ALL EMPLOYMENT DISCRIMINATION CLAIMS ARE NOT CREATED EQUAL: FLORIDA'S WORKSHARING AGREEMENT DOES NOT ALLOW FOR EQUAL JUSTICE UNDER THE FLORIDA CIVIL RIGHTS ACT

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I. INTRODUCTION

Courts impose roadblocks for employment discrimination plaintiffs that simply do not exist for other classes of civil plaintiffs.[1] Prospective plaintiffs are forced to navigate intricate and burdensome administrative remedies prior to initiating litigation, which in Florida, have the unique ability to effectively bar a plaintiff's right to civil adjudication.[2] Each year, an alarming number of discrimination claims brought under the Florida Civil Rights Act of 1992 ("FCRA")[3] never see the inside of a civil courtroom.[4] While some discrimination claims are denied access to Florida's courts for lack of merit, a great deal more are falling through the cracks of Florida's current workshare agreement between the two agencies that investigate violations of the statute.[5]

While this Comment seeks to analyze a procedural problem within the administrative remedies exclusive to the FCRA, a thorough analysis mandates both reference to, and comparison of, the administrative remedies

1. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001).

2. Kenneth M. Curtin, *Administrative Pitfalls of Litigating Under the Florida Civil Rights Act*, 13 ST. THOMAS L. REV. 523, 537 (2001).

3. FLA. STAT. §§ 760.01–.11, 509.092 (2019).

4. *See, e.g.*, FLA. COMM'N ON HUM. RELS., ANN. REP. 2017–2018: A FISCAL YEAR IN REVIEW 9 (2018) [hereinafter 2018 FC ANN. REP.].

5. *See* discussion *infra* Part III; U.S. EQUAL EMP. OPPORTUNITY COMM'N, FY 2017 EEOC/FEPA WORKSHARING AGREEMENT, WORKSHARING AGREEMENT BETWEEN FLORIDA COMMISSION ON HUMAN RELATIONS AND THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 2 (2017) [hereinafter WORKSHARE AGREEMENT].

under Title VII of the Civil Rights Act of 1964 ("Title VII").[6] In fact, it is the very way in which the agencies that enforce both laws interact in Florida that this Comment suggests has created unequal access to justice under the FCRA.[7] Part II of this Comment will analyze anti-discrimination litigation in Florida and explore the pros and cons of litigating under the FCRA.[8] This section will include both an overview of the administrative remedies mandated under the statute and a numerical representation of how many claims are subsequently denied access to Florida's civil courtrooms each year.[9] Part III will outline the procedural problem created by Florida's workshare agreement, starting with its creation through contract to its solidification through Florida case law.[10] Part IV will address issues of constitutionality, equal protection, and due process.[11] Part V will briefly touch on the long-standing problem's current relevance, and Part VI will advance multiple solutions while discussing the impact that pending legislation may have on issues alleged herein.[12]

II. ANTI-DISCRIMINATION LITIGATION IN THE STATE OF FLORIDA

"[T]he United States is a land of dual sovereigns," affording protection to employees under both federal and state law.[13] Federal law prohibits employment discrimination under Title VII in addition to a plethora of other "class-specific" laws including, but not limited to, the Age Discrimination in Employment Act ("AEDA"),[14] the Americans with Disabilities Act of 1990 ("ADA"),[15] and the Equal Pay Act of 1963 ("EPA").[16] In Florida, state law prohibits employment discrimination under the FCRA.[17] While the FCRA was closely patterned after Title VII and shares significant overlap with its federal counterpart, Title VII and the FCRA comprise distinct causes of action with considerable differences in

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6. *See* discussion *infra* Section II.B; 42 U.S.C. § 2000e; Curtin, *supra* note 2, at 523.
7. *See* discussion *infra* Part III; WORKSHARE AGREEMENT, *supra* note 5, at 1.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Parts II.A., II.B.
10. *See* discussion *infra* Part III.
11. *See* discussion *infra* Part IV.
12. *See* discussion *infra* Parts V, VI.
13. *See* Curtin, *supra* note 2, at 524.
14. *The Florida Civil Rights Act*, FINDLAW, http://corporate.findlaw.com/litigation-disputes/the-florida-civil-rights-act.html (last updated May 26, 2016); 29 U.S.C. §§ 621–626.
15. 42 U.S.C. §§ 12101–12103.
16. 29 U.S.C. § 206(d).
17. FLA. STAT. §§ 760.01–.11, 509.092 (2019).

scope and administrative schemes.[18] The most notable departure between the FCRA and Title VII is the impact that administrative remedies have on an aggrieved party's ability to seek redress in a civil courtroom.[19]

While many Florida employees may have viable claims under both Title VII and the FCRA, the FCRA is attractive to prospective plaintiffs for a multitude of reasons.[20] Notwithstanding a defendant's opportunity for removal based on diversity, the FCRA allows a plaintiff to seek redress for employment discrimination in state court.[21] State courts draw their jurors from the county in which the court sits as opposed to a district-wide pool, allowing victims of discrimination the greatest opportunity to have their claims adjudicated by a jury of like persons.[22] It has been well documented that employment discrimination plaintiffs experience significantly low success rates in federal courts, particularly when their claims are adjudicated by a judge.[23] Thus, the advantage of litigating employment discrimination in state courts cannot be understated.[24]

A. *A Brief History of the Florida Civil Rights Act*

Put simply, the FCRA is Florida's state law prohibiting discrimination in employment on the basis of "race, color, religion, sex . . . national origin, age, handicap, or marital status."[25] The FCRA was enacted in 1992, the year after Congress amended Title VII.[26] Among the most notable amendments to Title VII were provisions that allowed for the recovery of punitive and compensatory damages and the right to a jury trial for plaintiffs seeking such relief.[27] States, including Florida, moved to expand the traditional coverage of their anti-discrimination statutes to match or exceed the new protections of Title VII.[28] Florida's new law closely mirrored Title VII—enacting comparable remedies, guaranteeing plaintiffs a right to a jury trial, and imposing the same pre-suit duty to "exhaust

18. Curtin, *supra* note 2, at 524.

19. *See* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 895 (Fla. 2002).

20. Curtin, *supra* note 2, at 525; 28 U.S.C. §1332.

21. 28 U.S.C. § 1332; FLA. STAT. § 760.11 (2019).

22. *See* FLA. STAT. § 40.01 (2019); Selmi, *supra* note 1, at 560.

23. *See* Selmi, *supra* note 1, at 560; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 103, 103 (2009).

24. *See* Clermont & Schwab, *supra* note 23, at 119.

25. *See* FLA. STAT. § 760.01(2) (2019).

