida Statutes, pursuant to Article VIII, Section 1(g), Florida Constitution.

Broward County, in its capacity as a charter county, may enact ordinances intended to eliminate discrimination and provide remedies and relief from discriminatory practices. If the award of damages does not constitute a penalty, there is no in conflict with Article VIII, Section 1(j) or Section 125.69, Florida Statutes. Article VIII, Section 1(j) of the Florida Constitution as a new subsection was intended by the Constitutional Revision Commission to be supplemental to subsections (f), (g) and (h) of Article VIII, Section 1. See Commentary by Talbot "Sandy" D'Alemberte, at 26A Fla. Stat, Ann. 272 (1970).

Broward County will establish that the award of such damages is not a penalty and, in the absence of constitutional prohibition or a conflict with an existing state statute, Broward County, as a charter county, is within its power to enact an ordinance containing such a provision.

The analysis of the Fourth District Court of Appeal with regard to this issue relies on only two cases which are readily distinguishable from the case sub judice. The first such case is United States v. Chouteau, 102 U.S. 603, 26 L.Ed. 246 (1880). On page 6 of its opinion, the court quoted Chouteau as follows:

> "The term penalty involves the idea of punishment and its character is not changed by the mode in which it is inflicted, whether by civil action or criminal prosecution."

The issue to which the United States Supreme Court applied the above language involved double jeopardy. Chouteau was a distiller who had been indicted for illegal diversion of liquor without payment of the tax; he effected a compromise wherein the government, upon "the advice and consent of the Secretary of the Treasury and upon the recommendation of the Attorney General" and acceptance by the Internal Revenue Service, entered into a full satisfaction, compromise and settlement of the indictment. Chouteau paid the agreed amount, and the indictments were dismissed. The government then sued Chouteau and his sureties on their bond under the alleged facts under which the indictments had been issued, seeking recovery of the $25,000.00 bond. The court held that a recovery of the penalty executed in the compromise was made part of the 'punishment' for the offense and that it could have been enforced by a criminal prosecution, had the government so chosen. The court further reasoned that the compromise of the criminal cases covered all penalties and all 'punishment' for the acts in question. Chouteau, supra at 611-612.

The entire text of the passage referred to by the district court reads as follows:

> Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment and its character is not changed by the mode in which it is inflicted, whether by civil action or a criminal prosecution. The compromise pleaded must operate for

> the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offen(s)e with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless. Whilst there has been no conviction or judgment against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty.

Chouteau, supra at 611.

It is upon this principle of the fundamental unfairness of subjecting a party to multiple actions on the same offense that Chouteau was subsequently cited, inter alia, in Bulk Terminals Co. v. Environmental Protection Agency, 29 Ill. App. 3d 978, 331 N.E.2d 260 (Ill. App. Ct. 1975); United States v. J. R. Watkins Co., 127 F.Supp. 97 (D. Minn. 1954).

Chouteau, supra is of little assistance to the court with regard to understanding the distinction between actions brought under statutes which are remedial, as opposed to actions brought under statutes which are penal in nature. An excellent discussion of the problem of identifying penal laws and distinguishing, or at least explaining, Chouteau in this context is found in Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed 1123 (1892) in which Mr. Justice Gray wrote:

> In the municipal law of England and America, the words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws . . . United States v. Chouteau, . . . But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to damages suffered . . . (emphasis added)
>
> Penal laws, strictly and properly are those imposing punishment for an offense committed against the State and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. (Emphasis added.)
>
> It has been held in many instances that where a statute gives accumulative damages to the party grieved, it is not a penal action.

Huntington, supra at 667-668.

