

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 70,394

FOURTH DISTRICT COURT OF  
APPEAL CASE NO. 85-1995


FLA. BAR. NO. 163418

WILLIAM F. SCOTT,  
Petitioner/Plaintiff,  
v.  
OTIS ELEVATOR COMPANY,  
Respondent/Defendant.

FILED  
SID J. WHITE

MAY 14 1987

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BRIEF OF AMICUS CURIAE  
ACADEMY OF FLORIDA TRIAL LAWYERS  
SUPPORTING POSITION OF PETITIONER

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On Behalf of Amicus Curiae,  
ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

This brief is submitted on behalf of the ACADEMY OF FLORIDA TRIAL LAWYERS, a large statewide association of trial lawyers specializing in litigation in all areas of the law, in support of the position of the Petitioner/Plaintiff in this case.

Since the ACADEMY does not have a complete copy of the Record on Appeal, we will assume the accuracy of the Statement of the Case and Facts as set forth by the Plaintiff in his initial brief on the merits.

In this brief references to the Respondent/Defendant, OTIS ELEVATOR COMPANY, will be by name or as the Defendant; references to WILLIAM F. SCOTT, will be by name or as the Plaintiff. Any emphasis in this brief is that of the writer unless otherwise indicated.

## SUMMARY OF ARGUMENT

The Academy of Florida Trial Lawyers submits that a cause of action pursuant to Fla. Stat. §440.205 is subject to a four year statute of limitations and therefore the District Court erred in holding that this action was time barred. Regardless of whether the applicable limitations period is Fla. Stat. §95.11 (3)(f) or Fla. Stat. §95.11 (3)(o), a cause of action for wrongful discharge is subject to a four year statute of limitations. It is clear from the abundance of out of state case law which has held that an action for wrongful discharge is an intentional tort that such is the prevailing law in all states which have considered and adopted such a cause of action.

The decision relied upon by the District Court, Broward Builders Exchange, Inc. v. Goehring, 231 So. 2d 513 (Fla. 1970), is not controlling for two reasons. First, obviously Goehring was adopted prior to our Legislature's enactment of §440.205 and therefore its language, which states that Fla. Stat. §95.11 (7)(b) [the predecessor to Fla. Stat. §95.11 (4)(c)]:

(W)as intended to apply to all suits for wages or overtime, however accruing, as well as to suits for damages and penalties under the laws respecting the payment of wages and overtime

is not applicable here.

Secondly, MR. SCOTT'S cause of action for wrongful termination arises from his receipt of workers' compensation benefits not his wages or salary as the plaintiff in Goehring. Third, the Goehring decision concerned an action seeking wages pursuant to an employment contract which is also not present here.

For these reasons, the Academy respectfully requests that this Court quash the decision of the District Court and hold that a cause of action under §440.205 is subject to a four year statute of limitations.

In addition, it is the position of the Academy that the Plaintiff, WILLIAM F. SCOTT, as well as all other plaintiffs who prevail in a §440.205 action are entitled to have the jury instructed and to recover damages for mental pain and suffering and humiliation arising from his or her wrongful termination. Since a claim for wrongful discharge is an intentional tort, and mental pain and suffering damages are recoverable in other intentional tort cases, the Academy respectfully submits that such damages are available herein and that this Court should so find.

ARGUMENT

POINT I

A CAUSE OF ACTION UNDER FLORIDA STATUTE §440.205 FOR WRONGFUL DISCHARGE IS SUBJECT TO A FOUR YEAR STATUTE OF LIMITATIONS.

The Fourth District held in this case that Plaintiff's cause of action was time barred by Fla. Stat. §95.11 (4)(c) which provides a two year statute of limitations for "an action to recover wages or overtime or damages or penalties concerning payment of wages and overtime" and certified this question to this Court. The Academy urges that this decision is erroneous for several reasons, all of which require reversal.

