IN THE SUPREME COURT OF FLORIDA

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

Appellants,

v.

Case No. SC01-472
Lower Tribunal No.: 3D00-524

CALDER RACE COURSE, INC.,

Appellee.
_____/

Amended Brief Amicus Curiae of the National Employment Lawyers Association, Florida Chapter

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF FLORIDA, THIRD DISTRICT

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Summary of the Argument

Florida courts should not, in a civil action brought pursuant to the Florida Civil Rights Act of 1992, give res judicata effect to the judgment of a federal court on an age-discrimination claim brought by the Equal Employment Opportunity Commission for two reasons:

One, the parties to the two actions are neither the same nor in privity; and

Two, the causes of action are different.

Argument and Authority

I.

THE FEDERAL COURT JUDGMENT IN THIS CASE INVOLVES NEITHER IDENTICAL PARTIES NOR IDENTICAL CAUSES OF ACTION, AND THUS SHOULD NOT BE GIVEN RES JUDICATA EFFECT.

Federal claim preclusion rules govern what res judicata effect Florida courts should give a federal judgment. See, e.g., Dalbon v. Women's Specialty Retailing Group, 674 So. 2d 799 (Fla. 4th DCA 1996) (holding that plaintiff was unable to sue in state court on state law claims that could have been brought in connection with Title VII claim on which federal court granted judgment to defendant).

Under federal claim preclusion principles,

> "Res judicata bars * * * a subsequent action if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same."

Dalbon, 674 So.2d at 801, quoting Israel Discount Bank Ltd. v. Entin, 951 F.2d 311, 314 (11th Cir. 1992). The third and fourth prongs of that test compel the conclusion that the courts below must be reversed.

First, the Equal Employment Opportunity Commission (EEOC) simply is neither identical to the plaintiffs in this case, nor even in privity with them — especially for the purposes of bringing an action pursuant to the Florida Civil Rights Act of 1992, Chapter 760, FLA. STAT.[1]

The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., (ADEA) empowers the EEOC to prosecute an age-discrimination suit without the consent of the victims. 29 U.S.C. § 626(b). Like the Fair Labor Standards Act, 29 U.S.C. § 201, et

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[1]In Rhyne v. Miami-Dade Water & Sewer Authority, 402 So. 2d 54 (Fla. 3rd DCA 1981) (holding that assignee of foreclosure claim entitled to benefits of summary judgment achieved by bank in earlier litigation against same party), the court quoted St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp., 605 F.2d 1169, 1175 (10th Cir. 1979) as stating that "privity exists in relation to subject matter between prior and instant litigation if the parties to the instant litigation claim under the same title," and adopted the St. Louis Baptist Temple court's quotation of 46 Am.Jur.2d, Judgments, §§ 532, pp. 684, 685:

> Under this rule, privity denotes mutual or successive relationship to the same right of property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment. There is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property which were involved in the original litigation.

seq. (FLSA), the enforcement provisions of which the ADEA adopts, 29 U.S.C. 626(b), the ADEA permits the EEOC to preempt any private civil action by the discrimination victim, stating that "[t]he right of any person to bring such an action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." Significantly, unlike the enforcement provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., the ADEA does not countenance even intervention by the discrimination victim. Compare 42 U.S.C. § 2000e-5(f)(1) ("[T]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision....").[2]

Florida law, meanwhile, defers substantially to the aggrieved person, giving her the right to choose, upon the Florida Commission on Human Relations' determining that

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[2]The FLSA's enforcement provisions, 29 U.S.C. § 216, similarly provide, in pertinent part,

> (b) **Damages; right of action; attorney's fees and costs; termination of right of action.** * * * The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 15(a)(3).

reasonable cause exists to believe that a discriminatory practice has occurred (or, alternatively, upon the expiration of 180 days with no determination having been made), either to seek an administrative hearing or to move directly into court as the plaintiff in a civil action. § 760.11(4), FLA. STAT. There is no provision for the FCHR's either preempting a private action, or intervening in one. Interestingly, while the EEOC's filing suit under the Age Act supercedes any pending state enforcement efforts, 29 U.S.C. § 633(a), it does not preclude state-court suits from being filed subsequent to the EEOC's filing of a federal civil action. See Burns v. Equitable Life Assurance Soc., 696 F.2d 21, 24 (2nd Cir. 1982) (holding that EEOC's filing of a civil action cannot preclude private actions pending in federal courts).[3] In the instant case, the state-court suit was filed January 21, 1998, more than a month after the EEOC filed its federal court complaint December 18, 1997.