In Murphy v. Household Finance Corporation, 560 F.2d 206 (6th Cir. 1977) the court applied Mr. Justice Gray's observations in Huntington, supra, to a bankruptcy case under its review in the attempt to determine whether a cause of action under the Truth in Lending Act for "twice the finance charge" was penal in nature. The Sixth Circuit Court of Appeals established three factors to be applied in determining whether the statute involved is penal in nature: (1) whether the purpose of the statute is to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered. The court then reviewed the United

States Supreme Court's interpretation of the Truth in Lending Act as remedial in nature as well as the treble damages provisions of the antitrust and patent laws which have also been held to be remedial, and had little difficulty in finding the contested provision of the Truth in Lending Act to be remedial in nature.

Applying the foregoing analysis and factors to the Broward County Human Rights Ordinance, it is clear that this ordinance is remedial in nature. First, the purposes and construction of the Broward County Human Rights Ordinance as set forth in Section 16½-2 are as follows:

> Sec. 16½-2. Purposes; Construction.
>
> (a) The general purposes of this chapter are:
>
> (1) To provide for execution within Broward County of the policies embodied in the Federal Civil Rights Act of 1964, as amended to January 15, 1979 and Title VIII of the Federal Civil Rights Act of 1968, as amended to January 15, 1977.
>
> (2) To secure for all individuals within the county freedom from discrimination because of race, color, religion, national origin, sex, age, marital status, political affiliation or handicap (hereinafter referred to as "discriminatory classification") in connection with employment, public accommodations and real estate transactions, and thereby to promote the interests, rights and privileges of individuals within the county. (Emphasis added.)
>
> (b) This chapter shall be liberally construed to preserve the public safety, health and general welfare and to further the general purposes stated in this chapter . . .

The second factor to be applied, whether recovery under the ordinance runs to the harmed individual or to the public, requires discussion of Section 16½-67 of the ordinance, which sets forth the available relief upon determination of a discriminatory practice. Nearly all of the affirmative relief authorized by this section benefits the harmed individual. These remedies include hiring, reinstatement or upgrading of employees, with or without back-pay; admission or restoration of individuals to union membership, guidance and training programs; admission of individuals to places of public accommodation; sale, exchange, lease, rental, assignment or sublease of housing accommodations to an individual; and the payment to the individual of actual damages for injury including compensation for humiliation and embarrassment suffered as a direct result of a discriminatory act.

The third and last factor to be applied in determining whether the Broward County Human Rights Ordinance is remedial is whether recovery authorized by the ordinance is wholly disproportionate to the harm suffered. The ordinance does not and cannot make provision for punitive or exemplary damages. Each and every element of the award of damages authorized by Section 16½-67(b)(8), of the former Broward County Human Rights Ordinance, is limited to actual damages that the individual has incurred as a result of the discriminatory act and must be proven.

The holding in a line of decisions in this state wherein the issue before the court was whether a given statute was penal or remedial in nature supports Broward County's contention that the Broward County Human Rights Ordinance is remedial. A concise overview of this subject is

set forth in Ranger Insurance Co. v. Bal Harbour Club, Inc., 10 FLW 1278, May 21, 1985 (Fla. 3rd DCA), in which the district court construed Chapter 11A, Article I, of the Metropolitan Dade County Code, which affords protection to the citizens of Dade County from discrimination in housing, employment and public accommodations, as remedial.

The district court discussed decisions of the Florida Supreme Court which generally defined 'penal laws' as those laws imposing a preliminary or personal punishment for an offense against the state which are subject to the pardon power:

> In determining whether a statute is penal in the strict and primary sense, a test is whether the injury sought to be redressed affects the public. If the redress is remedial to an individual and the public is indirectly affected thereby, the statute is not regarded as solely and strictly penal."

Ranger, supra at 1279.

In addition to conferring the power upon the board to award damages to a prevailing complainant for injuries incurred as a result of a prohibited act of discrimination, the court noted that the Dade County Ordinance against discrimination includes potential imprisonment for not more than 60 days and for the assessment of a fine of not more than $500 by the court upon prosecution and conviction. Notwithstanding the fact that this ordinance provides for a punishment which is penal in nature, the district court found the overriding purpose and effect of the ordinance to be remedial. Ranger, supra at 1279.