26. RICK JOHNSON & ELIZABETH OAKES, NAT'L EMP'T LAWS. ASS'N, FLA. CHAPTER, THE FLORIDA COMMISSION ON HUMAN RELATIONS: A ROGUE AGENCY 7–8 (2012).

27. *Id.*

28. *Id.* at 8.

administrative remedies."[29] However, the Florida Legislature added a unique feature in which a claim under the FCRA could be barred by an administrative finding of no cause, discussed in detail below.[30]

B. *A Crash Course in Administrative Remedies*

As a general principle, the law requires that "[w]here adequate administrative remedies are available, it is improper to seek relief in court before those remedies are exhausted."[31] At their inception, both Title VII and the FCRA either created or designated an administrative agency tasked with supporting the enforcement of their provisions.[32] Title VII created the Equal Employment Opportunity Commission ("EEOC"), and the FCRA greatly expanded the authority of the pre-existing Florida Commission on Human Relations ("Florida Commission").[33] Both agencies provide prospective plaintiffs the opportunity to engage in pre-litigation mediation and conciliation efforts, and both the EEOC and the Florida Commission hold varying degrees of authority to litigate claims on a plaintiff's behalf.[34] Because both Title VII and the FCRA proscribe such remedies, both laws mandate a plaintiff to exhaust said remedies as a condition precedent to commencing litigation.[35] Plaintiffs that file suit before exhausting administrative remedies are subject to the complete dismissal of their claims.[36]

The "exhaustion of administrative remedies" generally begins with the filing of a charge of discrimination.[37] Notwithstanding the workshare that is the subject of this Comment, plaintiffs seeking redress under federal law are required to file a charge of discrimination with the EEOC, whereas plaintiffs seeking redress under the FCRA are required to file a charge of discrimination with the Florida Commission.[38] While both the EEOC and

29. *See id.*; *The Florida Civil Rights Act*, *supra* note 14.

30. JOHNSON & OAKES, *supra* note 26, at 8–9.

31. Palm Lake Partners II, LLC v. C & C Powerline, Inc., 38 So. 3d 844, 853 (Fla. 1st Dist. Ct. App. 2010) (quoting Communities Fin. Corp. v. Fla. Dep't of Env't Regul., 416 So. 2d 813, 816 (Fla. 1st Dist. Ct. App. 1982)).

32. 42 U.S.C. § 2000e–4(a); *see also* FLA. STAT. §§ 760.03–.05 (2019).

33. 42 U.S.C. § 2000e–4(a); *see also* FLA. STAT. §§ 760.03–.06.

34. *See* 42 U.S.C. § 2000e–4(g)(6); FLA. STAT. § 760.11.

35. *See* 42 U.S.C. § 2000e–5(f); FLA. STAT. § 760.07.

36. *See* Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016); Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1851 (2019).

37. *See* JOHNSON & OAKES, *supra* note 26, at 10–11; *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/filing-lawsuit (last visited Dec. 14, 2020).

38. *Compare* 42 U.S.C. § 2000e–4(g) *with* FLA. STAT. § 760.11.

the FCRA work to prevent discrimination before it occurs, the main function of both agencies is to accept complaints from persons who feel they have been discriminated against, investigate the charges, and issue a finding.[39]

An agency determination made by the EEOC and the Florida Commission do not take identical forms.[40] Moreover, an agency determination has a dissimilar impact on a claimant's ability to pursue civil litigation under each respective law.[41] A finding made by the EEOC, regardless of cause, does not preclude a timely federal lawsuit under Title VII.[42] Conversely, the FCRA "clearly delineates when, and under what circumstances, a civil action may be filed for unlawful discrimination," which occurs in only two distinct circumstances.[43]

1. The Rigid Administrative Structure of the Florida Civil Rights Act

The FCRA provides that any person alleging a violation of the statute "may file a complaint with the [Florida] Commission within 365 days of the alleged violation," and grants authority to the Florida Commission and Florida's Attorney General to file suit on behalf of an aggrieved party.[44] Notwithstanding the statutory use of the word "may," all persons seeking relief must file a charge of discrimination with the Florida Commission or an agency authorized to accept service on its behalf.[45] The Florida Commission is then responsible for investigating the charge and issuing a determination within 180 days.[46]

A finding issued by the Florida Commission takes one of three forms.[47] If the Florida Commission determines that there is "reasonable cause" to believe discrimination took place, the party is free to bring a civil action in a court of competent jurisdiction after a finding of cause is issued.[48] While the Florida Commission makes every effort to issue a determination within the statutory timeframe of 180 days, if a determination is not issued,

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39. *See Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/overview (last visited Dec. 14, 2020); FLA. STAT. § 760.05; JOHNSON & OAKES, *supra* note 26, at 5.

40. *See* discussion *infra* Part III.C; Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 895–96 (Fla. 2002).

41. *See Woodham*, 829 So. 2d at 894–95.

42. *Id.* at 895.

43. Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016).

44. FLA. STAT. § 760.11(1).

45. *Id.*; *see also Sheridan*, 182 So. 3d at 789.

46. FLA. STAT. § 760.11(3).

47. *Id.* § 760.11(1).

48. *Id.* § 760.11(4).

the party is likewise free to proceed to court as if a cause determination had been issued.[49] However, if the Florida Commission determines that there is "not reasonable cause" ("no cause") to believe that discrimination took place, it *must* dismiss the complaint and the charging party cannot file a civil lawsuit alleging discrimination under the FCRA.[50]

If a finding of no cause is issued, an aggrieved party's only remedy is to request an administrative hearing before the Division of Administrative Hearings ("DOAH").[51] If the claimant either fails to petition for an administrative hearing within thirty-five days of the no cause determination or the hearing results in an affirmation of no cause, the claimant's civil claims are barred.[52] In summation, a claim under the FCRA can proceed to a civil jury trial if, and only if, either a finding of cause has been found, or 180 days have elapsed without a finding issued by the Florida Commission.[53] Claimants who receive a finding of no cause by the Florida Commission, while free to appeal the determination, are ultimately prevented from having the matter adjudicated by a jury of their peers.[54] Despite its express terms that the FCRA must be liberally construed to further its purposes and to "preserve and promote access to the remedy intended by the legislature,"[55] a significant number of claims are prevented from accessing Florida's court system by the investigatory conclusions of the Florida Commission.[56]

2. Painting a Numerical Picture

Using the last year of available data, the Florida Commission issued 745 no cause findings in comparison to thirty-three reasonable cause findings for the fiscal year of 2017–2018.[57] Previous years reported very similar trends of no cause findings.[58] Analyzing the seven years of statistical data

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49. *Id.* § 760.11(8); *see also* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 899 (Fla. 2002).

