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IN THE SUPREME COURT OF FLORIDA

KAREN TRVEN,

Plaintiff/Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Defendant/Respondent.
/

Supreme Court Case No. 94,926

Second DCA Case No. 97-05373

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Second District, State of Florida

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STATEMENT OF THE CASE AND FACTS

The petitioner, Karen Irven ("Irven"), was employed as a Child's Protective Investigator ("CPI") with the Florida Department of Health and Rehabilitative Services ("HRS")[1]. Al at 2. Beginning in February 1994, Mrs. Irven sent a series of written communications to HRS regarding its mishandling of a case of alleged child abuse (the "SS" case) and voicing her concern about the effect that this mishandling had upon the child abuse victim. Al at 4, 5-6, 7. It is undisputed that HRS fired Mrs. Irven in reprisal for her communications to HRS in connection with the SS case. Al at 4.

Briefly stated, the SS case involved a petition for dependency that had been filed in Nassau County and subsequently transferred to Polk County. Al at 3. SS had been placed in the temporary custody of her maternal grandmother, based on an investigation of a Child Protection Team ("CPT") in Nassau County. Al at 3. The CPT's report disclosed that SS told her grandmother of digital penetration by her mother's boyfriend, that SS's mother was a drug addict, and that SS's sibling had been sexually abused by one of her mother's boyfriends. Al at 8-9. A medical examination of SS found genital trauma which was consistent with the history provided by SS. Al at 9.

[1] The facts are taken from the Second District's opinion, Department of Health and Rehabilitative Services v. Irven, 1999 WL 22435 (Fla. 2d DCA Jan. 22, 1999). Citations herein are to the conformed copy of the opinion found at appendix tab 1.

A dependency petition was filed in the Circuit Court in Nassau County, where the child resided in her grandmother's custody. Al at 3. However, on a motion by SS's mother for a change of venue, to which HRS did not object, the dependency case was transferred from Nassau County to Polk County, even though SS remained in the custody of her grandmother in Nassau County. Al at 8. HRS reassigned the case from the CPI who filed the dependency petition in Nassau County to Mrs. Irven, a Polk County CPI. Al at 9.

Mrs. Irven expressed her concern, in writing, that HRS had failed to comply with Florida Rule of Juvenile Procedure 8.530, when it consented to the transfer of the SS case from Nassau County to Polk County. Al at 6-7. Mrs. Irven further reported that HRS in Nassau County had expressed concern for SS's safety, and she told her supervisor "I cannot adequately investigate this case with all of the witnesses located out of county. I cannot assess the safety, risk or well-being of the child, located in Nassau County." Al at 8. As noted, Mrs. Irven worked in Polk County, not Nassau County. A 1 at 3.

After she was fired by HRS, Mrs. Irven filed an action under the Whistle-Blower's Act, sections 112.3 187-112.3 1895, Florida Statutes (1997) (the "Act"), asserting HRS illegally fired her in retaliation for reporting concerns over suspected HRS violations that directly impacted the health and safety of a minor

child. Al at 2, 8. The jury found HRS violated the Whistle-Blower's Act, Al at 4, and awarded Mrs. Irven reinstatement, back pay, and related damages.

On appeal, the Second District accepted the jury's finding that HRS fired Mrs. Irven in reprisal for her communications about the SS case. Al at 4. However, the district court reversed the final judgment for Mrs. Irven, concluding that, because the Whistle-Blower's Act waives sovereign immunity, "the waiver must be stictlv construed and applied.[2] A protection against acts not clearly delineated as prohibited or protected must not be implied." Al at 2-3.

Consistent with its strict construction of the Whistle-Blower's Act, the Second District proceeded to itself examine the first two communications that led to HRS's firing of Mrs. Irven.[3] Al at 5. The court concluded that Mrs. Irven incorrectly interpreted the Florida rules with respect to venue, and thus her communications "[did] not fall within the specifics of the disclosure of information sought to be protected by the 'Whistle-Blower's Act."' Al at 13. The court acknowledged that, ultimately, SS was adjudicated dependent, put under protective services supervision, and the case was remanded back to Nassau County,

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[2] All emphasis herein has been supplied unless otherwise noted.