The application of these three factors to the second case cited by the Fourth District Court of Appeal lends further support to this argument.

The case relied upon by the district court was Broward County v. Plantation Imports, Inc., 419 So.2d 1145 (Fla. 4th DCA 1982). Plantation Imports was correctly decided but erroneously applied to the instant case by the district court. The "fines" or "penalties" which were the subject of judicial review in Plantation Imports were those imposed by the Broward County Consumer Protection Board for violation of the board's cease and desist orders, not the relief ordered as to the aggrieved party. Plantation Imports, supra at 1147, 1148.

The former Broward County Human Rights Ordinance simply does not implicate the provisions of Article I, Section 18 of the Florida Constitution. The cases relied upon by the Fourth District Court of Appeal do not support the court's holding as to this issue. The decision below should be reversed as to the applicability of Article 1, Section 18 of the Florida Constitution to the award of compensatory damages by the Broward County Human Rights Board.

B. The award of such damages does not violate the doctrine of separation of powers nor does it result in the usurpation of judicial power vested solely in the courts.

Article II, Section 3 of the Florida Constitution provides in part that:

> "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

A political subdivision may be created by the legislature pursuant to Article VIII, Section 1(a) of the Florida Constitution. Although created by the legislature, a political subdivision cannot be said to be a part of the

legislative branch of state government. Therefore, Article II, Section 3 of the Florida Constitution has no direct bearing on this issue which is whether Broward County may create, by ordinance and pursuant to its charter mandate, a human rights board with the power and authority to conduct hearings, make findings of fact and conclusions of law, and issue orders for affirmative relief which may include actual damages as compensation for a discriminatory act.

The constitutionality of the delegation of such authority by Broward County to the Human Rights Board cannot be determined through Article II, Section 3 of the Florida Constitution. The only provision of the Florida Constitution which needs to be applied to this issue is Article V, Section 1 of the Florida Constitution which provides in part that:

> The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. . . . Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the function of their offices."

Broward County has delegated the exercise of quasi-judicial power to the Human Rights Board in matters connected with the functions of this agency. Article III, Sections 16½-61 through 16½-67(a) and (b). (R. 28-37).

The Fourth District Court of Appeal held that Section 16½-67(b)(8), which allows the panel to award actual damages as compensation for humiliation and embarrassment suffered as a result of a discriminatory practice, is essentially judicial. Yet the cases relied upon by the district court lend little support to this conclusion.

In Biltmore Construction Co. v. Florida Department of General Services, 363 So.2d 851 (Fla. 1st DCA 1978), the district court granted a writ of certiorari to review the final order of the State of Florida Department of General Services. The court quashed the final order and held that it departed from the essential requirements of law in that it ordered specific performance of a contract which only a court, in the exercise of its equitable powers, may decree.

The issue raised in Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973), focuses on whether the county school board was part of the legislative branch for the purposes of the application of the Government in the Sunshine Law. The decision clearly states that a board exercising quasi-judicial functions is not a part of the judicial branch of government. Canney, supra 263.

The actions of the Broward County Human Rights Board panel, including the award of compensatory damages, are quasi-judicial. It has long been held in this state that a determinative or adjudicative power may be conferred upon an administrative agency so long as there is an opportunity to be heard and for judicial review which satisfies the requirements of due process. In State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 975 (1908), the Florida Supreme Court stated:

> The exercise of some authority, discretion or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review, and is not among the powers of government that the constitution separates.

The court recognized the importance of allowing an administrative agency to accomplish a valid legislative purpose, thereby allowing such authority to be construed as constitutionally permissible.

While the Fourth District Court of Appeal recognized that the legislature has the power to create administrative agencies with quasi-judicial powers, it stated that "such agencies may not exercise powers which are basically and fundamentally judicial." (Petitioner's Brief on Jurisdiction, App. Tab B, p.6). The focus of inquiry must therefore be shifted to the determination of the relevancy of the distinction between judicial and quasi-judicial functions. In Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), the Supreme Court stated:

> "If the affected party is entitled by law to the essentially judicial procedures of notice and hearing, and to have the action taken based upon the showing made at the hearing the activity is judicial in nature. If such activity occurs other than in a court of law, we refer to it as quasi-judicial."