50. FLA. STAT. § 760.11(7); *see also Sheridan*, 182 So. 3d at 790.

51. FLA. STAT. § 760.11(7); *see also* JOHNSON & OAKES, *supra* note 26 at 35.

52. FLA. STAT. § 760.11(7).

53. *See Sheridan*, 182 So. 3d at 790.

54. *Id.* at 792.

55. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000).; *see also* FLA. STAT. § 760.01(3) (2019).

56. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

57. *Id.*

58. *Compare id.*, *with* FLA. COMM'N ON HUM. RELS., ANN. REP. 2016–2017: A FISCAL YEAR IN REVIEW 11 (2017) [hereinafter 2017 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2015–2016: A FISCAL YEAR IN REVIEW 11 (2016) [hereinafter 2016 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2014–2015 11 (2015) [hereinafter 2015 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2013–2014: A FISCAL YEAR IN REVIEW 6 (2014) [hereinafter 2014 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP.

available from the years spanning 2011–2018, the lowest number of no cause findings reported was 645[59] and the highest was 998.[60] While no cause findings have remained relatively constant, findings of cause made by the Florida Commission have plummeted exponentially.[61] From five years leading up to 2015, an average of 146 claims issued a finding of reasonable cause were reported.[62] In the years 2016, 2017, and 2018, findings of reasonable cause dropped to seventy-three, thirty-nine, and thirty-three, respectively.[63]

It is important to note that a large volume of charges received by the Florida Commission are not resolved within the statutory time frame, allowing plaintiffs to proceed to litigation virtually by chance.[64] An alarming fifty percent of claims filed with the Florida Commission between 2017–2018 were not closed within the statutory time frame.[65] In effect, plaintiffs that desire the opportunity to litigate may even hope that the Florida Commission drags its feet instead of barring their claims outright through a finding of no cause.[66] The claims subject to the Florida Commission's jurisdiction under the current workshare are, thus, subject to a metaphorical lottery.[67] While most claims are issued a finding of no cause and prevented from litigating, a large majority also skate through essentially, by happenstance.[68]

Despite the large number of discrimination charges that are blocked from pursuit in civil courts, employment discrimination cases account for an alarmingly miniscule amount of total civil claims filed annually in Florida state courts.[69] Revisiting the last year of data issued by the Florida

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2012–2013: A FISCAL YEAR IN REVIEW 6 (2013) [hereinafter 2013 FC ANN. REP.]; FLA. COMM'N ON HUM. RELS., ANN. REP. 2011–2012: A FISCAL YEAR IN REVIEW 6 (2012) [hereinafter 2012 FC ANN. REP.]; *and* FLA. COMM'N ON HUM. RELS., ANN. REP. 2010–2011: A FISCAL YEAR IN REVIEW 8 (2011) [hereinafter 2011 FC ANN. REP.].

59. 2015 FC ANN. REP., *supra* note 58, at 11.

60. 2017 FC ANN. REP., *supra* note 58, at 11.

61. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

62. *Compare* 2011 FC ANN. REP., *supra* note 58, at 8, *with* 2012 FC ANN. REP., *supra* note 58 at 6, 2013 FC ANN. REP., *supra* note 58, at 6, 2014 FC ANN. REP., *supra* note 58, at 6, *and* 2015 FC ANN. REP., *supra* note 58, at 11.

63. 2016 FC ANN. REP., *supra* note 58, at 11; 2017 FC ANN. REP., *supra* note 58, at 11; 2018 FC ANN. REP., *supra* note 4, at 10.

64. *See* FLA. STAT. § 760.11(8) (2019).

65. *See* 2018 FC ANN. REP., *supra* note 4, at 9.

66. *Compare* 2018 FC ANN. REP., *supra* note 4, at 10, *with* FLA. STAT. § 760.11.

67. *See* FLA. STAT. § 760.11(8).

68. 2018 FC ANN. REP., *supra* note 4, at 10.

69. *See* FLA. OFF. OF STATE CT. ADMIN., FY 2017–2018 STATISTICAL REFERENCE GUIDE 4-4 (2018) [hereinafter 2018 CIRCUIT CIVIL FILINGS].

Commission for 2017–2018, that same year the Florida Office of the State Court Administrator reported a total of 1,717 "Employment Discrimination or Other" circuit civil cases filed in the state.[70]

Moreover, while 1,717 employment discrimination claims were filed in Florida state courts between 2017–2018, that number represents less than *one percent* of the total 164,253 civil court filings that year.[71] In fact, employment discrimination cases have never exceeded more than one percent of annual circuit civil filings in Florida for any year spanning the last decade.[72] While administrative remedies pose an important function as discussed below, employment discrimination claims are hardly flooding the court dockets and overwhelming our justice system.[73]

3. Policy Rationales for Mandating Administrative Remedies

Mandating a duty to exhaust administrative remedies as a prerequisite to litigation helps to support the integrity of the administrative process as a whole by "allow[ing] the executive branch to carry out its responsibilities as a co-equal branch of government."[74] Advocates argue that administrative remedies in employment discrimination cases help conserve valuable judicial resources by preventing meritless claims and providing parties with the opportunity to vindicate credible claims without judicial intervention.[75] One of the main arguments advanced in support of administrative remedies is that immediate judicial access has the potential to weaken the effectiveness of an agency by allowing people to ignore, or otherwise circumvent, their procedures.[76]

4. Criticisms of Imposing Administrative Remedies

Administrative agencies, including both the EEOC and the Florida Commission, have been widely criticized for being overworked and ineffective due to increasing workloads absent corresponding increases in

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70. *Id.*

71. *Id.* at 4-15.

72. *See, e.g.*, FLA. OFF. OF STATE CT. ADMIN., FY 2018–2019 STATISTICAL REFERENCE GUIDE 4-4 (2019) [hereinafter 2019 CIRCUIT CIVIL FILINGS].

73. *See id.* at 4-5.

74. Santana v. Henry, 12 So. 3d 843, 846 (Fla. 1st Dist. Ct. App. 2009) (quoting Key Haven Associated Enters. Inc. v. Bd. of Trs. of Internal Imp. Trust Fund, 427 So. 2d 153, 157 (Fla. 1982); Seann M. Frazier et. al., *Choice of Forum in Florida's Administrative and Circuit Courts: A Review of the Doctrine of Exhaustion of Administrative Remedies*, FLA. BAR J. July–Aug. 1997, at 62, 63.

75. *Santana*, 12 So. 3d at 846.

