IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC 01-472

FRANK POER, ROBERT ANDERSON,
STANLEY CORCELL, and ARTHUR CARRATT,

Petitioners,

-vs-

CALDER RACE COURSE, INC.,

Respondent.

On Discretionary Review of the
District Court of Appeal of the State of Florida, Third District Court of Appeal
DCA Case No. 3D 00-524

INITIAL BRIEF

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TABLE OF CONTENTS

Page

Table of Citations iii

Points on Appeal 1

Preface 1

Statement of the Case and Facts 1

1. Nature of the Case 2
2. Restatement of the Facts 2
3. Course of Proceedings 5

Summary of the Argument 7

Standard of Review 8

Argument

I. COLLATERAL ESTOPPEL WILL NOT PRECLUDE A STATE DISCRIMINATION LAWSUIT WHERE THE PLAINTIFFS WERE DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES IN FEDERAL PROCEEDINGS BY VIRTUE OF THE EEOC ABANDONING THE PLAINTIFFS AND DISMISSING THEIR APPEAL 8

II. THE PLAINTIFFS ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION AND DEMONSTRATED THAT DEFENDANT'S ALLEGED NON-DISCRIMINATORY REASON FOR NOT HIRING THEM WAS MERELY A PRETEXT 11

III. THE FEDERAL COURT WAS NOT A COURT OF COMPETENT JURISDICTION WITH RESPECT TO PLAINTIFFS' FLORIDA CIVIL RIGHTS ACT AGE DISCRIMINATION CLAIMS 19

Conclusion 21

Certificate of Service 22

Certificate of Compliance 22

TABLE OF CITATIONS

Case Law Page

All Pro Sports Camp, Inc. v. Walt Disney Co.,
727 So.2d 363 (Fla. 5th DCA 1998) 8

Andujar v. National Property & Casualty Underwriters,
659 So.2d 1214 (Fla. 4th DCA 1995) 5,19-21

Baxas Howell Mobley, Inc. v. BP Oil Co.,
630 So.2d 207 (Fla. 3d DCA 1993) 8

Benson v. Tocco, Inc., 113 F.3d 1203 (11th Cir. 1997) 13,14

Burrell v. Bd. of Trustees of Georgia Military College,
125 F.3d 1390 (11th Cir. 1997) 16

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997) 12,19

Dalbon v. Women's Specialty Retailing Group,
674 So.2d 799 (Fla. 4th DCA 1996) 21

Department of Health & Rehabilitative Services v. B.J.M.,
656 So.2d 906 (Fla. 1995) 19

Equal Employment Opportunity Comm'n v. Harris Chernin, Inc.,
10 F.3d 1286 (7th Cir. 1993) 9

Equal Employment Opportunity Comm'n v. United States Steel Corp.,
921 F.2d 489 (3d Cir. 1990) 9

Gentile v. Bauder, 718 So.2d 781 (Fla. 1998) .10

Gray v. Lacke, 885 F.2d 399, (7th Cir.),
cert. denied 494 U.S. 1029, 110 S.Ct. 1476 (1990) 10

Hairston v. Gainesville Sun Publishing Co.,

9 F.3d 913 (11th Cir. 1993) 14

Hoskins v. Midland Ins. Co., 395 So.2d 1159 (Fla. 3d DCA 1981) 19

Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994) 17

TABLE OF CITATIONS

Page

Hunter v. Hunter, 359 So.2d 500 (Fla. 4th DCA 1978) 10

Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,
97 F.3d 436 (11th Cir. 1996) 12,13

Johnson v. James H. Price & Co., 235 So.2d 763 (Fla. 3d DCA 1970) . . . . .
10

Kounelis v. Mount Sinai Medical Center of Greater Miami, Inc., 987
F.Supp. 1452 (S.D.Fla.), *aff'd* 166 F.3d 352 (11th Cir. 1998) . . . . . .
16

Lane v. Ogden Entertainment, Inc.,
13 F.Supp.2d 1261 (M.D.Ala.1998) 17

Lombardi v. City of El Cajon, 117 F.3d 1117 (9th Cir. 1997) 10

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 93 S.Ct. 1817 (1973) 12

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970 (1979) 19

O'Connor v. Consolidated Coin Caterers Corp.,
517 U.S. 308, 116 S.Ct. 1307 (1996) 16

Riddle v. Cerro Wire & Cable Group, Inc.,
902 F.2d 918 (11th Cir. 1990) 9

Sierra v. Shevin, 767 So.2d 524 (Fla. 3d DCA 2000) 8

Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999 (1980) 10

United States v. Salerno, 81 F.3d 1453 (9th Cir.),
cert. denied, 519 U.S. 982, 117 S.Ct. 436 (1996) 10

