

7-20

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROY LEE HULLINGER,

Petitioner,

vs.

RYDER TRUCK RENTAL, INC.,
a Florida corporation,

Respondent.

Supreme Court Case No: 71,795
Fifth DCA Case No: ~~87-1073~~

FILED
JUN 20 1998
CLERK, SUPREME COURT
By _____
Deputy Clerk

APPEAL FROM THE FIFTH DISTRICT
COURT OF APPEALS OF FLORIDA

BRIEF OF PETITIONER/APPELLANT

Glen D. Wieland, Esquire
KELAHER & WIELAND, P.A.
20 N. Orange Ave., Ste. 1307
Post Office Box 944
Orlando, Florida 32802
(305) 841-7698
ATTORNEY FOR PETITIONER/
APPELLANT

TABLE OF CONTENTS

Table of Citations ii, 111

Statement of *Case* and Facts..... 1

Summary of the Argument..... 4

Argument

 Issues: I. A cause of action for wrongful discharge
 is subject to a four year statute of
 limitations under Florida law..... 6

 II. Jury trials are permitted in age
 discrimination actions..... 11

Conclusion..... 13

Appendix..... 14

Index..... 15

Certificate of Service..... 17

CITATIONS OF AUTHORITY

Bertrand v. Orkin Exterminating Co. 432 F.Supp 952 (D. ILL 1977)	9
Brenimer v. Great Western Sugar Co. 567 F.Supp 218 (D. Col, 1983)	9
Broward Builders Exchange, Inc. v. Goehring, 201 So. 2d 519 (Fla.1970)	2, a
Cavanaugh v. Texas Instruments, Inc. 440 F.Supp. 1124 (D. Tx 1977)	3
Coates v. National Cash Resister Co. 433 F.Supp. 655 (3.Va. 1977)	3
Crawford County Trust & Savings Bank of Dennison, Iowa v. Crawford County, Iowa. 291 U.S. 664. 54. S.Ct. 439. 78 L.Ed. 1055 (1934)	10
Flynn v. Morgan Guaranty Trust Co. of New York 453 F.Supp 676 (E.D. N.Y. 1979)	2
Gifford v. Diagnostics 458 F.Supp 462 (3.Ohio 1978)	9
Hassan v. Delta Orthopedic Medical Group, Inc. 476 F. Supp 1063 (E.D. Ga. 1979)	9
Hollywood, Inc. v. City of Hollywood 321 So 2d 65 (Fla. 1975)	11
King Mountain Condominium Association v. Gundlach 425 So 2d 569 (Fla. 4th DCA 1983)	F
Lorillard v. Pons 434 U.S. 575 (1978)	5, 11
Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc. 511 So.2d 962 (Fla.1987)	12
Murphy v. American Motor Sales Corp. 410 F.Supp 1403 (N.D. Ga 1976)	a
Scott v. Otis Elevator Company, Supreme Court of Florida Case Number 70,394. 13 FLW 289 (April 28, 1988)	4, 6, 7, 8
Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F. 2d 1057 (5th Cir, 1981)	8

Smith v. Peizo Technology and Professional Administrators,
427 So. 2d 182 (Fla. 1983)..... 7

Wyse v. Olan Mills, Inc. of Texas
485 F.Supp 542 (D. Col, 1980)..... 9

Other Authority

Florida Statute 95.11(3)(f)..... 4,6,7,-
10

Florida Statute 95.11(3)(o)..... 4,7,10

Florida Statute 440.205..... 7

Florida Statute 95.11(4)(c)..... 8,9,10

Florida Statute 760.10..... 1,2,4,5-
6,7,10,-
11

W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton
on Torts S130 (5th Ed. 1984)..... 6

STATEMENT OF THE CASE AND FACTS

This appeal arises from the Fifth District's opinion upholding the Trial Court's Order denying Hullinger's right to a jury trial and dismissing his case by finding that the statute of limitations on wrongful discharge claims based upon age discrimination and violation of F.S. 760.10 is two years rather than four years for tortious claims. (R-8).

