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IN THE SUPREME COURT OF FLORIDA

ELIAS MAKERE, FSA, MAAA

)

Petitioner

)

Case No.: ____ - ____

)

DCA Case No.: 1D19-3236

v.

)

LT No. (FCHR): 2017-17432

)

LT No. (DOAH): 20-003021

ALLSTATE INSURANCE COMPANY,

)

Respondent

)

PETITION FOR WRIT OF QUO WARRANTO

September 28, 2020

ELIAS MAKERE, FSA, MAAA, Petitioner
s/ Elias Makere, Pro Se
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Somewhere in the vineyards of deception, the executive branch authored a fictional tale about a man and a corporation. The judicial branch then took the author's pen, changed the story's roots, and minted that fable with the seal of original perfection.

In everyone's eyes - including the author's eyes - only the author was authorized to author the author's lies.

So, may this Court send the latter branch a writ directing it to write how it could have possibly had that right.

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PREFACE

Petitioner, Elias Makere, was the Complainant/Petitioner/Appellant in the lower tribunal; and will be referred to in this petition as Petitioner. Respondent, Allstate Insurance Company, was the Respondent/Appellee below; and will be referred to as Respondent. Pursuant to Rule 9.100(b)(3) Fla. R. App. P., Florida's First District Court of Appeals issued the order that is the subject of this petition; and will be referred to as 1DCA.

The following references will be used in this petition:

[A___] Appendix^{1/}

The following abbreviations will also be used:

ALJ	Administrative Law Judge
DCA	District Court of Appeals
DOAH	Division of Administrative Hearings
FAC	Florida Administrative Code
FCHR	Florida Commission on Human Relations
FS	Florida Statute
LT	Lower Tribunal

All statutory and rule references are made to their 2018 versions (unless otherwise indicated).

I. INTRODUCTION

1. Pursuant to Rule 9.100 Fla. R. App. P., Petitioner respectfully petitions this Court for a Writ of Quo Warranto directed at 1DCA, and shows the Court the following.

II. JURISDICTIONAL BASIS

2. This Court has jurisdiction to issue a Writ of Quo Warranto under Art. V §3(b)(8) Fla. Const., and Rule 9.030(a)(3) Fla. R. App. P.. Quo Warranto empowers the Supreme Court to examine whether a state agency has lawfully performed its function (see Martinez v Martinez, 545 So. 2d 1338 (Fla. 1989); State ex rel. Christian v Austin, 302 So. 2d 811 (Fla. 1st DCA 1974); State ex rel. Smith v Brummer, 443 So. 2d 957 (Fla. 1984); see Whiley v Scott, 79 So. 3d 707).
3. In the instant case, the state agency involved is 1DCA (see Art. V §4 Fla. Const.), and the state officers are the panel of judges who acted on the case below (see Art. V §10 Fla. Const.).
4. Moreover, Quo Warranto can be examined only after the alleged impropriety has occurred (see League of Women Voters of Fla. v Scott, 232 So. 3d 264 (Fla. 2017)). Which is the situation in the instant case, as outlined in the statement of facts.

III. STATEMENT OF PERTINENT FACTS

A. Originating/Underlying Legal Dispute Between Petitioner and Respondent

5. In June 2017, Petitioner filed his employment discrimination complaint with the FCHR. Pursuant to §760.11(1), he alleged that Respondent had violated his civil rights on the basis of race **and** sex [A0007] [A0036].

6. In September 2017, Respondent denied **both** allegations.^{2/} Stating that it fired Petitioner for a legitimate reason [A0048]. Specifically, because he had failed an actuarial exam:

"Complainant was terminated solely because he failed his [FSA] exam."

- [A0050] - Respondent's Position Statement

7. In December 2017, the FCHR concluded its investigation. Notably affirming that race **and** sex were the basis of Petitioner's complaint [A0005].

8. In January 2018, Petitioner 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 [A0003]. Thus, pursuant to §760.11(7) FS and §120.569 FS, the FCHR transmitted it to DOAH.