76. *Id.*

staff and budget.[77] The Florida Commission has been specifically characterized by employment attorneys representing plaintiffs as a politically charged organization that cares more about combating frivolous suits than establishing equal opportunity.[78] Nevertheless, the law appears clear that administrative remedies are here to stay as courts consistently uphold and enforce administrative mandates despite the frequency in which they are challenged.[79]

III. OUTLINING THE PROCEDURAL PROBLEM: FLORIDA'S WORKSHARE AGREEMENT

In Florida, not all charges of discrimination are subject to the stringent determination standards of the Florida Commission and subsequently, are denied access to our courts.[80] Florida, like many other states, currently employs a workshare agreement with the EEOC to process and investigate charges of discrimination.[81] The failure to adopt uniform agency determinations, or otherwise define the legal effect of an EEOC determination on FCRA claims, brought significant confusion to state courts during the infancy years of Florida's workshare.[82] As courts interpreted the legal effect of a dual-filed charge under Florida's current workshare, a procedural system that favors one jurisdiction over the other has irrefutably emerged.[83]

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77. JOHNSON & OAKES, *supra* note 26, at 7; Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), http://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/.

78. *See* JOHNSON & OAKES, *supra* note 26, at 3–4.

79. *See* Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1848 (2019); Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 898 (Fla. 2002); Sheridan v. State Dep't of Health, 182 So. 3d 787, 792 (Fla. 1st Dist. Ct. App. 2016); McElrath v. Burley, 707 So. 2d 836, 838 (Fla. 1st Dist. Ct. App. 1998).

80. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2; U.S. EQUAL EMP. OPPORTUNITY COMM'N, FY 2019 EXTENSION OF WORKSHARING AGREEMENT (2019) [hereinafter WORKSHARE EXTENSION]. The original workshare contract and the recent extension is available for viewing by clicking the link located on the Florida Commissions Website. *Employment: EEOC Worksharing Agreement*, FLA. COMM'N HUM. RELS., http://fchr.myflorida.com/employment (last visited Dec. 14, 2020).

81. *Employment: EEOC Worksharing Agreement*, *supra* note 80.

82. *See* Curtin, *supra* note 2, at 531–32.

83. *See* discussion *infra* Section III.C; WORKSHARE AGREEMENT, *supra* note 5, at 2; WORKSHARE EXTENSION, *supra* note 80.

A. *The Basic FEPA Workshare*

The Florida Commission is just one of ninety-two state and local Fair Employment Practice Agencies ("FEPA") that the EEOC currently contracts with through annual work sharing agreements.[84] In recognition of the procedural overlap bound to arise under both federal and state protections, Congress authorized the EEOC to cooperate with state agencies by entering into work sharing agreements that provide for division of labor in processing charges of discrimination where there is concurrent state and federal jurisdiction.[85] These workshares simultaneously help agencies avoid duplicative investigations of the same allegations while helping plaintiffs preserve their rights under both state and federal law.[86]

B. *Florida's Workshare Agreement*

Under Florida's current workshare agreement, the EEOC and the Florida Commission each designate the other as an agent for the purposes of receiving and processing charges, thus allowing a party to elect to "dual-file" a charge of discrimination with both agencies.[87] Dually filed charges can be submitted to either the EEOC or the Florida Commission but are recognized as filed with both agencies.[88] While charges can be transferred between agencies in accordance with the workshare agreement or by mutual agreement, the agency that receives the charge first will generally retain it for investigation.[89] Thus, each charge of discrimination is subject to the investigatory finding of the agency that receives and retains the charge.[90]

The original statutory scheme of Title VII anticipated that all charges would first be investigated by a deferral agency, such as the Florida Commission, and subsequently reviewed by the EEOC.[91] However, overwhelming workloads have caused the EEOC to instead "utilize a work-

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84. *See United States Equal Employment Opportunity Commission (EEOC) Strategic Plan for Fiscal Years 2018-2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-strategic-plan-fiscal-years-2018-2022 (last visited Dec. 14, 2020).

85. Barbara J. Fick, *Of Time Limits, Worksharing and Deferral*, 8 1987 PREVIEW U.S. SUP. CT. CAS. 226, 226 (1988).

86. *Id.* at 228.

87. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2.

88. *Id.*

89. *Id.*

90. *Id.*

91. Fick, *supra* note 85, at 226.

splitting procedure."[92] The current workshare agreement "divides the principle jurisdiction of the agencies geographically, with the [Florida Commission] processing most dual-filed claims in North Florida and the EEOC processing most claims from South Florida."[93] Although the right is not frequently exerted, "each agency maintains jurisdiction to perform a substantial weight review of the determination[]" issued by the other.[94] While "[t]he division of work is not solely [calculated] based on geography," the large majority of claims are divided by this standard.[95]

Importantly, the EEOC and the Florida Commission do not share uniform investigatory processes, nor do they issue the same categories of conclusions.[96] The impact of these conclusions has a disparate impact on a claimant's ability to pursue their claims in a civil courtroom.[97] The lack of uniformity in agency findings under the current workshare agreement, in conjunction with the legal effect of an EEOC determination as refined by

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92. *The Florida Civil Rights Act*, *supra* note 14; *see also* Donna Ballman, *Is the Florida Commission on Human Relations A Malignant Force Against Employees?*, LEXISNEXIS: LEGAL NEWSROOM (Dec. 13, 2012), http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/posts/is-the-florida-commission-on-human-relations-a-malignant-force-against-employees. It is important to note that the Workshare agreement itself is silent on geographical jurisdiction. WORKSHARE AGREEMENT, *supra* note 5, at 1–6. However, upon visiting a plethora of Employment firms' websites, every law firm in North Florida mentions a charge of discrimination with the Florida Commission whereas every law firm in South Florida references the EEOC. *E.g.*, *Employment Law Attorneys*, DOLMAN L. GRP., http://www.dolmanlaw.com/legal-services/employment-law-attorneys/ (last visited Dec. 14, 2020); *Employment Discrimination | Processing a Discrimination Claim with the FCHR*, PRINTY & PRINTY, P.A. (June 29, 2016), http://printylawfirm.com/employment-discrimination-discr-process/. This could be, in large part, because the Florida Commission's headquarters are located in Tallahassee whereas the EEOC's Florida office is located in Miami. *Compare* 2018 FC ANN. REP., *supra* note 4, at 25, *with Miami District Office*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/field-office/miami/location (last visited Dec. 14, 2020). Notwithstanding current administrative orders allowing electronic submission of charges in light of COVID-19, charges of discrimination have to be filed in person. *See Miami District Office*, *supra*. This requirement lends support to the position that the workshare defines geographical jurisdiction in an unpublished document. *The Florida Civil Rights Act*, *supra* note 14. Regardless of whether this geographical boundary exists in a document not available to the public or merely exists in common practice, the issues raised herein remain the same. *Id.*; WORKSHARE AGREEMENT, *supra* note 5, at 2.

93. *The Florida Civil Rights Act*, *supra* note 14.

94. *Id.*

95. *Id.*

96. *See* discussion *infra* Section III.C; *compare* FLA. STAT. § 760.11 (2019), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 893 (Fla. 2002).