In April of 1983, Roy Lee Hullinger was 53 years old and had been employed with Ryder for approximately 9 years as a supervisor in the mechanics shop with 1 year before retirement and his vesting in the retirement plan.(R-1) He was fired by his supervisor, Jim Hollingsworth, because he was "too old to do the job any longer."(R-1-3) Mr. Hullinger pursued his claim against Ryder for over three and one half years before the Human Relations Commission. During this time Ryder caused significant delays in the commission's investigation by failing to comply with requests for documents and statements of employees. As a result of these delays and the stress associated therewith, Mr. Hullinger lost his home and suffered a stroke for which he had no medical insurance.(R-1-3)

On January 16, 1987, Hullinger filed a Complaint against Ryder Truck Rental, Inc. claiming age discrimination and specifically alleged that the age discrimination was a tortious act in direct statutory violation of F.S. 760.10. (R-1-3). Count II of said Complaint seeks punitive damages for an intentional violation of F.S. 760.10. (R-2,3).

Hullinger seeks damages as follows:

"Lost wages, loss of future earning capacity, loss of health insurance benefits, loss of disability benefits, humiliation, embarrassment, mental distress, mental anguish, was forced to sell his home, and other directly related expenses." (R-2,3)

Hullinger seeks more than simply lost wages or incidental damages caused by lost wages. He seeks compensation for the loss of his home, the loss of his reputation among his friends and co-workers, and the medical expenses that he incurred when he suffered his stroke.

On February 12, 1987, Ryder Truck Rental, Inc. filed a Motion to Strike Hullinger's Claim for a Jury Trial and a Motion to Dismiss the Complaint alleging the statute of limitations had run after two years. (R-4,5,6). Ryder claimed in it's Motion to Strike that Hullinger was not entitled to a jury trial under F.S. 760.10. (R-6)

On May 6, 1987, the Trial Court entered an Order dismissing Hullinger's complaint based on the conclusion that the statute of limitations had run. (R-7). Subsequently, the Trial Court held another hearing and entered a Final Order of Dismissal which states that no jury trial is permitted under F.S. 760.10 and dismissed Hullinger's complaint with prejudice. (R-8)

On June 4, 1987, Hullinger filed his Notice of Appeal of the Trial Court's Orders. (R-9). On December 24, 1987, the Fifth District Court of Appeals affirmed the trial court's order and based its opinion largely upon *Broward Builders Exchange, Inc. v. Goehring*, 231 So.2d 513 (Fla. 1970). On June 6, 1988 this

Honorable Court entered its order accepting jurisdiction and dispensing with oral argument.

SUMMARY OF ARGUMENT

Ryder Truck Rental, Inc. directly violated F.S. 763.10 when Jim Hollingsworth fired him because he was "too old to do the job any longer." This action by Ryder Truck Rental, Inc. is an intentional tort and as such carries a 4 year statute of limitations. Mr. Hullinger's claim involves more than a simple claim for wages. It includes a claim for humiliation, embarrassment and mental anguish which are recoverable under the law. It also includes all of the damages associated with the loss of his home and the medical expenses from his hospitalization due to his stroke.

This is not a "suit for wages" or a claim that he was not paid for work done. This is a suit for wrongful discharge under 760.10 because Hullinger was fired for being too old to continue to work. This claim is a statutory cause of action subject to the four year statute of limitations contained within Fla. Stat. §95.11 (3)(f), and is an intentional tort which provides for a four year statute of limitations under Fla. Stat. §95.11 (3)(o). Under either statute, Mr. Hullinger's claim is not time barred as his suit was filed within 4 years.

This Court has recently held that a claim for wrongful discharge is founded upon a statutory cause of action and is therefore entitled to the four year statute of limitations. Scott v. Otis Elevator Company, Supreme Court of Florida, Case Number 70.394. 13 FLW 289 (April 28, 1988). This case and Scott are identical in that each involves a direct violation of statute and

each is entitled to a 4 year statute of limitations.

F.S. 760.10 is specifically designed to protect Mr. Hullinger from being fired because of he is "too old." This statute **was** written by our legislature to codify the public policy against the willful firing of citizens of this state based solely ~~on~~ a determination by the employer that they are too old.