Modlin, supra at 74.

Conferring adjudicatory or determinative power upon an administrative agency is constitutionally permissible:

> . . . so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, and the courts in upholding particular statutes or ordinances vesting determinative or adjudicative powers in administrative agencies against a contention of denial of due process of law frequently note or emphasize that the act makes the determination only prima facie proof, makes provision for judicial review, or that judicial review is otherwise available. 1 Am. Jur. 2d Administrative Law § 154 (1962).

The term "quasi-judicial" has often been used to indicate or approve the exercise of a judicial power by an administrative agency:

> Aside from such approval the terms 'quasi-judicial' or 'judicial in nature' are used to designate the character of particular proceedings or powers the exercise of which must be accompanied with certain formalities and safeguards characteristic of the judicial process. 1 Am. Jur. 2d Administrative Law § 161 (1962).

In the case sub judice, the Broward County Board of County Commissioners has, by ordinance, empowered the Broward County Human Rights Board to exercise quasi-judicial powers in connection with the functions of their office. The ordinance provides a procedure for notice and hearing and prescribes rules for the conduct of such hearings and presentation of evidence. A panel of the Human Rights Board members thereby determines whether an unlawful discriminatory act has occurred. Upon such a finding, the panel may order affirmative relief. Sections 16½-61 through 16½-67, Broward County Code (R. 31-38).

Significantly, Section 16½-67(c), Broward County Code provides that:

> If the respondent does not accept to be bound by the order, then the board may seek enforcement through a judicial proceeding in the circuit court. (R. 38.)

Notwithstanding the fact that the issue of whether an order of such an agency may be enforced by the Circuit Court is pending in Southern Records and Tape Services v. Goldman, 458 So.2d 325 (Fla. 3d DCA 1984), review granted, Fla. Case No. 66,290, September 20, 1985 (argued, January 13, 1986), the ordinance in question is not self-enforcing and is therefore

clearly within the constitutional parameters of the exercise of quasi-judicial powers.

Other state courts have specifically ruled on this issue. A significant number of those jurisdictions which have considered whether the award of compensatory damages for embarrassment and humiliation by an administrative agency is an unconstitutional usurpation of judicial power have found such awards to be constitutionally permissible.

In Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981), the Supreme Court of Kentucky reviewed a decision of the court of appeals which had affirmed a decision of the circuit court reversing the decision of the State Commission on Human Rights, ordering the respondent to pay compensatory damages to an employee who was terminated from employment with the respondent because of her pregnancy. The state statute allowed for the award of compensatory damages for embarrassment and humiliation caused by unlawful discrimination. As to this issue the court, in a 5-2 decision, held that there was nothing unconstitutional in the administrative award of damages under the statute where due process procedural rights have been protected, where prohibited conduct has been well defined by the governing statute, and where judicial review is available. The court noted that:

> In Kentucky and elsewhere, this authority of administrative bodies extends to the determination of liabilities between individuals . . . The substantial trend of authority extends administrative powers of adjudication to encompass the award of damages.

Kentucky Commission of Human Rights v. Fraser, supra at 855. See also Kentucky Commission on Human Rights v. Barbour, 625 S.W.2d 860

(Ky. 1982), a unanimous decision involving the same issue in a housing discrimination case.