[3] Although the Second District acknowledged that Mrs. Irven identified four communications in which she "blew the whistle," the court concluded that her subsequent whistle-blowing activity "grew out of and was premised upon" her first and second communications. Al at 5. On that basis, the district court declined to address Mrs. Irven's other two whistle-blowing communications. See id.

just as Mrs. Irven had originally urged. Al at 11. Nevertheless, the district court concluded that, because Mrs. Irven's written communications were not protected, "it does not matter that she was discharged in reprisal for them." Al at 4.

The Second District accordingly reversed the final judgment entered below, and instructed that a directed verdict be entered for HRS. Al at 14.

SUMMARY OF ARGUMENT

This Court has jurisdiction to consider this appeal because the lower court's decision expressly and directly conflicts with a decision of this Court. The court below concluded that, because the Whistle-Blower's Act waives sovereign immunity, "the waiver must be strictly construed and annlied." However, this Court has squarely held that the Whistle-Blower's Act "should be construed liberally in favor of granting access to the remedy." Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992). The decision of the Second District in this case cannot exist side-by-side with the Martin County decision of this Court.

This Court should accept jurisdiction in this case because the Second District's decision eviscerates the Whistle-Blower's Act. It will inevitably cause public sector employees to hesitate to report suspected violations of law or other wrongful acts by public officials, for fear that, unless it turns out their reported concerns are accepted by the appellate court, they will lose their jobs because of those reports--exactly as happened to Karen Irven in this case.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW BECAUSE IT EXPRESSLY AND DIRECTLY CONFLICTS WITH A PRIOR DECISION OF THIS COURT.

This Court has jurisdiction to consider this appeal because the decision below expressly and directly conflicts with a prior decision of this Court as to how Florida's public sector Whistle-Blower's Act should be construed.[4] The Act requires that government entities "shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this section." § 112.3 187(4)(a), Fla. Stat. (1997). Furthermore, it protects government employees who disclose "[a]ny violation or suspected violation of any federal, state, or local law, or regulation committed by an employee or agent of an agency , . , which creates a substantial and specific danger to the public's health, safety, or welfare." § 112.3 187(5)(a), Fla. Stat. (1997).

The Second District held that, because the Whistle-Blower's Act waives sovereign immunity, "the waiver must be strictly construed and applied." Al at 3. However, this Court has held exactly to the contrary, declaring that the Whistle-Blower's Act "should be construed liberally in favor of granting access to the remedy." Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).

[4] The Whistle-Blower's Act, sections 112.3 187-112.3 1895, applies to public sector employers and to independent contractors engaged in business with public sector employers. A separate set of statutes, sections 448.10 1-448.105, Florida Statutes (1997), define Florida's private sector whistle-blower's act.

In Martin County, an assistant road superintendent was instructed by his supervisor to use a county truck to deliver sod to the supervisor's private residence. See 609 So. 2d at 28. When subsequently contacted by a county commissioner about the incident, the county employee admitted his involvement and implicated his supervisor. See id. After being given a lesser job at lower pay, the employee sought relief under Florida's public sector Whistle-Blower's Act. See id.

Liberally construing the Whistle-Blower's Act in favor of granting access to the remedy, this Court concluded that even a government employee who actually participated in corrupt acts should not be precluded from seeking relief under the statute. See Martin County, 609 So. 2d at 29 ("the statute should be construed liberally . . . . We so construe it here.") (internal citation omitted). See also Hutchison v. Prudential Ins. Co. of Am., Inc., 645 So, 2d 1047, 1050 (Fla. 3d DCA 1994) (the Whistle-Blower's Act "must be liberally interpreted in order to accomplish its intended purpose.")

The Second District's decision in the underlying case simply cannot exist side-by-side with the Martin County decision. It is impossible to severely limit the scope of the Whistle-Blower's Act based on a strict construction of the waiver of sovereign immunity, as the Second District held below, while at the same time liberally construing that same statute "in favor of granting access to the remedy," as this Court held in Martin County. See 609 So. 2d at 29.

Although the Second District acknowledged that the public sector Whistle-Blower's Act clearly and unequivocally waives sovereign immunity, it engrafted judicial limits on that legislative waiver by requiring strict construction of the Act. But that mixes apples with oranges: a public sector whistle-blower's statute waives sovereign immunity by definition. Indeed, implicit in this Court's Martin County decision is the fact that the statute waives sovereign immunity. The case could not have been decided in favor of the public sector employee if Martin County had been immune from a lawsuit. Once a waiver has been granted by the legislature, the sovereign immunity issue has been resolved and it was not for the Second District to limit that waiver through its strict construction of the Act.

