IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC04-755
LOWER TRIBUNAL CASE NO.: 2D03-2046

JANET MAGGIO,

Petitioner/Appellant,

vs.

FLORIDA DEPARTMENT OF LABOR
AND EMPLOYMENT SECURITY,

Respondent/Appellee.

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

REPLY BRIEF OF PETITIONER

GARY LEE PRINTY
FL BAR ID NO.: 363014
The Law Office of Gary Lee Printy
1804 Miccosukee Commons Drive, Ste. 200
Tallahassee, Florida 32308-5471
Telephone: (850) 877-7299
FAX: (850) 877-2211

Attorney for Petitioner
JANET MAGGIO

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Florida Statutes

Federal Statutes

REPLY ARGUMENT

1. Actions Filed Under the Florida Civil Rights Act Against State Agencies Are Not Torts.

Respondent and the Florida Department of Financial Services (hereinafter "DFS") both heavily relied upon Scott v. Otis Elevator Co., in which this Court found that wrongful discharge was a tort. 572 So. 2d 902 (Fla. 1990). The claimant in Scott brought that action under § 440.205 for retaliatory discharge. Id. Section 440.205 mandates that an employee shall not be discharged for filing or threatening to file a workers' compensation claim. This Court reasoned that "[w]rongful termination of employment in violation of public policy evidences an intent on the part of the employer to discharge an employee for a reason that contravenes a clear mandate of public policy," and that "wrongful termination of employment in violation of public policy can be accurately characterized as an intentional tort." Id. The decision in Scott makes many references to the fact that the claimant had been wrongfully terminated, and that wrongful termination should be characterized as a tort. Similarly, in Hullinger v. Ryder Truck Rental, Inc., 548 So. 2d 231, 233 (Fla. 1989), this Court stated that an age discrimination claim under the FCRA could serve as the basis for a wrongful termination claim. It is the wrongful termination in violation of public policy that has been characterized as a

tort, not the underlying discrimination. Petitioner in this case was not terminated. She willingly resigned because of the discrimination she was being forced to endure. The two situations are completely different, and any comparison between the two should not be given much credence.

Respondent and the DFS also rely upon Byrd v. Richardson-Greenshields Secur., Inc., for the proposition that employers should held accountable in tort for the sexually harassing environments they permit to exist, whether premised upon a statute or the common law. 552 So. 2d 1099, 1104 (Fla. 1989). A claim of hostile work environment created through sexual harassment is a form of sex discrimination. Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69 (1986). Petitioner in this case was not claiming that she was being subjected to a hostile work environment, but rather that she was being subjected to disparate treatment and the lack of reasonable accommodations because of her handicap. Just because hostile work environment, a form of discrimination, is treated as a tort does not mean that all discrimination must be treated similarly. Traditional failure to accommodate claims are not torts.

Chapter 760 should be construed in accordance with Title VII of the Federal Civil Rights Act of 1964. The FCRA is patterned upon the federal Title VII anti-discrimination law and has been construed in a consistent manner by Florida

courts. Florida Dept of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991). An employee does not have to give notice under the Federal Tort Claims Act, 28 U.S.C. § 2675, in order to bring an action under Title VII. As a matter of fact, a complainant has the option of bringing a discrimination lawsuit under either the FCRA or Title VII. Actions brought under Title VII are not subject that this presuit notice issue at all. Under Title VII actions, the DFS receives only a charge of discrimination from the EEOC, without any other presuit notice, and yet it still defends the state agency and pays any damages that are assessed, even though it could be liable for three times as much as it would have been under the FCRA.

Respondent points out that 42 U.S.C. § 1983 has be interpreted in the realm of tort liability. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 709 (1999). Consistent with historical practice, where the government takes property without providing an adequate means of obtaining redress, the ensuing actions are regarded as common-law tort actions. Id. Because of the vast array of possible claims that can arise under § 1983, the United States Supreme Court has concluded that all § 1983 actions should be characterized as tort actions. Id.; Wilson v. Garcia, 471 U.S. 261 (1985). Section 1983 is a sort of "catch all" provision for actions against the federal government that cannot be placed any where else. On the other hand,

Title VII and the FCRA are statutes specifically addressed to unlawful discrimination. Just because the United States Supreme Court has declared that the § 1983 is an action sounding in tort does not mean that the FCRA should be similarly classified. The FCRA is more akin to Title VII, and there are no federal cases holding that Title VII is a tort action or that filing presuit tort notice is a condition precedent for Title VII claims against the state or its agencies.

