FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2578

FLORIDA FISH & WILDLIFE
CONSERVATION COMMISSION,

Appellant,

v.

JEFFREY HAHR,

Appellee.

On appeal from the Circuit Court for Leon County.
John C. Cooper, Judge.

August 9, 2021

RAY, J.

The Florida Fish and Wildlife Conservation Commission ("the Commission") asserts that the trial court erred in denying its motion to dismiss upon finding that the Commission had no right to sovereign immunity for private suits brought under section 92.57, Florida Statutes (2018), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301–4333. We agree with the Commission and reverse.

I.

Hahr filed a four-count complaint against the Commission, claiming he was wrongfully terminated from his position of OPS Reserve Officer. He asserts that his termination was primarily in

retaliation for providing unfavorable testimony in another lawsuit against the Commission brought by a fellow officer.

Relevant to this appeal, Count I of Hahr's amended complaint alleged a violation of section 92.57, Florida Statutes, which prohibits an employer from terminating an employee because of the nature of the employee's testimony provided in a judicial proceeding under a subpoena. Count IV alleged retaliation under USERRA. The trial court denied the Commission's motion to dismiss the counts based on sovereign immunity, and this appeal followed.

II.

The State and its subdivisions enjoy sovereign immunity from civil liability unless such immunity is waived by legislative enactment or constitutional amendment. *See* Art. X, § 13, Fla. Const. "[A]ny waiver of sovereign immunity must be clear and unequivocal," and therefore "waiver will not be found as a product of inference or implication." *Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 472 (Fla. 2005). "In Florida, sovereign immunity is the rule, rather than the exception. . . ." *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984).

"Whether a legislative enactment has waived the defense of sovereign immunity is a pure question of law reviewed de novo." *State, Dep't of Elder Affs. v. Caldwell*, 199 So. 3d 1107, 1109 (Fla. 1st DCA 2016) (citing *Klonis v. State, Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000)).

A.

Taking Hahr's claims in reverse order, we turn first to Count IV, which alleges retaliation under USERRA. During the briefing period for this appeal, this Court held that sovereign immunity bars private actions brought under USERRA against a state agency. *See Dep't of Highway Safety & Motor Vehicles v. Hightower*, 306 So. 3d 1193 (Fla. 1st DCA 2020). Because *Hightower* is directly on point, we reverse the trial court's order on this count and remand for entry of an order granting the Commission's motion to dismiss.

B.

We next consider whether the State has waived sovereign immunity for claims arising under section 92.57, Florida Statutes. We hold that it has not, and thus the Commission is entitled to immunity from such claims.

Section 92.57, entitled "Termination of employment of witness prohibited," states:

> A person who testifies in a judicial proceeding in response to a subpoena may not be dismissed from employment because of the nature of the person's testimony or because of absences from employment resulting from compliance with the subpoena. In any civil action arising out of a violation of this section, the court may award attorney's fees and punitive damages to the person unlawfully dismissed, in addition to actual damages suffered by such person.

To begin, Hahr concedes—and we agree—that section 92.57 contains no independent waiver of sovereign immunity. Nothing in the language of the statute shows a clear expression by the Legislature that it intended to consent to suits against the State in this context. Section 92.57 is unlike other statutory claims for retaliatory discharge where the waiver of sovereign immunity derives from the plain text of the statutes. *See Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1258 (Fla. 2010) (explaining that the Legislature "chose to create liability [for workers' compensation retaliation claims] through its specific and clear definition of 'employer,' which includes the State and its subdivisions"); *Maggio v. Fla. Dep't of Lab. & Emp. Sec.*, 899 So. 2d 1074, 1078 (Fla. 2005) (explaining that the Florida Civil Rights Act's inclusion of the State as an "employer" subject to liability was an independent waiver of sovereign immunity); *Fla. Dep't of Educ. v. Garrison*, 954 So. 2d 84, 86 (Fla. 1st DCA 2007) (explaining that the Florida public sector Whistle-blower's Act is a "stand-alone statutory scheme" designed to provide a remedy against the State under certain conditions). In short, those statutes specifically authorize a lawsuit against the State. That is not the case with section 92.57.

While section 92.57 does not contain its own waiver of sovereign immunity, Hahr contends that a section 92.57 claim falls within the sovereign immunity waiver of section 768.28, Florida Statutes (2018). Section 768.28 provides a limited waiver of sovereign immunity for tort actions involving "injury or loss of property, personal injury, or death." § 768.28(1), Fla. Stat.

To support his argument, Hahr relies on *Mason v. City of Miami Gardens*, No. 14-23908-CV, 2015 WL 2152702 (S.D. Fla. May 6, 2015). In *Mason*, the plaintiff sued his former employer for wrongful termination in violation of section 92.57. *Id.* at *1. Focusing on the type of damages pleaded, the district court concluded that because section 768.28 waives sovereign immunity for personal injury torts and the plaintiff was seeking damages under section 92.57 for "pain, suffering, and humiliation"—which is a form of personal injury—his claim would fall within the sovereign immunity waiver of section 768.28. *Id.* at *2.

