****
22-13588-AA
****

****

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

****

****
ELIAS MAKERE, FSA, MAAA
(Appellant/Plaintiff)

v.

ALLSTATE INSURANCE COMPANY
(Appellee/Defendant)
****

On Appeal From The
United States District Court, Florida, Middle District
3:20-cv-00905-MMH-LLL

****

APPELLANT'S OPENING BRIEF

****

Elias Makere, FSA, MAAA
Appellant ("Employee X")
PO Box 324
Hobart, IN 46342
P: 904.294.0026
E: Justice.Actuarial@gmail.com
W: TextBookDiscrimination.com
Get ***Booked Up*** on Justice!

ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Makere v Allstate, 22-13588

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Lower Tribunal:

Lambert, Laura	Magistrate
Howard, Marcia	District Judge

Non-Parties:

Division of Administrative Hearings (FL)

Early, Edward Gary (FL)

Florida Commission on Human Relations, The (FL)

Gorsica, Stanley G. (FL)

Parties:

Allstate Insurance Company	(NYSE: ALL)
Makere, Elias (FSA, MAAA)	Appellant

Appellant is not a subsidiary/affiliate of a publicly owned corporation. Pursuant to Rule 26.1-2 11th Cir. R., Appellant does not know of any other entities that have interest in this case. Appellant hereby certifies that this CIP is complete.

(//)

Inundated by Defendant's lies the lower court used a bad date. A bad date that led to a bad mistake: when that court closed its ears to what the state failed to validate.

Yet, updated and clear-eyed, all can see that it was not a valid date. And with a good date in hand, a valid case will stand.

So, may this Court – perched at this higher stand – vacate the error that lies beneath this dated land.

(//)

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) Fed. R. App. P., Appellant respectfully requests oral argument as this case presents novel/complex/intertwined topics of law and public trust (also see Rule 28-1(c) 11th Cir. R.). In particular, he believes verbal presentation will benefit Issue I; a point about clear facts which have been muddied by an avalanche of state-nuanced improprieties.

Also, Appellant asserts that none of the factors listed in Rule 34(a)(2) Fed. R. App. P. exist in this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

REGULATIONS

RULES

FEDERAL STATUTES

STATE STATUTES (FL)

INTRODUCTION

Appellant, Elias Makere, was the Plaintiff in the lower tribunal; and will be referred to in this brief as "Employee X" (Rule 28(d) Fed. R. App. P.). Appellee, Allstate Insurance Company, was the Defendant below; and will be referred to as "Company Y".

The following references will be used in this brief:

[A_] Appendix on Appeal[1/]

The following abbreviations will also be used:

1DCA	First District Court of Appeals (FL)
ALJ	Administrative Law Judge
DCA	District Court of Appeals (FL)
DOAH	Division of Administrative Hearings (FL)
EEOC	Equal Employment Opportunity Commission
FAC	Florida Administrative Code
FCHR	Florida Commission on Human Relations
FS	Florida Statute
LT	Lower Tribunal
USCA11	US Court of Appeals, 11th Circuit
USFLMD	US District Court, Florida, Middle District
USFLND	US District Court, Florida, Northern District

All statutory and rule references are made to their 2020 versions (unless otherwise indicated).

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter under 42 USC §1981 (by virtue of 28 USC §1331 (*federal question jurisdiction*)). On February 8, 2021, USFLMD dismissed three counts from Appellant's Complaint. Doing so on account of them being administratively barred. Fourteen days later – on February 22, 2021 – Appellant filed written objections. Plus, on March 11, 2021 Appellant filed a timely notice of appeal (tolled by Rule 4(a)(4)(A)(iv)-(vi) Fed. R. App. P.). Nineteen months after that (on 10/13/22), the LT overruled Appellant's objections; thereby ripening this appeal.[7/] Thus, this Court has jurisdiction under 28 USC §1291 (also see 28 USC §1292(a)(1), and 28 USC §1294(1)).

STATEMENT OF THE ISSUES ON APPEAL

I. Whether an incorrect date – which determined the timeliness calculation for the state's administrative jurisdiction – constitutes a clear error of law [when the correct date would have divested jurisdiction].

II. Whether accrediting adjudication of an excluded charge – in contravention of The Seminal Case (McDonnell-Douglas v Green, 411 US 792 (1973)) - constitutes reversible error.

STATEMENT OF THE CASE

Overview

1. This is a discrimination case (42 USC §1981) between a former employee (Appellant-'Employee X') and an employer (Appellee-'Company Y'). Employee X charged Company Y with violating Employee X's civil rights by (a) subjecting him to a hostile work environment; (b) subjecting him to unequal terms & conditions; (c) terminating him; and (d) retaliating against him.
2. Company Y, a publicly-traded private corporation, engaged with Employee X - at all times material hereto – in the state of Florida. At first, Company Y did so as Employee X's active employer. Then, it did so as his former employer. A brief review of the underlying facts is in order.