Volusia County v. Aberdeen at Ormond Beach, L.P.,
760 So.2d 126 (Fla. 2000) 8

TABLE OF CITATIONS

Page

Statutes and Appellate Rules

28 U.S.C. §1291 10

Fed.R.App.P. 3 10

FlaR.App.P. 9.210(a)(2) 22

Other Authorities

RESTATEMENT (SECOND) OF JUDGMENTS §28(1) (1982) 10

POINTS ON APPEAL

I. COLLATERAL ESTOPPEL WILL NOT PRECLUDE A STATE DISCRIMINATION LAWSUIT WHERE THE PLAINTIFFS WERE DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES IN FEDERAL PROCEEDINGS BY VIRTUE OF THE EEOC ABANDONING THE PLAINTIFFS AND DISMISSING THEIR APPEAL.

II. THE PLAINTIFFS ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION AND DEMONSTRATED THAT DEFENDANT'S ALLEGED NON-DISCRIMINATORY REASON FOR NOT HIRING THEM WAS MERELY A PRETEXT.

III. THE FEDERAL COURT WAS NOT A COURT OF COMPETENT JURISDICTION WITH RESPECT TO PLAINTIFFS' FLORIDA CIVIL RIGHTS ACT AGE DISCRIMINATION CLAIMS.

PREFACE

The Record on Appeal is referred to herein as (R.) and the Appendix to the Florida Supreme Court as (A.).

On appeal to the Third District Court of Appeals, the record was supplemented to include various depositions from the federal court litigation which were inadvertently not included in the Record on Appeal. References to these depositions are by the deposed parties last name. For example, the deposition of Robert Anderson is referred to herein as (Anderson Depo., pp. ____).

STATEMENT OF THE CASE AND FACTS

Petitioners Frank Poer, Robert Anderson, Stanley Corcell and Arthur Carratt were the plaintiffs in the trial court and the appellants on appeal. The Petitioners are collectively referred to herein as the "Plaintiffs." The Defendant, Calder Race Course,

Inc. is referred to herein as "Calder" or, alternatively, the "Defendant."

I. Nature of the Case:

This is an employment discrimination case wherein the Plaintiffs allege they were discriminated against on the basis of their age in violation of the Florida Civil Rights Act of 1992, Fl.Stat. §760.01 *et seq*. The nature of the discrimination is the Defendant's failure to rehire the Plaintiffs after numerous years of continued employment on the basis of their age.

II. Restatement of the Facts:

Calder is a pari-mutuel race track that is open to the public on a seasonal basis. (R. 150-66 at ¶2). Hiring is done on a season to season basis and each employee is required to formally apply for a position at the beginning of the racing season and an employee is hired only for the current season. (R. 150-66 at ¶3). Many of the personnel hired seasonally by Calder also typically work at other race tracks, such as Hialeah and Gulfstream during their racing seasons. (R. 150-66 at ¶3).

In May 1996, Calder accepted applications for its money room divisions for the 1996-97 racing season. (R. 150-66 at ¶20). Each Plaintiff applied for the position of division head. (R. 150-66 at ¶20). In previous years, there had been nine division heads; however, due to a restructuring, four of the division head positions had been eliminated. (R. 150-66 at ¶17). The Plaintiffs were not hired for the five remaining division head positions. (R. 150-66 at ¶20).

Of the 9 division heads considered for the position, the Plaintiffs were by far the oldest. Robert Anderson was 74, Arthur Carratt was 70, Frank Poer was 68, and

Stanley Corcell was 67. (R. 166). The five hired were Betty Comegys, age 61, John Gantz, age 57, Bill Doolen, age 56, Tom Barrett, age 54, and David Levy, age 54. (R. 166). In addition to the age disparity, respective Plaintiffs also rated higher in seniority and qualifications then those rehired.

Robert Anderson had worked as a division head since Calder first opened in 1970 (R. 166), working all but one of Calder's money rooms in that time (Anderson Depo., p. 96) and was recognized in the preceding year for his 25 years of continued employment with Calder. (Anderson Depo., pp. 87-88). Mr. Anderson was trained and previously acted in the capacity of head cashier, a more skilled position. (Anderson Depo., pp. 28-30). Mr. Anderson had also personally participated in the training of several of the individuals who were hired over him for the 1996-97 season. (Anderson Depo., pp. 97-100). Of all those considered for the division head positions, Robert Anderson held the highest seniority. (R. 166).

Arthur Carratt had worked as a division head since 1974. (R. 166). Mr. Carratt had worked in all of Calder's money rooms throughout his career (Carratt Depo., p. 82) and had also participated in the training of several individuals who were hired over him. (Carratt Depo., pp. 84-85). During the preceding year, Mr. Carratt had been recognized as the "Mutuel Employee of the Week", an honor bestowed by Patrick Mahoney, the individual charged with not rehiring him. (Mahoney Depo., pp. 23-24). Of all those considered for the division head positions, Arthur Carratt held the second highest seniority. (R. 166).

