In the Supreme Court of Florida

CASE NO.: SC2024-0099

DCA Case No.: 2D 22-3465
Lower Tribunal Case No.: 20-CA-000811

STEAK N SHAKE, INC.,

Petitioner/Defendant,

v.

WILFRED RAMOS JR.,

Respondent/Plaintiff.

INITIAL BRIEF ON MERITS

On Discretionary Review from the District Court of Appeal, Second District

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I. STATEMENT OF THE ISSUE

Petitioner, Steak N Shake, Inc., submits the following statement of issue on appeal:

> May a plaintiff who has opted to forego his federal claims seek relief for alleged discrimination based upon a disability under the Florida Civil Rights Act when his Charge of Discrimination filed with the Equal Employment Opportunity Commission only and specifically alleged a violation of the Americans With Disabilities Act?

II. STATEMENT OF THE CASE AND FACTS

Respondent, Wilfred Ramos, Jr., alleged that Steak N Shake discriminated against him due to an actual or perceived disability. On November 14, 2017, Ramos dual filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) and Florida Commission on Human Relations (FCHR). Ramos not only failed to identify the Florida Civil Rights Act (FCRA) as a basis for alleged discrimination, but he affirmatively identified only the federal Americans with Disabilities Act (ADA) in his administrative complaint. Ramos received his Dismissal and Notice of Rights from the EEOC in September 2018, but failed to seek relief under the ADA within 90 days of his receipt of that Notice. Ramos then waited until January 2020 before filing this lawsuit, seeking relief only under the Florida Civil Rights Act. The trial court concluded that because

Ramos did not invoke the FCRA during the administrative process he could not maintain such a claim, dismissing his lawsuit. On appeal, the Second District Court of Appeal reversed.

1. NATURE OF THE CASE

In October 2017, Steak N Shake hired Ramos as a cook. [*See Original Record on Appeal from the Second District Court of Appeal*,[1] RR. 9, 79].Within weeks of being hired, on November 14, 2017, Ramos filed a Charge with the EEOC. [*See* R. 79]. Ramos related verbal abuse from his manager along with negative shift reassignments starting as soon as he began. [*See id.*]. Ramos then alleged he was in an accident while off the job during which he suffered a back, head, and neck injury. [*See* R. 79]. Ramos claimed he sought to submit paperwork regarding his injury; however, his manager failed to consider it and then verbally assaulted him again, leading him to file the Charge because he feared he would be terminated. [R. 79].

[1] Pages within the Original Record on Appeal will be short cited as "R" or "RR." followed by the page number(s) supplied by the Clerk of Court for Hillsborough County to the Second District.

According to Ramos's charge, Ramos alleged he believed Steak N Shake discriminated against him between November 6, 2017 and November 14, 2017 "on the basis of [his] disability and/or perceived disability and by retaliation for my request for reasonable accommodation ***in violation of the Americans with Disabilities Act of 1991, as amended***." [RR. 79-80] (emphasis added). Ramos checked boxes for disability discrimination and retaliation. [R. 79]. However, Ramos's Charge did not identify, reference, or mention the FCRA. [*See id.*]. Ramos never alleged that Steak N Shake violated the FCRA, and he never invoked the FCRA. [*See id.*]. Indeed, Ramos did not otherwise allude to the FCRA as a basis for any remedy for his Charge. [*See id.*].

There is a ***pre-printed*** statement on the Charge form indicating that the filer, Ramos, wished to file the Charge with the EEOC and the State or local agency, if any. [R. 80]. Yet, Ramos solely checked the box for the Charge to be presented to the EEOC. [R. 79]. He listed no state or local agency in the line below the agency to which the Charge was presented on either the first or second page. [RR. 79-80]. No FCHR agency charge number was generated for the Charge. [*See id.*]

On November 15, 2017, the EEOC notified Steak N Shake about the Charge, advising that a charged had been filed with the EEOC based on the ADA. [R. 183]. No reference is made to any dual-filing in that document. [*See id.*].

Two days later, on November 17, 2017, Steak N Shake agreed to mediate the Charge, further confirming that they would not be submitting a Position Statement unless mediation failed. [R. 176]. About ten days later, on November 24, 2017 Ramos was separated for failing to appear for work on three consecutive days. [RR. 190, 226]. Ramos never amended his Charge to address his separation. [*See* RR. 79-80, 189-226].

Starting in November 2017, the EEOC handled the matter. On April 10, 2018, or almost 5 months after Ramos filed his Charge with the EEOC, the EEOC finally transmitted a copy of the Charge to the FCHR. [RR. 179-181]. The Charge transmittal document noted that "[p]ursuant to the worksharing agreement, this charge is to be initially invested by the EEOC." [R. 179]. The Record on Appeal does not contain a copy of any worksharing agreement in place between the EEOC and the FCHR at that time. It is also worth noting that no

FCHR agency charge number had been generated by that time either. [*See id.*]

Also throughout that time, the EEOC attempted to informally resolve the matter—at least through May 10, 2018. [RR. 172-173]. That same day, on May 10, 2018, Steak N Shake submitted its Position Statement. [RR. 189-226]. In its Position Statement, Steak N Shake addressed the ADA claim, solely citing to federal case law. [*See* RR. 189 ("The Charging Party alleges that . . . [a] violation of The Americans with Disabilities Act, as amended ("ADA")."); R. 193 ("To establish a claim of disability discrimination under the ADA, the Charging Party may show . . ."); and R. 195 (". . . because the employee has engaged in activity protected under the ADA.")]. At no point did Steak N Shake reference or identify the FCRA in its Position Statement. [*See* RR. 189-196].

