NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

SUNCOAST ARCHITECTURE & ENGINEERING, LLC,
Petitioner,

Case No.: 14-000016AP-88A
UCN: 522014AP000016XXXXCI

v.

KENAN TUZLAK,
Respondents.
_____/

Opinion Filed _____

Petition for Writ of Certiorari
from decision of Administrative
Law Judge, Division of
Administrative Hearings

William M. Hurter, Esq.
Attorneys for Petitioner

Thania Diaz Clevenger, Esq.
Attorney for Respondent

PER CURIAM.

Opinion on Rehearing

We grant Petitioner, Suncoast Architecture and Engineering, LLC's, motion for rehearing to the extent we withdraw this Court's opinion dated January 6, 2015, and issue the following opinion in its stead.

Petitioner, Suncoast Architecture and Engineering, LLC, seeks certiorari review of the January 17, 2014, Final Order of the Administrative Law Judge concluding that Suncoast violated Pinellas County Code of Ordinances, Section 70-54(1). Suncoast was found to have engaged in an unlawful retaliatory practice after a discrimination

claim had been filed against it by Respondent, Kenan Tuzlak. Upon review of the briefs and the appendix, this Court dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The petition is granted in part, denied in part, and remanded to the Administrative Law Judge.

Statement of Case

Mr. Tuzlak was employed by Suncoast. On November 5, 2012, he filed with the Pinellas County Office of Human Rights a "Charge of Discrimination" on the basis of religion and retaliation against Suncoast after his discharge on June 11, 2012. Mr. Tuzlak received a letter dated December 21, 2012, from counsel for Suncoast. The letter in pertinent part stated:

> **To begin, we would like to reiterate Suncoast's position: your termination from employment had nothing to do with any sort of discrimination whatsoever, and was based solely on legitimate business necessities. Our client also stated your claim is filled with falsehoods and misrepresentations. As a result, Suncoast is demanding that you withdraw your discrimination claim within 7 days of the date of this letter.**
>
> **If you do not withdraw your claim, we will represent Suncoast throughout the discrimination proceedings and we will also be filing a lawsuit against you for trade slander, in addition to any other legal causes of action which Suncoast may be able to pursue against you for your meritless discrimination claim.**
>
> **We would also ask that any further communications you may seek to have with Suncoast come strictly through this office. We will ensure that any statements or other information from you is forwarded to the appropriate representative of Suncoast.**
>
> **Overall, we are sympathetic to your situation and understand the hardships associated with losing one's job. However, in today's economy many individuals and business are struggling and it is inappropriate and against the law to file a discrimination claim in retaliation to a lawful and necessary termination of employment. With that in mind, we hope you will accept our offer to withdraw your claim against Suncoast in exchange for Suncoast agreeing not to pursue its legal rights against you.**

(hereinafter "the December 21, 2012 Letter").

On January 22, 2013, Mr. Tuzlak filed a new "Charge of Discrimination" alleging that the threat of legal action against Mr. Tuzlak in the December 21, 2012 Letter was in direct retaliation to the good faith discrimination charge filed against Suncoast on November 5, 2012. It was alleged that the December 21, 2012 Letter violated County Ordinance, Section 70-54(1), as it was a retaliatory action. Thereafter, the Pinellas

County Office of Human Rights referred the matter to the Florida Division of Administrative Hearings for a de novo formal administrative hearing.

On September 10, 2013, Suncoast's counsel and Mr. Tuzlak's counsel filed with the Division of Administrative Hearings a joint motion to permit Mr. Tuzlak to appear telephonically at the final hearing before the Administrative Law Judge ("ALJ"). Mr. Tuzlak had moved to Canada to secure employment and personal attendance was not convenient. On September 23, 2013, the ALJ granted the joint motion.

However, on October 23, 2013, Suncoast filed a motion to compel Mr. Tuzlak to physically appear at the final hearing to enable the ALJ "the best possible opportunity to take testimony and judge credibility as part of making the Court's ultimate decision(s) in this action." (App. I, p. 3). On October 29, 2013, the motion was denied.