2. Actions Filed Under the FCRA Against State Agencies Should Not Be Subject to the Presuit Notice Provisions Contained in § 768.28(6) Because They Are Not Torts.

Section 768.28(6)(a), Fla. Stat. (2003) clearly states that compliance with its presuit notice requirements is a condition precedent to maintaining a cause of action in tort against a state agency or political subdivision. However, because employment discrimination claims are not torts, Petitioner should not have been required to comply with the presuit notice requirements of § 768.28(6).

Respondent points out that § 768.28 provides a limited waiver of the State's sovereign immunity, allowing individuals to bring legal actions based in tort against the State up to a threshold amount after certain statutory conditions precedent are completed. §§ 768.28(1), (5), and (6), Fla. Stat. (2003). Not all actions against the state sound in tort, though, and the FCRA contains its own waiver of sovereign immunity that is completely separate and distinct from that of § 768.28. §§

760.02(6), (7) and 760.10, Fla. Stat. (2003). While a waiver of sovereign immunity by legislative enactment must be clear, specific, and unequivocal, no specific words are required. *See* Spangler v. Florida State Turnpike, 106 So. 2d 421, 424 (Fla. 1958). One must presume that the Florida Legislature stated in Chapter 760 what it meant, and meant what it said. *See* Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992). So long as the statutory wording is unambiguous, then judicial inquiry is complete. Id. One must look "to the provisions of the whole law, and to its object and policy," rather than considering various statutory subsections in isolation from one another and out of context. *See* Richards v. United States, 369 U.S. 1, 11 (1962). It is now agreed that the legislature intended to allow suits against the State of Florida and any of its agencies under the FCRA. Jones v. Brummer, 766 So. 2d 1107 (Fla. 3d DCA 2000); Klonis v. Dept. of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000). Discrimination claims are not torts, and there is no language in Chapter 760 that would include these claims under § 768.28. In fact, the cross-referenced provision § 768.28(5), Fla. Stat., merely "immunizes 'the state and its agencies and subdivisions' from punitive damages and places limits on compensatory damages." Klonis, 766 So. 2d at 1189. Since the FCRA contains a waiver of sovereign immunity that must be strictly construed, individuals bringing actions under the FCRA need not depend upon § 768.28 in order to pierce the

State of Florida's veil of sovereign immunity and should not be required to comply with its presuit notice requirements either.

This is in accordance with the proposition that presuit notice requirements "should be construed in a manner that favors access to the courts." Patry v. Capps, 633 So. 2d 9, 13 (Fla. 1994). Courts are required to interpret statutes so that a person's constitutionally guaranteed access to the courts is not restricted. Fort Walton Beach Med. Ctr., Inc. v. Dingler, 697 So. 2d 575, 579 (Fla. 1st DCA 1997). Presuit notice requirements are "not intended to deny access to the courts on basis of technicalities." Id. (citing Archer v. Maddux, 645 So. 2d 544, 546 (Fla. 1st DCA 1994). This Court has stated that presuit notice serves to weed out frivolous claims and defenses and promotes the settlement of claims. Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996). While the importance of statutory compliance should be recognized, all litigants' right of access to the courts must be preserved. Id. Petitioner's claims against Respondent are not frivolous, and requiring her to comply with any presuit notice requirements in addition to those contained in the FCRA will only serve to restrict her access to the courts, in violation of this Court's mandate.