A. A Statutory Cause of Action.

First of all, at the time Goehring and its progeny were decided, §440.205 did not exist. It was enacted in 1979 as part of our Legislature's "overhaul" of the Workers' Compensation Act. As is obvious from the face of the statute its purpose is to provide a cause of action for those employees who are discharged by their employer or otherwise harrassed or threatened in retaliation for the employee's filing of a worker's compensation claim.

This Court stated in Smith v. Piezo Technology and Professional Administrators, 427 So. 2d 182 (Fla. 1983) that §440.205 creates a "statutory cause of action for wrongful discharge in retaliation for an employee's pursuit of a worker's compensation claim." Smith at 183 (emphasis supplied). This Court noted in Smith that some jurisdictions have adopted a common law cause of action for retaliatory discharge. However, this Court emphasized that Florida has not adopted such a tort but rather that the Legislature saw fit to

implement a prescribed statutory remedy for wrongful discharge. Smith at 184.

This Court stated in Smith that a claim under §440.205 is not a claim for compensation or benefits under Chapter 440. Smith at 184. Therefore an action for wrongful discharge is in fact a statutory cause of action subject to the four year statute of limitations contained within §95.11 (3)(f).

As to the District Court's finding that this case is an action or claim for lost past or future wages as in Geohring, the Academy would note that the complaint herein contained a claim not only for lost past and future wages but also damages for loss of morale, self-esteem, humiliation and loss of reputation sustained by MR. SCOTT as a result of his wrongful discharge (R. 673-675). The Plaintiff here sought "tort" damages because, we submit, OTIS committed an intentional tort.

If the District Court's decision is allowed to stand, then any claim which includes as damages lost past or future wages would be subject to a two year statute of limitations. That would include all personal injury, products liability, and medical malpractice claims, etc. Certainly such a result illustrates the logical inconsistency of such a holding.

Moreover, the Academy should point out that MR. SCOTT has no direct entitlement to lost past or future wages such as the plaintiff in Goehring who had an employment contract. Rather MR. SCOTT'S cause of action is based upon his entitlement to and procurement of workers' compensation benefits which resulted in his loss of employment. Therefore it also cannot be said that the facts of Goehring are



analogous to the facts present herein.

B. An Intentional Tort.

Nevertheless, even if this Court should find that contrary to its decision in Smith and the specific language of §440.205, that the controlling statute of limitations is not one for an action founded on a statutory liability, this action is still an intentional tort within the provisions of the four year statute of limitations contained in Fla. Stat. §95.11 (3)(o). Several states have held that a claim for wrongful discharge is either a tort or an intentional tort. See, Hansen v. Harrah's, 675 P. 2d 394 (Nev. 1984); Kelsay v. Motorola, Inc., 385 N.E. 2d 353 (Ill. 1978); Scott v. Union Tank Car Co., 402 N.E. 2d 992 (Ind. Ct. App. 1980); Boyle v. Vista Eyewear, Inc., 700 S.W. 2d 859 (Mo. Ct. App. 1985); and Shanholtz v. Monogahela Power Company, 270 S.E. 2d 178 (W. Va. 1980). The Academy urges that this Court follow the majority of jurisdictions which have held that a cause of action for wrongful discharge is a tort or intentional tort thereby making MR. SCOTT'S claim subject to a four year statute of limitations under Florida law.

For these reasons, the Academy requests that this Court quash the decision of the Fourth District and reinstate the judgment herein based upon a finding that this action is governed by a four year statute of limitations and is therefore not barred.

POINT II

DAMAGES FOR MENTAL PAIN AND SUFFERING AND HUMILIATION ARE AVAILABLE IN AN ACTION FOR WRONGFUL DISCHARGE PURSUANT TO FLA. STAT. §440.205.

Since this Court has accepted jurisdiction herein to answer the question certified by the Fourth District, the Academy respectfully submits that this Court has jurisdiction to entertain an underlying issue specifically related to the nature of a §440.205 claim. Namely, the Academy urges this Court to hold that the Plaintiff in a §440.205 action is entitled to recover damages for mental pain and suffering and humiliation arising from his or her wrongful discharge.