9. In May 2018, DOAH **struck** the sex discrimination portion of Respondent's complaint [A0017] despite being unauthorized to do so (see [A0057], 60Y-2.001 FAC).

10. Indeed, in April 2019, DOAH's Recommended Order ("RO") **excluded** Petitioner's sex discrimination complaint from his cause of action (see [A0036]). Plus - confronted with the reality that Respondent never fired its other^{3/} actuaries for also failing exams (see [A0040]) - DOAH adjusted Respondent's defense and ruled in its favor (emphasis added):

"[Petitioner] was terminated solely for failing [his exam], and for..."

- [A0048] - DOAH ALJ

11. Two months later (June 2019), the FCHR issued its Final Order ("FO") [A0052] (see §120.57(1)(1) FS). In which **it listed race as the only protected characteristic** in Petitioner's complaint; and adopted DOAH's ruling. Thereafter, Petitioner appealed the FO; where 1DCA took over (see §120.68 FS, Rule 9.190 Fla. R. App. P.).

B. The Proceeding at the First District Court of Appeal

12. The 1DCA proceeding began in September 2019 and ended in September 2020 (with a mandate). In it, Petitioner argued only two points (see [A0062]).

Point 1: the FCHR violated Petitioner's due process rights by basing its final decision on Respondent's unpled defense; and

Point 2: the FCHR committed a material error by **excluding** Petitioner's sex discrimination charge from his cause of action.

13. Importantly, Respondent answered Petitioner's second point by confirming that his sex discrimination complaint was excluded (see [A0064])).

14. By mid-March 2020, all of the appellate briefs had been filed. And everyone who was involved affirmed that sex discrimination was **not** litigated/adjudicated.

a. DOAH **excluded it** (§10 *supra*);

b. the FCHR **excluded it** (§11 *supra*);

c. Petitioner appealed **its exclusion** (§12 *supra*); and

d. Respondent praised **its exclusion** (§13 *supra*).

15. Yet, months later in its written opinion ("WO") (rendered August 28, 2020), 1DCA cemented the contrary. It 'affirmed' that the underlying dispute **included** sex discrimination.

16. Of course, 1DCA's decision begs the question 'by what authority could you *affirm* something *into* existence?'

IV. ANALYSIS

17. As it appears, 1DCA summoned some unknown power when it *sua sponte* changed the legal basis of the underlying cause of action. It used its modification to "affirm" the FCHR's [appealed] final order. A modification that was contradicted by the appealed order itself (ie, the RO/FO excluded sex discrimination, but the WO included it - whilst affirming the RO/FO).

18. How can this be done?

V. NATURE OF RELIEF BEING SOUGHT

19. On account of the mystery, Petitioner respectfully asks this Honorable Court to issue a Writ of Quo Warranto to the First District Court of Appeals to have it demonstrate what authority it had to change the legal basis of Petitioner's underlying case (in contrast to the appealed final order) while still affirming that modified order.

VI. ARGUMENT

20. This Court should issue a Writ of Quo Warranto because 1DCA has improperly exercised its appellate authority.

21. The standard for reviewing a petition for a writ of quo warranto can be established by combining the rulings of three fundamental Supreme Court cases.

22. In Whiley v Scott, 79 So. 3d 702 (Fla. 2001), this Court held that the alleged impropriety must have been committed by either a state agency or a state officer.

"This writ historically has been used to determine whether a state officer or agency has improperly exercised a power or right derived from the state."

23. Also in Whiley, Florida's Supreme Court stated that such a petition must show that the officer/agency exceeded its authority.

"...a petition for writ of quo warranto is directed at the action of the [agency] and whether such action exceeds [its] constitutional authority."

24. In the second case - State ex rel. Pooser v Wester, 170 So. 736 (Fla. 1936) - the Supreme Court ruled that the complainant in such a writ must have been harmed.