Additionally, Hullinger **seeks** discretionary review *by* this Court **of** the one additional issue not addressed by the Fifth District Court of Appeal, namely whether actions founded upon age discrimination are entitled to a trial by jury. This identical issue was addressed by the United States Supreme Court in *Lorillard v. Pons*, 434 U.S. 575 (1978). The Supreme Court determined that persons bringing **age** discrimination claims are entitled to a trial by jury.

ARGUMENT

POINT I

A CAUSE OF ACTION FOR WRONGFUL DIS- CHARGE IS SUBJECT TO A FOUR YEAR STATUTE OF LIMITATIONS UNDER FLORIDA LAW

Ryder Truck Rental, Inc. committed a direct violation of F.S. 760.10 by firing Mr. Hullinger because he **was** "too old to do the job." (R-1-3). F.S. 95.11(3)(f) provides for a four year statute of limitations for violations based upon a "statutory liability." There can be no question that Hullinger's claim is based solely on Ryder's statutory liability under F.S. 760.10. Yet, Ryder has successfully convinced the lower courts of this state that Hullinger's claim should be looked at wearing a pair of legal blinders seeing only lost wages and not the humiliation, embarrassment, **loss** of health insurance and loss of his home that he has suffered. However, this is not simply an action to recover wages, it is an action for the tort of discrimination based on age, *an* unfair labor practice under F.S. 760.10.

There are no cases which specifically discuss this issue *with regard* to §760.10. However, in a very similar factual circumstance this Court has recently held that a suit for retaliatory discharge brought pursuant to a statutory remedy implemented by the legislature is tortious in nature and is subject to a four year statute of limitations. *Scott v. Otis Elevator Company*. Supreme Court of Florida, Case Number 70,394, 13 FLW 289 (April 28, 1988). The legislature has created a statutory cause of action for discrimination in employment and has also given us a very specific statute of limitations with regard to

alleged statutory violations, S95.11 (3)(f). Mr. Hullinger has properly sought to avail himself of these statutory rights specifically created to protect him and other working citizens of the State of Florida.

In interpreting a sister statute, S440.205, this Court stated that the legislature enacted a statute that imposed a duty and **was** intended to preclude retaliatory discharge with the implied power necessary to insure compliance. *Smith v. Piezo Technology and Professional Administrators*, 427 So.2d 182 (Fla. 1983). Fla. Stat. S760.10 creates a duty of which a violation results in the accrual of a cause of action under S760.10. It **was** the legislature and not the courts of this state that recognized wrongful discharge as being a tort and enacted F.S. S760.10 to protect employees. This claim is one based upon a statutory liability for which there is a four year statute of limitations under S35.1: (3)(f). This case **was** not filed because Mr. Hullinger was not given a paycheck.

Ryder did intentionally and in direct violation of F.S. 760.10 terminate him from its employment in a wanton, willful manner and violated his rights under Florida law. Wrongful discharge is an action for an intentional tort for which Mr. Hullinger has specifically sought redress in his complaint and falls squarely within the provisions of Fla. Stat. S95.11 (3)(o).

Wrongful discharge is considered to be a tort rather than a breach of contract and is grounded on intent rather than in negligence. *Scott v. Otis Elevator Company*, Supreme Court of

Florida, Case Number 70,394, 13 FLW 289 (April 28, 1988); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on Torts S130, (5th Ed. 1984).

In the very recent opinion of this Court in Scott v. Otis Elevator, this Court stated wrongful discharge was tortious and was grounded upon intent. Scott allowed recovery for emotional distress and punitive damages as well as lost wages.

It was most succinctly put in Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981) that:

"Wrongful termination of employment in violation of public policy evidences an intent on the part of the employer to discharge an employee for a reason that contravenes a clear mandate of public policy. Thus, wrongful termination of employment in violation of public policy can be accurately characterized as an intentional tort."

Mr. Hullinger's claim is an intentional tort and as such he is entitled to the four year statute of limitations.