Frank Poer and Stanley Corcell were also long time employees of Calder. (R.

166). Mr. Poer had worked for Calder since 1970 (Poer Depo., p. 16) and, like Mr. Anderson, had been recognized for his 25 years of service to Calder in the preceding year. In 1982, Mr. Poer became a division head and of the candidates considered for the division head position, Mr. Poer held the sixth highest seniority. (R. 166). Mr. Poer had been recognized in the preceding year as the "Mutuel Employee of the Week." (R. 186-93). Both Mr. Poer and Mr. Corcell had worked as division heads in different money rooms (Poer Depo. pp. 23-25) and both possessed the necessary skills and qualifications for the division head position. (Poer Depo., pp. 21-27).

While the Plaintiffs had higher seniority, skill levels and qualifications, they were not hired as division heads for the 1996-97 season. Instead, they were given conditional offers of employment for a newly created (but lesser) mini-dealer position. Each Plaintiff would ultimately refuse continued employment as a mini-dealer.

The hiring decision as to which five candidates would be hired for the division head positions was made by Patrick Mahoney, Ed Mackie and John Gantz. (Mahoney Depo., pp. 37-39). Over the preceding years, Mr. Gantz made repeated statements that the Plaintiffs were receiving Social Security and should retire as that the "younger guys" would have opportunities. (Carratt Depo., pp. 85-86; Corcell Depo., pp. 89-90). Mr. Mahoney supplemented these discriminatory comments by stating to Mr. Carratt, when he was informed he would not be rehired, that Mr. Carratt was receiving Social Security benefits. (Carratt Depo., pp. 85-86).

When Mr. Carratt and Mr. Corcell when informed that they were not being hired for the five positions, Mr. Mahoney represented to both of these Plaintiffs (who did

not have knowledge of the offer to the other) that the Bill Doolen division head position was about to become open and they would get that position. (Carratt Depo., p. 83; Corcell Depo., p. 58). This turned out to be false. When the position became available, it was awarded to Raymond Loretto, age 44. (Mahoney Depo., p. 54; R. 166). Mr. Loretto had less seniority, skills and qualifications than any of the Plaintiffs. Calder has claimed Mr. Loretto had a division head seniority date of 1989 (R. 166); however, by Mr. Loretto's own deposition testimony he did not become a division head until the 1996 season. (Loretto Depo., p. 5). In any event, each Plaintiff was more qualified than Mr. Loretto, and yet they were still not offered the position.

III. Course of Proceedings:

Believing themselves to be victims of age discrimination, each Plaintiff served a Charge of Discrimination with the Florida Commission on Human Relations and the Equal Employment Opportunity Commission asserting they were victims of the Florida Civil Rights Act of 1992, Fl.Stat. §760.01 *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §626(b). The Equal Employment Opportunity Commission (EEOC) investigated the claims and subsequently issued a Letter of Determination finding reasonable cause to believe Calder discriminated against the Plaintiffs on the basis of their age. (R. 20-31).

On December 18, 1997, the EEOC instituted a lawsuit against Calder in federal court under the ADEA. (R. 121-27) One month later, the Plaintiffs filed a lawsuit in state court asserting their claims under the Florida Civil Rights Act of 1992. (R. 4-31). In the state court proceedings, Calder filed a Motion to Abate Proceedings and argued

that the matter should be stayed pending resolution of the EEOC lawsuit. (R. 50-64). The trial court denied the motion. (R. 65). In response, Calder filed a Motion for Reconsideration arguing that the trial court's reliance on the Fourth District Court of Appeal's opinion in *Andujar v. National Property & Casualty Underwriters*, 659 So.2d 1214 (Fla. 4th DCA 1995) was misplaced. (R. 66-71). The trial court again refused to stay the matter. (R. 72).

On March 31, 1999, the federal court entered summary judgment in favor of Calder. (R. 128-49). The EEOC filed a Notice of Appeal of the summary judgment order. (R. 258-59). However, the EEOC subsequently dismissed the appeal without notice to, or the consent of, the Plaintiffs. (R. 174-75; 258-59).

With the EEOC action having been dismissed, Calder then moved for summary judgment in the state court proceedings on the grounds of collateral estoppel. (R. 95-149). The Plaintiffs duly responded. (R. 210-231). After allowing Calder to amend its affirmative defenses, the trial court granted summary judgment on collateral estoppel grounds. (R. 266-68). Final Judgment was entered on January 21, 2000 (R. 269) and this matter proceeded on appeal to the Third District Court of Appeal. (R. 260-65).