Underlying Facts (Hostilities, Disparities, Terminations, etc.)

3. On November 18, 2013, Employee X began working for Company Y. **[A0019]**
4. Company Y admitted him into its Actuarial Career Program ("ACP") alongside many of his newfound co-workers. The ACP's goal was to develop its members into FSAs (Fellows of the Society of Actuaries). **[A0019]**
5. At the time of hiring, Employee X had passed six (6) actuarial exams, and had a little over one year of experience. This meant

that he would have to pass four (4) more exams to attain the desired credential. **[A0019]**

6. Throughout Employee X's 3-year tenure, Company Y subjected him to a hostile work environment. With harassment that included – but was not limited to:
   a. Unwanted date requests from his direct manager **[A0019]-[A0020]**;
   b. Racist dolls **[A0022]**, racist characterizations **[A0021]-[A0022]**; and
   c. Cursing at Employee X for buying a condolence card **[A0022]**;
7. Company Y also conditioned Employee X's employment on racial inferiority. Highlights included – but were not limited to:
   a. Paying Employee X a lower ASA salary than it paid other similarly-situated employees **[A0021]**;
   b. Proclaiming that Employee X's newly acquired actuarial credentials (ASA) "*devalue[d] the profession*" **[A0021]**.
8. Recognizing the employer's animus, Employee X begged management to let him work from home **[A0023]**; doing so on a routine basis. A request that Company Y always denied.
   a. A work privilege, however, that Company Y granted to everyone else in its actuarial department. **[A0023]**
9. Yet every time Employee X tried to avoid the hostilities, Company Y targeted him for more.

a. In Fall 2015, an IT manager phoned Employee X, told him a series of lies, then explained how he would get Employee X fired. That same manager carried out the plan **[A0024]-[A0026]**.

    i. That IT manager, importantly, had been charged with employment discrimination before **[A0024],[A0034]**.

b. Also, in Fall 2015, Employee X's direct manager relayed a message from a different IT manager. A different IT manager who wanted Employee X fired. **[A0024]**.

10. Given these facts & circumstances, Employee X filed an internal discrimination complaint. The primary subject of the complaint (¶9a) acknowledged that it was based on "racism".

11. Thereafter, Company Y worsened the work environment for Employee X. With acts which included – but were not limited to:

    a. Job replacement **[A0025]**;

    b. Denied raises **[A0025]**;

    c. Sabotaged work **[A0025]**; and

    d. Company Y forcing Employee X to pay for an actuarial exam fee while never doing the same to its other employees. **[A0025]**

12. Company Y met Employee X's additional internal complaints with indignation. Telling Employee X to "*figure out if this [was] the place for [him] to work*". **[A0025]**

13. Soon thereafter – on Friday, August 12, 2016 – Company Y told Employee X that it was terminating his employment; effective immediately. **[A0026]**

    a. Notably, Employee X's direct manager made the decision just hours after Employee X declined her last date request (doing so on 8/10/16).

14. Company Y's reason for firing Employee X was that Employee X had failed an actuarial exam. It gave no other reason. **[A0026]**

15. Yet, Company Y had many other employees who also failed actuarial exams. Some who failed multiple exams; all who failed easier exams. Discriminatorily, though, Company Y never fired any of them. **[A0027]**

16. Plus, immediately after firing Employee X, Company Y replaced him with two employees who had never even passed one exam. The disparity in qualifications is/was drastic (0 exams passed vs 8 exams passed). **[A0027]**

17. Right after termination, Employee X passed the exam-in-question, and continued to avoid Company Y (and its employees). **[A0027]**

    a. From 8/12/16 until now: Employee X has never done any work for the employer, never tried, and never inquired. **[A0027]-[A0028]**

18. He did, however, attempt to seek justice & repair from the harassment/discrimination/retaliation that Company Y subjected

him to. As well as punishment for the unlawful conduct Company Y has subjected [and will subject] others to (see ¶9ai).[2/]

External Discrimination Complaint #1 (*Employee X v Company Y*)

19. On June 30, 2017, Employee X filed an employment discrimination complaint with the FCHR. Pursuant to §760.11(1) FS, he alleged that Company Y had violated his civil rights on the bases of race ***and*** sex (**[A0028][A0062][A0112]**).

20. On September 8, 2017, Allstate denied ***both*** allegations **[A0062][A0115]**. Stating that it fired Employee X for a legitimate reason. Specifically, because he had failed an actuarial exam **[A0118]** (highlights added):

> *"[Employee X] was terminated solely because he failed his [FSA] exam."*
>
> - Allstate Insurance Company | 9/8/17 | **[A0118]**

21. On December 15, 2017, the FCHR concluded its investigation. Notably affirming that race ***and*** sex were the bases of Employee X's complaint (**[A0124]**).