For its part, the Commission relies on a federal district court decision that reached the opposite conclusion. *See Ashworth v. Glades Cnty. Bd. of Cnty. Comm'rs*, No. 2:17-cv-577-FtM-99MRM, 2017 WL 6344209 (M.D. Fla. Dec. 12, 2017). The district court in *Ashworth* focused on the statutory language of section 92.57 rather than the type of damages sought by the plaintiff. *Id.* at *2. Following the guidance of Florida state court decisions, the district court concluded that the plain language of section 92.57 did not include a clear and unequivocal waiver of sovereign immunity and there was no other indication that the Legislature intended such a waiver for section 92.57 claims. *Id.*

In reaching its decision, the *Ashworth* court examined the Florida Supreme Court's decision in *Bifulco*. In *Bifulco*, the supreme court held that the presuit notice requirements of section 768.28(6) do not apply to workers' compensation retaliation claims against the State under section 440.205, Florida Statutes. 39 So. 3d at 1258. The court reasoned that the waiver of sovereign immunity for claims under section 440.205 derived from the plain text of the statute and not by reference to section 768.28. *Id.* It noted that "[w]hen the Legislature has intended particular statutory causes of action to be subject to the requirements of

section 768.28(6), it has made its intent clear by enacting provisions explicitly stating that section 768.28 applies." *Id.*

The *Ashworth* court also observed that "the purpose of the enactment of Section 768.28 was to waive sovereign immunity for breaches of *common law duties of care*, limited to traditional torts, rather than causes of action created by statute." 2017 WL 6344209, at *2 (citing *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 917 (Fla. 1985), and *Hill v. Dept. of Corr.*, 513 So. 2d 129, 133 (Fla. 1987)). It then discussed this Court's decision in *Caldwell*, where we stated that section 768.28 "applies only to tort claims, not to statutory claims such as retaliatory discharge." 199 So. 3d at 1110. Even though *Caldwell* involved a claim that allowed for the recovery of tort-like compensatory damages, including pain and suffering, this Court focused on the statutory language to determine whether the Legislature expressed a "clear and unequivocal waiver" of sovereign immunity. *Id.*

We are persuaded by the reasoning of *Ashworth*. There is no clear and unequivocal waiver of sovereign immunity in section 92.57 and the waiver provisions of section 768.28 do not apply. The trial court therefore erred in denying the Commission's immunity claim on this count.

* * *

For these reasons, we reverse the trial court's order and remand for entry of an order granting the Commission's motion to dismiss as to Counts I and IV.

REVERSED and REMANDED.

LEWIS, J., concurs; JAY, J., specially concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

JAY, J., specially concurring.

I concur in the majority's conclusion as set forth in part "II A" only because I must. Precedent demands it. In no uncertain terms, this Court in *Department of Highway Safety & Motor Vehicles v. Hightower*, 306 So. 3d 1193 (Fla. 1st DCA 2020), rejected the same claim as made by Hahr and held that the Florida Legislature did *not* waive its sovereign immunity when it incorporated into Florida statutory law the provisions of the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"). But I have serious concerns with the "whys and wherefores" of that ruling.

Briefly, USERRA was enacted by Congress to encourage "non-career" enlistment in the military by "minimiz[ing] the disruption to the lives of persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of [military] service[.]" 38 U.S.C. § 4301(a)(1) & (2) (2019). The definition of "employer" for purposes of the act includes "a State." 38 U.S.C. § 4303(4)(A)(iii). As acknowledged by this Court in *Hightower*, to protect enlisted employees USERRA creates a private right of action enforceable against states in their own courts. 306 So. 3d at 1196 (citing 38 U.S.C. § 4323(b)(2)). The act "provides that '[a] person who is a member of . . . a uniformed service shall not be denied . . . reemployment . . . or any benefit of employment by an employer on the basis of that membership . . . .'" *Id.* at 1197 (quoting 38 U.S.C. § 4311(a)). Yet, following a lengthy recitation of sovereign immunity law in general, and, specifically, emphasizing the inviolability of state immunity from Congressional overreach, *Hightower* concluded that Congress did not abrogate Florida's historic and constitutionally protected sovereign immunity through USERRA. *Id.* at 1198.

