FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-227

STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES,

Appellant,

v.

JAMES HIGHTOWER,

Appellee.

On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

October 9, 2020

M.K. THOMAS, J.

In this case of first impression, we address whether sovereign immunity bars a private individual's claims against a Florida state agency under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–4335 (2014), and the Florida Uniformed Servicemembers Protection Act (FUSPA). §§ 250.80–250.84, 250.905, Fla. Stat. (2014). After determining that the State had waived sovereign immunity, the trial court denied its motion for judgment on the pleadings. The State appeals the denial. We reverse, finding sovereign immunity applies.

I. Facts

James Hightower, a member of the United States Navy Reserve and Lieutenant with the Florida Highway Patrol (FHP), filed suit against the Department of Highway Safety and Motor Vehicles (the State), alleging retaliation and harassment by his FHP superiors for performance of reservist duties. Hightower's complaint raises two counts. Count one proceeds under FUSPA, which Hightower claims creates a cause of action by its adoption of USERRA. Count two proceeds separately under USERRA itself, which Hightower contends provides a cause of action against the State in state court.

The State moved for judgment on the pleadings, arguing resolution in its favor was warranted as a matter of law because the State had not waived sovereign immunity. The State argued that because no Florida statute clearly and explicitly waives sovereign immunity from Hightower's claims of liability, both counts of the complaint must fail. The trial court disagreed, finding FUSPA waived the State's sovereign immunity from claims under both USERRA and FUSPA. In its entirety, the trial court's order provided the following:

> Defendant's Motion for Judgment on the Pleadings and Defendant's Renewed Motion for Judgment on the Pleadings are denied as a matter of law. The language in [FUSPA] provides for a private right of action against the State of Florida by a private citizen. Further, [FUSPA] waives sovereign immunity on behalf of the State of Florida in respect to causes of action brought under [USERRA]. Defendant is not entitled to Sovereign Immunity from claims under [USERRA] or [FUSPA], as a matter of law.

II. Analysis

A trial court's determination that the State has waived its sovereign immunity raises only legal issues and is, thus, subject to de novo review. *See Plancher v. U.C.F. Athletics Ass'n, Inc.*, 175 So.

3d 724, 725 n.3 (Fla. 2015); *State v. Caldwell*, 199 So. 3d 1107, 1109 (Fla. 1st DCA 2016).

In *Clark v. Virginia Department of State Police*, 793 S.E. 2d 1 (Va. 2016), the Supreme Court of Virginia aptly summarized the evolution of sovereign immunity in the United States, and we will not rehash the same here. Sovereign immunity is a common law principle that provides that "a sovereign cannot be sued without its own permission." *Fla. Dep't of Health v. S.A.P.*, 835 So. 2d 1091, 1094 (Fla. 2002). As described by the Constitution's framework of governmental power, states retain "a residuary and inviolable sovereignty" that precludes them from being "relegated to the role of mere provinces or political corporations" of a consolidated national government. *Alden v. Maine*, 527 U.S. 706, 715 (1999) (internal citation omitted). James Madison remarked that states have "distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Id.* at 714 (quoting The Federalist No. 39, at 245). Difficulty arises in trying to balance the independence of the states with the enforcement of federal law.

The doctrine of sovereign immunity has been adopted and codified by the Florida Legislature. *See generally*, § 2.01, Fla. Stat.; *S.A.P.*, 835 So. 2d at 1094. "[S]tatutes purporting to waive the sovereign immunity must be clear and unequivocal" in order to effectuate a valid waiver. *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958). Therefore, a waiver of immunity should not be found where it can only be inferred from or implied by the text of a statute, and any statute purportedly waiving immunity should be strictly construed. *Id.* This is "for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. It is enforced as a protection of the public against profligate encroachment of the public treasury." *Id.* However, "no particular magic words are required" for a legislative act to clearly waive state immunity. *Klonis v. State, Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). Sovereign immunity that has not been waived at the state level can be abrogated at the federal level, but only where Congress has unequivocally expressed an intent to do so and only where Congress has been granted exclusive authority

over a certain matter. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996).

A. Abrogation of State Immunity by Congress

The first issue to be addressed is whether Congress validly abrogated the State's sovereign immunity through USERRA. Hightower argues, and the trial court agreed, that USERRA should be exempt from the general sovereign immunity rule of *Alden v. Maine*, 527 U.S. 706 (1999), and be regarded similarly to the bankruptcy power in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), as an exceptional, but nonetheless valid, congressional abrogation of Florida's sovereign immunity to suits in its own courts. We disagree.