22. On January 19, 2018, Employee X filed his Petition for Relief with the FCHR. Just as in his original charge, he listed only race and sex as the protected characteristics for his complaint. Thus, pursuant to §760.11(7) FS and §120.569 FS, the FCHR transmitted it to DOAH. **[A0063][A0085]**

23. During the pendency of that administrative action, Company Y enlisted its employees to dissuade Employee X from continuing with his suit. Doing so in a variety of ways:

    a. Death threats **[A0028][A0070]-[A0071]**;

    b. smear campaigns **[A0028][A0063]-[A0069]**; and

    c. Lethal attacks **[A0028][A0070]-[A0074]**.

24. Additionally, after a series of procedural irregularities (authority breaches, deposition sit-ins, recusals, etc.), a man named Edward Gary Early became the administrative hearing officer over the case (circa November 13, 2018).[3/] **[A0073]**

25. That man – in his quest to cover for Company Y – further violated Employee X's constitutional rights. He did so by (a) destroying evidence **[A0312]-[A0313]**; and (b) committing perjury **[A0313]-[A0315]**.

26. Due to these attacks, Employee X sought subsequent relief. First: against Company Y (¶27-29, *infra*); and second: against the state hearing officer (¶36-38 *infra*).

External Discrimination Complaint #2 (*Employee X v Company Y*)

27. Thus, on April 10, 2019, Employee X filed his second discrimination complaint against Company Y **[A0046]**. Emailing it to the FCHR; who blessed it with a same-day timestamp (2:35PM on 4/10/19) **[A0109]-[A0111]**.

28. This second complaint – which was dual-filed with the EEOC – included Company Y's post-termination retaliation (¶23, *supra*).

29. October 7, 2019 marked the deadline for the FCHR's determination, but the state agency failed to produce one (at least not on time) **[A0134]**.

Federal Lawsuit (*Employee X v Company Y*)

30. Despite the inequities **[A0131]-[A0149]**, Employee X filed this lawsuit in federal court. Doing so on August 12, 2020. Doing so, importantly, under both federal (42 USC §1981) and state law (§760 FS).
    a. note: Employee X first filed suit in state court (on 6/30/2020). That state case subsequently consolidated with this federal case.[4/]
    b. Plus, Employee X's initial complaint excluded his Title VII charges **[A0136]**.
    c. Later – and once the inequities began diminishing – he attached them **[A0137]** (circa March 9, 2021).
    d. Importantly, the Title VII charges and the state charges were hydrated by Employee X's second administrative complaint (¶27-29, *supra*).
31. On February 8, 2021, the LT entered its partial order of dismissal **[A0150]**. The lower court dismissed Employee X's state charges (ie, §760 FS), because of administrative timeliness (highlights added):

> *"In sum, the record establishes that the FCHR rendered timely "No Cause" determinations on*

> *[Employee X's state] charges... As such, [Employee X] is administratively barred under section 760.11(7) of the Florida Statutes from pursuing his [state] claims here. The Court will [dismiss] Counts I-III of the Complaint and dismiss the [state] claims in their entirety."*
>
> - USFLMD | 2/8/21 | **[A0168]**

32. Two weeks later, Employee X filed his objections **[A0188]** (and appealed). He also amended his complaint. An amendment that Company Y met with another motion to dismiss.
    a. This subsequent motion featured a crucial lie.
    b. A crucial lie, importantly, that was the same one promulgated by Mr. Early (¶36-37, *infra*).
    c. A crucial lie that Employee X met with:
        i. a motion for sanctions **[A0213]**; and
        ii. a motion in limine **[A0263]**.
33. Then, on October 13, 2021, the LT ordered Employee X to amend his complaint once more **[A0299]**. Therein, the LT instructed Employee X to include all of his claims (highlights added)[5/]:

> *"[Employee X] therefore should include all claims and factual allegations he wishes for the Court to consider in his Third Amended Complaint."*
>
> - USFLMD | 10/13/21 | **[A0302]**

Employee X obliged **[A0039]**, and added a charge for Company Y's *fraud-on-the-court* (¶32a).

34. On October 13, 2022 the lower court overruled Employee X's objections (¶32); thereby ripening this appeal.

35. Notably, between October 2021 and October 2022 (¶33-34 supra), Employee X focused his efforts on getting justice from the constitutional infringements inflicted by Mr. Edward Gary Early.

Related Federal Lawsuit (*Employee X v Mr. Edward Gary Early*)

36. On-or-around January 31, 2021, Employee X sued Mr. Edward Gary Early (a state hearing officer) for constitutional deprivations (4:21-cv-00096; USFLND) ("That Case"). He brought the action under federal law (42 USC §1983, 42 USC §1985), and did so at USFLND **[A0305]**.