Around that time, the EEOC advised Ramos that because the mediator was no longer available due to a promotion, the investigators would be assisting in settlement discussions between the parties to facilitate settlement. [R. 173]. The EEOC asked Ramos send a reasonable demand so he could forward it to Steak N Shake

for consideration [*Id.*]. Yet, as of June 28, 2018, Ramos had made no such demand [RR. 172-175].

On September 4, 2018, the EEOC dismissed the charge and issued a notice of right to sue letter after concluding it was unable to find that the charge established an ADA violation. [R. 83]. Before then, no conciliation ever meaningfully occurred for Steak N Shake before the notice was issued. In an undated letter address to Ramos, the EEOC advised Ramos it appeared unlikely Ramos was subjected to termination based on his disability because he failed to abide by Steak N Shake's policies about time-off and FMLA leave requests since text messages he sent did not comply with those policies. [R. 171].

While Ramos did not allege wrongful termination in his Charge of Discrimination,[2] he claimed that Steak N Shake failed to schedule him and terminated his employment on November 27, 2017, after he filed his Charge. [*See* R. 12].

[2] Ramos never amended the Charge of Discrimination in spite of the fact that the termination of his employment occurred while the EEOC's investigation was ongoing.

2. COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE LOWER TRIBUNALS

Over two years after the Charge was filed and more than a year after receiving the EEOC right to sue letter, and while represented by counsel, Ramos filed a two-count Complaint on January 27, 2020. [RR. 8-16]. Ramos asserted no claims under the ADA. [*See id.*]. Instead, Ramos only assert violations of the FCRA. [*See id.*]. For each count, Ramos sought "Front Pay" as amongst the relief he sought. [RR. 13, 15].

Steak N Shake timely answered. [RR. 17-26]. One of the affirmative defense was that Ramos failed to exhaust administrative remedies under the FCRA. [*See id.*].

The trial court referred the parties to confidential, non-binding arbitration. [RR. 30-31]. Afterward the arbitration, Ramos timely moved for Trial *de novo*. [RR. 39-40].

Steak N Shake moved for Final Summary Judgment, arguing the undisputed evidence showed that Ramos had failed to exhaust his administrative remedies under the FCRA. [RR. 69-120]. Steak N Shake specifically directed the trial court's attention to numerous other courts applying Florida law that had similarly concluded failing

to identify a violation of the FCRA in a charge meant the aggrieved party had failed to exhaust administrative remedies. [RR. 95-120].

Five days before the motion hearing, Ramos filed his untimely opposition with voluminous exhibit documents. [RR. 121-243]. His argument was that under Section 760.11(1), FLA. STAT., he could file a complaint with the EEOC in *lieu* of the FCHR. [R. 128].

Ramos pointed to the statutory text that stated "[i]n lieu of filing the complaint with the [FCHR], a complaint . . . may be filed with the [EEOC]. . ." [*Id.*]. Ramos also argued because Title VII and the FCRA proscribed the same conduct, Ramos argued that the mere act of filing of a charge with the EEOC alleging conduct proscribed by the FCRA also satisfied the FCRA's requirements. [RR. 129-130].

Following the hearing on August 30, 2022, the trial court granted final summary judgment in the Steak N Shake. [R. 251]. The trial court observed that Ramos alleged no claims under the FCRA in his EEOC Charge so he did not exhaust his administrative remedies under the FCRA. Ramos sought reconsideration and rehearing at which point—for the first time—he sought to distinguish the case law and statutory analysis Steak N Shake argued for Summary

Judgment. [RR. 253-264]. The court denied his motion for reconsideration. [RR. 265].

Ramos appealed to the Florida District Court of Appeal, Second District, arguing that Steak N Shake was not entitled to summary judgment as a matter of law. [*See Certified Copies of Appeal Papers*,[3] PP. 23-49]. While the appeal was pending before the Second District, the Florida District Court of Appeal, Fourth District decided *Belony v. North Broward Hospital District d/b/a Broward Health*, No. 4D2022-3061, 374 So. 3d 5 (4th DCA 2023). [PP 120-124].

On December 20, 2023, the Second District issued its order, reversing the decision of the trial court. [PP. 125-132]. The Second District noted the purpose of filing a charge with the FCHR is to notify the employer of the allegedly discriminatory practices and provide the FCHR with the first opportunity to investigate and perform its role in promoting conciliation efforts. [PP. 128-129 (*citing Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 873 (Fla. 3d DCA 2012))]. Pointing to a "U.S. Equal Emp. Opportunity Comm'n, FY 2017

[3] Pages within the Certified Copies of Appeal Papers will be short cited as "P." or "PP." followed by the page number(s) supplied by the Clerk of Court for the Second District.

EEOC/FEPA Worksharing Agreement, Worksharing Agreement Between Florida Commission on Human Relations and the U.S. Equal Employment Opportunity Commission 2 (2017)" not contained within the record or otherwise judicially noticed, the Second District suggested that in all instances the EEOC and FCHR had designated each other their agents while Ramos's Charge was pending, including for matters not necessarily within the other agency's jurisdiction. [P. 129].

