

SUPREME COURT OF FLORIDA

**CASE NO. SC23-1072
FIRST DCA NO. 1D21-2499
L.T. NO. 2017-CA-000966**

**CHRISTINE ASKEW, as Personal Representative of
the Estate of Kevin Askew,**

Petitioner,

v.

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CITATIONS ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

THE EXERCISE OF CONFLICT JURISDICTION IS
WARRANTED BECAUSE THE FIRST DISTRICT COURT OF
APPEAL RELIED UPON CASES WITH FACTS MATERIALLY
DISTINGUISHABLE FROM THOSE OF THE PRESENT
ACTION AND THUS MISAPPLIED THE LAW..... 7

CONCLUSION..... 12

CERTIFICATE OF COMPLIANCE..... 13

CERTIFICATE OF SERVICE..... 13

TABLE OF CITATIONS

Cases

<u>Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Ins. Co.</u> , 140 So. 3d 529 (Fla. 2014)	7
<u>City of Miami v. Kory</u> , 394 So. 2d 494 (Fla. 3d DCA 1981).....	9-12
<u>Gibson v. Avis Rent-A-Car System, Inc.</u> , 386 So. 2d 520 (Fla. 1980)	7
<u>Hargray v. City of Hallandale</u> , 57 F.3d 1560 (11th Cir. 1995).....	9, 10
<u>Herald v. Hardin</u> , 95 Fla. 889, 116 So. 863 (1928).....	9
<u>Joshua v. City of Gainesville</u> , 768 So. 2d 432 (Fla. 2000).....	8
<u>Lewis v. City of Union City, Georgia</u> , 918 F.3d 1213 (11th Cir. 2019)	8
<u>Russell v. KSL Hotel Corp.</u> , 887 So. 2d 372 (Fla. 3d DCA 2004).....	8
<u>Woodham v. Blue Cross & Blue Shield of Florida, Inc.</u> , 829 So. 2d 891 (Fla. 2002)	7

Statutory Provisions

Art. V, § 3(b)(3), Fla. Const.....	7
§ 760.01, Fla. Stat.	8

Rules

Fla. R. App. P. 9.030(a)(2)(A)(iv).	7
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STATEMENT OF THE ISSUES

I. Whether the First District Court of Appeals misapplied Florida law by failing to liberally construe the provisions of the Florida Civil Rights Act, Chapter 760, Fla. Stat., as provided for both in the statutory language itself and case law from sister courts and this Court.

II. Whether the First District Court of Appeals misapplied Florida law applicable to claims brought pursuant to the Florida Civil Rights Act, Chapter 760, Fla. Stat., by concluding that Petitioner Askew did not experience a constructive discharge to support his claim of disability discrimination.

STATEMENT OF THE CASE AND FACTS

The matter below concerned an appeal from a jury verdict in Petitioner Kevin Askew's favor, in which the jury found that Respondent, the Department of Children and Families, engaged in discriminatory employment practices based on Askew's disability, resulting in his constructive discharge.

Askew's entire career was dedicated to the service of children. He worked for Respondent for more than twenty-five years, until his wrongful separation in 2015. Several years after his hire, Askew developed a tumor that marked the beginning of his first battle with neurofibrosarcoma, a result of his genetic disorder, neurofibromatosis. As the style of this matter now indicates, Askew has since passed away.

Patricia Badland had indirect supervisory authority over Askew between 2005 and 2015. The evidence presented below established that Badland discriminated against Askew because of his disability, and the jury ultimately believed that evidence.

In August 2015, Askew received a phone call from his wife, who had just spoken with a longtime friend, Tori Green. Green's sister lived in Florida with her six children. Two of the children contacted Green, and told her that their mother's boyfriend at the time had done violent things to them and several siblings. The children also informed her that they had reported the abuse to their teachers, who had called their mother and her boyfriend.

Following their phone call, Ms. Askew called her husband to let him know that Green would contact him. Green then described the situation to Askew, informing him that the children reported that there was abuse and domestic violence occurring in their home. Green also informed Askew that the children had informed their teachers, and that the school called the children's mother. As a result, the children were spanked or beaten when they came home from school. Critically, the school never contacted the abuse hotline.

Askew told Green that the best course of action would be to contact the Okaloosa County Sheriff's Office regarding the domestic violence as well

as the abuse hotline, which she did. He did not provide any confidential information, although he utilized the “Florida Safe Families Network” database, which he had access to by virtue of his position with Respondent, to see if there were additional local agencies Green might be able to contact for assistance. The only information Askew sought and acquired from the database was the county in which the children were located, to offer Green the best advice possible as to how she might proceed. Searching for the location of the children was strictly for business purposes and related to the possibility of children experiencing abuse. It was only from Green herself that he learned that there was an additional concern, that the children’s teachers were made aware of the abuse but apparently had not reported it to the abuse hotline.