Nevertheless, in the face of the legislature's clear and unambiguous waiver of sovereign immunity in the Whistle-Blower's Act, the Second District held the waiver had to be strictly construed. In so holding, it misapplied this Court's decision in Spangler v. Florida State Turnpike Authority, 106 So. 2d 42 1 (Fla. 1958), because the Second District was not applying "strict construction" to determine whether this act waived sovereign immunity.

In Spangler, a plaintiff sought to recover damages for the alleged negligence of the Turnpike Authority, alleging that the legislature waived immunity when it provided the Authority with the power "to sue or be sued in its own name." Id. at 423. This Court concluded that the legislature had not waived sovereign immunity

for the Turnpike Authority because "[w]aiver will not be reached as a product of inference or implication." Id. at 424. It is in that context--determining in the first instance whether sovereign immunity has been waived--that this Court declared that waiver of immunity statutes "are to be strictly construed." See id. Unlike the statute reviewed in Spangler, the public sector Whistle-Blower's Act necessarily waived sovereign immunity of state agencies because it expressly authorized claims under that Act by government employees against state agencies.

If Spangler were controlling in the context of this public sector Whistle-Blower's Act, this Court could not have held in Martin County, as it did, that the Act is to be "liberally construed" in favor of granting government employees access to this remedy. Mrs. Irven's case involves the exact same statute construed by this Court in Martin County, and the Second District's "strict construction" of that statute cannot be reconciled with this Court's decision in Martin County.

II. THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE DECISION BELOW WILL EVISCERATE THE WHISTLE-BLOWER'S ACT AND DISCOURAGE PUBLIC SECTOR EMPLOYEES FROM REPORTING SUSPECTED VIOLATIONS BY PUBLIC OFFICIALS FOR FEAR OF LOSING THEIR JOBS.

This Court should exercise its discretion and accept jurisdiction in this case because the Second District's decision eviscerates the Whistle-Blower's Act. It will inevitably cause public sector employees to hesitate to report actual or suspected violations of law, or other wrongful acts by public officials, for fear that

they might lose their jobs because of those reports-exactly as happened to Karen Irven in this case.

The Florida legislature enacted the public sector Whistle-Blower's Act "to encourage the elimination of public corruption by protecting public employees who 'blow the whistle."' Martin County, 609 So. 2d at 29. Whistle-blowers, like Mrs. Irven, are everyday government employees who encounter a wrong or a harm against the public, and simply tell the truth about a suspected illegal or wrongful act by their employer. By blowing the whistle in this case, Mrs. Irven risked her job and the welfare of her family solely for the benefit of an abused child.

For many years, employees like Mrs. Irven were without protection if they blew the whistle on their employers' illegal acts. See DeMarco v. Publix Super Markets, Inc., 384 So. 2d 1253 (Fla. 1980) (under Florida's at-will employment doctrine, an employee could be fired for any reason, or no reason at all). In order to protect government workers in Florida from retaliatory acts in situations which impact the health and safety of the citizens of this state, the legislature enacted the Whistle-Blower's Act in 1986. The decision below negates that protection.

Under the plain language of the statute, a protected disclosure includes suspected violations of the law which present a substantial and specific danger to the public. See § 112.3 187(5)(a). It does not require actual knowledge that the law is being violated. Yet under the decision below, which concludes that reports of

suspected violations are not protected when the concerns turn out to be legally unfounded, government employees are effectively required to consult an lawyer before disclosing a suspected violation of law, or risk being fired.

Simply put, the district court "strictly construed" the Act to preclude a remedy where there is an after-the-fact determination that the reporting employee was wrong and no actual violation occurred. If that standard remains the benchmark, then government employees will have no whistle-blower protection, and will be discouraged from disclosing actual or suspected violations of law by government employers, That, of course, is contrary to Martin County, where this Court "liberally construed" the Act to provide a remedy to the reporting employee.

CONCLUSION

This Court should accept discretionary jurisdiction in this case, and review the decision below.

Respectfully submitted,

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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 to David H. McClain, McClain & Associates, P.A., 1000 North Ashley Drive, Suite 105, Tampa, FL 33602 on this 1 st day of March, 1999.

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