Then, analyzing the text of Section 760.01(3), Florida Statutes and statements this Court made in *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000), the Second District concluded that Section 760.11(1), Florida Statutes should be interpreted liberally. [P. 130].

The Second District focused on the provision in Section 760.11(1), Florida Statutes that states "[t]he complaint shall contain a short and plain statement of the facts describing the violation and the relief sought." [*Id.*] Focusing on the language requiring a "short and plain statement," the Second District reasoned that through Section 760.11(1) the Florida Legislature did not require aggrieved parties like Ramos to specifically allege a violation of the FRCA in his agency charge—even though he cited the ADA. [PP. 131-132].

On January 18, 2024, Steak N Shake filed a Notice to Invoke Discretionary Jurisdiction, seeking this Honorable Court's discretionary review. [PP. 135-137]. On April 9, 2024, this Court accepted discretionary review.

III. SUMMARY OF THE ARGUMENT

The trial court appropriately granted summary judgment and the Second District Court of Appeal erroneously reversed because Ramos failed to exhaust his administrative remedies in the manner that the FCRA textually requires.

By indicating that an aggrieved party's charge should also describe "the relief sought," the Florida Legislature intended that the FCRA's text requires a party like Ramos to state that Steak N Shake violated the FCRA and not just the analogous federal law, the ADA. Ramos' invocation of ***only*** federal law did not provide requisite notice for the invocation of the FCRA. Under these circumstances, the liberal construction of the FCRA Ramos championed and the Second District accepted denied Steak N Shake the opportunity to conciliate the matter as the statutory scheme provides, undermining the administrative process that Ramos was required to exhaust.

Beyond that, the interpretation Steak N Shake offers confirms that the Florida and federal anti-discrimination laws are enacted from distinct sovereigns, such that they do not operate as *res judicata* for the other. Moreover, Steak N Shake's interpretation recognizes the other important procedural and substantive differences between Florida and federal law.

Further still, the Second District's analysis erroneously relied upon evidence not contained within the record nor plausibly judicially noticed and seems to have misapprehended Ramos's charge when it conducted its analysis.

IV. ARGUMENTS ON APPEAL

This Court employs a *de novo* standard of review when considering a court's interpretation of a statute. *Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022). Here, Steak N Shake respectfully submits that the trial court properly granted summary judgment and the Second District erroneously reversed.

1. THE PRINCIPALS OF STATUTORY CONSTRUCTION APPLICABLE TO INTERPRETING THE FCRA.

The fundamental question posed is how to interpret the FCRA's text. Several standards of statutory construction aid in this task.

As an initial matter, this Court has explained in recent decisions that "the first (and often only) step . . . is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used" when enacted. *Tsuji v. Fleet*, 366 So. 3d 1020, 1025 (Fla. 2023) (*citing Shepard v. State*, 259 So. 3d 701, 705 (Fla. 2018) (*quoting Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 313 (Fla. 2017) (Lawson, J., concurring in part and dissenting in part)).

Further still, this Court has observed that courts must "exhaust 'all the textual and structural clues'" that bear on the meaning of a disputed statute to determine its meaning. *Conage v. U.S.*, 346 So. 3d 594, 598 (Fla. 2022) (*citing Alachua Cnty.*, 333 So. 3d at 169 ((*quoting Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021)). As this Court has observed, an "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute . . . words in a statute should not be construed as mere surplusage." *Sch. Bd. of Palm Beach Cnty v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 149 (2012 Kindle Edition) ("Because legal drafters

should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.")

To the extent there is any "plainness or ambiguity" in the statutory language, that is determined by referencing the language itself, the specific context in how that language is employed, and the broader context of the statute as a whole." *Conage*, 346 So. 3d at 598 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

This Court will give "full effect to all statutory provisions and construe related statutory provisions in harmony with one another" where possible. *Tsuji*, 366 So. 3d at 1025 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)); *see also Alachua Cnty. v. Watson*, 333 So. 3d 162, 170 (Fla. 2022) (citing Scalia & Garner, *Reading Law* 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.")).

Further still, while a statute may be considered a remedial statute and subject—according to the Legislature—to a liberal construction, that fact does not give a Florida court the power to alter

the plain meaning of the statute. *See Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). That is because a liberal construction invites courts "to engage in 'purposive' rather than textual interpretation, and generally engage in judicial improvisation." Scalia & Garner, *Reading Law* 274 (further observing that the historical intended meaning of a "liberal construction" was to reject any "strict construction" of a statute and instead use a "fair meaning" of the statutory language.).

2. BASED ON THE APPLICABLE PRINCIPALS OF STATUTORY CONSTRUCTION, THE FCRA'S STATUTORY TEXT REQUIRES THAT THE FCRA IS IDENTIFIED IN THE ADMINISTRATIVE PROCESS HANDLED BY THE EEOC.

As a general proposition, Florida law requires that a party aggrieved under the FCRA must exhaust their administrative remedies, and it is improper to seek relief in court before doing so. *Palm Lake Partners II, LLC v. C & C Powerline, Inc.*, 38 So. 3d 844, 853 (Fla. 1st DCA 2010). Like analogous federal law, FCRA designated an administrative agency, the FCHR, to help enforce its provisions. §§ 760.03-.05, FLA. STAT. The FCHR provides aggrieved parties the opportunity to engage in pre-litigation mediation and conciliation efforts. § 760.11, FLA. STAT. In fact, the FCRA mandates

that an aggrieved party exhaust the administrative remedies as a condition precedent to suing. §§ 760.07-.11, FLA. STAT.

