O/a 1-8-87

IN THE FLORIDA SUPREME COURT

BROWARD COUNTY, a political subdivision of the State of Florida,	)	
Petitioner	)	Case No. 68,[illegible]
v.	)	
JOHN LAROSA,	)	
Respondent	)	

* * *

ON DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF APPEAL
FOURTH DISTRICT

* * *

BRIEF OF RESPONDENT

* * *

GARY M. FARMER, P.A.
Counsel for Appellees
Suite 301
888 S. Andrews Avenue
Fort Lauderdale, FL 33316
(305) 523-2022

TABLE OF CONTENTS

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

TABLE OF AUTHORITIES

CASES

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

CONSTITUTION

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

STATUTES

TEXTS

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

ISSUE ON REVIEW
(Restated)

Whether local governments can create administrative agencies with the power to award common law money damages for personal injuries such as humiliation and embarrassment after a proceeding before the agency where the party charged with a violation has no right to compel the attendance of witnesses and production of documents and the agency can make a finding based only on pure hearsay testimony and where the award is enforceable without a right to a jury trial in a court of competent jurisdiction and without any right of appeallate review in favor of the party charged with a violation.

SUMMARY OF ARGUMENT

Section $16\frac{1}{2}$-67 of the Broward County Human Rights Ordinance is unconstitutional to the extent that it permits a local administrative agency to order a party charged with the violation to pay the charging party money damages for personal injuries (humiliation and embarrassment) after a hearing before the agency in which the party charged with a violation has no right to compel the attendance of witnesses and production of documents and where the agency can make a finding based only on pure hearsay testimony and without any right to a jury trial in a court of competent jurisdiction or any right of appellate review in favor of the party charged with a violation, because: (a) if viewed as an administrative penalty, the award violates Article I, Section 18, Fla.Const. which prohibits an administrative agency from imposing penalties unless the legislature authorizes it to do so and there was no such authority from the legislature at the time of the enactment of the ordinance in this case; and (b) if viewed as an award of compensation in money damages, the award violates both Article I, Section 22, and Article 2, Section 3, Fla.Const., because the award was made through an exercise of the judicial power, which only constitutionally created courts can effect and deprives the parties of the right to a trial by jury.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

If the award is properly viewed as a penalty, it is not saved from invalidation by describing it as an exercise of "remedial" purposes in light of the decision by the United States Supreme Court in Curtis v. Loether, 415 U.S. 189 (1974), where a similar characterization in a case arising under the identical federal act was rejected. Also, the legislature had not given Broward County the power to impose civil penalties in a civil rights, or fair housing ordinance at the time of the adoption of the human rights ordinance in question, and thus the ordinance had to be invalidated under the decision of the Fourth District in Broward County v. Plantation Imports, Inc., 419 So.2d 1145 (Fla. 4th DCA 1982).

If, instead, the award is viewed as compensatory, it violates the separation of powers doctrine contained in Article II, Section 3, Fla.Const., even if the legislature had given Broward County the power to do so, in light of this court's decision in Canney v. Board of Public Instruction of Alachua County. In deciding whether an ordinance or statute improperly reposes essentially judicial power in an administrative agency, the court must consider the actual nature of the power exercised by the agency and not the labels or characterizations used to describe it. In this case, the agency awarded compensatory damages for humiliation and embarrassment, and such awards have been exclusively the province of the judicial power since the common law. There is a difference between a quasi-judicial proceeding by an administrative agency to resolve facts necessary to carry out its function and a judicial proceeding to determine

the amount of compensatory damages. There is no exception in Art. II, § 3, permitting administrative agencies to perform judicial functions if affected parties are given due process rights to be heard and the right of judicial review; and, even if there were, the procedure established by Broward County's ordinance fails to satisfy due process requirements because of the absence of compulsory process for attendance of witnesses and production of tangible evidence and the absence of any right of appellate review for parties charged with a violation.

Finally, if the award is viewed as compensatory damages, Section 16½-67 violates Art. I, § 22, Fla.Const., because the Respondent was denied his right to a jury trial. Under Hollywood, Inc. v. City of Hollywood, 321 So.2d 65 (Fla. 1975), questions as to the right to a trial by jury must be resolved, if at all possible, in favor of jury trials, because of the importance of that right in the Florida Constitution. If the issues raised are of the kind triable to a jury at common law, the right exists irrespective of the form of suit or proceeding which may be used. Moreover, the United States Supreme Court has held that jury trials are required under the Federal Fair Housing Legislation which was used as the model for the Broward County Human Rights Ordinance, Curtis v. Loether, supra. And, even if civil penalties can be imposed by administrative agencies without a trial by jury in factfinding necessary for enforceable public rights, private damages claims must still be tried in courts before juries. Atlas Roofing Company v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). In any event,

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

Broward County has made no showing that enforcement of its human rights ordinance cannot be carried out except by an administrative agency without jury trials.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF FACTS

Respondent accepts Petitioner's Statement of Facts, so far as it goes. In fairness, however, certain additional facts from the record need to be stated.