97. *See* Curtin, *supra* note 2, at 533.

case law, has inadvertently created unequal access to justice under the FCRA.[98]

C. *The Legal Effect of an EEOC Determination*

Although the workshare itself is silent on the reciprocity of agency determinations, the Florida Commission expressly states on its website that "the determination issued by the EEOC serves as the determination of both agencies."[99] However, the EEOC and the Florida Commission do not share uniform determination decisions, which creates conflict under the rigid pre-suit mandates of the FCRA.[100] A finding issued by the Florida Commission issues one of two concrete findings: cause or no cause.[101] On the other hand, a standard EEOC determination form lists ten applicable findings that can be checked by the investigator.[102] These include a multitude of procedural bases for dismissal including, "failed to provide information . . . or otherwise failed to cooperate," listed as box five, and while "reasonable efforts were made to locate you, we were not able to do so," listed as box six.[103] Importantly, the large majority of claims receive the following determination that the Florida Commission does not offer:

> The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the Respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.[104]

There was early confusion as to whether an "unable to conclude" finding operated as a finding of no cause under the workshare and precluded suit under the FCRA, producing an early string of inconsistent case law.[105]

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98. *See id.* at 523–24.

99. *You Ask We Answer: Case Status with the EEOC*, FLA. COMM'N ON HUM. RELS., http://fchr.myflorida.com/faq-frequently-asked-questions (last visited Dec. 14, 2020).

100. *Compare* FLA. STAT. § 760.11, *with Woodham*, 829 So. 2d at 893.

101. *See* FLA. STAT. §§ 760.11(3)–(8).

102. *Woodham*, 829 So. 2d at 893.

103. Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231 (M.D. Fla. 2002).

104. *Woodham*, 829 So. 2d at 893; *see also* FLA. STAT. § 760.11.

105. *Compare Woodham*, 829 So. 2d at 893, *with* Cisko v. Phoenix Med. Prods., Inc., 797 So. 2d 11, 12 (Fla. 1st Dist. Ct. App. 2001) (addressing lower courts' refusal to equate unable to conclude with no reasonable cause), *and* White v. City of Pompano Beach, 813 So. 2d 1003, 1006 (Fla. 4th Dist. Ct. App. 2002) (refusing to equate unable to conclude with no reasonable cause).

The Supreme Court of Florida resolved the issue in the case of *Woodham v. Blue Cross & Blue Shield of Fla. Inc.*,[106] refusing to equate "unable to conclude" with a determination that "there is not reasonable cause."[107] The court reasoned that to hold otherwise would be contrary to the plain language of the statute and incompatible with the court's requirement to "liberally constr[ue] the FCRA in favor of a remedy for those who are victims of discrimination . . . ."[108] In reaching their holding, the Supreme Court of Florida expressly concluded that the language used by the EEOC does not state the claim was dismissed for *lack of merit*, but rather that it lacked sufficient information from which to make a determination.[109]

It has been close to two decades since the ruling of *Woodham*, and as of yet, the Florida Commission has yet to adopt an analogous finding of "unable to conclude."[110] While the Supreme Court of Florida granted review of *Woodham* because they found the question raised therein to be of "great public importance," the court's answer begs the exploration of more questions.[111]

1. Access to Information v. Lack of Merit

It strains logic to believe that the Florida Commission has the staff and resources to thoroughly investigate every charge of discrimination it receives and render a determination exclusively on merit, while the EEOC brazenly admits that it cannot.[112] In general, attorneys representing victims of employment discrimination often initiate cases based on substantially less information than an attorney might possess for other types of claims.[113] "Employers often do not provide reasons for their employment decisions . . . ."[114] Frequently, the information necessary to corroborate a plaintiff's allegations lies within the exclusive knowledge and control of their employers.[115] In many cases, attorneys are forced to initiate suit with little more than the word of the plaintiff.[116]

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106. 829 So. 2d 891 (Fla. 2002).
107. *Id.* at 897.
108. *Id.*
109. *Id.* at 896–97.
110. *See* FLA. STAT. § 760.11 (2019); *Woodham*, 829 So. 2d at 893.
111. *See Woodham*, 829 So. 2d at 892.
112. *See id.* at 896.
113. *See* Selmi, *supra* note 1, at 556, 558, 570.
114. *Id.* at 570.
115. *See* Lonny Scheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 217 (2007).
116. *See* Selmi, *supra* note 1, at 570.

Naturally, employees likewise have limited information at their disposal when they file a charge of discrimination with the Florida Commission.[117] While the Florida Commission utilizes a variety of fact-finding models to collect information, this process undeniably falls short of formal discovery proceedings.[118] First and foremost, investigations are conducted by investigators, not licensed attorneys.[119] Despite the Florida Commission's express statement that "[i]t is the [i]nvestigator's job to determine if the evidence is relevant to [the] charge," these investigators arguably lack the legal expertise necessary to render such determinations.[120]

Generally, the Florida Commission gathers information by sending respondents and witnesses a generic "request for information."[121] These requests contain form questions and are not tailored to the facts of a particular case.[122] Surely, on some occasions, employers and witnesses fail to respond to a request for information altogether.[123] While the Florida Commission has the authority to compel the cooperation and testimony of witnesses through subpoenas, the agency does not publish any statistical data on the frequency in which that right is exercised.[124] While the Florida Commission states that such a failure would allow for an inference "that such information is adverse to the respondent's interest" in rendering a determination of cause,[125] the statistical data does not support that this happens frequently.[126] Moreover, if a witness *does* appear before the Florida Commission, the interview is conducted absent plaintiff's counsel, and thus outside of the adversarial system of justice on which our legal system was founded.[127]

2. Legislative Intent in Light of "Unable to Conclude"

In the absence of an analogous, unable to conclude determination, how then is the Florida Commission inclined to rule if they lack the

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117. *See id.*
118. *See* FLA. COMM'N ON HUM. RELS., INVESTIGATOR TRAINING MANUAL 16 (2005).
119. *See id.*
120. *Id.*
121. *Id.* at 20–24.
122. *See id.* at 24.
123. *See* FLA. COMM'N ON HUM. RELS., *supra* note 118, at 25.
124. *Id.*
125. *Id.*
126. *See, e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.
127. *See* FLA. COMM'N ON HUM. RELS., *supra* note 118, at 25.

information necessary to render a determination on the merits of a charge?[128] Courts tasked with interpreting the intent of the Florida Legislature have held:

> [p]roblematically, by employing a technical use of the English language, the second category [of "no cause"] is broader than intended and includes all possible outcomes other than a reasonable cause finding. The Florida Legislature used "reasonable cause" to describe the first category and "not reasonable cause" to describe the second category. 'Not reasonable cause' is the negative of 'reasonable cause.' That is, 'not reasonable cause' is every response other than a finding of reasonable cause.[129]