3. Respondent and The DFS Misapply Rules Of Statutory Construction

Respondent urges that the FCRA must be read in *pari materia* with § 768.28, not as an independent waiver of sovereign immunity. That would be incorrect. Rules or parts of rules are only in *pari materia* when they relate to the same proceedings or class of proceedings, and rules that are in *pari materia* should be construed together, if possible, as one rule. While the FCRA does make a reference to § 768.28(5), it does not cross-reference the entire section. Section 768.28(5) prohibits punitive damages or pre-judgment interest and places monetary limits on compensatory damages recovered in actions against the state, its agencies and subdivisions, without mention of any presuit notice. Just because the legislature made reference to one subsection within § 768.28 does not mean that both statutes should be read as a whole. Florida courts have found that the language contained in the FCRA demonstrates a clear legislative intent that sovereign immunity for public employers be waived for causes of action brought in state court under the FCRA. *See* Klonis, 766 So. 2d at 1190; Jones, 766 So. 2d at 1108-9; Diaz v. Florida Highway Patrol, 775 So. 2d 389, 389 (Fla. 3d DCA 2000). There is nothing contained in either the FCRA or § 768.28 that would direct one to construe the FCRA and § 768.28, in their entirety, as a whole.

Respondent claims that Petitioner has misapplied the *expressio unius est exclusio alterius* doctrine, and that the specific incorporation of § 768.28(5) into § 760.11(5) does not serve to exclude every other portion of § 768.28 from the FCRA. However, as Respondent recognizes, this canon depends upon an identification of a series of two or more things that should be understood to go together, which supports an inference that any terms left out must have purposefully excluded. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003); Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 81 (2002). Furthermore, the application of this canon depends upon the demonstration that the failure to include the omitted term would produce a negative implication. Id.

First, and foremost, § 760.11(5) only incorporates § 768.28(5). There is no series of two or more subsections that could be understood to go together. Secondly, all other subsections of § 768.28 were intentionally omitted from the FCRA and do not create any negative implications. Subsection 768.28(5) is separate and distinct from the others of § 768.28. It does not make sense to argue that the inclusion of that single subsection was intended to incorporate all other subsections in the FCRA. To do otherwise would frustrate the legislature's design.

Under another rule of statutory construction, special statutes that cover a specific subject matter control general statutory provisions that cover the same subject. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). The FCRA applies to civil rights and § 768.28 applies to torts. Obviously, these two provisions do not cover the same subject matter. Therefore, this method of statutory construction should not apply. The FCRA should be allowed to stand on its own, as intended, without regard to § 768.28.

Respondent and the DFS claim that the FCRA does not have a "self-contained" waiver of sovereign immunity independent of § 768.28(6) because other legislatively-created torts with administrative schemes similar to that of the FCRA require compliance with the presuit notice requirements set forth in § 768.28(6). Respondent purports that claimants under the FCRA should be subject to the presuit notice requirements of § 768.28(6) because claimants bringing suits under medical malpractice claims pursuant to Chapter 766 must satisfy the mandatory conditions precedent set forth in § 768.28(6). *See* Clark v. Sarasota County Public Hospital, 65 F. Supp. 2d 1308, 1312 (M.D. Fla.), *reconsideration denied*, 65 F. Supp. 2d 1308 (M.D. Fla. 1998). It makes perfect sense that claimants suing a state agency for medical malpractice should follow the presuit

notice requirements of § 768.28(6) because both Chapter 766 and 768 are included in Title XLV, Torts. It is obvious that anything classified as a tort by title would be subject to § 768.28(6), which applies to all torts. The FCRA, included in Title XLIV, Civil Rights, is not classified as a tort, and should not be subjected to § 768.28(6) like medical malpractice claims are.

The DFS claims that the FCRA is not a "self-contained" statute because it cannot be understood without reference to other statutes. The DFS relies upon Florida Bar v. Prior for the proposition that the FCRA is not self-contained because one cannot learn all there is to know about it without looking to other provisions. 330 So. 2d 697, 699 (Fla. 1976). While there are references to other provisions within the FCRA, the FCRA does not refer to any other provisions with regard to the state's waiver of sovereign immunity. That part of the FCRA can be fully understood without reference to any other provisions, and is therefore, self-contained.