On September 20, 2000, the Third District Court of Appeal entered a written order affirming the trial court. (App. 1). The appellate court held that since the Plaintiffs were in privity with the EEOC, the Plaintiffs were collaterally estopped from pursuing their claims in the state court. (App. 1). However, the appellate court's order was erroneous, as the Court applied the incorrect standard for assessing collateral

estoppel and failed to recognize that privity was not the issue on review. In this respect, the Plaintiffs sought rehearing and certification of conflict before the Third District Court of Appeals. (App. 2). On January 31, 2001, the Plaintiffs' requests were summarily denied. (App. 3). The mandate was issued on February 16, 2001 (App. 4) and on February 26, 2001, the Plaintiffs filed their Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court (App. 5). On July 31, 2001, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

With all due respect to the Third District Court of Appeals and the trial court, the issue before the courts was not whether the Plaintiffs were in privity with the EEOC during the federal trial court proceedings. The proper issue is whether that privity was destroyed when the EEOC dismissed its appeal without notice to, or the consent, of the Plaintiffs and whether such actions denied the Plaintiffs a full and fair opportunity to litigate their issues in federal court. As the Plaintiffs were entitled to an appeal "as of right" and the federal summary judgment order was questionable, the EEOC's abandonment of the appeal denied the Plaintiffs a full and fair opportunity to litigate the issues in the federal court proceedings. Accordingly, a requisite element of collateral estoppel could not be established and summary judgment in these proceedings should have been denied.

In addition, there is precedent from the Fourth District Court of Appeals holding that the federal courts are not courts of competent jurisdiction as to issues that would

otherwise arise under the Florida Civil Rights Act of 1992. As both the United States Supreme Court and this Court have recognized that collateral estoppel is dependent on the prior proceeding having been determined by a court of competent jurisdiction, collateral estoppel could not attach to these proceedings.

STANDARD OF REVIEW

The standard of appellate review of a summary judgment order is de novo and requires viewing the evidence in the light most favorable to the non moving party. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla. 2000); Sierra v. Shevin, 767 So.2d 524, 525 (Fla. 3d DCA 2000).

ARGUMENT

I. COLLATERAL ESTOPPEL WILL NOT PRECLUDE A STATE DISCRIMINATION LAWSUIT WHERE THE PLAINTIFFS WERE DEPRIVED OF A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES IN FEDERAL PROCEEDINGS BY VIRTUE OF THE EEOC ABANDONING THE PLAINTIFFS AND DISMISSING THEIR APPEAL.

In seeking summary judgment on its affirmative defense of collateral estoppel, Calder was required to prove four elements: (1) the issue was identical to the one involved in the federal action, (2) the issue was actually litigated in the prior suit, (3) the determination of the issue in the prior litigation was a critical and necessary part of the federal judgment, and (4) the non-moving party had a full and fair opportunity to

litigate the issue in the prior suit. All Pro Sports Camp, Inc. v. Walt Disney Co., 727 So.2d 363, 366 (Fla. 5th DCA 1998); Baxas Howell Mobley, Inc. v. BP Oil Co., 630 So.2d 207, 209 (Fla. 3d DCA 1993). In the present case, the fourth element has never been established.

In order to demonstrate that the Plaintiffs had a full and fair opportunity to litigate the issues in the federal proceedings, Calder and the reviewing courts have consistently relied upon the singular proposition that the Plaintiffs and the EEOC were in privity in the federal action. As a general proposition, the Plaintiffs recognize that privity between the EEOC and the aggrieved parties may arise in EEOC enforcement actions under the ADEA. *See,* Equal Employment Opportunity Comm'n v. United States Steel Corp., 921 F.2d 489, 494-95 (3d Cir. 1990); Equal Employment Opportunity Comm'n v. Harris Chernin, Inc., 10 F.3d 1286, 1289-90 (7th Cir. 1993). However, Calder's interpretation of ADEA case law that the EEOC and the employees it represents in ADEA claims are in privity "as a matter of law" is fundamentally incorrect. The courts do not reach such absolute distinctions as the interests of the EEOC and private litigants "are not necessarily compatible" and "are not always identical." Riddle v. Cerro Wire & Cable Group, Inc., 902 F.2d 918, 922-23 (11th Cir. 1990).

In this context, the Plaintiffs have never disputed they were in privity with the EEOC in the federal trial court proceedings. Such privity, however, vanished when the EEOC decided to unceremoniously abandon and dismiss an otherwise meritorious appeal of the summary judgment order without either counseling or giving prior notice

to the Plaintiffs. The EEOC's actions had the unfortunate consequence of foreclosing appellate review of the summary judgment order. As such, the issue is not one of privity as privity was destroyed when the EEOC abandoned the Plaintiffs and left them without any meaningful rights in the federal proceedings.

