D/a 1-8-87

IN THE
SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

BROWARD COUNTY adheres to and adopts by reference in this Reply Brief the Statement of the Case and the Statement of the Facts contained in its Initial Brief in this cause.

The parties will be referred to in this brief, as they were in BROWARD COUNTY'S Initial Brief, by name or where appropriate by the position they occupy before the Supreme Court. The symbols for references used in BROWARD COUNTY'S Initial Brief will also be used in this Reply Brief and are restated for convenience:

(App. _____) refers to the page number as identified in the appendix accompanying the Initial Brief.

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

In addition, the following symbols are adopted for use in this Reply Brief:

(AB. _____) refers to the page number as identified in the Answer Brief of Respondent.

(App. R. _____) refers to the page number as identified in the appendix accompanying this Reply Brief.

QUESTION PRESENTED FOR REVIEW

Petitioner and Respondent in the earlier briefs have used different statements of the Question Presented for Review. Petitioner BROWARD COUNTY adheres to its original statement of the Question Presented for Review, which is restated here for convenience:

> 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

In resolving the issue of whether the award of actual damages by an administrative panel as compensation for humiliation and embarrassment suffered as a result of a discriminatory practice is a "penalty" for purposes of the application of Article I, Section 18 of the Florida Constitution, the proper inquiry is whether the award of such damages is penal or remedial. Ignoring this approach, LA ROSA has instead chosen to focus on an equitable versus legal analysis. LA ROSA'S application of the latter is grounded upon misplaced reliance on cases which have no real bearing on this issue. In discussing what constitutes a penalty within the purview of Article I, Section 18 of the Florida Constitution, Florida courts have held that a remedial provision designed to effect restitution is not a penalty.

As to the issue of whether the award of such damages violates Article II, Section 3 of the Florida Constitution, which establishes three branches of state government, LA ROSA has failed to cite even one authority wherein the court applied this constitutional provision to a political subdivision. The establishment of the Broward County Human Rights Board pursuant to the Broward County Human Rights Ordinance and the exercise of quasi-judicial power by the board pursuant to the ordinance is consistent with Article V, Section 1 of the Florida Constitution.

LA ROSA'S reliance on Article I, Section 16 of the Florida Constitution as additional grounds upon which the ordinance should be declared unconstitutional is misplaced as this provision, which guarantees the right to compulsory process for witnesses, applies only to criminal prosecutions. As to the provision of due process, in addition to the notice and hearing pro-

visions of the ordinance, the availability of judicial review of the orders of the Broward County Human Rights Board, which the courts of this state have found exists as a matter of right to a party aggrieved by administrative action, guarantees a respondent his day in court. Further and perhaps most significant is the fact that the orders rendered by the Broward County Human Rights Board Panel are not enforced or enforceable by BROWARD COUNTY. Enforcement of such orders is completely dependent upon the judiciary and, at present, the issue of whether or not such orders may be enforced through a proceeding brought in the circuit court is pending before the Florida Supreme Court.

Finally as to whether the award of such damages by the Human Rights Board violates the right to jury trial guaranteed by Article I, Section 22 of the Florida Constitution, the primary authority cited by LA ROSA is a case in which the United States Supreme Court interpreted the section of Title VIII of the Civil Rights Act of 1968 which creates a private right of enforcement in the federal or state courts for acts prohibited within said statute. The reasoning of the court therein simply does not compel the result urged by LA ROSA with regard to the right to jury trial guaranteed by the Florida Constitution. Cases involving issues identical to those presented in this case, decided by other state courts subsequent to the United States Supreme Court decision relied upon by LA ROSA, have held that the award of such damages by administrative agencies does not violate the right to jury trial guaranteed by their state constitutions. In these cases, and under the Florida Constitution, it is clear that the civil rights protected in the administrative forum did not exist at common law at the time these state constitutions were adopted or became effective. Therefore, the courts held that the right to jury trial does not apply.

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 ACTUAL DAMAGES INCLUDING COMPENSATION FOR HUMILIATION AND EMBARRASSMENT SUFFERED AS A 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.

In an attempt to refute BROWARD COUNTY'S contention that the award of actual damages, including compensation for humiliation and embarrassment suffered as a result of an unlawful discriminatory practice, does not constitute a "penalty" for purposes of Article I, Section 18 of the Florida Constitution, LA ROSA, in his Answer Brief, relies upon Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), a case in which this question was not at issue. The distinction between the "equitable" and "legal" nature of the relief sought in a proceeding brought under the Broward County Human Rights Ordinance need not be grappled with in order to resolve the issue of whether the award of actual damages as compensation for humiliation and embarrassment suffered as a result of an unlawful discriminatory act constitutes a "penalty."