Focusing on the statutory provision, Section 760.11(1) outlines the administrative processes by which an individual like Ramos can sue under the FCRA. § 760.11(1), FLA. STAT.; *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So. 2d 891, 894 (Fla. 2002).

Section 760.11(1) states that an aggrieved party must file a discrimination complaint with the FCHR within 365 days of such conduct:

> (1) Any person aggrieved by ***a violation of ss. 760.01-760.10*** may file a complaint with the [FCHR] within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of s. 760.10(5), the person responsible for the violation and describing the violation. . .

§ 760.11(1), FLA. STAT. (emphasis added). It further states that other than filing a complaint with the FCHR, an aggrieved party may also file with the EEOC:

> (1) . . . In lieu of filing the complaint with the commission, a complaint ***under this section*** may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. . .

Id. (emphasis added). Later within Section 760.11(1), the statute states:

> (1) . . . The complaint shall contain a short and plain statement of the facts describing the violation ***and the relief sought***. . .

Id. (emphasis added).

Interpreting this language, the Second District Court reasoned that the FCRA is remedial in nature. As such, it construed the language in Section 760.11(1) as only requiring that the charge describe the facts of the violation and be filed with the agencies. [PP. 130-131]. It opined that had the Legislature wanted "the aggrieved party specifically allege in the [charge] that his or her claims were under the FCRA, then it could have said so, but it did not." [P. 131]. Thus, because the Charge purportedly contained the same claims as those presented in Ramos's lawsuit, it concluded the trial court improperly added to Section 760.11(1)'s statutory requirements. [PP. 131-132].

Yet, this interpretation is erroneous. Identifying the FCRA does not add a requirement not present within the statutory text. Rather, the Second District Court's interpretation exalts the beginning of the statutory text stating the "complaint [] contain a short and plain

statement of the facts describing the violation," at the expense of reading the phrase ". . . and the relief sought" out of the statute. § 760.11(1), FLA. STAT. [4]

Looking at the statutory text itself, the Legislature directs aggrieved parties to provide a statement that describes the (1) violation, and (2) the relief sought. These two words are not interchangeable based on their ordinary meaning. On the one hand, according to the Meriam-Webster dictionary definition, the word "violation" includes "*the act of violating : the state of being violated: such as infringement, transgression.*" https://www.merriam-webster.com/dictionary/violation (last accessed on May 21, 2024). On the other, Meriam-Webster defines the word "relief" in several ways, including particularly "*legal remedy or redress.*" https://www.merriam-webster.com/dictionary/relief (last accessed on May 21, 2024).

By stating that the complaint must describe the violation ***and*** the relief sought, that purposeful language is important. While the

[4] It is also noteworthy that Ramos never made a demand during the administrative process—in spite of Steak N Shake immediately agreeing to mediate and the EEOC requesting Ramos provide a demand.

damages available under federal law and the FCRA overlap in several respects, they are substantively different. As an initial matter, federal law imposes caps on the amount of compensatory damages available to a plaintiff that do not exist under the FCRA. *Compare* 42 U.S.C. § 1981a(b)(3) *with* § 760.11(5), FLA. STAT.

Moreover, the FCRA does not explicitly afford recovery of "front pay" for an aggrieved party unlike the ADA. Neither front pay—which is the "money awarded for lost compensation during the period between judgment and reinstatement or *in lieu* of reinstatement," *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)—nor reinstatement or any comparable equitable relief is provided for in the FCRA's text. *See* § 760.11(5), FLA. STAT.; *see also Scott v. Walmart, Inc.*, 528 F.Supp.3d 1267, 1276 (M.D. Fla. 2021). Comparatively, the ADA specifically affords front pay as relief allowed by law. *See* 42 U.S.C. § 12117(a) (applying powers, remedies, and enforcement provisions of Title VII to any person alleging employment discrimination on basis of disability); 42 U.S. Code § 2000e–5(g)(1) (authorizing reinstatement or any other equitable relief).

In these respects, the relief available—the relief that an aggrieved party like Ramos seeks by identifying a statute at issue—

is meaningfully different by expanding or limiting what legal or equitable redress for which a court can judgment.

This requirement that an aggrieved party identify the FCRA makes additional sense when considering other aspects of the statutory scheme. The Legislature empowered the FCHR to conciliate and mediate matters. The Second DCA recognized this important feature, quoting from the case law that observed:

> "The purpose of these requirements is to notify the employer of discriminatory practices and to provide the [Commission] with 'the first opportunity to investigate the alleged discriminatory 5 practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts.'" *Sunbeam Television Corp.*, 83 So. 3d at 874 (quoting *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004)).

For a respondent like Steak N Shake to meaningfully conciliate and mediate matters, it must know what remedy the aggrieved party seeks.

When Ramos filed his Charge only identifying the ADA, he was putting Steak N Shake notice about that claim alone, that relief and the related damages from such a claim. Allowing an aggrieved party to sandbag on what relief they seek would frustrate the conciliatory purposes embedded within the FCRA, bolstering the conclusion that

an aggrieved party should not be allowed to only identify federal law in the Charge and then sue only under state law.

Other textual clues likewise support this conclusion. The Legislature provided that the complaint filed with the EEOC must be "under this section":.