On November 19, 2013, a final hearing was conducted by video conference. The ALJ was located in Tallahassee, Florida. Counsel for Suncoast and Keith Burnett, owner of Suncoast, appeared in St. Petersburg. Mr. Tuzlak appeared telephonically in the St. Petersburg hearing from Quebec, Canada. Counsel for Mr. Tuzlak appeared telephonically.

On January 3, 2014, the Recommended Order was issued by the ALJ finding that by a preponderance of the evidence Mr. Tuzlak had established a prima facie case of retaliation by the December 21, 2012 Letter. Further, the Recommended Order found that Suncoast did not provide a legitimate, non-discriminatory, non-retaliatory reason for the letter. The Recommended Order found Suncoast violated County Ordinance, section 70-54(1) and ordered it to pay Mr. Tuzlak's reasonable costs and attorney's fees.

Suncoast filed Exceptions to the Recommended Order. The Final Order was entered on January 17, 2014.

Standard of Review

Pinellas County Code of Ordinances Section 70-77(g)(14) provides for review of the Administrative Law Judge's decision in an employment discrimination action by petition for writ of certiorari filed in the Circuit Court. Further, under Florida Rule of Appellate Procedure 9.190(b)(3), judicial review of quasi-judicial decisions by any administrative body, agency, board, or commission not subject to the Administrative

Procedures Act is by petition. In its appellate capacity this Court must decide (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether there was competent, substantial evidence to support the administrative findings. See Falk v. Scott, 19 So. 3d 1103, 1104 (Fla. 2d DCA 2009).

Analysis

Suncoast presents six arguments in support of its petition for writ of certiorari.

Due Process

(1) "Suncoast was not afforded a meaningful opportunity to he heard as the lower tribunal failed to consider Suncoast's affirmative defense" of Florida's Litigation Privilege.

Suncoast raised Florida's Litigation Privilege at the final hearing. (App. E, p. 19, 64-70). The Special Magistrate's "Recommended Order" dated January 3, 2014, did not reference Suncoast's argument concerning Florida's Litigation Privilege. However, in the Final Order the ALJ rejected Suncoast's First Exception to the Recommended Order in which Suncoast repeated its argument concerning Florida's Litigation Privilege.

Basic due process requirements are met if the parties are provided notice of the hearing and an opportunity to be heard. Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). Suncoast was afforded due process with regard to its argument concerning Florida's Litigation Privilege when it presented its argument at the final hearing and in the Exception to the Recommended Order. The petition is denied on this basis.

(2) "Suncoast was denied a meaningful, full and fair opportunity to be heard as Mr. Tuzlak was not compelled to appear physically at the final hearing, thus significantly impairing the ALJ's ability to adequately perform its function of evaluating and assessing witness credibility."

Suncoast complains that its due process rights were violated because (a) Mr. Tuzlak speaks English as a second language and has an accent which frequently makes it difficult to understand what he is saying; (b) Mr. Tuzlak testified via telephone over Suncoast's objection; and (c) the ALJ appeared for the hearing via a video conference "meaning there was yet another electronic medium for Mr. Tuzlak's testimony to travel through prior to being received by the fact finder."

Counsel for Suncoast explains in the petition that at the time it filed the joint motion to permit Mr. Tuzlak to appear telephonically, he had not yet conducted Mr. Tuzlak's deposition. At the deposition, counsel for Suncoast noted that there were "significant difficulties" in interpreting Mr. Tuzlak's responses. Thereafter, the motion to compel Mr. Tuzlak's physical attendance at the final hearing was filed and Suncoast's counsel notified the ALJ that he was "withdrawing" his consent to the telephonic appearance. In the argument to this Court, counsel for Suncoast indicates that the denial of the motion to compel was entered without explanation.