A 1998 amendment to the USERRA created a private right of action enforceable against states in their own courts. 38 U.S.C. § 4323(b)(2). USERRA 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.* § 4311(a). Subchapter III of USERRA sets forth a procedure under which employees may seek assistance in investigating and enforcing their claims under USERRA and enforcing their claims of USERRA violations. *See id.* §§ 4321–4327. Under that subchapter, a person who claims entitlement to employment or reemployment rights under USERRA may file a complaint with the Secretary of Labor, who must then investigate the claim. *Id.* § 4332(a), (d). If the Secretary cannot resolve the complaint, the claimant may request that the claim be referred to the Attorney General, who must then decide whether to appear on behalf of, or act as attorney for, the claimant. *Id.* §§ 4323(a)(1), (2). The statute further provides:

> A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person
>
> (A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

> (B) has chosen not to request that the Secretary refer the complaint to the Attorney General paragraph (1); or
>
> (C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

Id. § 4323(a)(3). The following subsection, entitled "Jurisdiction," provides as follows:

> (1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.
>
> (2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.
>
> (3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

Id. § 4323(b). Section 4323(f) specifies that "[a]n action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1)."

The Supreme Court in *Alden* set forth "general principles" for addressing sovereign immunity issues. *Clark*, 793 S.E. 2d at 5. In *Alden*, probation officers filed suit in a Maine state court asserting that their employer, the State of Maine, had violated overtime pay provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219. *Alden*, 527 U.S. at 706. The Act purportedly authorized private actions against states in their own courts. *Id.*; §§ 203(x), 216(b). In dismissing the suit, the Supreme Court explained: "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts." *Alden*, 527 U.S. at 712. The opinion further detailed, "[i]n light of history, practice, precedent, and the structure of the Constitution,

we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Id.* at 754. Accordingly, the Supreme Court observed, "it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and to cede to the Federal Government a power to subject nonconsenting States to private suits in these fora." *Id.* at 743.

As described in *Clark*, the Supreme Court in *Alden* emphasized that this form of "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself" and the "fundamental postulates implicit in the constitutional design." *Clark*, 793 S.E. 2d at 3 (citing *Alden*, 527 U.S. at 728–29). The Supreme Court determined that Article I of the United States Constitution does not provide Congress with the ability to subject nonconsenting states to private suits for damages in its own courts. *Alden*, 527 U.S. at 734. The Court reasoned that the "contours of sovereign immunity necessarily must be 'determined by the founders' understanding" of the constitutional design. *Id.* The Supreme Court noted that to hold otherwise would adopt "the type of ahistorical literalism" employed by the "discredited decision in *Chisholm*."[1] *Id.* at 730. (citing *Chisolm v. Georgia*, 2 U.S. 419 (1793)).

An exception to the general rule of sovereign immunity analyzed in *Alden* arises in the *sui generis* context of federal bankruptcy litigation. In *Katz*, the Supreme Court previously held that because "[b]ankruptcy jurisdiction, at its core, is *in rem* . . . it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." 546 U.S. at 362. Here, Hightower argues this exception applies.

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[1] In *Chisolm v. Georgia*, 2 U.S. 419 (1793), the Supreme Court ruled that Article III, Section 2, of the Constitution abrogated the states' sovereign immunity and granted federal courts the affirmative power to hear disputes between private citizens and states. The case was superseded in 1795 by the Eleventh Amendment.

Hightower claims that Congress enacted USERRA pursuant to its grant of war powers in Article I, Section 8, Clauses 11–16 of the United States Constitution, not its power to "regulate Commerce . . . among the several States" under Article I, Section 8, Clause 3, which authorized the Act addressed in *Alden*. We agree that the holding in *Alden* was based on all congressional powers recognized in Article I, not just the power over interstate commerce. Specifically, the Court in *Alden* clarified, "[w]e hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 527 U.S. at 712. However, for multiple reasons we decline to accept Hightower's request for creation of an additional exception to the holding in *Alden*. Unlike *Katz*, which involved claims against states exclusively in federal bankruptcy court, Hightower's claims are against the State in its own courts. *Alden* did not involve *in rem* proceedings, but rather *in personam* rights of action. *See Clark*, 793 S.E. 2d at 6. Furthermore, it is not within our discretion to grant Hightower's request to carve out additional exceptions. That is within the purview of the United States Supreme Court. We regard *Alden's* holding as unqualified: nonconsenting states cannot be forced to defend "private suits" seeking *in personam* remedies "in their own courts" based upon "the *powers delegated to Congress under Article I* of the United States Constitution." *Alden*, 527 U.S. at 712, 754 (emphasis added).