> (1) . . . In lieu of filing the complaint with the commission, a complaint ***under this section*** may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80. . .

§ 760.11(1), FLA. STAT. (emphasis added). The phrase "under this section," refers back to the first sentence of Section 760.11(1). That first sentence states that a person aggrieved by "a violation of ss. 760.01 – 760.10" (i.e., the FCRA) may file a complaint with the FCHR. Again, the word "violation" meaning includes an "infringement" or "transgression," of a law like the FCRA. The FCRA's language requires that—when a plaintiff like Ramos files an administrative complaint with the EEOC or an agency other than the FCHR—the complaint must be "under this section" By identifying the FCRA.

Although not binding, many lower courts within Florida read this provision to mean that the charge must identify state law to exhaust administrative remedies:

- *Karavas v. Board of Trustees, St. Petersburg College*, Case No. 20-000618-CI, 2021 WL 7707377, at **3-4 (Fla. Cir. Ct. for 6th Cir., Mar. 17, 2021) *affirmed* 340 So. 3d 482 (Table), 2022 WL 1020137 (Fla. 2d DCA April 6, 2022);

- *Casadesus v. Univ. of Miami*, No. 12-23334 CA (32) at ¶ 5, p. 6 [R. 102] (Fla. Cir. Ct. for 11th Cir., Sept. 26, 2013) (observing the charge must allege violations "under this section" and finding that dual-filing the charge was immaterial) *affirmed* 160 So. 3d 436 (Fla. 3d DCA 2015) (unpublished *per curiam*);

- *Robles v. Baptist Health S. Fla., Inc.*, No.15-CA-026943, 2016 WL 5279015, at *3 (Fla. Cir. Ct. for 11th Cir., Jan. 21, 2016) (observing that "filing of a charge of discrimination with the EEOC and the FCHR which alleged only violations of federal law, [does] not satisfy the statutory requirement that she file a charge of discrimination under the FCRA.");

- *Kemper v. Nienhuis*, No. 2019-CA-1230, at p. 2 [R. 114] (Fla. Cir. Ct. for 5th Cir., June 3, 2020);

- *Wester v. Datex, Inc.*, No. 8:20-cv-1785-T-33SPF, 2020 U.S. Dist. Lexis 195850, at *6–7 (M.D. Fla. Oct. 22, 2020) (dismissing FCRA claim because no allegation that the plaintiff complied with the FCRA's administrative requirements under Section 760.11);

- *Huenefeld v. Nat'l Beverage Corp.*, No. 16-62881-civ-Scola, 2017 U.S. Dist. Lexis 175489, at *11–12 (S.D. Fla. Oct. 24, 2017) (same).

Considering the words that the Legislature used in their totality, the statute contemplates that a plaintiff must ***affirmatively*** invoke the FCRA's jurisdiction by alleging a violation of ***state law***—especially where they identify federal law—in the administrative process to exhaust their administrative remedies. This Court should reverse the opinion of the Second District Court and affirm the summary judgment entered in Steak N Shake's favor.

3. THE SECOND DISTRICT'S LIBERAL CONSTRUCTION UNDERMINES STEAK N SHAKE'S RIGHTS.

The Second District's interpretation gave Ramos all benefits of the doubt under the guise of a liberal construction of Section 760; however, this liberal construction results in the gross denial of due process rights to Steak N Shake. The statutory scheme, as written, requires that Steak N Shake receive a reasonable notice as to the claims it faced and the opportunity to voluntarily comply or to conciliate any such claims. *See Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 873 (Fla. 3d DCA 2012). Given the gamesmanship with the Charge, Steak N Shake received none of those opportunities.

Studying the administrative process chronologically established in the Record, Ramos filed his Charge with the EEOC on

November 14, 2017. [RR. 79-90]. The next day, on November 15, 2017, the EEOC only identified the ADA in its notice, and the EEOC made no reference to any dual-filing whatsoever. [R. 183].

Shortly thereafter, the EEOC invited Steak N Shake the opportunity to conciliate through mediation. Steak N Shake immediately accepted this opportunity. [R. 176]. Nothing happened for months. Then, in mid-April 2018, the EEOC shared a copy of the Charge with the FCHR. [RR. 179-181]. With no conciliation efforts forthcoming, Steak N Shake was forced to submit its Position Statement on May 10, 2018, addressing only the ADA allegations as presented in the Charge. [RR. 189-226].

That same day, the EEOC asked Ramos to provide a demand to explore conciliation. [R. 173]. A month later in June 2028, Ramos had not responded to the EEOC's demand inquiry, and the EEOC could still not conduct any conciliatory efforts. Three months later, in September 2018, the EEOC ended its administrative proceeding, issuing the Notice of Right to Sue letter. [R. 83].

Whatever fault might be assigned for the failure in this administrative process of nearly every procedure designed to ensure

the overarching goal of voluntary compliance and conciliation, it was never Steak N Shake's fault. Yet, under the guise of the liberal construction, it will bear all of that fault without the benefit of the statutory scheme the Florida Legislature actually enacted to secure voluntary compliance.

Lest one forget, in the context of Ramos's failure to exhaust administrative remedies, Ramos was afforded plenty of opportunities to amend his Charge of Discrimination to include the termination of his employment and to advise that he was also seeking his remedies under the Florida Civil Rights Act. He did neither.