A similar holding was reached by the Supreme Court of Missouri in Percy Kent Bag Company v. Missouri Commission on Human Rights, 632 S.W.2d 480 (Mo. 1982), in which the court rejected the Petitioner's argument that a determination of whether one person is entitled to recover money from another by way of damages by the agency charged with the duty of determining whether a discriminatory practice has occurred and to eliminate the effects of such discrimination is a judicial question. The Missouri Supreme Court recognized the enormous changes that have occurred over the past 50 years both in the state of Missouri and nationally in the field of administrative law. Once again, the justification for allowing an administrative agency to adjudicate private rights is based upon the rule that the decision rendered by the agency must be subject to judicial review. Accordingly, the court held that:

> [T]he legislature has not unconstitutionally delegated judicial powers to the Commission in violation of Mo. Const., art. II, § 1. The legislature has established standards for the Commission to apply; . . . the legislature has provided a check on the exercise of quasi-judicial power by the Commission by providing that all decisions by the Commission can be reviewed by the Administrative Procedure and Review Act.[4]

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4. Article V, Section 18 of the Missouri Constitution establishes that the standard of judicial review of a judicial or quasi-judicial decision which affects private rights "shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent substantial evidence upon the whole record." Cf. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982).

Percy Kent Bag Company, supra at 485.

Likewise, the Supreme Court of New Jersey saw no constitutional objection to legislative authorization to an administrative agency to award, as incidental relief in connection with a subject delegable to it, money damages, ultimate judicial review thereof being available. Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793, 800 (N.J. 1969), citing David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (N.J. 1965), which held that the law against discrimination does not vest judicial powers in the executive branch of the state government in violation of the New Jersey Constitution.

Oregon, too, has ruled that the agency charged with carrying out the provisions of Oregon's anti-discrimination law has the authority to award damages as compensation for humiliation caused by racial discrimination. In Fred Meyer, Inc. v. Bureau of Labor, 39 Or. App. 253, 592 P.2d 564 (Or. Ct. App. 1979), the court discussed at great length the award of damages for humiliation. Oregon courts have long recognized, as have other state courts, that mental suffering, embarrassment and humiliation are among the effects of racial discrimination. In allowing the award of such damages, the court looked to the purposes of the statute, one of which is "to ensure human dignity, and to eliminate the effects of an unlawful practice found." Meyer, supra at 569. The court had no difficulty in finding that mental anguish can be an effect of racial discrimination and therefore the award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination, Meyer, supra at 570.

The issue herein was presented in a case of first impression to the Supreme Court of Appeals of West Virginia in State of West Virginia Human Rights Commission v. Pauley, 158 W. Va. 495, 212 S.E.2d 77 (W. Va. 1975). Upon a finding of racial discrimination in housing by the West Virginia Human Rights Commission, the Commission ordered an award of damages including the sum of $100.00 as compensation for embarrassment and loss of personal dignity and $100.00 as exemplary damages for the alleged misconduct of the respondent.[5]

The West Virginia Human Rights Act does not expressly authorize the Commission to make an award of damages but the court felt that in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied may be exercised by the agency accomplishing the purposes of the act. Pauley, supra at 78. Relying on Jackson v. Concord Co., supra the court found no constitutional objections to the award of such damages.

Significantly, the court recognized that there is no unanimity of decisions among the courts on this issue. The court nevertheless decided that those states which permit the Human Rights Commission to award money damages when warranted by the evidence were better reasoned decisions.

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5. The court reversed the award of such damages because the record failed to reveal that the Complainant incurred any monetary loss.

Accord, see Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (N.J. 1973); and Gilliam v. City of Omaha, 331 F.Supp. 4 (D. Neb. 1971). Contra, see Iron Workers Local No. 67 v. Hart and Iowa Civil Rights Commission, 191 N.W.2d 758 (Iowa 1971); Pauley, supra at 81.