Thus, we answer the question of whether Congress has validly abrogated the State's sovereign immunity through USERRA in the negative and find that sovereign immunity bars Hightower's USERRA claim against the State.

B. Waiver of Sovereign Immunity by
the Florida Legislature

Next, we address whether Florida validly waived its sovereign immunity as a defense to USERRA claims with passage of Chapter 115 and Chapter 250, Florida Statutes. Chapter 115— titled, "Leaves of Absence to Officials and Employees"—enumerates the requirements for granting leave to county and state officials and employees to allow service in the armed forces and receive scheduled training pursuant to said service. §§ 115.01, 115.07,

115.09, 115.14, Fla. Stat. (2014). Section 115.15 provides, "The provisions of [USERRA] 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."

Chapter 250—titled, "Military Affairs"—is a four-part Chapter. The fourth part, relied upon by the trial court in denying the State's motion, is billed as FUSPA. § 250.80, Fla. Stat. FUSPA provides in pertinent part:

> 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. (2014)

Concerning the applicability of state and federal law, section 250.82, Florida Statutes (2014), additionally provides:

> (1) Florida law provides certain protections to members of the United States Armed Forces, the United States Reserve Forces, and the National Guard in various legal proceedings and contractual relationships. In addition to these state provisions, federal law also contains protections, such as those provided in the Servicemembers Civil Relief Act (SCRA), Title 50, Appendix U.S.C. ss. 501 et seq., and the Uniformed Services Employment and Reemployment Rights Act (USERRA), Title 38 United States Code, chapter 43, that are applicable to members in every state even though such provisions are not specifically identified under state law.
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> (2) 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.

Chapter 250 further specifies that in the event "that any other provision of law conflicts with . . . USERRA . . . or the provisions of this chapter . . . the provisions of USERRA, or the provisions of this chapter, whichever is applicable, shall control. Nothing in this part shall construe rights or responsibilities not provided under the SCRA, USERRA, or this chapter." § 250.83, Fla. Stat. (2014).

Lastly, Chapter 250 provides:

> In addition to any other relief or penalty provided by state or federal law, a person is liable for a civil penalty of not more than $1,000 per violation if that person violates any provision of this chapter affording protections to members of the United States Armed Forces, the United States Reserve Forces, or the National Guard or any provision of federal law affording protections to such servicemembers over which a state court has concurrent jurisdiction under s. 250.82.

§ 250.905, Fla. Stat. (2014).

We begin our review with the applicable standard in mind: "The immunity of the State of Florida and its agencies from liability for claims arising under Florida law or common law is absolute absent a clear, specific, and unequivocal waiver by legislative enactment." *Caldwell*, 199 So. 3d at 1109.

Hightower argues it is evident the State waived its sovereign immunity for the following reasons: (1) USERRA is incorporated into Florida's statutory law in section 115.15; (2) under FUSPA, specifically section 250.82(1), Florida Statutes, the State adopted "protections . . . that are applicable to members [of pertinent armed forces] in every state . . ."; and (3) section 250.82(2), Florida Statutes, recognizes concurrent state and federal court jurisdiction "over all causes of action arising from federal law . . . ."

This Court's decision in *Klonis*, 766 So. 2d 1186, is instructive. While this Court held in *Klonis* that the Legislature need not use "magic words" to waive sovereign immunity, the Legislature still

must do so by an enactment that is clear, specific, and unequivocal. *Id.* at 1179. In *Klonis*, this Court determined that, based on the text of the act itself, which defined the State and its agencies as employers subject to suit and provided the State could be held liable in a civil action for damages, the Florida Civil Rights Act clearly and unequivocally waived sovereign immunity. *Id.* at 1189–90. This Court did not resort to the canons of statutory construction in reaching its conclusion.

Here, we find no similar exacting provisions in FUSPA. The Legislature is well-aware of how to explicitly waive state immunity in enactment of new law. *See City of Jacksonville v. Smith*, 159 So. 3d 888, 910 (Fla. 1st DCA 2015). Neither FUSPA nor section 115.15 clearly announce that the State is subject to suit in its own courts for claims under USERRA or FUSPA or defines the State as a defendant subject to a private cause of action for damages in its own courts. The language in FUSPA and section 115.15 indicating that the provisions of USERRA apply in the State are a far cry from the express language waiving sovereign immunity that was found in *Klonis*.