As originally adopted in June, 1978, the "Broward County Human Rights Ordinance" claimed as one of its primary purposes:

> "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, 1979."

R. 14. It sought to ban invidious discrimination in employment, public accomodations, and real estate transactions within the county. R. 18-25. It created an administrative agency called the "Broward County Human Rights Board," an appointed 21-member body demographically representative of the population of the county. R. 28. Persons who claim to have been the subject of illegal discrimination may file a complaint with the Human Rights Division of the County Department of Human Services, which then investigates to determine if there is reasonable cause to believe that illegal discrimination has occurred. R. 30-31. If, after the investigation, the complaint is dismissed by the Board, the complaining party is authorized to petition the "Broward County

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

Circuit Court" for review of the dismissal. R. 31. If the complaint is not dismissed, the ordinance provides for attempts at "conciliation" between the parties. R. 31. If conciliation fails and the complaint is not dismissed, the complaint is brought before a hearing panel composed of five members of the Human Rights Board. R. 32.

The ordinance allows for examination and cross-examination of witnesses, but there is no provision for compulsory attendance of witnesses or the production of tangible evidence. R. 33-34. The ordinance also provides that hearsay evidence is admissible to supplement or explain other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. R. 35. If, from the evidence presented, the hearing panel finds that the Respondent has engaged in a "discriminatory practice," the Human Rights Board must state findings of fact and conclusions of law and issue a cease and desist order. R. 36. The Board may also order "affirmative action" to carry out the purposes of the ordinance. R. 36. "Affirmative action" includes:

> "Payment to the complainant of actual damages for injury including compensation for humiliation and embarrassment suffered as a direct result of the discriminatory practice * * * ."

R. 36-37. The ordinance then provides for enforcement of its orders in the "Broward County Circuit Court." R. 37. It is from proceedings under this ordinance that the present case arose.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

In May, 1980, one Clifton G. Smith decided to relocate from Connecticut to south Florida. Before actually moving, he came to Fort Lauderdale and retained a realtor, one Dennis Kaplan, to assist him in finding suitable rental housing. Kaplan sent Smith to look at some houses, one of which was a duplex owned by Respondent. R. 195. Respondent did not know either Kaplan or Smith at this point and was unaware that Smith had been sent to inspect his duplex. R. 148. While inspecting Respondent's duplex, Smith met one of the tenants, who allegedly told Smith,[1] apparently without Respondent's knowledge or authority, that Respondent would never rent the premises to a black person. R. 150-152. Nevertheless, Smith decided to try to rent the duplex and arranged for Kaplan to negotiate a lease with Respondent. R. 158-162.

Kaplan approached Respondent, who agreed to a one-year lease without having seen or met Smith, subject to payment in advance of a security deposit and the first month's rent. R. 165-168. Kaplan then instructed Smith, who had by then returned to Connecticut, to wire-transfer the necessary funds to Kaplan's business account for delivery to Respondent. Smith did so, but Kaplan apparently failed either to notify Respondent of receipt or deliver the funds to him. R. 174-179. When Respondent failed

---

1. Mr. Smith is a black person, but there is no evidence in the record that Respondent knew his race until after the alleged illegal discrimination had already occurred.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

to receive the advance payment by the date he had previously prescribed, he instead rented the premises to another family, whose race or origin has not been established. R. 190-193.

When Smith and his family arrived in Florida with their household goods, believing that their apartment awaited their arrival, they soon learned that another family had rented it. After receiving no satisfaction from Kaplan and after confronting Respondent for the first time, Smith filed a complaint with the Human Relations Division, charging Respondent with illegal racial discrimination in housing. R. 39-41. The division allegedly investigated the charge and then failed at conciliation. R. 37, 39 and 45. It then sent a letter finding reasonable cause to believe that a violation of the ordinance had occurred and scheduled a hearing before a panel of the Human Rights Board, under Section $16\frac{1}{2}$-64 of the ordinance. R. 39-41.