Using the framework of this analysis, the category of "not reasonable cause" would encompass all scenarios in which "reasonable cause" was not expressly found.[130] Findings of no cause axiomatically include no cause found due to lack of information for any number, or combination, of informational asymmetries.[131] This Comment suggests that the no cause issued by the Florida Commission is a misnomer and should be categorized as "unable to conclude" when the situation demands.[132]

The procedural problem alleged in this Comment was created by contract and has been solidified through decades of Florida case law.[133] Under the current workshare, charges filed in the EEOC's jurisdiction will most likely result in a determination of "unable to conclude," whereas charges filed in the Florida Commission's jurisdiction will likely result in a determination of no cause.[134] By extension, charges filed in the EEOC's jurisdiction have greater access to the statutory right to a jury trial under the FCRA, whereas the majority of charges filed in the Florida Commission's jurisdiction will be barred.[135] In synthesizing case law with the current state of the workshare agreement, it seems clear that the greatest opportunity for

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128. *See* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002).

129. *Id.* at 1231.

130. *See id.*

131. *See id.*

132. *Compare id.* (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where *anything other than cause* is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 896 (Fla. 2002) (refusing to equate unable to conclude with lack of merit).

133. *See Segura*, 184 F. Supp. 2d at 1232; *Woodham*, 829 So. 2d at 892, 897; WORKSHARE AGREEMENT, *supra* note 5, at 1.

134. *Compare* Ballman, *supra* note 92, *with* 2018 FC ANN. REP., *supra* note 4, at 10.

135. *See* Ballman, *supra* note 92; 2018 FC ANN. REP., *supra* note 4, at 11.

civil redress strongly favors those plaintiffs within the EEOC's jurisdiction.[136] A plaintiff's access to the remedies prescribed by the statute is therefore being delineated by arbitrary geographical boundaries rather than afforded exclusively on merit.[137]

IV. QUESTIONS OF EQUAL ACCESS AND DUE PROCESS

A. *A Direct Assault on the Constitutionality of the Florida Commission*

The administrative remedies imposed by the FCRA have been directly challenged as an unconstitutional access to courts and a deprivation of due process of law.[138] In *McElrath v. Burley,*[139] a plaintiff, who received a no cause determination from the Florida Commission, sued the executive director in his official capacity seeking to have the procedures governing a party's ability to sue declared unconstitutional.[140]

Burley argued that the administrative procedures governing a party's ability to seek civil redress were "unconstitutional as a denial of access to [the] courts and violative of due process and equal protection."[141] Plaintiff's constitutional challenge did not stem from any issues arising under the workshare agreement between the EEOC and the Florida Commission.[142] Rather, Burley argued that the statute unconstitutionally allowed "claimants whose claims are not processed within 180 days, regardless of merit, have the right to proceed directly to circuit court without having to go through the administrative process to which the statute relegated [her] . . . ."[143] Burley argued two plaintiffs with identical charges are being treated differently under the statute virtually by happenstance.[144] The trial court agreed, holding that the diversion from court violated the access-to-courts, due-process, and equal-protection provisions of the Florida Constitution and declared the no cause provision of the FCRA unconstitutional.[145] The

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136. *Compare* WORKSHARE AGREEMENT, *supra* note 5 at 1, *with Segura*, 184 F. Supp. 2d at 1231–32 (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where "anything other than cause" is found), *and Woodham*, 829 So. 2d at 897 (refusing to equate unable to conclude with lack of merit and allowing claimants issued a finding of "unable to conclude" to proceed with litigation under the FCRA).

137. *See* Curtin, *supra* note 2, at 524–25.

138. McElrath v. Burley, 707 So. 2d 836, 839 (Fla. 1st Dist. Ct. App. 1998).

139. 707 So. 2d 836 (Fla. 1st Dist. Ct. App. 1998).

140. *Id.* at 838.

141. *Id.*

142. *See id.*

143. *Id.*

144. *McElrath*, 707 So. 2d at 838.

145. *Id.*

victory for discrimination plaintiffs was short-lived and was quickly reversed by the First District Court of Appeals.[146]

1. Issues of Equal Protection

While many of the conclusions reached by the First District Court of Appeals can be rationally applied to unequal access under the workshare agreement, the problem alleged herein can be equally distinguished.[147] The equal protection argument advanced in *McElrath* was that two individuals could have similarly situated claims but receive different access to courts based on the Florida Commission's ability to render a timely determination.[148] The court's main focus in this case was, arguably, to ensure that the inability of the Florida Commission to issue any ruling within the statutory time frame did not foreclose relief to plaintiffs through no fault of their own.[149]

In rejecting the plaintiff's equal protection arguments, the court held that "it is not necessary under the equal protection clause to treat all persons in an identical manner."[150] An equal protection analysis employs a "minimum scrutiny test," which requires only that "a statute bear some reasonable relationship to a legitimate state purpose."[151] In employing said test, the court held that, while a statute "may result incidentally in some inequality, or that it is not drawn with mathematical precision[s] will not result in its invalidity."[152] The court upheld the constitutionality of the no cause provision on the premise that the statute itself does not contain any classification which discriminates between charging parties by mandating all persons seeking relief to go through the same screening process.[153] The court reasoned that it was not until a determination was made that there was any notable divergence in the treatment of charging parties.[154]

While this may hold true as applied to two parties filing with the Florida Commission, there is an arguable divergence in the treatment of charging parties under Florida's current intra-agency workshare, which irrefutably results in much more than some *incidental* inequality.[155] While

146. *Id.* at 841.
147. *See id.* at 839, 841.
148. *Id.* at 839.
149. *McElrath*, 707 So. 2d at 840.
150. *Id.* at 839.
151. *Id.* at 839–40.
152. *Id.* at 840.
153. *Id.* at 840, 841.
154. *McElrath*, 707 So. 2d at 840.
155. *Compare* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002) (analyzing the intent of the Florida legislature to conclude

equal protection may not mandate treating all persons in an identical manner, the lack of harmony between state and federal agencies is overwhelmingly subjecting plaintiffs to different administrative standards based solely on where they reside.[156]

2. Issues of Due Process

Under Florida's common law, an employee was considered to hold at-will employment, which could be terminated by his employer at any time without incurring liability.[157] The FCRA modified the common law and "created a cause of action for unlawful termination."[158] For this reason, the First District Court of Appeals rejected the plaintiff's due process challenge in *McElrath*, holding that "[t]he constitutional right of access to courts guaranteed by Article I, Section 21, of the Florida Constitution, protects only rights which existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[159] Discrimination, retaliation, and unlawful termination were created by the Florida Legislature, and those particular causes of action are not afforded a constitutional right of access to courts.[160] Moreover, the court reasoned that "due process is satisfied when a party has his 'day in court' by virtue of an administrative hearing and the right to appeal to a judicial tribunal."[161]

3. The Insufficiency of an Administrative Hearing as a Remedy

This Comment suggests that the administrative hearing process described below falls short of a plaintiff's "day in court" as held by the First District Court of Appeal.[162] While civil due process is a flexible confine wherein states are free to impose conditions on the right to institute litigation, due process nonetheless demands a meaningful opportunity to be heard in a meaningful way.[163] Should a court impose administrative remedies, they

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that a finding of no cause is issued where anything other than cause is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 896 (Fla. 2002) (refusing to equate "unable to conclude" with "lack of merit"); *see also* 2018 FC ANN. REP., *supra* note 4, at 10.