Ramos would no doubt again argue his *pro se* status demands a liberal construction in his favor. But, Ramos's status cannot excuse a failure to comply with the law. *Pro se* litigants are not supposed to be treated differently from represented parties in similar situations. *L.E.B. v. D.D.C.*, 304 So. 3d 54, 58 (Fla. 2d DCA 2020) (rejecting argument rejected a *pro se* litigant's argument he did not act because he did not understand the legal ramifications).

Indeed, a *pro se* plaintiff is not excused from complying with other procedural requirements. *Anderson v. Sch. Bd. of Seminole Cty., Fla.*, 830 So. 2d 952, 953 (Fla. 5th DCA 2002) (*pro se* plaintiff was

not excused from failure to preserve an issue for appeal). Unrepresented parties like Ramos are bound to the same—not lesser—standards and rules as represented parties. *Stueber v. Gallagher*, 812 So. 2d 454, 456, 457 (Fla. 5th DCA 2002); *Gladstone v. Smith*, 729 So. 2d 1002, 1004 (Fla. 4th DCA 1999).

Ensuring that plaintiffs like Ramos comply with the administrative prerequisites that bind represented litigants does not result in a harsh application of the law. Instead, it means the courts are following the "comprehensive statutory scheme" the Florida Legislature created for these claims. *See Hock v. Triad Guar. Ins. Corp.*, 292 So. 3d 37, 41 (Fla. 2d DCA 2020).

The language in Section 760.11 does not involve an issue outside of Ramos's control. It is one thing if the agency causes a time-stamping issue, which would not prevent him from proceeding with a suit. *See Roeder v. Fla. Dep't. of Env't Prot.*, 303 So. 3d 979, 981 (Fla. 1st DCA 2020) (because the plaintiff established the EEOC violated its time-stamping responsibilities, he could maintain his claim in court). It is different thing to fail to identify state law, identify a state or local agency in the Charge, or otherwise make an affirmative indication that his claims involved the FCRA. [RR. 79-80].

But, Ramos did none of those things. For that reason, this Court should affirm.

4. THE STATUTORY INTERPRETATION STEAK N SHAKE OFFERS RECOGNIZES THAT THE FCRA AND FEDERAL ANTI-DISCRIMINATION LAWS ARE DIFFERENT LAWS ARISING FROM DIFFERENT SOVEREIGNS.

Even if the statute's language did not dictate the conclusion the trial court reached, the fact that the statutes emanate from different bodies of law and sovereigns support the trial court's judgment.

"[T]he United States is a land of dual sovereigns," affording protection to employees under both federal and state law. Kenneth M. Curtin, *Administrative Pitfalls of Litigating Under the Florida Civil Rights Act*, 13 ST. THOMAS L. REV. 523, 524 (2001). As the Fourth District Court observed in *Belony v. North Broward Hospital District d/b/a Broward Health*, "a cause of action founded on a federal statute is not the same cause of action as one founded on a state statute, even where both statutes apply to the same transaction or occurrence." *Belony*, 374 So. 3d 5, 7 (Fla. 4th DCA 2023) (citing *Andujar v. Nat'l Prop. & Cas. Underwriters*, 659 So. 2d 1214, 1217 (Fla. 4th DCA 1995); *Santini v. Cleveland Clinic Fla.*, 843 So. 2d 1029, 1033 (Fla. 4th DCA 2003)).

Different federal, state, and local agencies "apply their own civil rights legislation to determine, under their separate [legislative] acts, whether a civil rights violation has occurred." *Santini*, 843 So. 2d at 1033; *see also Najiy v. City of Miami*, 980 So. 2d 1157, 1161 (Fla. 3d DCA 2008) (noting the FCRA and Title VII emanate from different sovereign bodies of law); *Armstrong v. Lockheed Martin Beryllium Corp.*, 990 F. Supp. 1395, 1400 n.5 (M.D. Fla. 1997) (noting that just because a litigant alleges a federal action does not mean he or she wishes to also allege the corollary state cause of action).

This is because "[t]he claims arise from separate rights recognized and protected by different sovereigns." *Santini*, 843 So. 2d at 1033 (citing *Andujar v. Nat'l Prop. & Cas. Underwriters*, 659 So. 2d 1214, 1217 (Fla. 4th DCA 1995)). For this reason courts consider claims under federal discrimination law—even if they involve the exact same facts—to be separate and distinct claims so the resolution of a federal claim ***does not serve*** as *res judicata* barring an analogous FCRA claim. *Andujar*, 659 So. 2d at 1217. Consequently, Ramos' claims asserted at the administrative level were not identical to those raised in his lawsuit.

If the interpretation employed by the Second District Court and argued by Ramos are correct, then that will mean the disposition of FCRA claim would dispose of a federal claim and vice versa. That result would infringe upon the dual sovereignty of federal and Florida law by eradicating any distinction between the two bodies of law.

As the Fourth District Court observed, the aggrieved party, as the charge's drafter, "one would reasonably assume the claimant only intended to bring a discrimination charge under federal law. Concluding otherwise would leave the employer having to guess whether the claimant also intended to bring a charge under Florida law." *Belony*, 374 So. 3d at 8. Hence, Ramos's act of identifying facts that might cause legal theories under either the FCRA or federal law was not equal to invoking both sovereign bodies of law—especially where substantive and procedural differences exist.