The Board convened and received "evidence" on February 4, 12 and 24, 1981. R. 44-375. Smith was represented by a lawyer from the Broward County General Counsel's office which also represented the Board as a legal advisor. Respondent objected to the proceedings on the basis of his inability to compel the attendance and testimony of both Kaplan and the tenant who had allegedly said that Respondent would not rent the premises to a black family, but the Board overruled the objection and proceeded anyway. R. 50-56. Smith and his wife testified, as did an investigator from the Human Relations Division. Smith testified as to what the tenant had allegedly told him, but

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

Respondent's hearsay objection was also overruled. R. 83-96. Smith adduced no other evidence on the issue of racial discrimination.

Respondent renewed his hearsay objection at the close of Smith's case and moved the Board to dismiss the complaint on the grounds that, without other admissible evidence on the question of racial discrimination, Smith had simply failed to prove a prima facie case. R. 267-270. The Board denied the motion. R. 279-280. Respondent then elected to present no evidence of his own and the parties argued the merits to the panel, which thereupon deliberated and announced a finding in favor of Smith. R. 280-342. The Board then proceeded to determine the damages at a later hearing on April 23, 1981, after which the Board entered a final order requiring Respondent to pay Smith $4,000 in compensatory damages for humiliation and embarrassment and $5,000 in attorneys' fees,[2] also requiring Respondent to rent another unit to Smith and to cease and desist from further acts of racial discrimination. R. 376-378.

Because the ordinance contains no provision for review of final orders by aggrieved respondents (as it does for complainants), Respondent did not appeal the final order. Instead, he filed an action in the Circuit Court for the Seventeenth Judicial Circuit, which resulted in a final summary

---

2. As previously noted, Smith was represented at the hearing by the Broward County General Counsel's office as provided by § 16½-64(e). (R.33) There is no evidence that Smith ever incurred any reasonable attorney's fees, particularly in view of his representation by the General Counsel's office.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

judgment invalidating the enforcement provisions of the ordinance to the extent that they permit an award of money damages and attorneys' fees. R. 410-411. The Fourth District affirmed the final judgment, and this court later granted discretionary review on the grounds that the decision of the District Court involved a construction of constitutional provisions.

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

ARGUMENT

This case does not involve the power of local governments in Florida to adopt ordinances prohibiting invidious, class-based discrimination in employment, housing and public accommodations. In fact, the real issues in this case have nothing at all to do with illegal discrimination; the ordinance here found unconstitutional could just as well have been, say, a consumer protection ordinance, an environmental protection ordinance or an ordinance regulating pit bulls--all subjects (like anti-discrimination laws) concededly well within the police power of cities and counties.

Respondent went out of his way to show both the circuit and the district court that he happily agrees that local governments have the power to adopt appropriate legislation to effectuate our strong national commitment to the elimination of invidious discrimination in the essential concerns of human life such as housing and employment--a commitment which has been in the forefront of our consciousness ever since President Kennedy proposed what became the Civil Rights Act of 1964 at a time when the "fires of racial discord were burning in every corner of the land" in the long, hot summer of 1963. No one can reasonably suggest that laws seeking to carry out this commitment are invalid or unconstitutional in and of themselves, and Respondent has certainly made no such attack on the ordinance in this case.[3]

---

3. This court has granted review in Metropolitan Dade County

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

The subject, then, is the enforcement provisions of the ordinance; the real issue is thus whether local governments can constitutionally empower local administrative agencies to award common law money damages for non-economic injuries such as humiliation and embarassment in a proceeding where the party charged with a violation of the ordinance has no right to compel the attendance of witnesses and production of documents and where the agency can make a finding on the essential facts based on pure hearsay testimony and where the award is enforceable without a right to a jury trial in a court of competent jurisdiction and without any right of appellate review in favor of the party charged with a violation. All of Respondent's constitional attacks on this ordinance in the circuit court were directed to this essential issue.

The circuit court found the ordinance unconstitutional as an imposition of a penalty by an administrative agency without any legal authority from the state legislature in violation of Article I, Section 18, Florida Constitution. The district court agreed with the circuit court and further found that the ordinance violated the separation of powers doctrine and the constitutional right to a jury trial. The gist of Broward County's argument in this court against these holdings is that

---

Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., 485 S.2d (Fla. 3d DCA 1986) where the Third District held invalid an ordinance banning age discrimination in housing on a holding that, in failing to allow reasonable age limitations for a mobile home park for the elderly, the ordinance exceeded the limits of the police power.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

the enforcement provisions of the ordinance are saved simply because their purpose is to remedy class-based discriminatory treatment.

A.