The question of whether an order for repayment of money imposed by an administrative agency constitutes a "penalty," thereby triggering application of Article I, Section 18 of the Florida Constitution, was carefully examined by the Third District Court of Appeal in Hyman v. State Department of Business Regulation, 431 So.2d 603 (Fla. 3d DCA 1983). The court held that a rule adopted by the Department of Business Regulation, Division of

Pari-Mutuel Wagering prior to specific statutory authorization, which provided that the owner of any drugged horse shall be required to repay the purse to the track for redistribution to owners of the other horses, did not impose a "penalty" within the meaning of Article I, Section 18 of the Florida Constitution. This holding was based upon the court's finding that the rule was not designed to benefit the state, but only to secure a compensatory reimbursement to those owners whose horses should have been successful. The broader principle established by the court therein is that a remedial provision designed to effect restitution rather than to punish and deter wrongdoing is not a penalty.

Nor does the fact that Ranger Insurance Company v. Bal Harbour Club, Inc., 10 F.L.W. 1278, May 21, 1985 (Fla. 3d DCA), is still under consideration in any way weaken BROWARD COUNTY'S showing that the ordinance under review was remedial rather than penal in nature. Although Ranger Insurance, supra, is not final, the cases cited therein, with regard to the distinction between remedial and penal statutes, most certainly are final. Ranger Insurance, supra at 1279. Additionally, LA ROSA'S Answer Brief has offered nothing of substance which would tend to rebut the argument raised in BROWARD COUNTY'S Initial Brief as to the erroneous application of Broward County v. Plantation Imports, Inc., 419 So.2d 1145 (Fla. 4th DCA 1982), to the instant case by the Fourth District Court of Appeal.

The Broward County Human Rights Ordinance seeks to compensate the victim of an unlawful discriminatory practice for the humiliation and embarrassment which may result from discrimination. This compensation is not a penalty. Therefore the decision of the Fourth District Court of Appeal,

finding such compensation to be a penalty in violation of Article I, Section 18 of the Florida Constitution, should be reversed.

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

LA ROSA argues that Article II, Section 3 of the Florida Constitution applies to entities which do not fall within the three branches of government enumerated therein. He would have the court focus on the action rather than the actors. Interestingly, BROWARD COUNTY has also urged the court to focus on the action rather than the actors with regard to the exercise of quasi-judicial power by the Broward County Human Rights Board in matters connected with its function in accordance with Article V, Section 1 of the Florida Constitution.

While LA ROSA reaches markedly different conclusions and interpretations from that of the Petitioner regarding the cases Biltmore Construction Co. v. Florida Department of General Services, 363 So.2d 851 (Fla. 1st DCA 1978) and Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973), his argument simply does not lend any support to the applicability of Article II, Section 3 of the Florida Constitution to a political subdivision of the State of Florida such as Broward County.

LA ROSA wholly fails to rebut the contention of BROWARD COUNTY that the key to differentiating between actions which may only be performed by the judiciary, as opposed to those actions which are quasi-judicial in nature, is the inability of the quasi-judicial agency to enforce its own orders.

The Broward County Human Rights Board orders, in the absence of voluntary compliance on the part of the party found to have committed an unlawful discriminatory act, are unenforceable by that board. Section 16½-67(c) of the Broward County Code of Ordinances (1978) 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 circuit court" (R. 37). Furthermore, as previously stated in BROWARD COUNTY'S Initial Brief, unless and until the Supreme Court of Florida resolves the conflicting decisions of the Fourth District Court of Appeal in the case of Winn Dixie Stores, Inc. v. Ferris, 408 So.2d 650 (Fla. 4th DCA 1982), and the Third District Court of Appeal in the case of 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), BROWARD COUNTY may not seek enforcement of these orders in the circuit court.

LA ROSA repeatedly argues that the ordinance must fail because it contains no provision for compulsory attendance of witnesses or the production of tangible evidence and additionally because the ordinance allegedly lacks any provision for judicial review in favor of a losing respondent. As to the former, compulsory attendance of witnesses and production of documentary evidence are components of due process but the absence of these elements does not, in and of itself, constitute the denial of due process. In fact, Article I, Section 16 of the Florida Constitution, which guarantees the right to compulsory process for witnesses, applies only to criminal prosecutions.