The proper issue therefore is whether a party who has been deprived of his right to appeal has had a full and fair opportunity to litigate the issues in the prior proceeding. In this respect, federal and Florida law are equally clear that the right to appeal is an absolute and necessary right of each litigant. Under federal law, every litigant in the federal court system may take an appeal "as of right" from all final decisions of the district court. 28 U.S.C. §1291; Fed.R.App.P. 3. Under Florida law, "[t]he right to take an appeal has been said to be an absolute right." Johnson v. James H. Price & Co., 235 So.2d 763, 765 (Fla. 3d DCA 1970). The right to appeal is deemed absolute for a simple reason: "[a] court that has jurisdiction to rule correctly also has jurisdiction to make a mistake." Hunter v. Hunter, 359 So.2d 500, 502 (Fla. 4th DCA 1978).

As such, it is well-established that where a party has been deprived of his right to appeal, that party has not received a full and fair opportunity to litigate the issues. Standefer v. United States, 447 U.S. 10, 23, 100 S.Ct. 1999, 2007 (1980); RESTATEMENT (SECOND) OF JUDGMENTS §28(1) (1982).[1] The United States Supreme

[1] *See also*, Gray v. Lacke, 885 F.2d 399, 406 (7th Cir.), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1476 (1990) ("a 'full and fair opportunity to litigate' includes the right to appeal an adverse decision"); Lombardi v. City of El Cajon, 117 F.3d 1117, 1122 (9th Cir. 1997) ("there is an exception to collateral estoppel where the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); United States v. Salerno, 81 F.3d 1453, 1464 (9th Cir.), *cert. denied*, 519 U.S. 982, 117 S.Ct. 436 (1996) ("The inability of a party to appeal from an

Court has explained the rationale for this rule:

> This is not to suggest that the availability of appellate review is always an essential predicate of estoppel. The estoppel doctrine, however, is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted.

Standefer, 447 U.S. at 23, 100 S.Ct. at 2007 n.18. In the present case, no such confidence can attach to the federal proceedings. When the EEOC dismissed its appeal without prior notice or counsel, the Plaintiffs were deprived of their guaranteed rights. *Cf.*, Gentile v. Bauder, 718 So.2d 781 (Fla. 1998) (collateral estoppel would not apply where "petitioner had no control over how the case would be prosecuted or if and how an adverse decision would be appealed"). Of importance, the federal summary judgment order was questionable as there was an overabundance of evidence demonstrating Calder's proffered reasons for not hiring the Plaintiffs was merely a pretext. *See infra,* Argument II. Under such circumstances, it cannot reasonably be disputed that the extinguishment of the Plaintiffs rights in the federal appellate process also extinguished their opportunity to fully and fairly litigate the issues in the federal court proceedings.

Accordingly, the trial court and the Third District Court of Appeals erred in determining that the Plaintiffs were collaterally estopped from prosecuting the subject lawsuit as Calder was incapable of proving an essential element of its affirmative defense. As such, the summary judgment should be reversed.

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adverse determination in the prior proceeding is a major factor to be considered").

II. THE PLAINTIFFS ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION AND DEMONSTRATED THAT DEFENDANT'S ALLEGED NON-DISCRIMINATORY REASON FOR NOT HIRING THEM WAS MERELY A PRETEXT.

In granting summary judgment on collateral estoppel, the state trial court never reached the merits of Plaintiffs' claims. (R. 218). Instead, the trial court relied on the privity distinction and held that "should the appellate court decide the doctrine of collateral estoppel was not properly applied in this case, the Court believes that the appellate court may review the issues raised in Defendant's Motion for Summary Judgment on the merits." (R. 218). This notwithstanding, the record evidence demonstrated that summary judgment was improper on the merits of the Plaintiffs' claims.

In a discrimination case based on circumstantial evidence, the courts apply the three-step burden shifting analysis established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under this analysis, the plaintiff must first establish a prima facie case. Combs v. Plantation Patterns, 106 F.3d 1519, 1527-28 (11th Cir. 1997). Once the plaintiff establishes the requisite elements, unlawful discrimination is presumed. Id. at 1528. The defendant then has the opportunity to rebut this presumption by articulating a legitimate, non-discriminatory reason for the employment action. Id. If the defendant produces such a reason, then the initial presumption is eliminated and the plaintiff then must offer evidence discrediting the defendant's proffered explanations for its employment decision. Id.