Petitioner begins by arguing, Brief of Petitioner, at 13-22, that the award against Respondent is not a "penalty" because the enforcement provisions under Section 16½-67 are "remedial," thus saving the ordinance from invalidation. A similar, if not identical, contention was rejected by the United States Supreme Court in Curtis v. Loether, 415 U.S. 189 (1974). Curtis involved a suit for an injunction and damages under Title VIII of the Civil Rights Act of 1968, one of the very statutes which Broward County says it adopted this ordinance to effectuate. There, the Plaintiff claimed that the Defendant had refused to rent an apartment to her because of her race in violation of the Act. The Defendant timely demanded a jury trial, but the case was tried to the district judge who found no actual damages yet awarded $250 in punitive damages and denied attorneys' fees and court costs. The United States Court of Appeals for the Seventh Circuit reversed, and the Supreme Court granted review on account of "the importance of the jury trial issue in the administration and enforcement of Title VIII and the diversity of views in the lower courts on the question * * * ."

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

While strictly speaking, the holding of the Supreme Court is that "the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under [Title VIII]," id. at 192, the Court brushed aside a contention that the relief afforded under Title VIII was essentially "equitable" in nature rather than legal. In cases arising under Title VII of the Civil Rights Act of 1964 (the fair employment practices provisions of the Act), the courts have characterized awards of monetary relief of back pay as restitutionary or equitable, thus eliminating any right to a trial by jury. In rejecting a similar characterization for Title VIII cases, the court pointedly viewed Title VIII's provision for actual and punitive damages as a legal remedy with a right to a trial by jury. The Court said:

> "Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief."

Id. at 197.

Broward County's contention that the enforcement provisions of the ordinance are "remedial" is nothing more than an argument that the remedy is equitable rather than legal, and that it may therefore use an administrative agency to make such awards, irrespective of the constitutional provisions here concerned. The language of the ordinance, like its Title VIII model is, however, instructive otherwise:

> "(b) Affirmative action ordered under this section may include but is not limited to * * * (8) payment to the complainant of

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

> actual damages for injury including compensation for humiliation and embarrassment suffered as a direct result of a discriminatory practice * * * ." [Emphasis added]

R. 36-37. Because the precise language of the ordinance expressly provides for the payment of "actual damages" and "compensation," Curtis v. Loether obviously stands for the proposition that the equitable or "remedial" characterization is futile and cannot be used to avoid clear constitutional provisions.

As Broward County could in no event set up administrative tribunals to award compensatory damages for common law damages such as pain and suffering or humiliation and embarrassment (about which more in due course), the only other possible characterization for the § 16½-67 is to view the award as a penalty.[4] And the penalty was not administered by a court,

---

4. Broward County places great reliance in this regard on the decision of the Third District in Ranger Insurance Company v. Bal Harbour Club, Inc., 10 F.L.W. 1278 (Fla. 3d DCA May 21, 1985), whee the insurance company argued that an occurrence was not covered by an insurance policy because it involved the willful violation of a penal statute, in this instance the comparable provision in Dade County banning illegal discrimination in housing and employment. The Third District found some of the provisions of the ordinance as penal in character but concluded that the overall purpose of the ordinance was for a public benefit with provisions remedial to individuals which only indirectly affect the public. The court rejected the argument that the policy exclusions applied and affirmed a summary judgment finding coverage under the policy in favor of the insured. There was no question raised as to the constitutionality of the ordinance. Judge Ferguson dissented, finding that the ordinance was definitely penal in nature and that public policy does not permit insurance against illegal acts, such as the violation of the anti-discrimination ordinance. On March 21, 1986, however, the Third District granted a motion for rehearing en banc, and the full court heard oral argument again on April 8, 1986. The case is still under consideration,

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

but instead by an administrative agency. Hence, Article I, Section 18, Florida Constitution, came into play, and the question then arose as to whether general law had authorized Broward County to do so. Because it was absolutely indisputable at the time that no general law authorized Broward County to set up such a scheme in its human rights ordinance, the Circuit Judge quite properly found that the ordinance violated Article I, Section 18, and was thus unenforceable. The District Court had no choice but to affirm for the same reasons. See Broward County v. Plantation Imports, Inc., 419 S.2d 1145 (Fla. 4th DCA 1982) (provision of consumer protection ordinance authorizing civil penalties without legislative approval is unconstitutional and not made valid by later special act). Because there is absolutely nothing in Broward County's brief to change that analysis, Respondent will not waste any more ink on the "penalty" rationale and will instead turn to the separation of powers and right to trial by jury constitutional provisions.

B.