In the case at bar, the four appellants were not privvies, but conscripts. It is true

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[3]The Burns court stated:

> [I]nquiry into the legislative history of the ADEA reinforces the conclusion that section 7(c)(1) was intended to adopt the scheme of the FLSA in allocating enforcement authority between public and private plaintiffs. Particularly telling in this respect is the portion of the House Report discussing section 14, 29 U.S.C. §§ 633, which allocates enforcement authority between plaintiffs suing under state discrimination laws and plaintiffs suing under the ADEA. According to the Report, section 14 requires that "commencement of an action under this act shall be a stay on any State action *previously* commenced." H.R. Rep. No. 805, 90th Cong., 1st Sess. 6 (1967), reprinted in 1967 U.S. Code Cong. & Ad. News, supra, at 2219 (emphasis added)....

that the plaintiffs would have benefitted from any favorable judgment that the EEOC might have obtained in its efforts to vindicate the congressional mandate against age discrimination, and that, considering the way in which Congress designed the ADEA, that would have precluded further litigation under that statute: Congress, by modeling the ADEA on the FLSA, obviously chose to address the communal welfare of older workers rather than the private benefit of individual discrimination victims. None of the plaintiffs "opted-in" as would have been required if the named plaintiff was an individual co-employee, as opposed to the EEOC. See 29 U.S.C. § 216(b) ("[N]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such

action is brought...") They had no say in either the EEOC's choice of forum,[4] or in the manner in which case was litigated — and later abandoned — by the EEOC. Significantly, the case at bar is not a case, as were the two cases upon which the court below relied,[5] in which the persons being estopped are ones who earlier had litigated privately and lost and now seek to recover as part of a class being represented by the EEOC. To the contrary, these are private claimants whose control of the litigation the EEOC wrested away and whom the defendant now seeks to burden with the agency's failure either to properly litigate the case in the federal trial court or to pursue any appeal. Thus, the parties cannot be said to be the same and that prong of the res-judicata test is not met.

Second, the cause of action is not the same.

While both the ADEA and the FCRA prohibit employment discrimination based on age, and while the state act is modeled after Title VII of the Civil Rights Act of

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[4]The choice of forum is critical in employment discrimination suits because the significantly different burdens assigned at the summary-judgment juncture. The federal standard for summary judgment places the burden on the non-moving party affirmatively to come forward with evidence that will support each of the elements of its cases. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). The Florida standard, however, places the burden on the summary judgment movant (generally the defendant) as opposed to the non-movant (generally the plaintiff). "The party moving for summary judgment must show conclusively that no material issues remain for trial." Visingardi v. Tirone, 193 So.2d 601, 604 (Fla. 1966).

[5]Equal Employment Opportunity Comm. v. United States Steel Corp., 921 F.2d 489, 494 (3d Cir. 1990) and Equal Employment Opportunity Comm. v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993).

1964, these are two different statutes that offer significantly different remedies. As observed in Andujar v. National Property & Casualty Underwriters, 659 So.2d 1214 (Fla. 4th DCA 1995) (holding that summary judgment for having failed to timely file a Title VII complaint following receipt of a 90-day notice of right to sue does not preclude litigating a state-law claim arising out of the same facts):

> [C]auses of action must arise under the same sovereign's laws in order to be identical [and] 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.
>
> The United States is a land of dual sovereigns. Citizens are subject to the sovereign power of the United States, but they are also subject to the sovereign power of the state in which they reside. Although designed to play different roles in our governmental scheme, the two sovereigns sometimes legislate on the same subject. If Congress does not intend for its legislation to displace state laws on the same subject, a citizen of a state may have rights under the federal law, and at the same time she may have rights under the state law.

Id. at 1216.