A. Prima Facie Case:

In a failure to hire case, the elements of a prima facie case of age discrimination are: (1) the plaintiff was a member of a protected class, (ii) the plaintiff applied and was qualified for a job for which the employer was seeking applicants, (iii) the plaintiff was rejected despite his qualifications, and (iv) after his rejection, the position remained open and the employer continued to seek applicants. Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 439 (11th Cir. 1996).

Whether the Plaintiffs satisfied the first three elements has never appeared to be in dispute. (R. 95-149, 210-31). On the fourth element, whether the division head position remained open at the commencement of the 1996-97 season, the record evidence was that (i) there were five division head positions available, (ii) Calder accepted applications for these positions, and (iii) Calder filled these positions with five other individuals. (Mahoney Depo. pp. 35-39). With respect to the secondary position filled by Mr. Loretto, the record evidence demonstrated that (i) there was one division head position available, (ii) Calder accepted applications for this position, and (iii) Calder filled this position with Mr. Loretto.

Accordingly, while a plaintiff's burden in proving a prima facie case is minimal, Isenbergh, 97 F.3d at 439, the Plaintiffs more than amply established a prima facie failure to hire case.

B. Calder's Alleged Legitimate, Non-Discriminatory Reason:

Calder's Motion for Summary Judgment never specifically identifies the alleged reasoning behind its failure to hire the Plaintiffs for the open division head positions. (R. 95-149). The Plaintiffs assume that the alleged reason was the decision to close

the money rooms on economic grounds. However, this alleged reason has little application to a failure to hire case, as it was undisputed there were five division head positions available.[2]

The Plaintiffs will also assume that Calder considered seniority, skill levels and qualifications in making its determination. Accepting this argument, the Plaintiffs concede that Calder articulated a legitimate, non-discriminatory reason for their failure to be hired at the commencement of the 1996-97 season. Calder does not, however, offer any such reason for their failure to hire any of the Plaintiffs for the position subsequently filled by Mr. Loretto. In this instance, Calder relied solely upon a disputed issue of material fact- Calder claiming the Plaintiffs quit and would not return, the Plaintiffs countering that they were waiting for a division head to become available but were never contacted about the opportunity.

C. Pretext:

Once the prima facie case has been rebutted with a legitimate, non-discriminatory reason, the analysis turns to whether the plaintiff can offer evidence that the alleged justification was merely a pretext. In the context of a summary judgment motion, the following standard is applied for determining whether pretext has been demonstrated:

> Once a plaintiff has established a prima facie case and has put on sufficient evidence to allow a factfinder to disbelieve an employer's

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[2] Calder has repeatedly attempted to recharacterize Plaintiffs' claims as a reduction in force (RIF) claim. *See generally*, Benson v. Tocco, Inc., 113 F.3d 1203, 1207-08 (11th Cir. 1997) (comparing general ADEA prima facie claims with RIF claims). However, this is a failure to hire case and Calder has failed to articulate a satisfactory reason why the five retained division heads were hired over the Plaintiffs for the open positions.

> proffered explanation for its actions, that alone is not enough to preclude entry of judgment as a matter of law. Stated differently, a plaintiff is entitled to survive summary judgment if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged actions.

Benson v. Tocco, Inc., 113 F.3d 1203, 1207 (11th Cir. 1997); *see also*, Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 921 (11th Cir. 1993). The Plaintiffs submitted more than sufficient evidence to permit a factfinder to disbelieve Calder's proffered explanation that the rehired division heads held more seniority, skill levels, and qualifications than the Plaintiffs.

1. Seniority: Of the 9 individuals considered for the division head positions, Robert Anderson held the highest seniority, Arthur Carratt held the second highest seniority and Frank Poer held the sixth highest seniority. (R. 166). All of the Plaintiffs had more seniority than Raymond Loretto, who filled the position vacated by Bill Doolen. (R. 166).

2. Skill Levels & Qualifications: Robert Anderson was a division head since Calder opened in 1970 and had worked all but one of the divisions at Calder, was trained and qualified in the position of Head Cashier, and had participated in the training of many of the individuals who were rehired over him. Arthur Carratt had been a division head since 1974, he had worked all of the divisions at Calder, he had participated in the training of a number of individuals who replaced him, and he had been recognized in the preceding year as the Mutual Employee of the Week.[3] Frank

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[3] In recognizing Arthur Carratt as Employee of the Week, Calder acknowledged Mr. Carratt's skills and qualifications as a Divison Head:

Poer had worked at Calder since 1970 and became a division head in 1982, he had worked most of the divisions at Calder, he had participated in the training of a number of individuals who replaced him, and he also had been recognized in the preceding year as the Mutuel Employee of the Week. Stanley Corcell had been a division head since 1987, he had worked the majority of the divisions at Calder, and he had the necessary skill levels and qualifications for the division head position.