Mr. Hullinger was at all times an at-will employee of Ryder, therefore: he does not fall in those types of causes of action which fall under Broward Builders Exchange, Inc. v. Goehring, 231 So.2d 513 (Fla. 1970), which was a cause of action arising from an alleged breach of a specific employment contract.

The Fifth District agreed with the trial court and Ryder that you must look to the damages being claimed and determine which statute of limitations applies. Ryder would ask this Court to hold that regardless of the cause of action, S95.11 (4)(c) should apply to any claim which involves a suit for wages. A ruling by this Court to that effect could be interpreted to include any tort action where part of the alleged damages involve

lost wages. This would mean that in any action which seeks to recover for lost wages, that there should be a 2 year statute of limitations. This would include personal injury claims, medical malpractice claims, *fraud* claims, slander and libel claims to name just a few of the actions which would be affected. Such interpretations would be made and could leave our well-established case law in a state of confusion.

Lost wages are not the only damage claimed. Because age discrimination claims allow a person to recover for compensatory damages such as pain and suffering, damage to reputation, humiliation, embarrassment and the like. *Brenimer v. Great Western Sugar Co.*, 567 F.Supp 218 (D. Col. 1983); *Bertrand v. Orkin Exterminating Company*, 432 F.Supp 952 (3 ILL 1977); *Coates v. National Cash Register Company*, 433 F.Supp 6355 (D. Va. 1977); *Cavanaugh v. Texas Instruments, Inc.*, 440 F.Supp 1124 (D. Tx 1977); *Gifford v. Diagnostics*, 458 F.Supp 462 (D. Ohio 1978); *Wyse v. Olan Mills, Inc. of Texas*, 485 F.Supp 542 (D. Col 1980); *Flynn v. Morgan Guaranty Trust Co. of New York*, 463 F.Supp 676 (E.D. N.Y. 1979); *Murphy v. American Motor Sales Corp.*, 413 F.Supp 1433 (N.D. Ga 1976); *Hassan v. Delta Orthopedic Medical Group, Inc.*, 476 F.Supp 1063 (E.D. Ga 1979). The damages sought by Hullinger are outside of the language of the 2 year statute of limitations, 95.11(4)(c). As such, a strict reading of S95.11(4)(c) only discusses suits for *Lost* wages and *not* those damages he is permitted to seek under a tortious cause of action for age discrimination. Mr. Hullinger must be entitled to satisfaction of the full damages that he has suffered as a result of Ryder's

direct **defiance** of Florida law, including the loss of his **home** and the medical expenses he incurred termination **of his** insurance policy.

Additionally, if there is doubt as to which of two statute of limitations to apply. that doubt should **be** resolved in favor of the application of the statute containing the longest period of limitation. Crawford County Trust & Savings Bank of Dennison, Iowa v. Crawford County, Iowa, 291 U.S. 664, 54 S.Ct. 439, 78 L.Ed. 1055 (1934). Therefore, if this Court is in doubt as to which statute to apply, F.S. 95.11(3)(f) or F.S. 95.11(3)(o) should be applied.

If this Court were to hold the **applicable** statute of limitations in age discrimination cases as being 95.11(4)(c), such a holding would substantially deprive Hullinger **and** all citizens of this state from seeking the full relief to which they are **entitled**. F.S. 95.11(4)(c) **applies** only to actions to recover lost wages and this Court should not extend its application to claims seeking nonquantifiable **damages** such as humiliation, embarrassment and mental distress, which are clearly allowable damages in a wrongful discharge suit.

Wherefore, this Court should hold that it is F.S. 95.11(3)(f) which applies to **age** discrimination claims alleging direct violation of F.S. 760.10 and seeking **damages** beyond simply lost **wages**.

POINT II

JURY TRIALS ARE PERMITTED IN AGE DISCRIMINATION ACTIONS

The declaration of rights of the Florida Constitution guarantees the right to trial by jury: "The right to trial by jury shall be secure and remain inviolate." Article I, Section 22, Florida Constitution: *King Mountain Condominium Association v. Gundlach*, 425 So. 2d 569 (Fla. 4th DCA 1983). Even the Seventh Amendment to the Federal Constitution guarantees a right to a jury trial. However, the Lower courts of this state have denied Mr. Hullinger his constitutional right to a trial by jury, and this Court should reverse those decisions.