On August 25, 2015, Askew emailed Badland and asked to speak with her about a “hotline case I would like to bring to your attention.” She responded soon after that she would be over in a few minutes, and Askew thanked her. Badland admitted that the email is in no way a confession or expression of guilt or wrongdoing. Based on his twenty-five years working for DCF, Askew had absolutely no concerns about his conduct or that he may have violated policy. He only became concerned after Badland’s

reaction. He never “confessed” or otherwise stated to Badland that he felt his actions were wrong or against any policy.

Instead, Askew asked if there were any steps he had missed or other actions he could have taken himself or suggested to Green to protect the children from possible abuse. He also told Badland that the school had not reported the abuse to the hotline but had instead contacted the parents which resulted in further abuse. He was particularly concerned that the teachers had failed to report the abuse to the hotline, as they are required to do as “mandatory reporters.” He also told Badland that he had looked up the county the children resided in to better inform Green of who she needed to contact.

Badland ignored his concerns about the children and instead accused Askew of misconduct for researching the county. She then reported Askew to the Office of the Inspector General. Askew was interviewed on August 28, 2015, however he was never asked if his FSFN access was for a legitimate business reason. He truthfully denied accessing the Case Notes, the intake reports, and anything related to investigations. Assuming he had established that he did nothing wrong, Askew returned to work following his IG interview. At the time, although he did not know what the outcome of the investigation would be, he still felt his actions served a legitimate business purpose to serve abused children. At no point between August 25 and September 1 did

either Badland or anyone from the IG's office inform Askew that he would need to resign or be terminated; the issue never came up.

However, at some point after noon on September 1, Badland came to Askew's office, entered it, and closed the door. Badland told Askew that based on the results of the IG's investigation, Askew would be terminated at the close of business that same day or could choose to resign. Askew asked if there was anything he could do to resolve the issue, and Badland answered no, DCF wanted him gone. He also asked what would happen to his retirement benefits if he was terminated, and she stated that she did not know nor did she offer him any guidance to answer that question. Badland then said she would be in her office and left.

Askew was afraid. It took him several minutes to compose himself following her departure. He was concerned about retirement, health insurance, and future employment, and was completely overwhelmed by the timeframe in which he had to make a decision. Askew had a doctor's appointment that afternoon that would take the rest of his workday, and thus, he only had one to one and a half hours to make his decision. He was actually under such significant stress during that appointment that his physician prescribed him Lorazepam to treat the severe mental health symptoms Badland's actions caused. Ultimately, to preserve his retirement benefits,

Askew drafted a “quick, business-type resignation letter” to preserve his options for seeking employment after his termination.

Askew was under duress at the time he resigned. He did not know that there were procedures by which he could appeal or otherwise contest an adverse decision, and no one, including Badland, made him aware of those options. Had he known about those appeal procedures, he would not have resigned. Badland, as Askew’s supervisor, would be aware of the termination process.

Without Badland’s misleading statements, Askew would not have resigned. He did not know that the IG’s investigation was not complete and took Badland at her word. He actually did not discover that the investigation was not completed until almost a month after his discharge until discovery commenced in the action below.

SUMMARY OF ARGUMENT

The decision below, issued by the First District Court of Appeal, provides this Court with conflict jurisdiction. The lower court’s decision conflicts with both the longstanding legal principles and express declaration contained within the actual text of the Florida Civil Rights Act, specifically that the Act should be liberally construed in favor of court access. The lower court further erred by misapplying the decisions of its sister courts as to the

breadth and applicability of constructive discharge as a viable adverse employment action necessary to sustain a claim pursuant to Chapter 760.

ARGUMENT

THE EXERCISE OF CONFLICT JURISDICTION IS WARRANTED BECAUSE THE FIRST DISTRICT COURT OF APPEAL RELIED UPON CASES WITH FACTS MATERIALLY DISTINGUISHABLE FROM THOSE OF THE PRESENT ACTION AND THUS MISAPPLIED THE LAW.

This Court may exercise conflict jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has conflict jurisdiction “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.” Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520, 521 (Fla. 1980); see also, Advanced Chiropractic and Rehabilitation Center Corp. v. United Automobile Ins. Co., 140 So. 3d 529, 534 (Fla. 2014). Below, the First District Court of Appeal misapplied longstanding principles governing cases brought pursuant to the Florida Civil Rights Act, Chapter 760, Fla. Stat., and relied upon cases with substantially different facts as found here.

Importantly, at the outset, it is worth noting that the Florida Legislature has specifically declared that discrimination laws “shall be liberally construed to further the general purposes stated in this section.” Woodham v. Blue Cross & Blue Shield of Florida, Inc., 829 So. 2d 891, 894 (Fla. 2002) (quoting

§ 760.01(3), Fla. Stat.). In Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), the Supreme Court explained:

Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature. Section 760.01(2) outlines the general purposes of the Act which include securing freedom from discrimination for all individuals and preserving the general welfare of all.