37. That Case is centered around Mr. Early's demonstrable perjury **[A0313]-[A0315]**. And it continues this day; albeit hampered by further unconstitutional conduct by other public officials.[6/]

38. That Case, notably, has made itself into this court; twice in fact.

    a. The first time was in Spring 2021.

        i. That appeal was successful (21-11901).

        ii. Plus, it prompted this Court to deem That Case to be one of "***first impression***".

    b. The second time was right now (please see 22-13613-G, *Makere v Early*; USCA11).

Procedural Summary

39. Put briefly, the LT dismissed the state charges from Employee X's discrimination lawsuit against Company Y (¶31 *supra*). It did so on account of administrative timeliness. Employee X objected (¶32), and twenty (20) months later the lower court overruled his objections (¶34).

40. Many procedural hiccups and hurdles arose along the way.

    a. Yet, the core facts of the case have remained in Employee X's favor (¶3-18, *supra*). And they have remained as untarnished (and clear to see) as ever.

41. Of course, one such hiccup was the LT's decision to dismiss Employee X's state charges. A decision that was based on a clear error of law. And an error that is hereby an issue-on-appeal.

STANDARD OF REVIEW

42. A district court's order of dismissal is reviewed ***de novo*** (see Castillo v Allegro, 603 F. App'x. 913, 915 (11th Cir. 2015)). Under that standard, the Court must accept all factual allegations in the Complaint as true and make all inferences in the light most favorable to the plaintiff (ie, Employee X) (see Chaparro v. Carnival Corp., 693 F. 3d 1333, 1335 (11th Cir. 2012)). Plus, courts must liberally construe *pro se* pleadings (see Tannenbaum v United States, 148 F. 3d 1262, 1263 (11th Cir. 1998)).

SUMMARY OF ARGUMENT

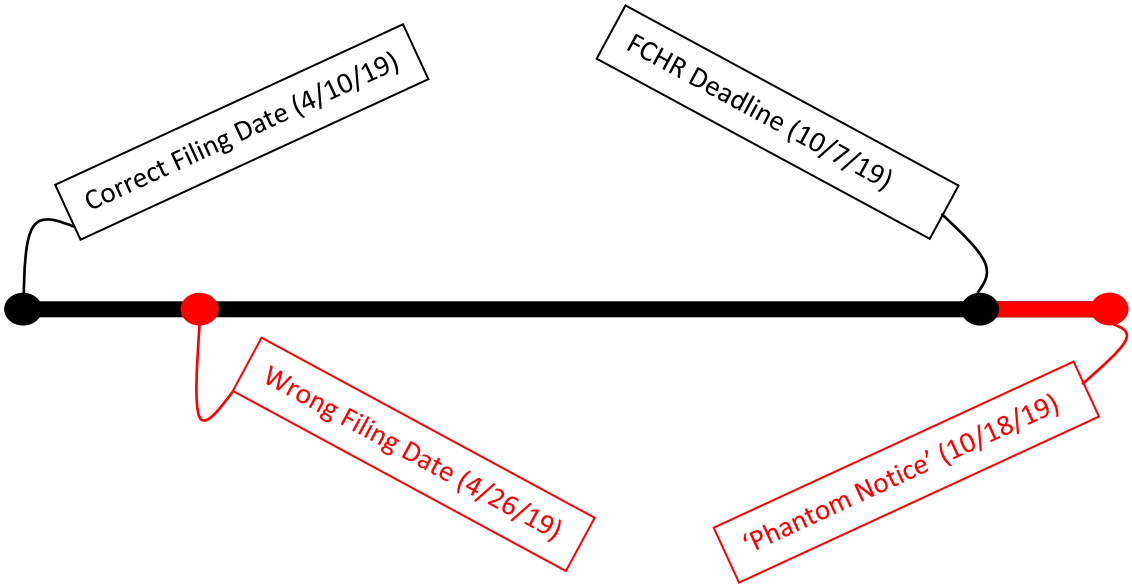
43. The Lower Tribunal – inundated with Company Y's lies (along with severe state-borne disruptions) – committed a clear error of law. It did so when it dismissed Employee X's state charges for [presumably] being administratively barred. A determination that was based on an incorrect filing date.

44. Plus – and proffered mainly to prevent additional injustice – Company Y is not entitled to *res judicata* (nor *collateral estoppel*). This is so because the first administrative action was in clear violation of the 14th Amendment's due process guarantee.

45. Thus, this Court of Appeals is well-positioned to fix the clear errors from below. And remand this cause to allow Employee X and Company Y to present their case to a jury of their peers.

ISSUE I

The District Court Committed a Clear Error by Using the Wrong Date in its Timeliness Calculation



OVERVIEW I

46. The Lower Tribunal erred when it based its '*timeliness*' determination (administrative bar) on a wrong date.

STANDARD OF REVIEW I

47. Fortunately, this appellate court has the power to remand this issue back, because it reviews factual determinations for clear error (highlights added):

> *"...this court reviews purely legal questions de novo, a district court's factual findings for clear error, and, in most cases, a district court's application of the guidelines to the facts for "due deference""*
>
> - United States v Rodriguez, 363 F.3d 1134 (11th Cir. 2004)

48. In Holton, this Circuit defined what a "clearly erroneous" factual finding is:

> *"[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."*
>
> - Holton v City of Thomasville, 425 F.3d 1325 (11th Cir. 2005)

ARGUMENT I

49. The factual finding that was clearly erroneous in the instant case was Employee X's filing date. The filing date attached to his second administrative complaint (¶27 *supra*).