Even though Petitioner recognizes the command of Article II, Section 3, Florida Constitution, as prohibiting any officer in one branch of government from exercising the powers belonging to another branch of government unless the Constitution expressly permits, it waves away this constitutional provision, saying that it has no direct bearing on this case because a

---

and thus the decision issued by the panel on May 21, 1985, is not final.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

county "cannot be said to be a part of the legislative branch of state government." Brief of Petitioner, at 22-23. It then refers to Article V, Section 1, Florida Constitution, which vests the judicial power of the state exclusively in the courts named in the Constitution and which prohibits local governments from establishing any other courts. This constitutional provision also provides that:

> "Commissions established by law, or adminsitrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."

Proceeding from this language, Petitioner goes on to argue that the Florida cases cited by the Fourth District as authority for its holding that an award of compensatory damages for humiliation and embarrassment is essentially judicial do not affect the county's power to delegate quasi-judicial powers to the Human Rights Board; instead, the county turns to decisions in other states (presumably construing other constitutions rather than Florida's) and concludes that this court should adopt the position taken in cases from Illinois, Kentucky, Missouri, Nebraska, New Jersey, New York, Massachusetts, Oregon, Washington, and West Virginia and uphold its ordinance scheme.

Obviously, the conclusions reached by other states in construing their own constitutions and statutes have little bearing on whether Florida's constitutional separation of powers permits administrative agencies to award money damages for such personal injuries as humiliation and embarrassment. The only

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

real guidance on the subject must be found in our own decisions. In Canney v. Board of Public Instruction of Alachua County, 278 So.2d, 260 (Fla. 1973), the precise issue before this court was whether the separation of powers doctrine permitted a school board to ignore the Sunshine Law in dismissing a student from high school other than in a public hearing. Along the way, Justice Adkins wrote the following:

> "As a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties, and the legislature may not authorize officers or bodies to exercise powers which are essentially judicial in their nature." [Emphasis added]

Id. at 262. The Fourth District cited Canney when it said:

> "While the Legislature has the power to create administrative agencies with quasi-judicial powers, such agencies may not exercise powers which are basically and fundamentally judicial."

Broward County v. LaRosa, 484 So.2d 1374, 1377 (Fla. 4th DCA 1986). Applying the foregoing principles, the district court then held that "a trial (hearing) which results in an award of unliquidated damages is a judicial proceeding." Id.

The court obviously drew an implicit distinction between a quasi-judicial proceeding conducted by an administrative agency to determine facts necessary to carry out its function (on the one hand) and a contested proceeding to resolve disputed facts leading to an award of unliquidated damages for personal injuries such as humiliation and embarrassment (on the other hand). The former is something an

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

administrative agency can admittedly do, while the latter is something that only a court can do because it consists of an exercise of the "judicial power." Even Broward County concedes in its Brief that the exercise of judicial power is reposed solely in the courts established by Article V of the Florida Constitution. When Broward County adopted its Human Rights Ordinance, it acted in a legislative capacity; when it seeks to enforce its Human Rights Ordinance, it acts in an administrative or executive capacity. Hence, the analysis of the district court was absolutely correct, for an award of unliquidated damages for humiliation and embarrassment is an exercise of judicial power which has been impermissibly intermingled with the exercise of executive power under Section 16½-67 of the ordinance.

In short, when faced with a separation of powers question, the court is necessarily called upon to make a critical analysis of what the parties actually did, rather than the labels or terminology which they have used to characterize their action. If, in substance, an administrative agency has undertaken to perform an essential judicial function, then Article II, Section 3, Art. II, § 3, Florida Constitution, makes the administrative action illegal. This was the analysis used by the court in Biltmore Construction Company v. Florida Department of General Services, 363 So.2d 851 (Fla. 1st DCA 1978), where the First District invalidated an order of the Department of General Services requiring a contractor to specifically perform a contract for the construction of nine cottages. The First

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

District expressly found that an order awarding specific performance of a contract is essentially a judicial function, and not something which an administrative agency may do in the exercise of quasi-judicial powers. In finding that Broward County had made the same constitutional error here, the Fourth District properly relied on Biltmore Construction Company and its analysis.

What then has Broward County brought to this court to compel a rejection of the analysis of the Fourth District? In brief, Broward County argues that it could lawfully do what it did to Respondent so long as it gave him an opportunity to be heard and for judicial review in a way which satisfies the demands of due process. Brief of Petitioner, 25-27. This argument is entirely at odds with Article II, Section 3, which contains no exception permitting an administrative agency to exercise an essential judicial function so long as the affected party is given an opportunity to be heard and the right of judicial review. But, even if the constitutional provision did contain such an exception, it surely could not be applied under the facts of this case.

