SC23-1072

In the Supreme Court of Florida

CHRISTINE ASKEW,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KEVIN ASKEW,
Petitioner,

v.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,
Respondent.

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D21-2499

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

1. Whether the First District correctly held that there was insufficient evidence to find that the Department of Children and Families (DCF) constructively discharged Kevin Askew.

2. Whether there was insufficient evidence to find that Askew's supervisor acted with discriminatory motive.

STATEMENT OF THE CASE AND FACTS

1. It is undisputed that, in August of 2015, Askew used his position as a DCF interstate adoption coordinator to access closed case files on the Florida Safe Families Network (FSFN) and gather confidential information for his wife about Floridian children. Pet. App. 5. Because the information he sought was unconnected to any interstate adoption proceeding, his search exceeded the scope of his duties, in violation of DCF's database-access policy. *See id.*

Askew later told his supervisor, Pat Badland, what he had done. *Id.* That admission triggered an investigation by DCF's Office of the Inspector General (OIG) and the Florida Department of Law Enforcement. *Id.* During that investigation, Askew admitted that his use of the database "was personal" and that he "should never have looked up the [information] in the first place." *Id.* at 5–6.

According to Askew, Badland told him that—because of the OIG investigation—he was being given the choice to resign or be terminated by the end of the day. *Id.* at 6. Askew chose to resign. *Id.* Askew later learned that no decision had been made about whether he

would be fired when Badland supposedly gave him this choice. *Id.* Badland disputed ever telling Askew he would be fired. *Id.*

2. Askew sued DCF in circuit court, raising one count of disability discrimination and one count of gender discrimination under the Florida Civil Rights Act (FCRA). At the close of Askew's case, DCF moved for a directed verdict, which the circuit court took under advisement without ruling. *Id.* The jury found that DCF had constructively discharged Askew because of his disability—a cancer diagnosis. *Id.* When DCF renewed its motion for a directed verdict, the circuit court denied the motion without explanation. *Id.*

The First District reversed. *Id.* at 4–5. Because Askew presented insufficient evidence "of constructive discharge" at trial, it held, the circuit court erred in denying DCF's motion for directed verdict. *Id.*

ARGUMENT

This Court lacks jurisdiction because Askew has not shown that the First District's decision expressly and directly conflicts with any decision of this Court or another district court. Askew makes no effort to satisfy the conflict-jurisdiction test outlined in *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021). Instead, he asserts that the First

District "misapplied" the law, but that is not a viable basis for conflict jurisdiction. And even if this Court had jurisdiction, there are prudential reasons to decline review: The decision below was correct, can be affirmed on alternative grounds, and presents no issue of sufficient importance to warrant this Court's attention.

I. The Court should deny review because it lacks jurisdiction over the First District's decision.

This Court "[m]ay review any decision of a district court of appeal" that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. Express-and-direct conflicts arise in two scenarios: when the district court (1) "announce[s]" a "rule of law" that conflicts with a rule announced by this Court or another district court, or (2) applies a "rule of law" announced by this Court or another district court "in a manner that results in a conflicting outcome despite substantially the same controlling facts." *Kartsonis*, 319 So. 3d at 623 (simplified). "Because the facts in the second situation 'are of the [utmost] importance,' there can be no conflict on this basis when the cases are easily distinguishable." *Id.* (citation omitted).

Askew fails to show that this case presents either of those scenarios.

a. The First District did not announce a new rule of law.

Askew does not even try to establish that the First District announced a new rule of law.[1] Nor could he. In analyzing Askew's claims under the FCRA, the First District faithfully applied Florida and Eleventh Circuit precedent.[2]

To sustain a verdict for disability discrimination under the FCRA, the plaintiff must show that he "suffered an adverse employment action because of his disability." *Doe v. Dekalb Cnty. Sch. Dist.*,

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[1] Askew's statement of the issues contains a conclusory assertion that the First District "fail[ed] to liberally construe" the FCRA. Pet'r's Br. 1. But he makes no effort to show that the First District construed the statute. And indeed the First District did *not* "construe" the FCRA; it applied settled law to the facts of Askew's case. *See Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973) ("Applying [a provision] is not synonymous with [c]onstruing [it]."); *see also* Black's Law Dictionary (11th ed. 2019) (defining "construe" as "[t]o analyze and explain the meaning of"); Pet. App. 7–11 (applying established FCRA precedent).

[2] Because the FCRA "is patterned after Title VII," *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030 n.3 (Fla. 1st DCA 2002), federal decisions "construing Title VII are applicable when considering claims under the [FCRA]," *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *see also State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995).