The courts of Washington, Illinois, Massachusetts and New York have also allowed for the award of damages for emotional distress, pain, and suffering by an administrative agency as a means of enforcing the states' anti-discrimination statutes. See, Bournewood Hospital, Inc., v. Massachusetts Commission Against Discrimination, 371 Mass. 303, 358 N.E.2d 235 (Mass. 1976); Marine Power v. Washington State Human Rights Commission Hearing Tribunal, 39 Wash. App. 609, 694 P.2d 697 (Wash. Ct. App. 1985); A.P. Green Services Division of Bigelow-Liptak Corporation v. State of Illinois Fair Employment Practices Commission, 19 Ill. App. 3d 875, 312 N.E.2d 314 (Ill. App. Ct. 1974); State Commission for Human Rights v. Speer, 29 N.Y.2d 555, 324 N.Y.S.2d 297 (N.Y. 1971). Contra, Ohio Civil Rights Commission v. Lysyj, 38 Ohio St. 2d 217, 313 N.E.2d 3, (Ohio 1974); Mendota Apartments v. District of Columbia Commission on Human Rights, 315 A.2d 832 (D.C. 1974); Zamantakis v. Commonwealth of Pennsylvania Human Relations Commission, 10 Pa. Cmmw. 107, 308 A.2d 612 (Pa. Commw. Ct. 1973).

Both the state of Florida and Broward County have expressed a strong public policy in favor of eliminating the effects of unlawful discrimination and have concurrently set about to attain this goal. The Court should adopt the position taken by the states of Illinois, Kentucky,

Missouri, Nebraska, New Jersey, New York, Massachusetts, Oregon, Washington and West Virginia in holding that the award of compensatory damages for humiliation and embarrassment does not violate the doctrine of separation of powers nor does it result in usurpation of a judicial power under the Florida Constitution.

C. The right to trial by jury preserved by Article I, Section 22 of the Florida Constitution does not apply to civil rights protected by the Broward County Human Rights Ordinance which were not recognized at common law at the time the first Florida Constitution was adopted.

Florida is a "common law" state. By an early statute we adopted the common law of England where not inconsistent with our own Constitution and laws. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 173 So. 820 (1937). The Constitutions of 1838, 1861, 1865, 1868, 1885 and 1968 all preserve in essentially the same language the right to trial by jury. This constitutional guarantee applies to those cases in which such right was enjoyed in 1845, upon Florida's admission to the union, when the Constitution of 1838 became effective. Dudley, supra at 825, citing Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722 (1904).

In Florida, as well as other states which through their constitutions have guaranteed the right to trial by jury as it existed at common law at the time these constitutions were adopted, a principle of jurisprudence has been established that new rights unknown to the common law procedure of trial by jury may be created, and provision made for their determination in the absence of a jury, without violating the guaranty to the right to trial by jury. It is also established that mere change in the form of an action

will not authorize the submission of common law rights to a court in which no provision is made to secure a trial by a jury. Wiggins v. Williams, 36 Fla. 637, 18 So. 859 (1896). But the state constitution was intended to provide for the future, as well as the past, to protect the rights of the people by every safeguard which their wisdom and experience then approved, whether those rights then existed by rules of the common law; or might from time to time arise out of subsequent legislation. All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article. Wiggins, supra at 864, citing Plimpton v. Town of Somerset, 33 Vt. 283 (Vt. 1860).

As early as 1896, the test established by the Florida Supreme Court for determining whether the right to trial by jury must be applied to a given cause of action is not the time when the violated right first had its existence, nor whether the statute which gives rise to it was adopted before or after the constitution, but the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of common law that must decide the question. Wiggins, supra at 854.

The Fourth District Court of Appeal diligently attempted to apply these principles to the case sub judice. But in attempting to determine the nature of the controversy between the parties, the district court limited the focus of its inquiry to damages alone. This is too narrow a focus for, in earlier cases which have resolved the question in favor of the right to jury trial, the award of damages was incidental to a cause of

action the nature of which was a well-recognized legal remedy at the time of the effective date of our first constitution.

In two such cases the legislature, subsequent to the adoption and effective date of the first constitution, enacted laws which extended the jurisdiction of courts in equity. In the first such case, Wiggins, supra, an action was brought pursuant to a statute which gave claimants of timbered land not only the right to an injunction for trespass but also to have an account taken of the damages resulting therefrom. Declaring this statute to be violative of the guaranty to the right to jury trial, the Supreme Court stated that the action of trespass was a well-recognized legal remedy, and at the time of the adoption of the first constitution the court of chancery did not enjoin a mere trespass, and assess the damages incident thereto, unless some recognized equitable ground for the court's interference was alleged and shown. Wiggins, supra at 866. It is not the ability to assess damages per se but the ability to assess damages in a case clearly triable at law by a jury that violates the guaranty to jury trial.