The court will recall from the statement of facts that this particular ordinance scheme contained absolutely no provision for the issuance of process to compel the attendance of witnesses or the production of tangible evidence. Indeed, Broward County conceded in both of the lower courts that the ordinance (before its amendment by a referendum of the electorate

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

on November 6, 1984) made no provision for the issuance of subpoenas to witnesses, either for the charging party or Broward County, or for a Respondent such as John LaRosa. This court will further recall that the only proof of invidious racial discrimination by Respondent was the alleged comment of a tenant at the same duplex and that this tenant neither testified by affidavit nor in person at the hearings. Respondent expressly objected to the proceeding because of the lack of his ability to compel the attendance and testimony of this witness. Thus, while the ordinance does indeed provide for notice of the hearing and an opportunity for the Respondent to be heard, it is an empty right to be heard which this ordinance has given without the related, but indispensible, power to compel the attendance of witnesses and production of evidence. This kind of procedure may be "process," but it can hardly be all that is "due."

Additionally, the ordinance lacks any provision for judicial review in favor of a losing Respondent even though it does provide that a complaining party may appeal to the "Broward County Circuit Court" the dismissal of a charge of illegal discrimination. Again, that may be "process," but it is certainly not even-handed. Moreover, it does not explain whence Broward County acquired its power to enlarge the jurisdiction of the Circuit Court for the Seventeenth Judicial Circuit (in Broward County) in the face of Article V, Section 5(b), Florida Constitution, which restricts the jurisdiction of the circuit courts to those appeals provided by general law. It is axiomatic

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

that a county ordinance is not general law. Grapeland Heights Civic Association v. City of Miami, 267 So.2d 321, 323-324 (Fla. 1972). Indeed, the purported grant of jurisdiction by this ordinance to the circuit court has already been held unconstitutional on these grounds in Winn Dixie Stores, Inc. v. Ferris, 408 So.2d 650 (Fla. 4th DCA 1982).[5]

In any event, the fundamental teaching of the constitution and the Florida cases is that the enforcement provisions of Section 16½-67 are unconstitutional under Article II, Section 3, to the extent that they empower Broward County's administrative agency to award unliquidated damages for humiliation and embarrassment, particularly in a procedure that lacks the elemental necessity of compulsory process for the attendance of witnesses and any provision for judicial review for a losing Respondent. Petitioner's out-of-state cases do not even attempt to speak to this kind of scheme. Even assuming, therefore, that the constitution contained some provision permitting administrative agencies to perform basic judicial functions so long as the procedure was infused with due process, that is certainly not the case here. Petitioner's argument thus must be rejected.

---

5. This court has granted review in Southern Records and Tape Service v. Goldman, 458 So.2d 325 (Fla. 3d DCA 1984), rev. granted [Sup.Ct. case no. 66,290] to decide whether the Dade County Fair Housing & Employment Appeals Board may seek enforcement in the Circuit Court of an order finding illegal sex discrimination in employment and awarding, among others, payment of unpaid wages, medical expenses and interest.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

C.

Our state Constitution says that "the right of trial by jury shall be secure to all and remain inviolate." Article I, Section 22, Florida Constitution. As the district court observed in this case, this right is basic and fundamental and can be traced back to the field at Runnymede and the Great Charter; it exists as to those issues triable before a jury at common law, irrespective of the form of suit or proceeding which may be devised or used for their solution. Olin's, Inc. v. Avis Rental Car System of Florida, 131 So.2d 20, 21 (Fla. 3d DCA 1961). This court said in Hollywood, Inc. v. City of Hollywood, 321 So.2d 65, 71 (Fla. 1975) that:

> "Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions. See U.S. Constitution, Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, § 22."

As the foregoing language shows, it isn't merely the fact that the right to trial by jury is of constitutional dimensions that courts so jealously protect the right; it is because the right is so basic and fundamental--so highly cherished and prized in our constitutional system of values--that doubts as to the right are generally resolved in favor of jury trials and not against them. Thus, this constitutional provision is a brake on the power of the legislature to create new tribunals to adjudicate new rights

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

without a jury where the issues are of the kind traditionally triable to a jury at common law. Olin's, Inc. v. Avis Rental Car Systems, supra.