In reviewing the October 29, 2013, Order of the ALJ this Court finds that an explanation is included. (App. H). The Order states in part: "Both parties acknowledge that the undersigned is the ultimate trier of fact in this case, and that Petitioner [Mr. Tuzlak] as the party asserting the affirmative, . [sic] carries the burden of proving his case. (Endnote: Any inability to understand Petitioner during the course of his telephonic testimony may impact the weight and credibility given to Petitioner's testimony.)"

This Court concludes that Suncoast's due process rights were not violated when the ALJ denied its request to withdraw its prior consent to Mr. Tuzlak's appearance by telephone and declined to compel Mr. Tuzlak's physical appearance. Further, Suncoast has failed to demonstrate how its due process rights were violated by Mr. Tuzlak's telephonic appearance or by the Administrative Law Judge's attendance at the final hearing by video conference. The petition is denied on this basis.

Departure from the Essential Requirements of Law

(1) "The lower tribunal erroneously applied a subjective standard in determining whether Mr. Tuzlak suffered a 'materially adverse' action."

Ordinance section 70-54, "Retaliation, coercion, interference, obstruction or prevention of compliance with division" states in pertinent part:

> It is unlawful discriminatory practice for a person to:
>
> (1) Retaliate or discriminate against a person because he or she has opposed a discriminatory practice, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this division . . . .

The Florida Civil Rights Act of 1992 includes a retaliation provision in section 760.10, Florida Statutes (2013). Ordinance section 70-54(1) mirrors section 760.10(7). [1] Additionally, section 760.10(7) is virtually identical to its federal counterpart, Title VII 42 U.S.C. section 2000e–3(a).[2] See Donovan v. Broward County Bd. of Comm'rs, 974 So. 2d 458, 459 (Fla. 4th DCA 2008). Florida state court case law and federal case law interpreting section 760.10(7) and 42 U.S.C. section 2000e–3(a) shall be considered by this Court in evaluating the decision of the ALJ.

To establish a prima facie case for retaliation, the employee must show that: (1) he or she engaged in a statutorily protected expression; (2) there was an adverse employment action; and (3) there was a causal connection between the participation in the protected expression and the adverse action. St. Louis v. Florida Int'l Univ., 60 So. 3d 455, 460 (Fla. 3d DCA 2011).

In Donovan, the appellate court discussed the burden of proof for the employee claiming retaliation under the statute. The appellate court stated:

> In [Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68-69 (2006)], the Court clarified that an employee need only show that "a reasonable employee would have found the challenged action materially adverse." [548 US 53]. In other words, the materially adverse employment action would discourage a reasonable employee from making or supporting a charge of discrimination.

Donovan, 974 So. 2d at 460. In Burlington, the U.S. Supreme Court explained:

> We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.

548 U.S. 53, 68-69.

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[1] Section 760.10(7) states in part:

> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because . . . that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

[2] 42 U.S.C. section 2000e–3(a) states in part:

> (3)(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

In the Recommended Order the ALJ made the following finding of fact with regard to the December 21, 2012 Letter:

> 7. Mr. Tuzlak felt threatened and scared by the letter. Mr. Tuzlak believed the intent "of this document [letter] was to scare me off and stop me from enforcing my legal rights." Mr. Tuzlak understood the letter was a demand for him to withdraw the prior discrimination case (Charge 1) against Suncoast, or Mr. Tuzlak would be sued for, among other things, "trade slander." The letter accused Mr. Tuzlak of filing Charge 1 with "falsehoods and misrepresentations." Mr. Tuzlak feared he would incur financial losses. His testimony is found to be credible.

(App. C, p. 6)(endnote omitted). In the Recommended Order the ALJ made the following conclusion of law:

> 17. In this instance, a preponderance of evidence establishes a prima facie case of retaliation. Mr. Tuzlak participated in a protected activity, as he had the right to file a complaint alleging discrimination, Charge 1. The fear and apprehension instilled in Mr. Tuzlak after receiving the December 21, 2012, letter threatening a law suit if he did not drop Charge 1 was significant. The letter was sent as a result of Mr. Tuzlak exercising his right to file the complaint. Thus, the causal connection is well-established.