50. The lower court assigned a wrong date of April 26, 2019. However, the correct date was April 10, 2019.

51. Public record shows that Employee X filed his second administrative complaint on April 10, 2019. **[A0109]-[A0111][A0341]-[A0358]**

    a. The **email** that he used to transmit it to the FCHR was sent **at 8:00 AM EST on April 10, 2019. [A0111][A0356]**

    b. The **timestamp** that the state agency emblazoned on the complaint was set to **2:35 PM EST on April 10, 2019. [A0110][A0358]**

52. The incorrect date, importantly, was central to the lower court's ruling (highlights added):

> *"In sum, the record establishes that the FCHR rendered timely "No Cause" determinations on [Employee X's state] charges... As such, [Employee X] is administratively barred under section 760.11(7) of the Florida Statutes from pursuing his [state] claims here. The Court will [dismiss] Counts I-III of the Complaint and dismiss the [state] claims in their entirety."*
>
> - USFLMD | 2/8/21 | **[A0168]**

53. That ruling was based on that order's prior determination that the state agency rendered a decision within the 180-day statutory window (highlights added):

> *"As set forth above, the FCHR issued a "No Cause" determination regarding the 2019 FCHR Charge on October 18, 2019, within the 180-day period."*
>
> - USFLMD | 2/8/21 | **[A0167]**

54. That 180-day calculation was based on a starting date of April 26, 2019 (highlights added):

> *"[Employee X] filed a second charge of discrimination with the [state agency], which was received on April 26, 2019."*
>
> - USFLMD | 2/8/21 | **[A0161]**

55. The problem, of course, is that **the starting date (ie, 4/26/19) was wrong.**

    a. Employee X filed his administrative complaint on April 10, 2019. **[A0109]-[A0111][A0358]**

Materiality of Error

56. **The difference** between the correct date (4/10) and the incorrect date (4/26) **is/was vital.** The incorrect date fell within the 180-day investigatory window, while the correct date did not.

    a. By law, an FCHR determination falling inside that window would have been valid. A valid determination would have

required Employee X to successfully complete a state administrative proceeding.

b. Since the FCHR's Determination fell outside of that window, though, it was **invalid** (ie, "null & void"). Therefore, it released Employee X from the state's administrative requirements.

57. According to statute, the FCHR has authority to enter determinations within the 180-day window (highlights added):

> *"(3)...Within 180 days of the filing of the complaint, the [FCHR] shall determine if there is reasonable cause to believe that discriminatory practice has occurred..."*
>
> - §760.11(3) FS

58. However, once that six-month period ends, the state agency loses such power:

> *"(4)... In the event that the commission determines that there is reasonable cause ... the aggrieved person may either:*
>
> > *(a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or*
>
> *(8) In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause."*
>
> - §760.11(4) FS, §760.11(8) FS

The FCHR cannot contravene this statute [even with a late-filed notice of determination] (please accord DeMario v Franklin, 648 So.2d 210, 213-214, (Fla. 4th DCA)).

59. Florida's Supreme Court went on to say that the 180-day cut off renders any late-filed FCHR determination null & void:

> *"Reading the relevant provisions of the statute together clearly establishes that whenever the FCHR fails to make its determination within 180 days, even if the untimely determination is made before the filing of a lawsuit, the claimant may proceed to file a lawsuit under subsection (4)."*
>
> - Woodham v BCBSFL, 829 So.2d 891 (Fla. 2002)

60. Thus, once the 180-day window closes (regardless of any untimely FCHR determination), plaintiffs are no longer bound by state administrative proceedings. Instead, they are given 1-year to file suit (§760.11(4) FS).

    a. If the FCHR issues a "no reasonable cause" determination ***before*** the window closes, though, then plaintiffs must take administrative action (§760.11(4)(b) FS) before being granted permission to take civil action (§760.11(7) FS).

61. In fact, the LT acknowledged that the closure of this 180-day window releases litigants from the bindings of a state administrative proceeding (highlights assed):

> *"As stated above, unless the FCHR fails to issue a determination in 180 days, a claimant must successfully complete the administrative*

> *review process before he can pursue a claim in court."*
>
> - USFLMD | 2/8/21 | **[A0166]**

In the instant case, the FCHR did indeed fail to issue its determination within the 180-day window.

62. So, these statutes and Supreme Court holdings fit the facts of this appeal perfectly. And they showcase the materiality of the LT's error.