"We permitted [Quo Warranto] in [two distinct cases] on the theory that the law will not permit a wrong to go without a remedy, which principle was reincorporated in [the Florida Constitution]."

"..."

"The test [to see if Quo Warranto applies is based on] whether or not the one complaining has suffered an injury in his "lands, goods, person, or reputation" that should in right and justice be atoned for"

25. Lastly, in State ex rel. Gibbs v Bloodworth, 184 So. 1 (Fla. 1938), this Court instituted the fourth & final prerequisite - that the issued writ is the only remedy available:

"The writ of quo warranto will not be issued where there is another ample and sufficient remedy provided by law for the relief sought."

26. When put together, these cases create a 4-part test for permitting a writ of quo warranto.

- i) The alleged impropriety must have been committed by a state agency/officer.
- ii) The state agency/officer must have exceeded its constitutional authority.
- iii) The agency's/officer's action must have harmed the complainant.
- iv) The complainant must have no other means of redress.

This Petition satisfies all four items, as follows.

i) **State Agency**

27. The target of this Petition is 1DCA; which is a state agency (pursuant to Art. V, §4 and §35.02 FS)^{4/}.

ii) **Breach of Authority**

28. For starters, 1DCA violated the law when it perjured itself with the WO. It wrote that the lower tribunal's case **included** sex discrimination; making citations to both the RO and the FO. Two documents that contradicted 1DCA's statement.

29. Notwithstanding, 1DCA later mandated that the FCHR proceed with the information supplied by the WO. In laymen's terms, 1DCA told the FCHR it did *everything* right, yet fixed its error, and told the FCHR to use the fix. This was a misleading directive from a false statement.

30. According to §837.06 FS (Perjury, False official statements), anyone who *"makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor of the second degree"*. It could not be any clearer:

- a. 1DCA made a false statement;
- b. 1DCA instructed a public servant (ie, the FCHR) to use that statement; and
- c. 1DCA knew that the public servant was going to act in its official capacity.

Thus, 1DCA broke the law.

31. It is elementary that no agency/officer - under the constitution/laws of this state - is authorized to commit a crime.

32. In fact, the Rules Regulating the Florida Bar ("RRTFB") even state that a lawyer/judge "*shall not commit a criminal act that reflects adversely on [his/her] honesty, trustworthiness, or fitness as a lawyer in other respects*". Yet, that is precisely what the panel of judges did in Petitioner's case.

33. Secondly, 1DCA acted unconstitutionally. It did so by encroaching on the powers of a separate branch of government.

34. DOAH and the FCHR are executive branch agencies which report to the Department of Management Services (see Jones v Chiles, 638 So. 2d 48 (Fla. 1994), see Art. IV. §6 Fla. Const.).

a. Pertinently, The FCHR has sole authority to state what protected characteristics a complainant charged a defendant with (see 60Y-2.001 FAC).

35. 1DCA, of course, is a judicial branch agency (see Art. V. §4 Fla. Const.). Its sole authority in the instant case was to determine whether the FCHR departed from the "*essential requirements of law*" (see §120.68(7)). It had no power to tell the FCHR to change the legal basis without first reversing the FCHR's decision. By subverting that power, 1DCA acted as the FCHR (ie, 1DCA acted in executive capacity).

In Whiley, this Court held that it is unconstitutional for a judicial branch agency to act as an executive branch agency:

"...no branch [of government] may encroach upon the powers of another... The separation of powers doctrine is founded on mutual respect of each of the three branches for the constitutional prerogatives and powers of the other branches... [the judicial branch] must be equally careful to respect the constitutional authority of the other branches"

36. §120.68(7) FS gave 1DCA two rights; it could either:

- a. Affirm the FCHR's FO by continuing to exclude Petitioner's sex discrimination charge; **OR**
- b. Reverse the FCHR's FO by reinstating Petitioner's sex discrimination charge.

37. However, when 1DCA 'affirmed' by 'reinstating' it crossed the constitutional lines (see Art. II §3 Fla. Const.); and did so at Petitioner's expense.

iii) Harm

38. 1DCA's actions robbed Petitioner of his due process right.