When there is a question concerning whether a jury trial should be allowed, if possible, it should be resolved in favor of a jury trial. *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65 (Fla. 1375).

The United States Supreme Court has addressed *this* issue in *Lorillard v. Pons*, 434 U.S. 575 (1978). It was held that the right to a jury trial is afforded to claims involving age discrimination on private civil actions and for actions brought pursuant to the Seventh Amendment. Violations and claims arising from age discrimination claims are afforded the right of a jury trial due to the nature of the claims and the damages sought to be recovered.

Therefore, any claims brought pursuant to F.S. 760.10 based upon age discrimination should be afforded the right to a jury trial as §760.10 was amended in 1978 to "conform Florida

law... to the Federal Age Discrimination in Employment Acts Amendments of 1978." F.S.A. 760.10 (Historical note)

This Court has also addressed this issue and held that jury trials are proper in age discrimination claims which seek such nonquantifiable damages such as humiliation and embarrassment. Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., 511 So.2d 962 (Fla. 1987).

Wherefore, Hullinger respectfully requests this Court hold that he is entitled to his constitutional rights of a trial by jury.

CONCLUSION

Ryder Truck Rental, Inc. **has** directly violated a Florida statute and committed a tort against Mr. Hullinger for which they should be required to answer to the citizens of Florida and Mr. Hullinger. Therefore, this Court should **quash** the decision of Fifth District and remand **this** action to allow Mr. Hullinger to pursue his claim on the merits with a trial by jury.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Glen D. Wieland".

Glen D. Wieland, Esquire

a

APPENDIX

INDEX

- Bertrand v. Orkin Exterminating Co.**
432 F.Supp 952 (D. ILL 1977)
- Brenimer v. Great Western Sugar Co.**
567 F.Supp 218 (D. Col. 1983)
- Broward Builders Exchange, Inc. v. Goehring,**
501 So. 2d 513 (Fla.1970)
- Cavanaugh v. Texas Instruments, Inc.**
440 F.Supp. 1124 (D. Tx 1977)
- Coates v. National Cash Register Co.**
433 F.Supp. 655 (D. Va. 1977)
- Crawford County Trust & Savings Bank of Dennison, Iowa
v. Crawford County, Iowa.**
291. U.S. 664. 54. S.Ct. 439. 78 L.Ed. 1055 (1934)
- Flynn v. Morgan Guaranty Trust Co. of New York**
463 F.Supp 676 (E.D. N.Y. 1979)
- Gifford v. Diagnostics**
458 F.Supp 462 (D. Ohio 1978)
- Hassan v. Delta Orthopedic Medical Group, Inc.**
476 F. Supp 1063 (E.D. Ga. 1979)
- Hollywood, Inc. v. City of Hollywood**
321 So 2d 65 (Fla. 1975)
- King Mountain Condominium Association v. Gundlach**
425 So 2d 569 (Fla. 4th DCA 1383)
- Lorillard v. Pons**
404 U.S. 575 (1378)
- Metropolitan Dade County Fair Housing and Employment
Appeals Board v. Sunrise Village Mobile Home Park, Inc.**
511 So.2d 962 (Fla. 1987)
- Murphy v. American Motor Sales Corp.**
410 F.Supp 1403 (N.D. Ga 1976)
- Scott v. Otis Elevator Company, Supreme Court of Florida
Case Number 70.394. 13 FLW 289 (April 28, 1988)**
- Smith v. Atlas Off-Shore Boat Serv., Inc.,**
653 F. 2d 1057 (5th Cir. 1981)

Smith v. feizo Technology and Professional Administrators,
427 So. 2d 182 (Fla. 1983)

Wyse v. Olan Mills, Inc. of Texas
485 F.Supp 542 (D. Col. 1980)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the Initial Brief of the Appellant has been furnished to Anne C. Conway, Esquire, Post Office Box 1171, Orlando, Florida 52802, by U.S. Mail Delivery, this 20th day of June, 1988.


Glen D. Wieland, Esquire