156. *See Woodham*, 829 So. 2d at 895; *Segura*, 184 F. Supp. 2d at 1231–32; 2018 FC ANN. REP., *supra* note 4, at 12.

157. Curtin, *supra* note 2, at 523.

158. *Id.*

159. *McElrath*, 707 So. 2d at 839.

160. *See id.*

161. *Id.* at 841 (citing Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974); *see also* Dep't of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 30 (Fla. 1990) (per curiam).

162. *See* Curtin, *supra* note 2, at 525; *McElrath*, 707 So. 2d at 841.

163. *See McElrath*, 707 So. 2d at 841.

must be both "available and adequate," and cannot be so "devastating that the proposed administrative remedies would offer too little or would be too late."[164]

A temperate glance at the reality of an administrative hearing raises credible concerns about the adequacy of the remedy as compared to a day in court.[165] As previously detailed, the overwhelming majority of parties that file a charge of discrimination with the Florida Commission are issued a finding of no cause and locked into the sole remedy of an administrative hearing.[166] If a hearing is successfully petitioned for within thirty-five days, the claimant will appear before an administrative law judge for a proceeding analogous to a bench trial.[167] Even in the best-case scenario, the employee is only entitled to lost wages and costs if able to prevail; the compensatory or punitive damages available under the statute are not available in this setting.[168]

If the administrative law judge rules in the party's favor, a panel of commissioners thereafter approve, reject, or modify any relief granted.[169] On the rare occasion a party is afforded relief, the employer is likely to appeal as entitled by the statute.[170] If the employee is able to prevail once again, they must renounce and forfeit all recovery won before being entitled to proceed to court with a jury, risking the chance of losing relief previously afforded.[171] As of 2012, it was reported that "[i]n the [twenty] years this system has been in place, not one employee has successfully navigated [this system]."[172]

V. THE CURRENT RELEVANCE OF AN OLD PROCEDURAL PROBLEM

Plaintiffs that fall within the purview of the Florida Commission's jurisdiction are being disproportionately denied access to Florida's courts.[173]

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164. Frazier et al., *supra* note 74, at 63; Communities Fin. Corp. v. Fla. Dep't of Env't Regul., 416 So. 2d 813, 816 (Fla. 1st Dist. Ct. App. 1982).

165. *See* JOHNSON & OAKES, *supra* note 26, at 51.

166. *Id*; *see also* FLA. STAT. § 760.11(7) (2019).

167. *See* FLA. STAT. § 760.11(7); JOHNSON & OAKES, *supra* note 26, at 51.

168. *See* JOHNSON & OAKES, *supra* note 26, at 51.

169. *Id.* at 51–52.

170. *Id.* at 52.

171. *Id.*

172. *Id.*

173. *Compare* Segura v. Hunter Douglas Fabrication Co., 184 F. Supp. 2d 1227, 1231–32 (M.D. Fla. 2002) (analyzing the intent of the Florida legislature to conclude that a finding of no cause is issued where anything other than cause is found), *with* Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 893 (Fla. 2002) (refusing to interpret an "unable to conclude" finding issued by the EEOC to mean that the claim lacked merit); *see also* 2018 FC ANN. REP., *supra* note 4, at 10.

A finding of no cause deprives a plaintiff access to civil adjudication, the opportunity for meaningful discovery, early mediation, and—ultimately—settlement negotiations.[174] While the procedural deficiency created by Florida's workshare is by no means a novel problem, recent events revitalize the necessity of its resolution as new charges of discrimination are predicted.[175]

A. *Florida's Workshare and Black Lives Matter*

Amidst what has been hailed America's long overdue awakening to systemic racism, Americans are finally engaging in meaningful, albeit overdue, conversations about race inequality in our country.[176] The Black Lives Matter movement has empowered employees across all employment sectors to share their lived experiences with workplace discrimination.[177] The wave of firsthand accounts and the rise of public consciousness surrounding discrimination has been said to draw parallels of the #MeToo movement of 2017.[178] Following the rise of the #MeToo movement, there was a natural increase in sex discrimination and harassment litigation throughout the country.[179] As employees continue to take to social media to recount their experiences of employment discrimination, law firms and corporations alike expect a similar surge in race discrimination lawsuits in the near future.[180]

If this problem remains unresolved by the Florida Legislature, victims of race discrimination are at risk of falling through the cracks of the current workshare agreement and being denied a voice in our civil courtrooms.[181] In fact, should the procedural problem outlined herein persist unabated, charges of discrimination based on race will arguably be the class

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174. *See* FLA. STAT. § 760.11(7) (2019).

175. *Id.*; *see also Woodham*, 892 So. 2d at 893; WORKSHARE AGREEMENT, *supra* note 5, at 2. This Comment suggests that the procedural problem was created at the inception of Florida's workshare agreement and solidified through the Supreme Court of Florida's ruling in *Woodham v. Blue Cross & Blue Shield of Florida*. *Woodham*, 892 So. 2d at 893; WORKSHARE AGREEMENT, *supra* note 5, at 2.

176. *See* Justin Worland, *The Overdue Awakening: Ending centuries of racism requires systemic change*, TIME, June 22, 2020, at 26, 28.