Likewise, in Hughes v. Hannah, 39 Fla. 365, 22 So. 613 (1897), the statute in question provided that "any person claiming to own a tract or parcel of land, or two or more persons claiming to own the same tract or parcel of land, or portions thereof, under a common title, may enter suit in chancery against all persons, more than one, occupying or claiming title to said tract . . . adversely to the complainant or complainants, whether the defendants claim or hold under a common title or not; and in such suit the court shall determine the title of the complainant or complainants; and each

of them, as against the defendants, and shall make a decree quieting the title and awarding possession . . ." Hughes, supra at 616. The court struck down the act on the theory that it creates new rights to the determination of the right of title and possession of land without a jury. This ruling was absolutely consistent with the rule that actions for recovery of real property, including damages for its wrongful detention, have always been at law. Hughes, supra at 616, 617. These early decisions are reflected in the more recent cases holding that in Florida, the test is whether the party seeking a jury trial is trying to invoke rights and remedies of the sort traditionally enforceable in an action at law. See, Cheek v. McGowan Electric Supply Co., 404 So.2d 834 (Fla. 1st DCA 1981).

In Florida, the award of damages by an administrative agency pursuant to duties and remedies provided by statute has been held not to be an unconstitutional violation of the right to trial by jury. Mayo v. Market Fruit Co. of Sanford, 40 So.2d 555 (Fla. 1949). In Mayo, the statute in question made it unlawful for any dealer in the connection with any transaction relative to the purchase, handling, sale and accounting of sales of citrus fruit . . . to fail or refuse truly and correctly to account promptly in respect to any such transaction . . . to the person with whom such transaction is had . . . any dealer violating any of the provisions of Chapter 596 shall be liable to the person injured thereby for the full amount of damages sustained in consequence of such violation. (Emphasis added.) Mayo, supra at 556.

The court rejected the dealer's contention that he had been deprived of trial by jury primarily on the ground that although the Commissioner of Agriculture could order the dealer to pay the grower for damages suffered, he has no power to enforce collection of the amount of damages found by him to be due. In order to enforce the order, suit must be instituted in a court having jurisdiction. Mayo, supra at 558.

In Olin's Inc. v. Avis Rental Car System of Florida, 131 So.2d 20 (Fla. 3d DCA 1961), a case expressly relied upon by the Fourth District Court of Appeal below, the court found the right to trial by jury violated because the triable issues related to breach of contract, of which the court stated:

> A cause of action for damages for an alleged breach of contract clearly comes within the category under discussion . . . What will constitute a breach of contract is a matter of law to be determined by the court. Whether or not that has occurred which could constitute a breach of contract is a matter of fact to be determined by a jury.

Olin's Inc., supra at 22.

Florida courts have subsequently and consistently held that in an administrative action brought under a statute unknown at common law where there is no requirement in the statute for jury trial, the determination of issues in an administrative hearing does not violate the right to trial by jury. Robins v. Florida Real Estate Commission, 162 So.2d 535 (Fla. 3d DCA 1964), citing J.B. Green Realty Co., Inc. v. Florida Real Estate Commission, 130 Fla. 220, 177 So. 535 (1937); 1 Fla. Jur. Administrative Law § 54 (1961).