Not only did the two sovereigns enact separate statutes concerning age discrimination, but each provided different procedures and different remedies. Under the ADEA, for example, a successful plaintiff may recover only back wages, which in the case of a wilful violation can be doubled as liquidated damages. 29 U.S.C. §§ 216(c), 626(b). Under the FCRA, however, a plaintiff may recover back wages, compensatory damages for "mental angusih, los of dignity, and any other intangible injuries," and up to $100,000 in punitive damages. § 760.11(5). An ADEA plaintiff

may file suit within as little as 60 days after filing a Charge of Discrimination with the EEOC, 29 U.S.C. § 626(d), while a plaintiff must wait until she receives a "reasonable-cause" determination from the FCHR, or until 180 days have elapsed since filing her Charge of Discrimination with that agency before filing suit.

In the case at bar, assume that the EEOC had been successful in its federal court action, and had obtained back wages and even liquidated damages. Would that then have precluded the plaintiffs from recovering money damages the emotional distress that the Florida Legislature has determined is likely to flow from employment discrimination? Would it have precluded the plaintiffs from obtaining an award of punitive damages to vindicate their Florida statutory rights? The answer to both questions must be "No" if the Florida Legislature's proscription of employment discrimination is to be anything but, in a case such as this, a paper remedy. Any argument that Florida's ability to prohibit, compensate and punish employment discrimination, in addition to any remedy that Congress may provide through the federal courts, is contrary to the well-established notion that federal anti-discrimination laws "explicitly leave[] the States free, and indeed encourage[] them, to exercise their regulatory power over discriminatory employment practices." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 67 (1980).

Conclusion

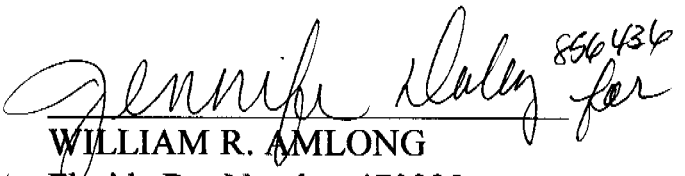
Florida courts should not, especially in situations in which the EEOC preempts

private litigants through the filing of a federal civil action under the ADEA, accord the resulting federal judgment res judicata effect. To do so would prevent the private plaintiffs from ever having *their* days in court and would dilute Florida's efforts to outlaw employment discrimination within its borders and to compensate its victims.

Certificate of Compliance

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

Respectfully submitted,



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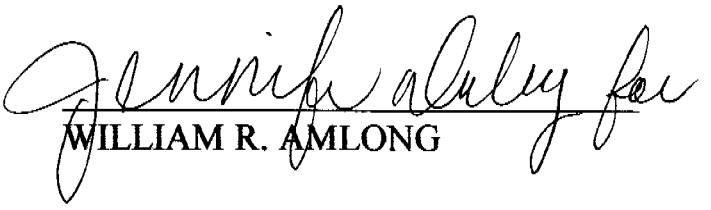
September 24, 2001

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail to Bruce Botsford, Esquire, Curtis & Curtis, P.A., Attorney for Petitioners, P.O. Box 21607, Fort Lauderdale, FL 33335, and to Eric D. Isicoff, Equire, and Teresa Ragatz, Attorney at Law, Isicoff & Ragatz, P.A., 1101 Brickell Avenue, Suite 800 South Tower, Miami, FL 33131.



WILLIAM R. AMLONG

Certificate of Compliance

I hereby certify that undersigned counsel has complied with the required for Florida Rule of Appellate Procedure 9.210(a)(2) by providing an original and seven (7) copies of the Amended Brief Amicus Curiae of the National Employment Lawyers Association, Florida Chapter on this the 22nd day of October, 2001 via Federal Express to the Clerk of the Supreme Court of Florida and by U.S. Mail to Bruce Botsford, Esquire, Curtis & Curtis, P.A., Attorney for Petitioners, P.O. Box 21607, Fort Lauderdale, FL 33335, and to Eric D. Isicoff, Equire, and Teresa Ragatz, Attorney at Law, Isicoff & Ragatz, P.A., 1101 Brickell Avenue, Suite 800 South Tower, Miami, FL 33131.

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