Id. at 435 (citations omitted). A primary element in any claim brought pursuant to Chapter 760 is that of establishing that the aggrieved employee was subjected to a materially adverse employment action. Russell v. KSL Hotel Corp., 887 So. 2d 372 (Fla. 3d DCA 2004); Lewis v. City of Union City, Georgia, 918 F.3d 1213, 1220-21 (11th Cir. 2019).

Here, Askew was constructively discharged based on both coercion or duress and material misrepresentation of fact. The First DCA disagreed with both the evidence presented below and the jury's verdict and found instead that Askew's resignation was not a constructive discharge. By so narrowly restricting the availability of constructive discharge as a form of materially adverse employment action sufficient to state a claim for discrimination, the First DCA failed entirely to "preserve and promote" the remedies available pursuant to Chapter 760.

Although it found that there was “no evidence of constructive discharge,” and thus reversed the trial court’s order denying Respondent’s motion for directed verdict, the court did note that an employee can show that his resignation was involuntary in two situations: “(1) where the employer forces the resignation by coercion or duress, or (2) where the employer obtains the resignation by deceiving or misrepresenting a material fact to the employee.” Hargray v. City of Hallandale, 57 F.3d 1560, 1568 (11th Cir. 1995). [A. 4-5, 7].

As to coercion or duress, almost a century ago, this Court defined duress as, “a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.” Herald v. Hardin, 95 Fla. 889, 116 So. 863, 864 (1928). Moreover, the “authorities are in agreement that the ultimate fact to be determined whenever the question of duress is raised is whether the purported victim's will was so overcome as to deprive him of free choice.” City of Miami v. Kory, 394 So. 2d 494, 497 (Fla. 3d DCA 1981) (quotations and citations omitted).

Kory is particularly instructive here, yet was misapplied by the First DCA to reach the wrong conclusion, as the facts at issue are significantly different. There, the Third DCA explained that the plaintiff’s resignation was

not the product of coercion or duress where it was entirely her own idea. Id. at 497. The court explained that Kory was not told to “quit or be fired” but responded on her own to the notice of her termination later that day, asking if she could resign first and then doing so. Id. Absent a finding of involuntariness, duress cannot be sustained. Id. at 498.

Here, however, the evidence established that Askew was told that if he did not resign, he would without question be terminated several hours later. As he testified, given his long tenure and medical conditions, preserving his was a significant concern, and he had little time to make his final decision. The immediate stress was so severe that his physician prescribed him Lorazepam within a few hours. The jury was thus given evidence that Askew’s free agency was “practically destroyed” and that his will was so overcome that he was not able to act of his own volition.

The First DCA also misapplied Kory and other authorities as it relates to constructive discharge based on a misrepresentation of material fact. Under this theory, Askew had to show: (1) that Badland knew, or reasonably should have known, that his threatened termination could not be substantiated, and (2) that he reasonably relied on her misrepresentation. See Hargray, 57 F.3d at 1570–71. [A. 10].

Kory again is instructive here, but once again was misapplied by the court below. There, the plaintiff was notified of her impending termination by a supervisor who did not have the requisite authority to terminate her employment. Kory, 394 So. 2d at 498. Despite that irregularity, however, the court held that she did not rely on that procedural deficiency in self-generating the decision to resign. Id. The court explained that a “voluntary action cannot be deemed the result of duress because the surrounding transaction involves a technical impropriety which is discovered long afterwards and which has no influence on the result.” Id. (citations omitted). Moreover, the Third DCA found that Kory’s supervisor was similarly unaware of the procedural defect and believed in good faith that he had the authority to fire her. Id. at 498. Here, however, there was no “technical impropriety” nor good faith belief, but instead an outright lie.

Instead, Badland told Askew that the IG had completed its investigation and DCF intended to terminate his employment based on the outcome of that investigation. Neither of these statements was true, however the evidence below made clear that Askew relied upon both of those lies during the brief window of time in which he had to choose between termination or resigning, the only options presented to him by Badland. The evidence made clear that Badland knew, or should have known, that the IG’s investigation

was not completed - and indeed was not completed until a month after Askew's discharge - and that at that time, there was no way to substantiate the threatened termination. Askew himself knew that he did not access the database for personal use, and did not violate DCF policies. Absent Badland's lies, Askew would not have resigned.

CONCLUSION

Here, the First District Court of Appeal misapplied Kory and other Eleventh Circuit authority to improperly restrict - and essentially eliminate - the constructive discharge as a viable adverse employment action under Chapter 760.

WHEREFORE, based on the foregoing grounds and authorities, Petitioner respectfully requests this Court accept discretionary review of the instant case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with Rules 9.120(d) and 9.210(A)(2)(a), Fla. R. App. P. In addition, this brief was typed in Arial, size 14 font and is in compliance with all applicable word count limitations governing the portions of this brief which must be counted.

s/ Ashley N. Richardson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic filing and email to all parties of record on this 8th day of August 2023, including:

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