That said, it is undeniable that Florida has the power, by statute, to waive its sovereign immunity. *Klonis v. State, Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000) ("Unquestionably, the Florida Legislature has the constitutional power to enact laws waiving sovereign immunity.") To be sure, "a waiver of sovereign immunity by legislative enactment must be clear, specific, and unequivocal," *id.* (citation omitted), but "no particular magic words are required." *Id.* Rather, in examining the

language of any particular legislation for waiver, "we must presume that the Florida Legislature stated [ ] what it meant, and meant what it said." *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)). "If the statutory wording is unambiguous, then judicial inquiry is complete." *Id.*

Hightower considered the operative legislative language adopting USERRA in Chapters 115 and 250, Florida Statutes, and concluded:

> [T]here is no indication that the Legislature specifically intended to permit the State to be sued under USERRA claims in its state courts. Even if it could be inferred that the Legislature intended to permit such suits, such an inference is not sufficient to constitute a clear and unequivocal waiver of sovereign immunity.

Id. at 1201. Granted, I am bound by that holding; but were I handed a clean slate, I would decide the question differently. In my view, by enacting the relevant provisions in Chapters 115 and 250, our legislature clearly, specifically, and unequivocally waived its sovereign immunity in suits brought against the state under USERRA, and I need not lean on mere inference in reaching that conclusion.

Chapter 115 falls under the aegis of Title X of the Florida Statutes, boldly entitled "PUBLIC OFFICERS, EMPLOYEES, AND RECORDS (Chapters 110-123)." Chapter 115 is expressly addressed to "LEAVES OF ABSENCE TO OFFICIALS AND EMPLOYEES." I stop here to observe that a reader of the law all too often sees its heading as just so much signage along the statutory road map. But the title of a statute is of no small stature and should not be given short shrift. While "text wins" in "a war between text and title," *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 293 (5th Cir. 2020) (citing Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 222-23 (2012)), a statutory title "is a permissible indicator of the meaning of [the] text." *U.S. v. Heon Seok Lee*, 937 F.3d 797, 812 (7th Cir. 2019) (citations omitted). A heading is "especially valuable" where "it reinforces what the text's nouns and verbs independently suggest . . . ." *Yates v. United States*, 574 U.S. 528, 552 (2015) (Alito concurring).

True to its heading, Chapter 115 extends leaves of absence, benefits, and protections to employees of the public sector who become active reservists in the armed forces. *See* § 115.14, Fla. Stat. (2019). And, section 115.15, Florida Statutes, is pointedly titled "Adoption of federal law for employees." It states:

> The provisions of the Uniformed Services Employment and Reemployment Rights Act, chapter 43 of Title 38 U.S.C., shall be applicable in this state, and the refusal of any state, county, or municipal official to comply therewith shall subject him or her to removal from office.

By adopting USERRA, wholly, unreservedly, and without exception, I believe that the Florida Legislature recognized and acceded to all provisions of the act, including its application to state employers. *See* 38 U.S.C. § 4303(4)(A)(iii) (2019) ("the term 'employer' means any person, institution, organization, or other entity, . . . including . . . a State."). In that manner, Florida unequivocally waived its sovereign immunity to a private cause of action brought under the act.

If the foregoing is not proof enough of legislative intent to waive sovereign immunity, the Florida Legislature has made certain that our public employee reservists are protected under Title XVII of the Florida Statutes, entitled "MILITARY AFFAIRS AND RELATED MATTERS." Part IV of Title XVII is the "FLORIDA UNIFORMED SERVICEMEMBERS PROTECTION ACT." The legislature's intent is explicitly set forth as follows:

> It is the intent of the Legislature that men and women who serve in the National Guard of any state, the United States Armed Forces, and Armed Forces Reserves understand their rights under applicable state and federal laws. Further, it is the intent of the Legislature that Florida residents and businesses understand the rights afforded to the men and women who volunteer their time and sacrifice their lives to protect the freedoms granted by the Constitutions of the United States and the State of Florida.

§ 250.81, Fla. Stat. (2019).

In furtherance of that goal, section 250.82(1), Florida Statutes, recognizes that "Florida law provides certain protections to members of . . . the United States Reserve Forces . . . in various legal proceedings and contractual relationships" and adds that in addition to state law, "federal law also contains protections, such as those provided in . . . the Uniformed Services Employment and Reemployment Rights Act (USERRA) . . . ." Paragraph (2) of the statute provides: "To the extent allowed by federal law, the state courts have concurrent jurisdiction for enforcement over all causes of action arising from federal law and may award a remedy as provided therein." § 250.82(2), Fla. Stat.

In short, there is little to doubt that by virtue of Florida's adoption of every jot and tittle of USERRA into its body of law, it has acceded to extending USERRA's protections to its own state employees. Any other conclusion is perplexing, given the clearly mapped legislative mandate. The result of this logic, then, is an unequivocal waiver of sovereign immunity under USERRA, as the trial court concluded below. Nevertheless, to the extent I am impelled to follow the precedent set in *Hightower*, I reservedly concur in part "II A" of the majority's opinion.

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