Petitioner strains desperately to avoid the fundamental right by arguing that the award of compensatory damages under Section 16½-67 is merely "incidental" to the fact-finding and enforcement provisions of the ordinance and that the legislature may create purely statutory rights and commit them for enforcement to administrative tribunals. This is, of course, essentially the same kind of argument made by the Defendant in Curtis v. Loether, supra, which the United States Supreme Court expressly rejected. There, the Supreme Court accepted the fact, as having been long settled, that the right extends beyond common-law forms of action recognized in the 18th century. Id. at 193. It expressly found the right to jury trial in actions to enforce statutory rights "as a matter too obvious to be doubted." Id. See also, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477 (1962); Beacon Theatres v. Westover, 359 U.S. 500 (1958); Ross v. Bernhard, 396 U.S. 531 (1970), and Hepner v. United States, 213 U.S. 103, 115 (1909). The Supreme Court emphasized its conclusion by saying:

> "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law." [Emphasis added]

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

Id. at 194. The holding in Curtis v. Loether is doubly important in this case, for it involved the identical kind of claim which Broward County has committed to an administrative agency without a right to trial by jury--a claim for money damages arising from an alleged act of illegal racial discrimination in the rental of housing. To repeat, Broward County says that it modeled its ordinance on the very same statute which Justice Marshall construed for the court in Curtis. Yet, Broward County has not even mentioned Curtis in its brief, even though it was cited to the district court in the appeal below.

As Respondent suggested to the Fourth District in his supplemental brief, an issue implicated by Petitioner's argument is whether administrative agencies can be given the power to award money damages for personal injuries (e.g. humiliation and embarrassment) without encroachment on the constitutional right to trial by jury. The leading treatise on administrative law takes the position that the states and Congress may determine for themselves what judicial powers to delegate to administrative agencies, except that these agencies may not be given the authority to administer criminal law or be used when juries are required. See 1 Davis, Administrative Law Treatise §§ 3:10-3:12. Davis cites with approval the decision of the first district in Department of Administration v. Stevens, 344 So.2d 290 (Fla. 1st DCA 1977), which held that the legislature can properly delegate to an administrative hearing officer the question whether an administrative rule was invalid because it

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

was not adopted under statutory procedures as against the contention that such a determination involves a judicial question which only a court can make. He also concludes that, as indeed Article I, Section 18, of the Florida Constitution implies, an administrative agency can properly be given the power by the legislature to assess fines without any violation of the constitutional right of a trial by jury. Indeed, the United States Supreme Court has itself so held in Atlas Roofing Company v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977). But these cases involve the imposition of civil penalties by administrative agencies without a trial by jury, a subject which is substantially unlike the question presented here--whether administrative agencies can award common law damages for personal injuries.[6] The mere fact that such agencies can levy fines does not yield the result that they can award common law money damages for personal injuries without doing considerable violence to the constitutional protection of a jury trial. The fine imposed by the governmental agency usually goes to the government; the damages in this case were directed to be paid by Respondent directly to the individual who claimed that

---

6. In fact, the Supreme Court was careful in Atlas Roofing Company to limit its holding to factfinding for "enforceable public rights" and to say that "[w]holly private tort, contract, property and a vast range of other cases as well are not at all implicated * * *" by its holding. Atlas Roofing Company, supra, at 458.

Respondent had subjected him to racial discrimination in housing. Broward County, itself, concedes that this distinction is important.

In any event, whatever may be said about the absence of a right to a jury trial in administrative proceedings to levy fines payable to the governmental authority, the Supreme Court's decision in Curtis v. Loether, supra, is dispositive on this question. As the court in Curtis expressly observed, a damages claim under Title VIII "sounds basically in tort--the statute merely defines a new legal duty * * *." Id. at 195. The court saw the damages claim as functionally equivalent to "a number of tort actions recognized at common law." Id. Again, because Title VIII provides the basis for the fair housing provisions of the Human Rights Ordinance, which is said to have been designed to effectuate the policies in Title VIII, the construction placed by the Supreme Court on the Statute with regard to a right to trial by jury is controlling on the issue.

The court should notice that Broward County does not argue, as indeed it could not, that administrative agency hearings without jury trials are absolutely essential to carry out the purposes of the ordinance. If that were so, it escaped the attention of the Congress in its drafting of the Title VIII model, and it similarly escaped the attention of the Florida legislature when it constructed the new Fair Housing Act, §§ 760.20-760.37, Fla. Stat. (1985). Like the federal scheme in Title VIII, the state Act leaves real enforcement to the

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

individual claimants, who may sue in the appropriate court for actual damages and not more than $1,000 in punitive damages together with court costs and attorneys' fees. See § 760.35, Fla. Stat. (1985). The role of the administrative agency, the Florida Commission on Human Relations, is limited to investigation, conciliation, and persuasion. See §§ 760.32 and 760.34, Fla. Stat. (1985). In fact, in this regard, the ordinance here is completely inconsistent with, and attempts to go far beyond, the state statute. Thus, it is impossible to read the federal and state fair housing schemes and conclude that Broward County has no alternative to administrative agencies enforcing its comparable ordinance by the awards of common law money damages without jury trials. Similarly, any notion of mere administrative ease and convenience must, of course, give way to the constitutional imperative of jury trials, particularly in view of the decision in Curtis.[7]