Although there are no cases in Florida which deal squarely with the issue presented, the question before the court has been resolved by the courts of other states. In Williams v. Joyce, 4 Or. App. 500, 479 P.2d 513 (Or. Ct. App. 1971), the court had no trouble in deciding that the right to trial by jury, as preserved by amended Article VII, Section 3, Oregon Constitution, is not violated by an award of compensation by an administrative body for damages suffered as an effect of racial discrimination. The court reached this result by inquiring into the classes of cases wherein the right was customary at the time the Constitution was adopted and concluded that the protection of the individual from the effects of racial discrimination is a new function of government. Thereafter the court discussed several actions to which the right to trial by jury did not apply. These included workman's compensation actions and commitment for mental incompetency. See also, Fred Meyer, Inc. v Bureau of Labor, 39 Or. App. 253, 592 P.2d 564, 570 (Or. Ct. App. 1979), wherein eight years later, the court refused to reconsider the same argument it had rejected in Williams, supra.

The highest court of Kentucky has held that the state statute which allows for the award of compensatory damages for humiliation and embarrassment suffered as a result of a discriminatory act does not unconstitutionally deprive the respondent of his right to a jury trial. Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981). The court reasoned that:

> Because the right to be free from discrimination based on race, color, religion, national origin, sex and age is a creature of statute and not a common-law tort, it

> does not fall within the scope of the right to trial by jury preserved by the Seventh Amendment and by Section 7 of the Kentucky Constitution.

Fraser, supra at 854.

The Supreme Court of Appeals of West Virginia allowed the order of the award of $1,000.00 "as compensation and damages for the humiliation, embarrassment, emotional and mental distress and loss of personal dignity" upon a finding of racial discrimination. State of West Virginia Human Rights Commission v. Pearlman Realty Agency, 161 W. Va. 1, 239 S.E.2d 145 (W. Va. 1977). The court based its holding upon its determination that the award of damages is purely incidental, a means of enforcing the broad power of the Commission. The court stated:

> The fact that the money goes to the injured party does not change its effect on the respondent, which is to secure compliance with the Commission's order and to depress the discriminator's ambition to repeat the behavior.

Pearlman, supra at 147. The court was not unaware of the fact that Maryland, the District of Colombia, Ohio, Pennsylvania and Iowa have disallowed administrative agency awards for humiliation, mental pain and suffering. However, the court felt that those courts "may have over-emphasized the label of relief, i.e., 'compensatory damages.'" Pearlman, supra at 147-148.

The lack of a pecuniary standard or limit by which to measure these damages was of great concern to the Fourth District Court of Appeal in the instant case. But in the absence of any constitutional prohibition there is absolutely no logical reason to treat these damages as anything but actual

compensation for actual harm, recovery of which was not authorized by common law or statute providing for jury trial of such issues in 1845. No one could seriously argue that in 1845 a person who was the victim of what is today regarded as unlawful discrimination in employment or housing could bring such an action at law in a civil court. The right to trial by jury, as this right has been preserved and guaranteed by Article I, Section 22 of the Florida Constitution, is not violated by allowing these agencies to award compensatory damages for humiliation and embarrassment suffered as a result of unlawful discrimination. Florida should now join those states which have reached this conclusion so that there can be no doubt as to the commitment of this state to eliminate the effects of unlawful discrimination.

## CONCLUSION

The decision of the Fourth District Court of Appeal must be reversed. The award of actual damages as compensation for humiliation and embarrassment suffered as a result of a discriminatory practice is not violative of Article I, Section 18, Article II, Section 3 or Article I, Section 22 of the Florida Constitution.

The award of such damages does not constitute a "penalty" proscribed by Article I, Section 18 of the Florida Constitution. The award of such damages does not violate the doctrine of separation of powers nor is it an unconstitutional usurpation of judicial power where judicial review is available. Finally, the ordinance which allows the Human Rights Board to award compensatory damages does not violate the right to trial by jury preserved by Article I, Section 22 of the Florida Constitution because no action at law for the protection or vindication of rights addressed by the Broward County Human Rights Ordinance existed at common law or pursuant to statute providing for jury trial of such matters at the time the first Florida Constitution became effective.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail to GARY M. FARMER, Counsel for Respondent, 888 South Andrews Avenue, Suite 301, Fort Lauderdale, Florida 33301, on this 26th day of September, 1986.

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