(App. C, p. 9).

The ALJ did not make a finding or a conclusion about whether the December 21, 2012 Letter "would discourage a reasonable employee from making or supporting a charge of discrimination." See Donovan, 974 So. 2d at 460.

A departure from the essential requirements of law is synonymous with the failure to apply the correct law. Achord v. Osceola Farms Co., 52 So. 3d 699, 702 (Fla. 4th DCA 2010)(citing State v. Belvin, 986 So. 2d 516, 525 (Fla. 2008)). By failing to apply the correct standard of review the ALJ departed from the essential requirements of the law. Suncoast is entitled to relief on this claim and this matter is remanded to the ALJ to make the necessary determination from the evidence of record.

> **(2) "The lower tribunal substantially departed from the essential requirements of law by failing to take into account the specific circumstances and context of the challenged action as mandated by the US Supreme Court in Burlington" in determining whether the December 21, 2012, letter was a 'materially adverse action' by Suncoast."**

The argument presented by Suncoast is that the surrounding facts and circumstances in this case tend to show that a reasonable employee likely would not be dissuaded from making or supporting a charge of discrimination.

As discussed above, the ALJ did not make a finding or a conclusion about whether the December 21, 2012 Letter was materially adverse, in other words, whether it would discourage a reasonable employee from making or supporting a charge of discrimination. Suncoast has been granted relief on this basis and this matter is remanded for the ALJ to make this determination.

(3) "The ALJ's failure to apply Florida's litigation privilege as a bar to Mr. Tuzlak's claim constitutes a substantial departure from the essential requirements of law."

This is a case of first impression under the facts of the present case.

The Florida Supreme Court in Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Insurance Co., 639 So. 2d 606 (Fla. 1994), unequivocally held that "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." Id. at 608. In Echevarria, McCalla, Raymer, Barret & Frappier v. Cole, 950 So. 2d 380 (Fla. 2007), the Florida Supreme Court reiterated its broad application of the privilege, and specifically held that the litigation privilege "applies in all causes of action, statutory as well as common law." Id. at 380–81.

In Hatcher v. Dixon, 660 So. 2d 1105, 1108 (Fla. 1st DCA 1995), the First District Court of Appeals in *dicta* held: "For purposes of decision, we nevertheless assume, without deciding, that a lawyer who deliberately misleads an unrepresented adverse party should answer in damages for injury he thereby causes; and that the 'litigation privilege' does not extend to settlement negotiations." The federal court in Jackson v. Bellsouth Telecommunications, 372 F. 3d 1250, 1276 n.26 (11th Cir. 2004), acknowledged that in *dicta* the First District Court of Appeal addressed the litigation privilege in relation to settlement agreements.

The Jackson opinion also acknowledged that in Ingalsbe v. Stewart Agency, Inc., 869 So. 2d 30 (Fla. 4th DCA 2004), the Florida appellate court concluded that the litigation privilege does not bar a tortious interference with contract claim arising out of

settlement negotiations. In that case, counsel for the defendant [Dealer] directly contacted the plaintiff [Client] who was represented by counsel and negotiated a settlement with Client, including attorney's fees to be paid to Client's counsel. The appellate court stated:

> [W]e begin with an acknowledgment that Dealer was privileged to propose and conclude a settlement because of the importance the law places on settlements of civil disputes. But there is nothing inherent in the right to settle lawsuits that would compel a corollary right to interfere with a fee contract between one of the settling parties and his lawyer. Without such a legally recognized right, Dealer was not privileged to use the right to settle in such a way as to interfere with the obligation of Client arising from the clear language of the fee contract.

Id. at 32-33.