145 F.3d 1441, 1445 (11th Cir. 1998). When, as here, the plaintiff resigned his position, he cannot establish an adverse employment action unless he proves that he was constructively discharged. *See Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1267–68 (11th Cir. 2021). That is because "employee resignations are presumed to be voluntary." *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995); *see also McLaughlin v. Dep't of Nat. Res.*, 526 So. 2d 934, 936 (Fla. 1st DCA 1988). To overcome this presumption, Askew had to prove either that DCF "force[d] [his] resignation by coercion or duress," or "obtain[ed] [his] resignation by deceiving or misrepresenting a material fact." *Hargray*, 57 F.3d at 1568.

When determining whether an employee's resignation was coerced, courts consider several factors, including whether the employee (1) "was given some alternative to resignation," (2) "understood the nature of the choice he was given," (3) "was given a reasonable time in which to choose," (4) "was permitted to select the effective date of his resignation," and (5) "had the advice of counsel." *Id.*

Under the misrepresentation theory, "a resignation [is] involuntary if induced by an employee's reasonable reliance upon an employer's misrepresentation of a material fact." *Id.* at 1570. A misrepresentation is material if "it concerns an alternative to resignation." *Id.* To succeed under this theory, the employee must show that (1) the employer knew, or reasonably should have known, that the threatened alternative to resignation (*e.g.*, termination or criminal prosecution) "could not be substantiated," and (2) the employee reasonably relied on the employer's misrepresentation in deciding to resign. *Id.* at 1570–71.

Those are the voluntariness standards that the First District relied on below. Pet. App. 7–8, 10 (citing these standards, oftentimes verbatim). It derived those standards from both *Hargray* and *McLaughlin*, *see id.*, and applied the standards to determine that Askew had *not* been constructively discharged, *id.* at 11. Nothing in the First District's decision announced a new rule of law.

Because the First District simply applied settled law—as opposed to announcing a *new* rule of law—Askew fails to establish conflict jurisdiction under the first prong of *Kartsonis*.

b. The First District's decision does not conflict with any case involving the same controlling facts.

Askew fares no better under *Kartsonis*'s second prong: None of the cases he cites reached "a conflicting outcome despite substantially the same controlling facts." 319 So. 3d at 623 (quotation omitted). Here, a conflicting outcome would be a finding of constructive discharge—a finding conspicuously absent from any of the cases Askew cites.

At the gate, most of the cases in Askew's jurisdictional brief do not even involve constructive discharge. Pet'r's Br. 8–9 (citing *Herald v. Hardin*, 116 So. 863, 864 (Fla. 1928) (defining "duress" in the context of a foreclosure suit); *Joshua v. City of Gainesville*, 768 So. 2d 432, 433 (Fla. 2000) (analyzing a certified question about the statute of limitations for filing civil actions under the FCRA); *Lewis v. City of Union City*, 918 F.3d 1213, 1218 (11th Cir. 2019) (delineating "the proper test for evaluating comparator evidence in intentional-discrimination cases"); *Russell v. KSL Hotel Corp.*, 887 So. 2d 372 (Fla. 3d DCA 2004) (analyzing sexual harassment and retaliation claims)). "A decision cannot expressly and directly conflict with another decision on a particular issue unless both decisions contain a holding on

that issue." *DelMonico v. Traynor*, 116 So. 3d 1205, 1221 (Fla. 2013) (Canady, J., dissenting).

Only two cases involve constructive discharge. Pet'r's Br. 9–11 (citing *Hargray*, 57 F.3d at 1568, 1570–71; *City of Miami v. Kory*, 394 So. 2d 494, 497–8 (Fla. 3d DCA 1981)). Yet both reached the same conclusion as the First District: The employee resigned voluntarily. *See Hargray*, 57 F.3d at 1572–73 ("He has failed, however, to overcome the presumption of voluntary resignation, either by the duress or coercion theory or by the misrepresentation theory.");[3] *Kory*, 394 So. 2d at 497–98 ("no finding of involuntariness, and thus no conclusion of duress may be sustained" where the idea of "resigning was initiated entirely by [the plaintiff]").[4] Neither case reached "a conflicting outcome despite substantially the same controlling facts." *Kartsonis*, 319 So. 3d at 623 (quotation omitted).

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[3] In any event, a conflict between *Hargray* and the First District's holding below could not support this Court's jurisdiction. *See Wyche v. State*, 573 So. 2d 953, 955 (Fla. 2d DCA 1991) ("[A] federal decision provides no basis for conflict jurisdiction in the Supreme Court of Florida."), *quashed on other grounds*, 619 So. 2d 231 (Fla. 1993).