As to the latter, LA ROSA seriously misapprehends that provision of the ordinance upon which he relies in furtherance of his argument that the ordinance lacks any provision for judicial review in favor of a losing respon-

dent, "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" (AB. 17). The subsections of the ordinance referred to by Respondent are 16½-63(b) and (c) which provide that:

> (b) If it is determined within ninety (90) days by the human relations division that there is no reasonable cause to believe a discriminatory practice has occurred, the board shall be advised and an order dismissing the complaint shall be issued by the board.
>
> (c) The complainant may appeal the dismissal of the complaint to the Broward County Circuit Court according to the Florida Appellate Procedure Rules.

The above subsections relate to the division level determination of reasonable cause. The Human Relations Division is charged with the responsibility of investigating all complaints filed with its office. Only in the event of a determination of reasonable cause by the division and a subsequent failure to effect a conciliation between the parties will the matter be scheduled for hearing before a five (5) member panel of the Human Rights Board. If, after investigation, the act complained of is deemed to be without reasonable cause, the complaint is dismissed. A finding of reasonable cause obviously is not final agency action since the matter may be conciliated or, failing that, set for hearing before the five-member panel of the Human Rights Board and therefore is not susceptible to judicial review. Dismissal of a charge for lack of reasonable cause is final agency action for purposes of judicial review. See generally, 1 Am. Jur. 2d Administrative Law §§ 145-149 (1977).

As to LA ROSA's inquiry as to "whence Broward County acquired its power to enlarge the jurisdiction of the Circuit Court for the Seventeenth Judicial Circuit . . . in the face of Article V, Section 5(b), Florida Constitu-

tion which restricts the jurisdiction of the circuit courts to those appeals provided by general law," (AB. 17), BROWARD COUNTY would reply that the method of obtaining the review referenced in Section 16½-63(c), above, is by petition for writ of common law certiorari, original jurisdiction for which is vested in the circuit courts by Article V, Section 5(b) of the Florida Constitution. Either the charging party or the respondent may avail themselves of this mode of judicial review. Notwithstanding the fact that issuance of a writ of common law certiorari was traditionally regarded as discretionary on the part of the court, it appears that judicial review by the circuit court of administrative action is granted as a matter of right. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). A respondent found by the five-member panel of the Human Rights Board to have committed a discriminatory act has an unqualified right to seek review of such an order in the circuit court. Therefore, in the course of judicial review, if the reviewing court determines that the absence of compulsory process for witnesses or the production of documents led to a denial of due process in the administrative hearing, it is within the court's powers to reverse the agency order. See, DeGroot v. Sheffield, 95 So.2d 912, 915 (Fla. 1957). A review of Sections 16½-64 and 16½-65 of the Broward County Code of Ordinances (1978) (R. 32-35) establishes that the ordinance complies with the standard pronounced therein.

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.

LA ROSA places great reliance on Curtis v. Loether, supra, in his attempt to refute BROWARD COUNTY'S contention that the right to trial by

jury does not apply to the rights and remedies created and protected by the Broward County Human Rights Ordinance. In that case, the Supreme Court of the United States held that the Seventh Amendment right to jury trial applies to actions enforcing the statutory rights created by The Civil Rights Act of 1968, 42 USC § 3601 et seq. (Title VIII).

Title 42 USC § 3612 creates a private right of enforcement by civil action brought in the United States District Court or in appropriate state or local courts. This section of the statute additionally allows for the award of actual as well as punitive damages together with court costs and attorney's fees. It is to this "private right of enforcement" that the holding in Curtis v. Loether, supra, applies. As will be seen in the discussion which follows, a broader view of Title VIII compels acceptance of the fact that the entire statutory scheme of Title VIII recognizes the existence of state and local laws or ordinances which provide "substantially equivalent" rights and remedies to those provided in Title VIII. 42 USC § 3612 provides only for a civil action. The fact that in some instances state and local laws may provide greater rights and remedies than those provided by federal law has been recognized by federal courts. Colon v. Tompkins Square Neighbors, Inc., 289 F.Supp. 104 (S.D. N.Y. 1968).

In Curtis v. Loether, supra, the action was brought under 42 USC § 3612 in federal court. In their answer, the Defendants demanded a jury trial. While 42 USC § 3612 sounds basically in tort, the Broward County Human Rights Ordinance does not. Although Sections 760.20 -760.37, Florida Statutes, the Florida Fair Housing Act, appear to have been fashioned after Title VIII, three points with regard to these laws as compared to the Broward County Human Rights Ordinance merit consideration. First, the Florida Fair

Housing Act, which also provides for a private right of enforcement in Section 760.35, Florida Statutes, did not even become effective until July 1, 1983 (Section 14, Chapter 83-221, Laws of Florida). Clifton G. Smith filed his complaint with the Broward County Human Relations Division on June 23, 1980 (R. 39-41). Second, Section 16½-2 (a)(1) of the Broward County Code of Ordinances (1978) states that among the general purposes of this chapter is to provide for the execution of the policies embodied in Title VIII of the Federal Civil Rights Act of 1968, as amended to January 15, 1979 (R. 17). The declaration of policy set forth in 42 USC § 3601 states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Third, 42 USC § 3615 expressly provides that nothing in that subchapter "shall be construed to invalidate or limit any law of a State or political subdivision of a State . . . that grants, guarantees or protects the same rights as are granted by this subchapter."