The FCRA is a self-contained statute and does not affect rights outside of its purview. Grice v. Suwannee Lumber Mfg. Co., 113 So. 2d 742 (Fla. 1st DCA 1959). Section 768.28 could also be classified as a self-contained statute because it covers only those subjects within its self-contained limitations and does not affect

rights outside its purview. Section 768.28 specifically addresses the state's waiver of sovereign immunity in tort actions and nothing more. Any rights granted by other statutes unrelated to tort actions are not affected by the provisions of § 768.28. Actions under the FCRA are not torts, so all rights granted by it are outside of the purview of § 768.28. The FCRA grants individuals the right to sue the state for employment discrimination after a charge of discrimination has been filed with the Florida Commission on Human Relations (hereinafter "FCHR"), and this right is should be unaffected by the presuit notice requirements contained in § 768.28(6).

Since employment discrimination under the FCRA cannot be classified as a tort, its statutory basis is contained in Title XLIV, which covers Civil Rights, not Torts, and it clearly and unequivocally waives the state's sovereign immunity beyond the scope of § 768.28, the presuit notice requirements of § 768.28(6) should not apply.

4. Chapter 760 Contains a Separate and Independent Presuit Notice Requirement Which Makes § 768.28(6) Unnecessary.

Respondent and the DFS claim that the FCRA's administrative claims process does not mirror or serve the same purpose as the notice requirement in

§ 768.28(6). Section 768.28 requires that all claimants present the claim in writing to the state agency, which puts the agency on notice that there are charges pending against it. § 768.28(3), Fla. Stat. (2003). The FCRA's administrative claims process requires all claimants to file a charge of discrimination with the FCHR as a condition precedent to filing suit. §§ 760.11(7) and (8), Fla. Stat. (2003). This charge of discrimination contains a statement of the facts describing the violation and any relief sought. § 760.11(1), Fla. Stat. (2003). The FCHR then sends a copy of the charge of discrimination to the person or state agency who allegedly committed the violation by registered mail. Id. This process puts the person or state agency being charged on notice, just like the presuit notice requirement contained in § 768.28(6). Just because the notification is provided to the state agency by the FCHR or the EEOC does not make the notification any less effective. If fact, the charge of discrimination that a state agency receives from the FCHR contains more information than a statement that complies with § 768.28(6). Section 768.28(6)(a) requires all claimants to provide their date and place of birth, social security or federal identification number, case style and tribunal and the nature and amount of "adjudicated penalties" owed by the claimant to the state. § 768.28(6)(c), Fla. Stat. (2003). This information is intended to allow the Department of Financial Services to determine whether to resolve or challenge

demands against the state before such claims become civil actions. However, the information provided under § 768.28(6)(a) does not give the state agency any facts about the alleged violation and what relief is being sought, and the DFS needs that information in order to decide what to do with such claims before they become civil actions. The information provided in the FCHR's charge of discrimination gives the state agency useful information about an allegation of discrimination before a lawsuit is filed, and serves the same purpose as the presuit notice requirement contained in § 768.28.

CONCLUSION

For all the foregoing reasons, Petitioner, Janet Maggio, requests this Court reverse the lower court's order and declare that the law and policy of the State of Florida is such that the provisions of § 768.28 do not apply to suits brought under the FCRA except to the limited extent that the FCRA specifically incorporates a particular subsection by reference.

Respectfully submitted,

_____

GARY LEE PRINTY
FL BAR ID NO.: 363014
The Law Office of Gary Lee Printy
1804 Miccosukee Commons Dr., Suite 200
Tallahassee, Florida 32308-5471

Telephone: (850) 877-7299
FAX: (850) 877-2211

Attorney for Petitioner/Appellant
JANET MAGGIO

CERTIFICATE OF SERVICE

I certify that a correct copy of the foregoing was served this ___ day of July, 2004, by U.S. Mail to: Jay P. Lechner, Esq. and Nancy A. Chad, Esq., Zinober & McCrea, 201 E. Kennedy Blvd., Suite 800, Tampa, Florida 33602; Mindy Raymaker; Acting General Counsel, Agency for Workforce Innovation, 1320 Executive Center Drive, Atkins Building-Kroger Center, Tallahassee, Florida 32399-2250; and John W. Bakas, Jr., Esq., Attorney for Plaintiff/Appellant, 201 E. Kennedy Blvd., Suite 400, Tampa, Florida 33602-5896.

_____

GARY LEE PRINTY

CERTIFICATE OF COMPLIANCE

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

_____

GARY LEE PRINTY