63. By using the incorrect date, the LT determined that the FCHR's late notice of determination (ie, "Phantom Notice" **[A0131]-[A0149]**) was valid (and timely). That false validity led the LT to conclude that Employee X's state charges were administratively barred.

64. Instead, had the LT used the correct date then it would have found that the FCHR's 180-day window had closed. A finding that would have mooted the state agency's late notice of determination (ie, "Phantom Notice" **[A0131]-[A0149]**), and relinquished all administrative bindings from Employee X.

65. With administrative bindings detached, the LT would have ruled that Employee X's state charges were ***not*** administratively barred. The key was the starting date.

    a. The correct starting date (ie, 4/10/19) would have led to this correct conclusion. Now, it is key to see that the correct starting date is the only date to be used.

The *Correct Starting Date* is the Only Starting Date

66. According to Florida law, the starting date for a state discrimination complaint is determined by the timestamp that the FCHR affixes to it [on the same day it was received].

67. Florida's legislature established this (highlights added):

> *"On the same day the complaint is filed with the commission, the commission shall clearly stamp on the face of the complaint the date the complaint was filed with the commission... If the date the complaint is filed is clearly stamped on the face of the complaint, that date is the date of filing."*
>
> - §760.11(1) FS

68. DOAH concurred (highlights added):

> *"However, she filed her Complaint on December 27, 2021 – which, according to section 760.11(1), is the date of filing because of the clear file stamp from FCHR."*
>
> - Cosby v Circle K, 22-002238; 9/26/22 | DOAH (FL) | **[A0493]**

69. DOAH - as an executive branch agency (§20.22(2)(f) FS) - is an arm of the state. Florida's legislature, of course, is part of the state's legislative branch.

70. Thus, the State of Florida – via its executive and legislative branches – holds that the FHCR's timestamp establishes the filing date of a discrimination complaint.

71. In the instant case, the record shows that the FCHR '*actually received*' (60Y-5.001(3) FAC) Employee X's second discrimination complaint on April 10, 2019 (¶27, *supra*).
    a. That was the date he emailed it to the agency; and
    b. That was the date that the agency stamped on his complaint.
72. Therefore, in addition to April 10, 2019 being the correct date, it is also the only date to be used for Employee X's filing date.
    a. This conclusion is backed by the State of Florida (the government whose rules the LT's decision was based on).

CONCLUSION I

73. The LT used the wrong date. This was clear (4/10 vs 4/26).
74. The error was material to its ruling (¶56-65 *supra*).
75. And, the correct date is the only applicable date (¶66-72).
76. WHEREFORE, this Appellate Court is well-positioned to reverse the decision from below. Because based on the '*entire evidence*', this Court is imbued with '*the definite and firm conviction*' that the Lower Tribunal made a mistake (Hybritech v. Monoclonal, 802 F.2d 1367 (1986)).
77. At the very least – and notwithstanding the appealed-order's other flaws (*infra*) – reversal will cure the sole basis of the decision below.

ISSUE II

Company Y is Not Entitled to Res Judicata or Collateral Estoppel Due to the State's Due Process Violations*

---

* This issue does not appear to be ripe for adjudication (at least not yet). For important reasons:

1. The appealed decision was not based on it (please see Issue I); and
2. Subsequently, Company Y seemed to have relented.

Also, this matter is more fully briefed in the related appeal (*Makere v Early*; 22-13613-H)

OVERVIEW II

78. Mr. Edward Gary Early infringed on Employee X's constitutional right to due process when he:
    a. hid evidence. **[A0316]-[A0317]**
        i. He did so by removing a crucial transcript page from the batch that he scanned; and
    b. Perjured himself. **[A0317]-[A0319]**
        i. He did this by lying in order to remove Employee X's sex discrimination charge (from Employee X's first discrimination complaint - ¶19 *supra*).
79. Company Y – as the benefactor of Mr. Early's transgressions – is thereby unentitled to *res judicata* (or *collateral estoppel*).
80. Thus, the District Court erred by suggesting that Employee X's due process rights were not violated [when it entertained those two doctrines].

STANDARD OF REVIEW II

81. The doctrines of Res Judicata and Collateral Estoppel are reviewable *de novo* (EEOC v Pemco, 383 F.3d 1280 (11th Cir 2004)):

> *"A district court's conclusions as to res judicata are conclusions of law, and are thus reviewable de novo by this Court."*
>
> - NAACP v Hunt, 821 F.2d 1563, 1560 (11th Cir. 1987)

ARGUMENT II

82. The Law of the Land states that removal of a discrimination basis from a lawsuit constitutes a violation of due process.

    a. This holding even withstands events in which evidence still gets taken on the removed basis.

Any suggestion to the contrary is '*erroneous*'.