Ramos would no doubt counter by arguing the FCRA is to interpreted similarly to analogous federal bodies of law. § 760.11(5), FLA. STAT. However, to be interpreted similarly does mean that the two bodies of law are the same in every respect.

Rather, the FCRA and the ADA arise from different sovereigns. Simply identifying a set of facts that may cause legal theories under

either sovereign law is not tantamount to invoking both. Hence, for this additional reason, the trial court correctly concluded that the invocation of only the ADA during the administrative process did not exhaust Ramos's remedies under the FCRA. For this additional reason, this Court should affirm.

5. THE STATUTORY INTERPRETATION STEAK N SHAKE OFFERS IS FURTHER SUPPORTED BY THE SIGNIFICANT PROCEDURAL DIFFERENCES BETWEEN FCRA AND FEDERAL LAW.

The EEOC and the FCHR operate differently. For any complaint under the FCRA filed with the FCHR, the FCHR shall have 180 days to investigate the allegations and determine whether there was reasonable cause to believe an FCRA violation happened. § 760.11(3), FLA. STAT. If the FCHR finds cause within 180 days, the plaintiff can either sue or request an administrative hearing, which would be the plaintiff's exclusive remedy. § 760.11(4)(a)-(b), FLA. STAT.

But if the FCHR finds no reasonable cause, then the FCHR dismisses the complaint, and the plaintiff must seek an administrative hearing within 35 days or their claim is forever barred. § 760.11(7), FLA. STAT.

"[T]he FCRA differs from Title VII, its federal counterpart, in that a 'no cause' determination precludes a civil suit under the FCRA but

not under Title VII." *See Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So. 2d 891, 895 (Fla. 2002). On the other hand, a right to sue determination from the EEOC ***does not*** operate as the same finding by the FCHR. *See Sheridan v. State Dep't of Health*, 182 So. 3d 787, 791-793 (Fla. 1st DCA 2016); *see also Jones v. Lakeland Reg'l Med. Ctr.*, 805 So. 2d 940, 941 (Fla. 2d DCA 2001) (explaining that EEOC "no cause" finding was not analogous determination by the FCHR).

In *Sheridan*, the employee complied with the administrative requirements of filing her lawsuit within 90 days of receiving a right-to-sue notice but did not wait the full 180 days investigatory period that the FCRA requires (discussed more fully below). The *Sheridan* Court concluded that the plaintiff failed to comply with the administrative requirements of the FCRA. Importantly, the court observed that "[t]he EEOC's right-to-sue notice is clear that the 90-day window applies only to claims under federal law brought in federal or state court." *Id.* at 791.

Here, because he did not allege an FCRA violation, Ramos frustrated the Legislature's carefully crafted statutory scheme. As an initial matter, there is no indication from the record how—if at all—

the FCHR viewed, received, or interpreted the Charge when shared in April 2018—over 5 months after the Charge was first filed and well into the 180 day period established by the FCRA. The face of the Charge does not identify the FCHR as a state FEPA. [RR. 79-80]. The Charge does not identify the FCRA. [*See id.*]. The Charge does not have an FCHR agency charge number. [*See id.*]. Other than the pre-printed language that a charging party like Ramos wished to dual-file the charge, there is no affirmative evidence that Ramos himself intended his Charge be dual-filed.

Had it believed the FCRA was invoked, the FCHR may have reacted differently to ensure its deadlines were met and a No Cause Determination issued within 180 days of the filing date. But, since Ramos only invoked the ADA and the EEOC held onto the Charge for 150 days before notifying the FCHR of its existence, it is reasonable to infer the FCHR took no steps—such as generating an agency charge number—because the FCRA had not been invoked.

Further still, even had the FCHR investigated, Ramos's judicial relief would also have been limited. Unlike a notice of right to sue letter from the EEOC, a "no cause" determination from the FCHR can preclude a civil suit unless Ramos successfully pursues a timely

administrative hearing before Administrative Law Judge—not a jury. Had Ramos invoked the FCRA during the administrative process and received a "no reasonable cause determination," the statutory text would require Ramos to seek for an administrative hearing. *See* § 760.11(7), FLA. STAT. He could not have sued first.

Under the approach he chose, Ramos avoided any risk to be limited to pursue an administrative hearing within 35 days of a "no reasonable cause" determination. Thus, he avoided the risk of having his FCRA claim statutorily barred. *See id.*; *see also Ayers v. Wal-Mart Stores*, 941 F. Supp. 1163, 1167 (M.D. Fla. 1996).

If aggrieved parties like Ramos can proceed under these circumstances, he will have successfully circumvented the risk associated with pursuing his claim under Section 760.11. Again, Ramos never amended his Charge to address the conduct occurring after submitting the Charge, including the subsequent separation. Ramos never responded to the EEOC's request he provide a conciliation demand. He failed to file a federal lawsuit on the ADA claims within the required 90 days. His dilatory conduct was capped off by Ramos's failure to timely respond to Steak N Shake's Motion for Summary Judgment.

The requirement to adequately exhaust administrative remedies is protection against brinkmanship. *Ayers*, 941 F.Supp. at 1167 (recognizing that a plaintiff who failed to exhaust her administrative remedies would avoid the possibility of a dismissal and being locked into the sole remedy of an administrative hearing). Adherence to the statutory scheme under the FCRA here remains the only protection against such brinkmanship so as to effect the Florida Legislature's scheme in encouraging early conciliation and dissuade unfairly dilatory conduct from a party like Ramos.