On its face, the Broward County Human Rights Ordinance provides for broader relief and remedies than Title VIII, as can be easily discerned by comparing Section 16½-67, Broward County Code of Ordinances (1978) (R. 14) with 42 USC § 3610. The latter essentially provides in subsection (a), only for an attempt to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation and persuasion. Pursuant to 42 USC § 3610(d), if the Secretary of Housing and Urban Development has been unable to obtain voluntary compliance within 30 days after a complaint has been filed, the charging party may commence a civil action in a court of competent jurisdiction. The Broward County Human Rights Ordinance provides only for administrative investigation and hearings, the results of

which the unsuccessful respondent may choose not to accept. Section 16½-67(c), Broward County Code of Ordinances (1978) (R. 57).

The so-called "functional justification" referred to by Mr. Justice Marshall in Curtis v. Loether, supra at 415 US 189, 195 recognizes that the application of the right to jury trial for enforcement of statutory rights may be incompatible with the legislative scheme. No "legal" cause of action of the sort typically enforced in an action at law was created by the Broward County Human Rights Ordinance. With regard to this matter, the only point which is axiomatic is that BROWARD COUNTY lacks the authority and indeed does not purport to create a private right of enforcement by a civil action in a Florida court for the rights protected by the Broward County Human Rights Ordinance. Furthermore, the Florida Fair Housing Act did not exist at the time the Broward County Human Rights Ordinance was enacted in 1978, nor when the act complained of by Clifton G. Smith took place in 1980. Finally, it was not the intent of Congress in enacting Title VIII to limit or invalidate the Broward County Human Rights Ordinance. Therefore, application of Curtis v. Loether, supra, to the instant case is inappropriate.

The Supreme Court of Kentucky in Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852 (Ky. 1981), did not find the holding in Curtis v. Loether, supra, to be an obstruction to its finding that the legislative scheme to protect against the effects of unlawful discrimination (such as that found in the Broward County Human Rights Ordinance) does not violate the right to trial by jury. In fact, the court quoted several passages from Curtis v. Loether, supra, in support of its holding that the award of compensatory damages for embarrassment and humiliation by an administrative agency does not deny the right to trial by jury, nor is it an unconstitutional

delegation or usurpation of judicial powers. Kentucky Commission on Human Rights v. Fraser, supra at 854-855.

LA ROSA implies that those states, in which the courts specifically held that the award of compensatory damages by an administrative agency for humiliation and embarrassment suffered as a result of a discriminatory act does not violate the right to trial by jury as guaranteed by the state constitution, may not place as high a value on the preservation of this right as does Florida. This is demeaning, unsupported and unsupportable. In each state wherein the court allowed for the award of such damages, the right to jury trial is expressly preserved in the state constitution (App. R. Tabs A.-I.).

CONCLUSION

LA ROSA has offered no authority on point which supports the decision of the court below. The decision of the Fourth District Court of Appeal is erroneous on three distinct constitutional grounds which find no support in Respondent's Answer Brief. First, the cases cited by LA ROSA in support of the decision below fail to establish that the award of damages by an administrative agency is a penalty within the purview of Article I, Section 18 of the Florida Constitution. Second, as neither party would dispute the fact that BROWARD COUNTY is not one of the three branches of government established by Article II, Section 3 of the Florida Constitution, an ordinance enacted by BROWARD COUNTY cannot implicate this constitutional provision. Additionally, the performance of quasi-judicial functions by the Broward County Human Rights Board pursuant to the ordinance under review is perfectly consistent with Article V, Section 1 of the Florida Constitution. Finally, as to the right of jury trial, LA ROSA continues to attempt to limit the court's focus to damages alone in determining whether or not the right to jury trial applies in this instance. The civil rights protected by the Broward County Human Rights Ordinance did not exist at the time the Constitution of 1838 became effective. Therefore, the right to jury trial guaranteed by Article I, Section 22 of the Florida Constitution does not apply.

The decision of the Fourth District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of November, 1986, to GARY M. FARMER, Counsel for Respondent, 888 South Andrews Avenue, Suite 301, Fort Lauderdale, Florida 33301.

JANET LANDER
Assistant General Counsel

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