83. In the appealed order, the LT violated this principle. It suggested that Employee X's due process rights were not violated [by the aforementioned hearing officer's removal of Employee X's sex discrimination basis]. The reason which the LT gave was that testimony was still taken on that removed charge:

> *"Notably, the record shows that contrary to [Employee X]'s argument, the [state hearing officer] made substantive findings on numerous allegations that were otherwise untimely or not raised in the underlying Charge."*
>
> – USFLMD | 2/8/21 | **[A0166]**

84. The US Supreme Court was faced with an identical assertion in McDonnell-Douglas v Green, 411 US 792 (1973) ("The Seminal Case").

85. It stated that making findings of fact after excluding a discrimination charge still constitutes reversible error (highlights added):

> *"[Employer] argues, as it did below, that [employee] sustained no prejudice from the trial court's erroneous ruling, because, in fact, the [removed] issue of racial discrimination in the refusal to reemploy "was tried thoroughly" in a trial lasting four days, with "at least 80%" of the questions relating to the issue of "race.""*
>
> *"..."*
>
> *"We cannot agree that the dismissal of [employee's race] claim was harmless error"*
>
> *"..."*
>
> *"[Employee] should have been accorded the right to prepare his case and plan the strategy of trial with the knowledge that the [excluded race] cause of action was properly before the [Lower Tribunal]. Accordingly, we remand the case for trial of [employee]'s claim of racial discrimination consistent with the views set forth below."*
>
> - McDonnell-Douglas v Green, 411 US 792 (1973)

86. A "*remand*" that *must* afford plaintiffs ***full & fair opportunities*** to present their discrimination cases (highlights added):

> *"In short, on the retrial, [employee] must be given a full and fair opportunity to demonstrate by competent evidence [of Employer X's discrimination]"*
>
> - McDonnell-Douglas v Green, 411 US 792 (1973)

87. Full & Fair opportunities which – according to Florida's 1DCA – equate to due process protection (highlights added):

> *"Procedural due process includes the right to reasonable notice and an opportunity to be heard [citations omitted] In the present case, the [lower tribunal] afforded GTECH a full and fair opportunity to contest the proposed agency action on any relevant ground, including the potential bias of the evaluation committee members."*
>
> *"..."*
>
> *"Here, the parties were afforded due process of law"*
>
> - GTech v. Florida, 737 So.2d 615 (Fla. 1st DCA 1999)

88. These rulings fit this issue perfectly, because:

    a. the record shows that Florida removed Employee X's sex discrimination charge **[A0081]-[A0085],[A0123]-[A0126], [A0174]**;

    b. Florida still credited testimony to Employee X's removed sex discrimination charge **[A0159]**; and

    c. the LT suggested that the unlawful removal was cured by testimony allocation **[A0166]**.

89. Thus, the LT's suggestion is the same suggestion that the US Supreme Court struck down in The Seminal Case. A suggestion which violates the constitution's due process guarantees. A legal pillar, importantly, that precludes *res judicata* and *collateral estoppel*.

90. In EEOC v Pemco, 383 F.3d 1280 (11th Cir. 2004), this Court held that *res judicata* cannot apply if a decision was not made on the merits (highlights added):

> *"We have held that res judicata can be applied only if all of four factors are shown: "...(2) there must have been a final judgment on the merits; ... and (4) both cases must involve the same causes of action.""*
>
> - EEOC v. Pemco, 383 F.3d 1280 (11th Cir. 2004)

91. The EEOC decision took a similar holding regarding *collateral estoppel* (highlights added):

> *"Likewise, in this Circuit, collateral estoppel can apply only "when the parties are the same (or in privity) [and] if the party against whom the issue was decided had a full and fair opportunity to litigate the issue in the earlier proceeding.""*
>
> - EEOC v. Pemco, 383 F.3d 1280 (11th Cir. 2004)

92. In the instant case, Employee X was robbed of a '*full & fair opportunity*' (ie, due process protection) to litigate his first administrative complaint against Company Y.

    a. The Seminal Case produces this conclusion.

93. Plus, the fact that Employee X's discrimination charge was [purposefully/wrongfully] absent from his first administrative case (Recommended Order, Final Order) makes it clear that "*a final judgment on the merits*" was never reached.

CONCLUSION II

94. WHEREFORE, this Appellate Court is well-positioned to extinguish any lingering suggestions of Res Judicata or Collateral Estoppel. The Seminal Case renders them inoperable. Plus, the record below renders any contentions of Collateral Estoppel to be '*clearly erroneous*'.

(//)

With a Valid Date in place/
May this Court validate this case/
With an order of reversal, remand, or vacate//

(//)

CONCLUSION

But for the Lower Tribunal making the mistake of using the wrong starting date, this appeal would not exist. Plus, the LT erred by suggesting that it could entertain Company Y's initial volley of *res judicata* (and/or *collateral estoppel*).

WHEREFORE, Appellant (Employee X) asks this Court to (a) vacate the lower tribunal's order, (b) reverse it, and (c) remand this case for further proceedings consistent with a repair of the LT's clear error.