Obviously, the question whether jury trials are required is all but intertwined with the related separation of powers question argued earlier in this brief. Thus, Article I, Section 22, must be read in conjunction with Article II, Section

---

7. The court should also review the later decision in Pernell v. Southall Realty, 416 U.S. 363 (1974), where the court said that the Seventh Amendment right to jury trial extends to an action to recover possession of real property because such an action was recognized and protected at common law.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

3; if local governments cannot constitutionally commit common law money damages proceedings to adminstrative agencies without treading upon the judicial power, it follows that jury trials must be permitted upon demand of the parties. Broward County has sought some comfort in decisions in other states which have permitted administrative agencies to award some compensation to the victims of illegal discrimination to be paid by the offending party. As discussed before, the courts have drawn a distinction between fair employment practices cases, in which the award of back pay and benefits is deemed restitutionary and thus equitable, from fair housing cases, in which damages awards are viewed under Curtis v. Loether as legal remedies covered by the Seventh Amendment. Even in those states where some compensation has been permitted through an administrative agency proceeding, the amounts involved are usually small and often simply represent economic damages, such as the cost of substitute housing or moving expenses, rather than substantial awards, as here, for humiliation and embarrassment. See e.g. State of West Virginia Human Rights Commission v. Pauley, 158 W.Va. 495, 212 S.E.2d 77 (1975). As the Fourth District found, however, a number of states have invalidated money damages awards by human rights agencies. See Mendota Apartments v. District of Columbia Commission on Human Rights, 315 A.2d 832 (D.C. App. 1974); Zamatakis v. Pennsylvania Human Relations Commission, 10

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

Pa.Cmwlth. 107, 308 A.2d 612 (1973); Ohio Civil Rights Commission v. Lysyj, 38 Ohio St.2d 217, 313 N.E.2d 3 (1974); and Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758 (Iowa 1971).

As suggested earlier, it is the Florida Constitution under interpretation here (as well as the United States Constitution), rather than the constitutions in other states. The decisions of the appellate courts of this state place Article I, Section 22, very high in our system of constitutional values. Questions on the right to a jury trial are usually resolved in favor of such trials, particularly where the kind of relief sought (money damages for pain and suffering) is all but identical to common law claims where jury trials have traditionally been required. Even conceding the power of local governments to create administrative agencies to carry out legislative schemes passed under the police power, it does not follow that such agencies may be given the power to award such damages without a significant impairment of the judicial power and the right to a trial by jury. If Broward County had made some showing here that such awards to private parties were indispensible to the enforcement of an important county power, there might be some basis for this court to determine whether our constitution permits the counties to create such agencies with such powers. In this case, there is no such showing, and thus the constitutional command must be enforced.

LAW OFFICES OF GARY M. FARMER, P.A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

CONCLUSION

The decision of the District Court was proper, whether the case is analyzed from the standpoint of a penalty by an administrative agency, from the standpoint of the separation of powers doctrine, or from the standpoint of the right to trials by jury. Broward County's Human Rights Ordinance as originally drafted attempts to permit an administrative agency to order one private party to pay another private party money damages as compensation for personal injuries of humiliation and embarrassment. The proceeding from which the award was entered fails to satisfy even the minimum requirements of due process in that there was no provision for the compulsory attendance of witnesses or production of tangible evidence, and the final decision was rendered on the basis of hearsay testimony as to which the Respondent had no power to bring the declarant before the tribunal and subject him to cross-examination. Under these circumstances, the ordinance must be seen, as the Fourth District did, as being unconstitutional on any of the three theories discussed in this brief. The decision of the Fourt District should be affirmed in all respsects.

Respectfully submitted,

By 
GARY M. FARMER

LAW OFFICES OF GARY M. FARMER, P. A., 888 SOUTH ANDREWS AVE., SUITE 301, FT. LAUDERDALE, FLA. 33316 • (305) 523-2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Respondent was placed in the U.S. Mail, First Class, postage pre-paid, and addressed to JANET LANDER, Assistant General Counsel for Broward County, Governmental Center, Suite 423, 115 S. Andrews Avenue, Fort Lauderdale, FL 33301, on this 31st day of October, 1986.

GARY M. FARMER, P.A.
Counsel for Defendant
Suite 301
888 S. Andrews Avenue
Fort Lauderdale, FL 33316
(305) 523-2022

By 
GARY M. FARMER

GMF:al
84-130.02
10/29/86