3. Age: Of the 9 division heads considered for the open positions (10 including Mr. Loretto), the Defendants hired the youngest. The age differences were:

Those Hired		Those Not Hired	
Comegys	61	74	Anderson
Gantz	57	70	Carratt
Doolen	56	68	Poer
Barrett	54	67	Corcell
Levy	54		
[Loretto]	44		

(R. 166). *See*, O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S.Ct. 1307, 1309-10 (1996) (age discrimination plaintiff need only prove that he was replaced by someone younger, regardless of whether the replacement is over 40).

4. Discriminatory Comments: There was record evidence that John Gantz

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> Because of the volume of money being exchanged, errors occasionally occur and Artie is the first person who can bring it to the attention and rectify the discrepancy before it causes a financial loss to either the Money Room or Mutuel Tellers.

(R. 200).

repeatedly commented to the Plaintiffs that since they were receiving Social Security benefits, they should retire so that the "younger guys" would have an opportunity. (Carratt Depo., pp. 85-86; Corcell Depo., pp. 89-90). John Gantz was a decisionmaker with respect to the hiring process. (Mahoney Depo., pp. 37-39). *See*, Burrell v. Bd. of Trustees of Georgia Military College, 125 F.3d 1390, 1393 (11th Cir. 1997) (statements of a decisionmaker that are not direct evidence may still be used as circumstantial evidence of a discriminatory motive). Mr. Gantz' statements were made repeatedly and spanned a period of at least two seasons at Calder. (R. 177-180, 194-98). *See*, Kounelis v. Mount Sinai Medical Center of Greater Miami, Inc., 987 F.Supp. 1452, 1458 (S.D.Fla.), *aff'd* 166 F.3d 352 (11th Cir. 1998) ("An employer may legitimately inquire about an employee's retirement plans so that it can prepare to meet its hiring needs. Repeated or coercive inquiries, however, can clearly give rise to a reasonable inference of an anti-age bias"). Patrick Mahoney supplemented these discriminatory comments by remarking to Arthur Carratt, at the time of the employment decision, that Mr. Carratt was receiving Social Security benefits. (Carratt Depo., pp. 85-86).

5. The Hiring Process Was Subjective: Calder had no written policies governing the hiring process, but instead relied upon the general observations of John Gantz and Ed Mackie. (Mahoney Depo., pp. 37-39). *See*, Howard v. BP Oil Co., 32 F.3d 520, 526 (11th Cir. 1994) (where hiring criteria is unwritten, "greater scrutiny" should apply). In fact, the entire hiring process was subjective in nature. With respect to the review process, Mr. Mahoney testified:

Q. Were there any criteria that [Mackey] used in making his recommendations to you?

A. I think evaluating in his judgment as money room manager their capabilities and skill levels.

Q. Were there any specific job duties or functions that he mentioned in making his recommendation to you?

A. No, I think just a general assessment of their performance as money room employees.

Q. How about the nature of Mr. Gantz' input into this decision?

A. John would have been involved in those discussions and recommendations, again, based on his firsthand knowledge having worked with these individuals.

(Mahoney Depo., pp. 38-39). Where the hiring process is subject to individual assessment of subjective factors, then the subjectivity of the process itself creates an inference of pretext. Lane v. Ogden Entertainment, Inc., 13 F.Supp.2d 1261, 1277 (M.D.Ala.1998).

6. Calder's Non-Discriminatory Reason Was Inconsistent With Its Actions:

The most glaring example of pretext is the situation surrounding the Bill Doolen position, a money room held by Stanley Corcell in the preceding year. As to the positions held by Plaintiffs Anderson, Carratt and Poer, Calder determined "those people that were in place in those existing money rooms that we left open... were best qualified to continue operating those rooms." (Mahoney Depo., p. 39). Stanley Corcell's division, however, was not closed. In this instance, Calder decided that the individual heading up the division, Mr. Corcell (a division head for 8 years), was not the best qualified and he was not rehired. His division went to Bill Doolen (11 years

his junior). Calder's justification was: "The decision I made was based on Mr. Doolen's qualifications, experience and skill." (R. 150-66 at ¶23).

Thus, Calder apparently considered Mr. Doolen's qualifications, experience and seniority important in deciding to place him in Mr. Corcell's division; however, the qualifications, experience and seniority of the Plaintiffs were not taken into consideration in the rehiring process for the other division head positions. Based on this disparity, a jury could certainly disbelieve Calder's proffered explanation. In fact, with Robert Anderson it is impossible to believe. As for qualifications and experience, Mr. Anderson had been a division head since the day Calder opened, he had worked the higher volume divisions at Calder since the day Calder opened and continued to work the high volume divisions at the companion racetrack, he was trained and acted in the capacity of Head Cashier, and had personally participated in the training of Bill Doolen for the Head Cashier position. (R. 177-80). As for seniority, it is undisputed that Mr. Anderson possessed the most seniority. (R. 166). If Calder was truly considering qualifications, experience and seniority, Robert Anderson would have been the first hired for any opening.