Dated this 5th day of December 2022.

Respectfully submitted,

/s/ Elias Makere
ELIAS MAKERE, FSA, MAAA, Appellant
PO Box 324
Hobart, IN 46342
P: (904) 294-0026
E: justice.actuarial@gmail.com
W: TextBookDiscrimination.com
Get ***Booked Up*** on Justice!

CERTIFICATE OF COMPLIANCE

1. Type-Volume

☒ This document complies with the word limit of Rule 32(a)(7)(B)(i) Fed. R. App. P., because - excluding the parts of the document exempted by Rule 32(f) - this document contains 4,976 words.

or

☐ ~~This brief complies with the line limit prescribed by Rule 32(a)(7)(B)(i) Fed. R. App. P., because - excluding the parts of the document exempted by Rule 32(f) - this document contains [NNNN] lines of monospaced text.~~

2. Typeface and Type-Style

☒ This document uses Courier New (12-Pt) Font; thereby complying with the typeface requirements of Rule 32(a)(5)(B) Fed. R. App. P.. This document also satisfies the type-style requirements of Rule 32(a)(6).

12/5/2022 — Date

/s/ Elias Makere — Elias Makere, FSA, MAAA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December 2022, I electronically filed the foregoing with the Clerk of Courts by using PACER; which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

[1/] [A0210] means page 210 from the appendix.

[2/] at USFLMD alone, Allstate has been sued by more than 15 employees [for discrimination] since 1990:
- *Augello v Allstate*, (2:01-cv-00115)
- *Bologna v Allstate*, (2:01-cv-00645)
- *Braedyn v Allstate*, (6:06-cv-00739)
- *Brennan v Allstate*, (5:02-cv-00168)
- *Cola v Allstate*, (6:02-cv-01001)
- *Davis v Allstate*, (8:20-cv-00852)
- *Dorsey v Allstate*, (3:02-cv-00434)
- *Howard v Allstate*, (8:01-cv-00513)
- *Huber v Allstate*, (6:96-cv-01254)
- *Kahn v AHL*, (3:06-cv-00731)
- *Lyons v Allstate*, (8:96-cv-00690)
- *Makere v Allstate*, (3:20-cv-00905)
- *Martin v Allstate*, (3:96-cv-01247)
- *Martin v Allstate*, (8:98-cv-02598)
- *McCranie v Allstate*, (3:92-cv-00664)
- *Mendivil v Allstate*, (8:01-cv-02415)
- *Ortiz v Allstate*, (2:10-cv-00280)
- *Reis v Allstate*, (8:12-cv-02452)
- *Rice v Allstate*, (8:98-cv-00601)
- *Thompson v Allstate*, (8:97-cv-02055)
- *Wright v Allstate*, (6:20-cv-00305)
- *Wynn v AHL*, (3:01-cv-00341)

[3/] Mr. Early – due to his unlawful actions – became the defendant in a §1983 action (4:21-cv-00096; USFLND). At USFLND, Appellant tried to transfer/consolidate the *Early* case with the instant case. However, transfer was denied; and the *Early* case has matriculated to this court (22-13613-H; USCA11).

[4/] State case = Duval County, FL (16-2020-CA-3770) Consolidated as 3:20-cv-00921.

[5/] The directive to include "All" of Employee X's charges did not explicitly reinstate Employee X's three (3) previously dismissed state charges (¶31)

[6/] please see *Makere v Fitzpatrick* (4:22-cv-00315; USFLND)

[7/] "ripe" because:
- (i) the LT dismissed Employee X's state charges;
  - a. it did so by granting Company Y's request to dismiss them "*with prejudice*"
- (ii) the dismissal was delivered with instructions to exclude those state charges from subsequent amendments;
- (iii) the absence of any explicit declarations/instructions to reinstate those dismissed state charges; and
- (iv) the overruled objections

Link to Underlying Complaint (HTML, PDF, Video)

HTML	TextBookDiscrimination.com/Allstate/Complaint-Full.html
PDF	TextBookDiscrimination.com/Files/USFLMD/20000905_AAC_20211104_230439.pdf
Video	https://youtu.be/e3mgBPHesXg

Electronic Copy: (text-searchable)

TextBookDiscrimination.com/Files/CA11/22013588_IB_202206_091600.pdf

TextBookDiscrimination.com/Allstate/OpeningBrief

SERVICE LIST

Kimberly J. Doud, Esquire (0523771)
Heather A. Johnson, Esquire (*pro hac vice*)
Lauren C. Robertson, Esquire (1024845)

E: kdoud@littler.com
E: hajohnson@littler.com
E: lcrobertson@littler.com
P: 407.393.2900
F: 407.393.2929

Littler Mendleson, PC
111 North Orange Avenue, Suite 1750
Orlando, FL 32801-2366

(appellee's trial lawyers)