Despite acknowledging these two Florida state court appellate opinions addressing Florida's Litigation Privilege, the Jackson federal court stated, "[W]e are aware of no decision in which a Florida court has squarely held that the litigation privilege applies to actions exactly like those taken by the BellSouth defendants to settle the ongoing, protracted litigation at issue here, we agree with those courts [in other states] that have applied similar litigation privileges to settlement activities, and believe that Florida's courts would do so too." Jackson, 372 F. 3d 1275-76. The question was never certified to the Florida Supreme Court.

In the present case, the December 21, 2012 Letter was mailed directly to Mr. Tuzlak because counsel for Suncoast was unaware that when the November 5, 2012, "Charge of Discrimination" was filed, Mr. Tuzlak was represented by counsel. The December 21, 2012 Letter stated: "Suncoast is demanding that you withdraw your discrimination claim within 7 days of the date of this letter." At the conclusion of the letter warning Mr. Tuzlak of the possibility of litigation Suncoast did include the statement: "With that in mind, we hope you will accept our offer to withdraw your claim against Suncoast in exchange for Suncoast agreeing not to pursue its legal rights against you." Suncoast claims that the December 21, 2012 Letter was merely attempting to settle this matter.

The departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682 (Fla. 2000).

> [T]he phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common-law certiorari, the [appellate courts] should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The [appellate] courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.
>
> It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari.

Nader v. Fla. Dep't of Highway Safety and Motor Vehicles, 87 So. 3d 712, 722 (Fla. 2012)(quoting Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983))(emphasis in original).

As noted above, this is a case of first impression. This Court concludes that, under the facts presented, the ALJ's legal determination to reject Florida's Litigation Privilege in the present case could have been based on a factual determination by the ALJ that (1) the December 21, 2012 Letter was not actually a genuine settlement letter, but an attempt to intimidate Mr. Tuzlak into dismissing his discrimination charge; or (2) the December 21, 2012 Letter is a settlement letter that is not subject to Florida's Litigation Privilege. See Ingalsbe, 869 So. 2d at 32-33.

This Court finds in its discretion that there has not been a violation of a clearly established principle of law resulting in a miscarriage of justice. The ALJ did not depart from the essential requirements of law when he concluded that the litigation privilege did not bar Mr. Tuzlak's cause of action for retaliation. The petition is denied on this basis.

Competent Substantial Evidence

(1) "There is no evidence in the record to support that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination based on the challenged action."

This Court has found that the ALJ did not make a finding or a conclusion about whether the December 21, 2012 Letter would discourage a reasonable employee from making or supporting a charge of discrimination. Suncoast has been granted relief on this basis and this matter is remanded for the ALJ to make this determination. On

remand, the ALJ shall determine if the evidence is sufficient to support Mr. Tuzlak's position.

(2) "There is no competent, substantial evidence in the record to support a finding that Suncoast did not provide a legitimate, non-retaliatory reason for sending the Letter."

This Court is to review the evidence presented to determine whether there was competent, substantial evidence to support the administrative findings. See Falk, 19 So. 3d at 1104. This Court is not to reweigh the evidence.

The Court finds that competent, substantial evidence supports the ALJ's conclusion "that Mr. Burnett did not provide a legitimate, non-discriminatory, non-retaliatory reason for the letter." Relief is denied on this basis.

Conclusion

The Petition for Writ of Certiorari is granted to the extent this matter is remanded to the Administrative Law Judge to review the evidence and testimony presented at the November 19, 2013, hearing. The ALJ shall determine whether "a reasonable employee" would have found the December 21, 2012 letter "materially adverse" so that it would discourage a reasonable employee from making or supporting a charge of discrimination. See Donovan, 974 So. 2d at 460. On remand the ALJ shall enter a Final Order announcing his or her determination and reviewing the sufficiency of the evidence. In all other respects the petition is denied.

Petition for writ of certiorari is granted in part, denied in part, and remanded.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 3 day of February, 2015.

Original Order entered on February 3, 2015, by Circuit Judges Linda R. Allan, John A. Schaefer, and Keith Meyer.

Copies furnished to:

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