Another major difference between a lawsuit under the FCRA and a lawsuit under the ADA is whether the lawsuit's venue would be in federal or state court. Had Ramos sued under the statute he proceeded under during the charge-filing process—the ADA—Steak N Shake would have had the opportunity to remove the lawsuit to federal court even if Ramos filed in state court. *See* 28 U.S.C. §§ 1441, 1446. Thus, since Ramos invoked federal law and not state law in the administrative phase, Steak N Shake could have reasonably anticipated that its defense of the eventual lawsuit would be in federal court. This affects the locality from which any jury pool is drawn.

Considering the foregoing, Ramos is effectively asking this Court to ignore Steak N Shake's substantive and procedural due process rights including the risk of a non-jury proceeding (whether deliberate or not) along with differing remedies and litigation forms. This Court should reject this argument and instead affirm.

6. THE SECOND DISTRICT'S ANALYSIS IS FUNDAMENTALLY FLAWED BY RELYING ON EVIDENCE NOT IN THE RECORD AND MISAPPREHENDING RAMOS'S CHARGE.

Underlying the Second District's analysis are two erroneous views of this case's facts. First, the analysis relies upon a worksharing agreement between the EEOC and the FCHR not contained within the record. [R. 129 (citing the "U.S. Equal Emp. Opportunity Comm'n, FY 2017 EEOC/FEPA Worksharing Agreement, Worksharing Agreement Between Florida Commission on Human Relations and the U.S. Equal Employment Opportunity Commission 2 (2017)")]. Reliance on this document was key to the Second District's analysis since it observed the EEOC and FCHR had designated each other their agents, including for matters not necessarily within the other agency's jurisdiction. [P. 129].

This 2017 worksharing agreement is not in the record. It is not clear whether the Second District was judicially noticing the

document under 90.202(5), FLA. STAT.; ("A court may take judicial notice of . . . [o]fficial actions of the . . . executive . . . departments of the United States. . .). However, Steak N Shake cannot find an official copy of that specific document through readily available means. Steak N Shake can locate the 2020, 2022, and 2023 versions through the FCHR's website. *See* https://fchr.myflorida.com/eeoc-and-hud.

The closest official version of a worksharing agreement in effect before Ramos's Charge was filed that Steak N Shake can identify is the 2012 model EEOC/FEPA worksharing agreement found here: https://www.eeoc.gov/fy-2012-eeocfepa-model-worksharing-agreement (last accessed on May 21, 2024). In considering all parts of this model document, an important point can be gleaned that the Second District seemingly did not consider: Each agency is supposed to provide affirmative notice within 10 days of any dual-filing. (*See id.* at II.E).

The record reflects that no such notice was sent to Steak N Shake—just the opposite. The November 15, 2017 notice from the EEOC only identified the ADA, and the EEOC makes no reference is made to any dual-filing . [R. 183]. The notice accurately reflects only that the Charge had been "with the EEOC." [*Id.*]. Further, the notice

only identified that the alleged actions of discrimination were filed "under the Americans With Disabilities Act." Nothing states that the charge was also filed under Section 760.11(1). [*See id.*] These facts strongly indicate that Ramos's charge had been filed under the ADA only and not the FCRA—despite the EEOC's belated decision to send a copy to the FCHR many months later.

Second, the Second District's analysis presumes that the "facts" contained within his Charge were the same as those made in his Complaint when they were not. [PP. 130-131]. In the Charge filed near contemporaneously, Ramos's factual allegations point to harassment beginning on the first and second day that included changing his job position—well before the out-of-work accident that purportedly created his disability. Ramos also alleges retaliation for seeking some unidentified accommodation while still working with Steak N Shake. In comparison, the Complaint does not mention his initial allegations that as soon as he began his manager subjected him to verbal assaults. [RR. 9-10]. Rather, in the Complaint filed years later, Ramos suggested the alleged harassment began after his out-of-work disability and submitting forms related to his injury. [RR. 10-11].

Although the two narratives have surface level similarities, they are substantively different in important ways. Despite these fundamental differences, the Second District somehow rationalized that the Charge contained identical claims as Ramos's lawsuit.

The fundamental issue with this view is that they invite charging parties to minimally describe the alleged conduct. They would be encouraged to sandbag their claims and avoid the conciliation requirements contained with the statute. For these additional reasons, this Court should affirm.

V. CONCLUSION

This Honorable Court should reverse the opinion issued by the Florida District Court of Appeal, Second District and instead affirm the trial court's final Order Granting the Motion for Summary Judgment for Petitioner, Steak N Shake, Inc. The reasoning the Second District Court offered and Respondent, Wilfred R. Ramos, supported would upend the specific statutory scheme the Florida Legislature created in the Florida Civil Rights Act.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on ***May 21, 2024***, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal which will send an electronic copy to:

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CERTIFICATE OF COMPLIANCE
FOR COMPUTER-GENERATED BRIEF

I HEREBY CERTIFY that this Brief on Jurisdiction uses Bookman Old Style 14-point font and contains 7,547 words (exclusive of words in a caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block) based on the word count of the word-processing system used to prepare the document, and therefore complies with the applicable font and word count limit requirements set forth in Florida Rules of Appellate Procedure 9.045(b), (e) and 9.210(a)(2)), (a)(5)(B), and (b).

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