[4] Even if the First District's outcome did conflict with *Kory*, Askew concedes that "the facts at issue are significantly different." Pet'r's Br. 9.

In sum, the First District properly applied established law to hold that Askew's resignation was voluntary. None of the asserted conflict cases come close to a different holding on substantially the same controlling facts. So this case presents no "real, live and vital conflict." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 735 (Fla. 1960).

c. Askew's theory of conflict jurisdiction does not survive *Kartsonis*.

Rather than grapple with this Court's conflict standard, Askew claims that conflict jurisdiction exists "when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review." Pet'r's Br. 7 (quoting *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 521 (Fla. 1980); and then citing *Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 140 So. 3d 529, 534 (Fla. 2014)). As *Kartsonis* makes clear, that standard has long been discarded.

Kartsonis teaches that fact-specific conflicts occur only when a district court's decision conflicts with the outcome of a case involving the "same controlling facts." *Kartsonis*, 319 So. 3d at 623. Askew's proffered standard says the exact opposite: On that view, conflicts

occur whenever a district court applies a materially distinct precedent to a new situation. If that were the rule, this Court would have jurisdiction whenever a district court extended any precedent to a new circumstance. *See Advanced Chiropractic*, 140 So. 3d at 537 (Polston, C.J., dissenting, joined by Canady, J.) (rejecting the continued application of the "materially at variance" standard). That is not the law. *See Kartsonis*, 319 So. 3d at 623 ("[W]here the district court decisions alleged to be in conflict are materially distinguishable," this Court "lack[s] jurisdiction.").

* * *

Because the First District's holding does not conflict with a decision of this Court or of another DCA, this Court lacks jurisdiction.

II. Even if the Court has jurisdiction over the First District's decision, it should deny review.

Jurisdiction aside, there are prudential reasons to deny review.

First, as discussed above, *supra* 7, the First District correctly held that Askew failed to show that he was constructively discharged. Without this showing, the jury's verdict could not be sustained.

Applying *Hargray*'s five factors leads to an inescapable conclusion: Askew was *not* constructively discharged under the coercion

theory. His resignation was voluntary—even though he faced a choice between two "unpleasant" alternatives—"because legitimate grounds for his termination existed." Pet. App. 9. There was no evidence that "Askew failed to understand the nature of the choice he was given between resigning and termination." *Id.* He had a reasonable time to make his decision: "about one week[.]" *Id.* at 10. He was permitted to select the effective date of his resignation. *Id.* And finally, there was no evidence Askew was denied access to counsel. *Id.* The evidence thus did not support a finding of coercion or duress.

Askew was also not constructively discharged under the misrepresentation theory. Because he admitted improperly accessing the FSFN to Badland, it was impossible for him to show that she knew or should have known "that his threatened termination could not be substantiated." *Id.* Without this showing, there can be no misrepresentation.

Second, this case is a poor vehicle to review the constructive-discharge issue because the First District's decision can be affirmed on alternative grounds: Askew presented insufficient evidence of a discriminatory motive at trial. Askew attempted to prove that

Badland discriminated against him through indirect evidence. To succeed, Askew had to demonstrate (1) that he was "treated differently from another similarly situated individual—in court-speak, a comparator," *Lewis*, 918 F.3d at 1217 (quotation omitted), or (2) "a convincing mosaic of circumstantial evidence that warrants an inference of intentional discrimination," *id.* at 1220 n.6 (quotation omitted). Askew did neither.

Askew pointed to several individuals he considered to be comparators. But "comparators must be 'similarly situated in all material respects.'" *Mac Papers, Inc. v. Boyd*, 304 So. 3d 406, 409 (Fla. 1st DCA 2020) (quoting *Lewis*, 918 F.3d at 1218). And the comparators Askew identified were not just "reasonably distinguished"—none of them even had Badland as a supervisor. *Id.*

Nor does the evidence Askew presented come close to assembling a "convincing mosaic" of discrimination. Vague assertions that

Badland's demeanor changed and that she mentioned his cancer diagnosis in her OIG interview are not enough to substantiate Askew's discrimination claim.

Third, the issue presented here is of such limited importance that Askew has not even tried to explain why this Court should grant review. *See generally* Pet'r's Br. The First District applied well-settled law to the specific facts of one employment-discrimination case. That fact-bound decision will not have an outsized impact on Florida law.

CONCLUSION

The Court lacks conflict jurisdiction and should deny review.

Date: October 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served by the Florida Courts E-Filing Portal, or by email, on October 9, 2023, to all counsel of record.

/s/ David M. Costello
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman Old Style font and contains 2,463 words.

/s/ David M. Costello
Deputy Solicitor General