39. DOAH and the FCHR made it clear that they had excluded Petitioner's sex discrimination charge against Respondent. 1DCA, however, compounded the problem by saying that they included it; obstructing the original case and potentially alienating his federal case^{5/}.

40. The US Supreme Court - in McDonnell Douglas v Green, 411 US 792 (1973) - established that it is harmful error for an agency to exclude a charge from a complaint. So, by covering up this same error, 1DCA harmed Petitioner.

iv) Proper Remedy

41. Pursuant to Johnson v Office of State Attorney, 987 So. 2d 206 (Fla. 5th DCA 2008), the only remedy available for examining the authority of a Court (or [a panel of] its judges) is a direct proceeding by quo warranto.

VII. CONCLUSION

As such, Petitioner has hereby satisfied all four prongs in the standard for reviewing a petition for writ of quo warranto. To summarize: a state agency (¶27) breached its authority (¶28-37) at Petitioner's detriment (¶38-40); rendering quo warranto as his only means of redress (¶41).

WHEREFORE, Petitioner respectfully asks this Court to issue a Writ of Quo Warranto and direct the First District Court of Appeals to explain what authority it had to *change the legal basis of Petitioner's case without first reversing the Lower Tribunal's final order.*

Dated this 28th day of September 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this document is Times New Roman 14-point Font (caption) and Courier New 12-point Font (contents); thus complying with the font requirements of Rule 9.210(a)(2) Fla. R. App. P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September 2020, I electronically filed the foregoing with the Clerk of Courts by using the Florida Courts E-filing Portal which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

^{1/} According to the pagination method outlined in Rule 9.220(c)(2) Fla. R. App. P. [A0010] means page 10 from the appendix.

^{5/} In July 2020, Petitioner filed federal charges of employment discrimination against the Respondent.

^{2/} Originally, Respondent confirmed that the charge was based on race **and** sex (see ¶2 of [A0051] - second paragraph).

^{3/} Employees of a different race and/or sex.

^{4/} To a lesser degree, this Petition is also directed towards 1DCA's panel of judges - who are state officers (see Art. V. §10 Fla. Const.)

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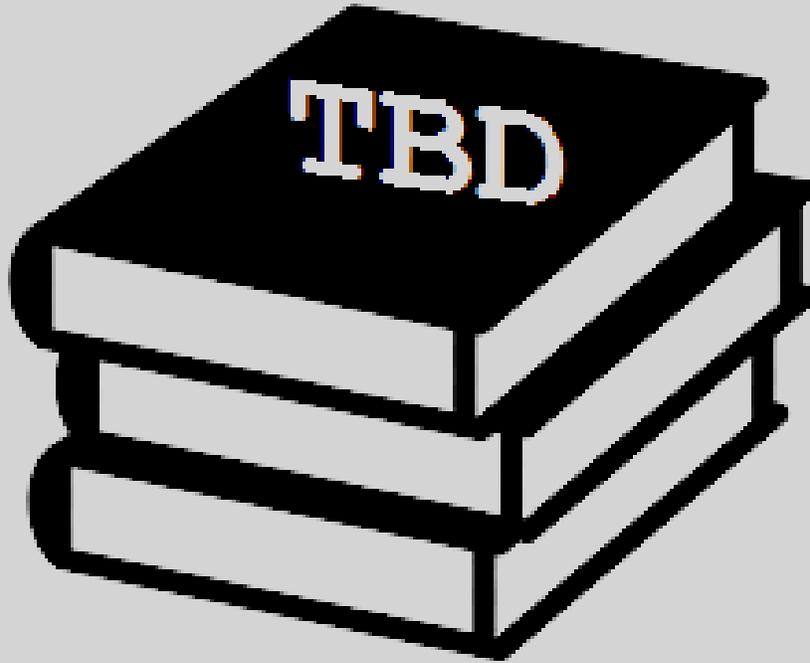
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