In summary, there was more than sufficient evidence from which a jury could have reasonably found that Calder's proffered reasons were merely a pretext for discrimination. As the Eleventh Circuit Court of Appeals has stated, "[a] defendant who puts forward only reasons that are subject to reasonable disbelief in light of the evidence faces having its true motive determined by the jury. But we fail to see how that result is particularly hurtful to employers." Combs, 106 F.3d at 1537.

Accordingly, there was a significant issue of fact as to whether Calder's proffered reason for not hiring the Plaintiffs was merely a pretext, thus foreclosing summary judgment against the Plaintiffs on the merits.

III. THE FEDERAL COURT WAS NOT A COURT OF COMPETENT JURISDICTION WITH RESPECT TO PLAINTIFFS' FLORIDA CIVIL RIGHTS ACT AGE DISCRIMINATION CLAIMS.

The trial court and the Third District Court of Appeal also erred in failing to consider whether the federal court was a court of competent jurisdiction with respect to Plaintiffs' Florida Civil Rights Act claims. As both Florida and federal law recognize, collateral estoppel requires a "final decision of a court of competent jurisdiction" on the issues decided. Department of Health & Rehabilitative Services v. B.J.M., 656 So.2d 906, 910 (Fla. 1995); Hoskins v. Midland Ins. Co., 395 So.2d 1159, 1162 (Fla. 3d DCA 1981); Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979).

The Fourth District Court of Appeals has held that federal courts are not "courts of competent jurisdiction" with respect to issues arising under the Florida Civil Rights Act. Andujar v. National Property & Casualty Underwriters, 659 So.2d 1214, 1216-17 (Fla. 4th DCA 1995). The underlying rationale for this policy is simply stated:

> Just as the defendants who were charged with state crimes and acquitted in the Rodney King case could later be charged and tried for federal crimes from the same conduct; and just as Byron DeLaBeckwith could be charged and tried for the same conduct in different proceedings under both Mississippi and federal law; so it is that a Florida citizen who claims to have suffered from invidious discrimination in employment has at one and the same time a remedy under the federal laws protecting against illegal discrimination in employment and a remedy under Florida law

protecting against illegal discrimination in employment.

Id. at 1217.

In *Andujar*, the plaintiff filed discrimination charges with the Florida Commission on Human Relations and the EEOC. Id. at 1216. The plaintiff subsequently filed a Title VII lawsuit in federal court, which was dismissed on summary judgment. Id. Under federal law, "the dismissal [was] deemed an adjudication on the merits." Id. The plaintiff responded by filing a Florida Civil Rights Act claim in state court, whereupon the defendant sought dismissal on res judicata grounds. Id. On appeal, the Fourth District Court of Appeals held that the federal court was not a court of competent jurisdiction in that plaintiff's case did not fall within the federal court's original or pendent jurisdiction. Id. at 1217.

In the present case, the Plaintiffs did not request or consent to the EEOC's filing of the federal lawsuit (R. 174-75), the EEOC repeatedly informed the Plaintiffs that it was representing the interests of the EEOC in the federal lawsuit, and the Plaintiffs had no authority to control or dictate the handling of the federal lawsuit and appeal. (R. 258-59). In addition, the Florida Civil Rights Act claims were not filed in the federal court action. (R. 121-49). Since "[t]he federal court would have been competent to decide [the state claims] only if the plaintiff had asked the court to do so and the court, in its discretion, agreed to assume jurisdiction over them", Id., the federal court in the EEOC proceeding was not a court of competent jurisdiction. In short, Calder was incapable of establishing that the federal court was a court of competent jurisdiction. Id., *compare*, Dalbon v. Women's Specialty Retailing Group,

674 So.2d 799, 800 (Fla. 4th DCA 1996) (where plaintiff litigated state court claims in federal action, plaintiff was precluded from litigating additional claims in state court). Accordingly, summary judgment was improvidently granted on grounds of collateral estoppel.

CONCLUSION

Pursuant to the argument and legal authorities cited herein, the Petitioners respectfully request this Court to reverse the summary judgment and remand this matter for a trial on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 24th day of September 2001 to: Eric D. Isicoff, Esq., Isicoff & Ragatz, P.A., 1101 Brickell Avenue, Suite 800 South Tower, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Petitioners' Brief on the Merits utilizes Times New Roman 14-point font and otherwise comports with the requirements of Fla.R.App.P. 9.210(a)(2).

By_________________________

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