As previously stated, it is the position of the Academy that a claim for wrongful discharge is an intentional tort. As with all other intentional torts then damages for mental pain and suffering are available. For example, in malicious prosecution and false imprisonment cases, the jury is instructed that it may award the plaintiff damages for injury to reputation or health, and any damages arising from shame, humiliation, mental anguish and hurt feelings arising from the defendant's conduct. See, Fla. Std. Jury Inst. (Civ.) MI 5.2.

Courts in other states have held that an action for wrongful discharge is an intentional tort and have allowed mental distress damages. See, Shanholtz, supra; Harless v. First Nat'l Bank in Fairmont, 289 S.E. 2d 692 (W. Va. 1982). In the case of City of Jacksonville v. Alexander, 487 So. 2d 1144, (Fla. 1st DCA 1986) the First District affirmed the recovery of compensatory damages for mental pain and suffering arising from the plaintiff's false imprisonment and false arrest. That court specifically found the

plaintiff was entitled to damages for verbal abuse, and the condemnation of her family and friends that she suffered while awaiting trial and receiving her jail sentence all for a non-existent crime.

Moreover, in the case of Freeman v. Rubin, 318 So. 2d 540 (Fla. 3rd DCA 1975) the Third District noted that a plaintiff who filed a claim for legal malpractice could recover damages for mental pain and suffering arising from his imprisonment which allegedly occurred as a result of the negligence of his lawyer in prosecuting a civil rights action for his illegal incarceration.

Since damages for mental anguish are available for claims such as legal malpractice, false imprisonment or malicious prosecution, there is no reason why such damages should not be available to an employee who suffers a wrongful discharge as a result of retaliation by his employer for the filing of a workers' compensation claim. What more difficult and more mentally taxing situation to be placed in than to be fired from your employment and have to suffer the humiliation of that firing in front of your family and friends not to mention the loss of ability to support yourself as well as your family.

The tort of wrongful discharge, if proven, cries out for such damages in order to make the employee whole. An employer's egregious conduct should not be tolerated and the employee's suffering should not go unrecompensed. In sum, both the nature of the action and the facts which would support successful pursuit of such a claim compel a finding that the plaintiff in a wrongful discharge case, such as this, be allowed by pursue and obtain damages for mental pain and suffering.

For these reasons, the Academy respectfully urges that this Court

reach the issue of the Plaintiff's entitlement to damages for mental pain and suffering as the result of a wrongful discharge and approve the availability of such damages herein.

CONCLUSION

For the reasons set forth above and in the initial brief of the Plaintiff, the Academy of Florida Trial Lawyers respectfully requests that this Court quash the decision of the Fourth District Court of Appeal and hold that a claim for wrongful discharge is subject to a four year statute of limitations. Additionally, the Academy requests that this Court hold that damages for mental pain and suffering are available to a plaintiff in a wrongful discharge case and so state in its opinion.

Respectfully submitted,

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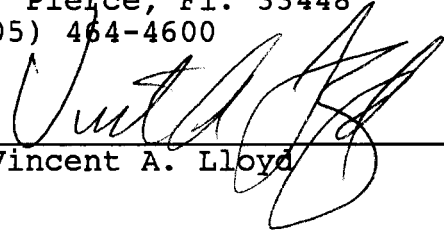
By

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 11<sup>th</sup> day of May, 1987, to: Edna L. Caruso, Esq., Suite 4-B Barristers Bldg., 1615 Forum Place, West Palm Beach, Fl. 33401; Mark Levitt, Esq., 609 W. Horatio St., Tampa, Fl. 33606; Edward J. Dempsey, Esq., United Technologies Bldg., Hartford, Conn. 06101; Earle Lee Butler, Esq., 1995 E. Oakland Park Blvd., Suite 100, Ft. Lauderdale, Fla. 33306; and Cathy Jackson Lerman, Esq., P. O. Box 24410, Ft. Lauderdale, Fl. 33307.

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