IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROY LEE HULLINGER,

Petitioner,

vs.

RYDER TRUCK RENTAL, INC., a Florida corporation,

Respondent.
_____/

District Court Appeal No. 87-1073

Supreme Court Case No. 71,795

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the plaintiff-appellant below and he will be referred to in this brief as "petitioner." Respondent, Ryder Truck Rental, Inc., was the defendant-appellee below and it will be referred to as "Ryder" or as "respondent." All emphasis is supplied unless otherwise noted.

Citations to the record on appeal will be noted as (R-) and to the appendix to this brief as (A-).

STATEMENT OF THE FACTS AND CASE

Petitioner's employment with Ryder terminated on April 30, 1983. He filed suit for age discrimination on January 16, 1987, alleging a cause of action based solely upon Florida Statute §760.10, the Florida Human Rights Act. (R-1-3, A-4-6). Petitioner sought, inter alia recovery for lost wages, loss of future earning capacity, humiliation, embarrassment, mental distress and mental anguish as a result of the wrongful termination. Ryder moved to dismiss the complaint on a number of grounds, including the fact that the claim was barred on its face because it was not brought within the time allowed by the applicable statute of limitations. (R-4-5). The trial court held that the two year statute of limitations pertaining to an action to recover wages, Florida Statute §95.11(4)(c), applied, and it accordingly dismissed the complaint. (R-7). The Fifth District Court of Appeal affirmed, citing Broward Builders Exchange, Inc., v. Goehring, 231 So.2d 513 (Fla. 1970) where the Florida Supreme Court held that Florida's two-year statute of limitations for suit for wages was intended to apply to all suits for wages, however accruing. (A-1-2). Thereafter, by order dated January 29, 1988, the Fifth District denied petitioner's motion to certify its opinion to the Supreme Court "as passing upon an area of great public importance." (A-3).

SUMMARY OF ARGUMENT

Petitioner urges this Court to exercise its discretionary jurisdiction in order to determine a question of "great public importance." However, the Fifth District specifically declined to certify this case to the Supreme Court on that basis, and petitioner cannot therefore demonstrate a basis for discretionary review under Rule 9.125, Fla. R. App. Proc. (A-3).

Petitioner has likewise failed to establish the requisite basis for this Court's discretionary "conflict" jurisdiction pursuant to Florida Constitution, Article V, Section 3(b)(3) (1980). There is no showing that the District Court's decision is in "direct" and "express" conflict with another Florida court's decision arising out of "practically the same facts." Certainly there is no announcement of "antagonistic principles of law" in the decision. Quite to the contrary, the District Court specifically cited and followed precedent of this Court. Hence, the petition is, on its face, legally insufficient to invoke this Court's jurisdiction.

ARGUMENT

Petitioner has failed to establish any legally sufficient basis for the exercise of this Court's discretionary jurisdiction. Despite the refusal of the Fifth

District Court of Appeal to certify this case to the Florida Supreme Court as involving a "question of great public importance," petitioner urges that this Court exercise jurisdiction on that very ground. The inescapable fact is, however, this Court's rules do not allow it to do so without the appropriate certification by the district court. Rule 9.125, Fla. R. App. Proc.

The only issue raised by this petition for review, then, is whether there is an "express" or "direct" conflict between the decision of the district court of appeal under review and a decision of another district court of appeal or of this Court. See, e.g., Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The conflict must be "patently irreconcilable." Florida Power & Light Co. v. Bell, 113 So.2d 697, 699 (Fla. 1959). As this Court said in Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98, 100-101 (Fla. 1961):

> antagonistic principles of law must have been announced in a case or cases by the lower court based on practically the same facts. The conflict must be obvious and patently reflected in the decisions relied on. The conflict must result from an application of law to facts which are in essence on all fours. . . .

This stringent jurisdictional standard is not satisfied here. Far from creating an "express conflict"

in decisions, the District Court's decision below is completely consistent with and follows this Court's decision in Broward Builder's Exchange, Inc. v. Goehring, 231 So.2d 513 (Fla. 1970) that all suits concerning the payment of wages -- such as petitioner's suit here -- are governed by Fla. Stat. 95.11(7)(b), now Fla. Stat. 95.11(4)(c).