Hightower's argument that section 250.82 incorporates USERRA is not persuasive because the statute merely dictates that the provisions of USERRA apply in the State—not that State can be sued by private citizens in its own courts for its violation. This conclusion is further supported by the Legislature's explicitly stated intent in enacting FUSPA—to inform military service members of their rights and protections under the law. *See* § 250.81, Fla. Stat. The reference to "concurrent jurisdiction" in section 250.82 also does not indicate the Legislature's intent to waive its sovereign immunity. Section 250.82 limits state court jurisdiction over USERRA claims where state and federal courts have concurrent jurisdiction. However, the critical distinction is that the condition precedent to "concurrent jurisdiction" is a state's waiver of its sovereign immunity. This waiver must be clear and explicit. Similarly, USERRA provides that federal courts do not have jurisdiction over USERRA claims against states and that those claims must be brought in state courts in accord with the laws of that state. *See* 38 U.S.C. § 4323(b)(2). Hightower's argument that Florida waived sovereign immunity is based on

speculation as to the Legislature's purpose in enacting the statute and not the plain meaning of the text.

Hightower claims that this Court is required, under the rules of statutory construction, to interpret the statutes in order to effectuate purpose and avoid a ridiculous conclusion. *See City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1982); *Carlile v. Game & Fish Comm'n*, 354 So. 2d 361 (Fla. 1978); *Klonis*, 766 So. 2d at 1189. His reliance on *Carlile* and *Gidman* in this context is misplaced as neither addressed the issue of whether a legislative enactment waives sovereign immunity. The supreme court in *Carlile* analyzed a statutory amendment related to venue in section 768.28, Florida Statutes. 354 So. 2d at 364. In *Gidman*, the court was concerned with the proper interpretation of the Florida Home Rule Powers Act. 440 So. 2d at 1281. Additionally, the argument that canons of statutory construction should be used to read into Florida law a waiver of sovereign immunity that does not project from the plain and unambiguous language of the text underscores the lack of unequivocal waiver.

We regard this case as similar to *Caldwell*, 199 So. 3d at 1110, where this Court found that the State did not waive its sovereign immunity in enacting the part of the Long-Term Care Facilities: Ombudsman Program (LTCF), which created a long-term care ombudsman and authorized a cause of action when the work of the ombudsman is interfered with. In holding the statute did not waive sovereign immunity, this Court noted the elements lacking in LTCF including the failure of the statute to include an express waiver of sovereign immunity, the failure of the statute to define persons subject to suit as including state agencies, and a lack of language that clearly demonstrated that the Legislature intended for the State to be subject to suit under the statute. *Id.* at 1109–10. The same elements are lacking in FUSPA.[2]

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[2] The court in *Brown v. Lincoln Property Company*, 354 F. Supp. 3d 1276 (N.D. Fla. 2019), addressed the issue now before this Court and reached the same conclusion. In *Brown*, the court addressed FUSPA, finding that it does not create a private right of action and does not indicate who may bring an action and recover any "civil penalty." *Id.* at 1279.

The key question on appeal is not what purpose would be served by sections 115.15 and 250.82 if they were interpreted to not waive sovereign immunity for USERRA claims. Rather, the question is whether FUSPA or section 115.15 clearly and unequivocally waive sovereign immunity based on the plain language of the statutes. As explained above, we do not find that the plain language of the statutes indicates the State waived sovereign immunity—a task the Legislature is well-aware requires clear and explicit language.

As in *Klonis*, there 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. *See Fla. Dep't of Transp. v. Schwefringhaus*, 188 So. 3d 840, 846 (Fla. 2016) ("Waiver cannot be found by inference or implication, and statutes waiving sovereign immunity must be strictly construed."); *Bradsheer v. Fla. Dep't of Highway Safety & Motor Vehicles*, 20 So. 3d 915, 921 (Fla. 1st DCA 2009) (holding any waiver of sovereign immunity must not be inferred).

III. Conclusion

Based on the foregoing, we reverse the trial court's denial of the State's motion for judgment on the pleadings as the State has established it is entitled to sovereign immunity as a matter of law. Because FUSPA does not waive immunity, the State is entitled to a judgment on the pleadings as it relates to count one as it is immune from the claim. Further, because USERRA does not validly abrogate state sovereign immunity and FUSPA does not constitute clear consent to suit under USERRA, the State is likewise entitled to a judgment on the pleadings as to count two.

REVERSED and REMANDED for further proceedings consistent with this opinion.

ROBERTS, J., and DUNCAN, J. SCOTT, ASSOCIATE JUDGE, concur.

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

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