Section 95.11(4)(c) provides that "[a]n action to recover wages or overtime or damages or penalties concerning payment of wages and overtime," shall be commenced within two years of the occurrence giving rise to the action. In interpreting this section's predecessor, Section 95.11(7)(b), the Florida Supreme Court squarely held that the limitation period contained in the section is to be afforded broad application:

> Thus we hold that Section 95.11(7)(b) [now 95.11(4)(c)] was intended to apply to all suits for wages or overtime, however accruing, as well as to suits for damages and penalties accruing under the laws respecting the payment of wages and overtime.

Broward Builder's Exchange, Inc. v. Goehring, 231 So.2d 513, 515 (Fla. 1970).

The present action is clearly a suit seeking the recovery of wages, and petitioner's prayer for relief speci-

fically requests lost wages under the Human Rights Act of 1977. In fact, other than attorney's fees and an order prohibiting the unfair employment practice, this is the only remedy provided by the Act sued upon by petitioner. That act does not contain an internal statute of limitations governing actions brought under it for loss of wages.[1] Therefore, given this Court's holding in Broward Builders that Section 95.11(7)(b) (now Section 95.11(4)(c)) applies to "all suits for wages," the District Court correctly followed that decision in holding petitioner's claims are governed by this section.[2]

Significantly, petitioner is unable to point to any Florida decision applying a different statute of limitations to claims under the Human Rights Act of 1977.

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[1] However, this statute does provide in 760.10(13) that liability for back pay shall accrue from a date more than two years prior to filing of a complaint with the commission. This shows that the legislature was cognizant of the limitations provision applicable to back wages.

[2] Likewise, after reviewing the decision in Broward Builders, the Eleventh Circuit Court of Appeal reached the same conclusion, holding that the appropriate Florida statute of limitations to be applied in employment discrimination actions was the two year statute of limitations in Section 95.11(4)(c), regardless of "the theory or legal basis for the cause of action. . . ." McGee v. Ogburn, 707 F.2d 1312, 1314 (11th Cir. 1983), reh. denied, 720 F.2d 688 (11th Cir. 1983) (applying F.S. 95.11(4)(c) to a federal employment case).

Indeed, the only Florida decision which petitioner cites for "conflict" here[3] is Van Dusen v. Southeast First National Bank of Miami, 478 So.2d 82 (Fla. 3d DCA 1985) which did not even involve the Human Rights Act or a claim for employment termination; rather, it involved a claim for breach of fiduciary duty in connection with various copyright matters. Thus, the decision there does not arise out of "practically the same facts," and there is certainly no announcement in the decision below of any principles of law which are "antagonistic" to those set forth in Van Dusen.

One final point must be made. Petitioner suggests that conflict might be created in the future if this Court were to reverse the Fourth District's decision in Scott v. Otis Elevator Co., 503 So.2d 941 (Fla. 4th DCA 1987), cert. granted, September 24, 1987. In point of fact,

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[3] Although petitioner also seeks to establish a conflict with various federal court decisions, that is patently insufficient to satisfy the jurisdictional test. It is only a conflict in Florida decisions that supplies jurisdiction for this Court's review. In any event, there is no conflict presented even by these federal decisions. For instance, Newberger v. United States Marshall's Service, 751 F.2d 1162 (11th Cir. 1985) involved a claim for conspiracy in violation of a federal statute, not an age discrimination claim under the Florida Human Rights Act.

however, Scott is not a case involving "practically the same facts" as this and, in particular, it did not involve a claim for age discrimination under the Florida Human Rights Act. To the contrary, the only question there involved the applicable statute of limitations for a claim under an entirely different statute.

Furthermore, even if the issue in Scott were identical to that determined by the District Court below, that would still not present a legally sufficient basis to demonstrate a present conflict of decisions as required to create jurisdiction under Article V, Section 3(b)(3). The Fourth District's decision in Scott was not even mentioned, much less relied on, in the decision below. Thus, there is no express and direct conflict "within the four corners" of that decision. Because no "express" conflict exists, the petition fails to satisfy the constitutional mandate for discretionary review. Department of Health and Rehabilitative Services v. National Adoption Counselling Service, Inc., **498** So.2d **888, 889** (Fla. **1986)** (conflict within "must appear within the four corners" of the decision); School Board of Pinellas County v. District Court of Appeal, **467** So.2d **985, 986** (Fla. **1980)** (term "expressly" means within the District Court opinion).

CONCLUSION

Petitioner has failed to demonstrate the necessary conflict of decisions to establish the constitutional basis for this Court's exercise of jurisdiction. The petition should therefore be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 11 day of February, 1988, to Glen D. Wieland, Kelaher & Wieland, PA, Suite 1307, 20 N. Orange Avenue, Orlando, Florida 32802.

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