177. *See* Ellen Milligan et al., *Black Lives Matter to Spark Rise in Race Discrimination Claims*, BLOOMBERG, (July 17, 2020, 1:00 AM) http://www.bloomberg.com/news/articles/2020-07-17/black-lives-matter-to-spark-rise-in-race-discrimination-claims.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See e.g.*, 2018 FC ANN. REP., *supra* note 4, at 10.

most adversely affected.[182] In any given year, the most frequent charge of discrimination filed is on the basis of race; putting black employees living in North Florida at the greatest risk, regardless of whether the expected increase of employment litigation proves accurate.[183]

B. *Florida's Workshare and the Expansion of Title VII*

The recent expansion of Title VII likewise necessitates the resolution of the procedural problem raised in this Comment.[184] The Supreme Court of the United States has recently decreed that Title VII's employment prohibitions based on sex extend to employees discriminated against on the basis of sexual orientation and gender identity in the consolidated cases of *Equal Employment Opportunity Commission ("EEOC") v. R.G. & G.R. Harris Funeral Homes, Inc.*,[185] *Zarda v. Altitude Express, Inc.*,[186] and *Bostock v. Clayton County Board of Commissioners*.[187]

Like Title VII, the FCRA currently prohibits employment discrimination on the basis of sex but has long left the term undefined in the statute.[188] The term "sex" has been liberally construed and largely left to

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182. *Id.*; *see also* 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. In recent years there has been a massive influx of disability discrimination charges filed with the Florida Commission. *See* 2018 FC ANN. REP., *supra* note 4, at 10; 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. It may appear at first glance that charges of discrimination filed on the basis of disability contend with, if not surpass, charges filed on the basis of race, in the last year of available data. *See* 2018 FC ANN. REP., *supra* note 4, at 10. However, when race and color are appropriately aggregated, charges of discrimination based on race continue to be the most frequently filed charge. *Id.* Charges based on race have led by a landslide virtually every year proceeding 2015. *See id.*; 2017 FC ANN. REP., *supra* note 58, at 11; 2016 FC ANN. REP., *supra* note 58, at 11; 2015 FC ANN. REP., *supra* note 58, at 11. This conclusion is also supported by charge statistics reported by the EEOC when appropriately aggregated. *See* WORKSHARE AGREEMENT, *supra* note 5, at 2; Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020) http://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data [hereinafter EEOC Press Release].

183. *See* 2018 FC ANN. REP., *supra* note 4, at 10; Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

184. *See Bostock*, 140 S. Ct. at 1737.

185. 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.*, Bostock v. Clayton Cnty., Georgia 140 S. Ct. 1731 (2020).

186. 883 F.3d 100 (2d. Cir. 2018), *aff'd sub nom.*, Bostock v. Clayton Cnty., Georgia 140 S. Ct. 1731 (2020).

187. 723 F. App'x 964 (11th Cir. 2018), *rev'd*, 140 S. Ct. 1731 (2020); *Bostock*, 140 S. Ct. at 1737.

188. Kelly M. Peña, *LGBT Discrimination in the Workplace: What Will the Future Hold?*, FLA. BAR J., Jan. 2018, at 35, 37.

judicial interpretation in Florida Courts.[189] At present, it remains unclear if and when the Florida Legislature will amend the FCRA to reflect the inclusion of sexual orientation and gender identity under the umbrella of "sex."[190] Prior to the United States Supreme Court's momentous ruling, legislators have tried and failed to amend the FCRA and extend its protections to discrimination based on sexual orientation and gender identity.[191] During Florida's 2017 legislative session, Senate Bill 666 and House Bill 623 were both introduced for consideration, but were indefinitely postponed and later withdrawn from consideration.[192]

However, the legislature need not act for new cases based on sex to seek refuge under the FCRA.[193] Not only is federal case law applicable to FCRA claims, but "[a]ny changes to federal case law on Title VII interpretation necessitates a change in the interpretation of the FCRA."[194] Thus, cannons of statutory interpretation and basic legal principles of stare decisis and federal preemption support the conclusion that such claims are on the horizon.[195]

VI. PROPOSED SOLUTIONS

It is worth noting that an aggrieved party *might* still have viable discrimination claims under Title VII or other class-specific federal laws should the Florida Commission bar such claims under the FCRA.[196] If the Florida Legislature continues to ignore the problems the workshare creates, North Floridians are likely to abandon litigating under the rigid confines of the FCRA altogether in favor of the more laissez-faire scheme of Title VII.[197] Thus, legislative inaction could effectively deprive Florida of its state interest in protecting its discrimination victims while potentially stressing federal dockets.[198] Instead, this Comment advocates for three possible solutions that could easily be undertaken by the Florida Legislature to eliminate the problem raised by this Comment.[199]

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189. *Id.*
190. *See id.* at 37–38.
191. *Id.* at 36.
192. *Id.* at 37.
193. Palm Beach Cnty. Sch. Bd. v. Wright, 217 So. 3d 163, 165 (Fla. 4th Dist. Ct. App. 2017) (en banc).
194. *Id.*
195. *See id.*
196. *See* JOHNSON & OAKES, *supra* note 26, at 52.
197. *See id.*
198. *See id.*
199. *See id.* at 50; FLA. STAT. §§ 760.40–.60 (2019); Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 897 (Fla. 2002).

A. *Align the Determinations Issued by the Florida Commission with the Determinations Issued by the EEOC*

The most prudent solution that can be undertaken is to harmonize the Florida Commission with the EEOC by adopting an analogous finding of "unable to conclude."[200] This solution would honor the intent of the Florida Legislature when the FCRA was enacted by leaving the statute largely unchanged.[201] This solution would allow the Florida Commission to maintain its right to deny access to the FCRA when a claim is blatantly unmeritorious.[202] However, potentially credible claims that cannot be proven or disproven within the statutory time frame would be guaranteed the right to pursue civil redress when the situation demands.[203]

B. *Align the Florida Commission with Other State Fair Employment Practice Agencies*

Removing the "no cause" provision of the FCRA would naturally align the Florida Commission with both the EEOC and the majority of state FEPAs successfully operating throughout the country.[204] The EEOC used to have a no cause provision, and many state FEPAs continue to retain the determination.[205] The key difference lies within the impact that a finding of no cause has on a claimant's ability to pursue civil remedies post-investigation.[206] While various discrimination statutes may still impose the requirement to exhaust administrative remedies, the effect of a no cause finding generally involves no more than a mere refusal of further agency involvement.[207] Under such models, the integrity of the administrative process is preserved by keeping agencies involved in allegations and affording them the opportunity to take action while not infringing on a party's access to courts.[208]

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200. *See Woodham*, 829 So. 2d at 897.
201. *See* FLA. STAT. § 760.11 (2019).
202. *Id.*
203. *See Woodham*, 829 So. 2d at 894.
204. *See* JOHNSON & OAKES, *supra* note 26, at 50–51.
205. *Id.* at 50.
206. *Id.* at 52.
207. *Id.*
208. *Id.*

C. *Align the Florida Civil Rights Act with Florida's Other Discrimination Statutes*

Right below the FCRA, contained within the same chapter of Florida Statutes, lies the Florida Fair Housing Act ("FFHA").[209] Both the FCRA and the FFHA: prohibit discrimination based on the same protected classes, are enforced by the same agency, and require the same duty to "exhaust administrative remedies."[210] Like Title VII, the FFHA does not contain a corresponding no cause restriction.[211] At present, a civil action may be filed after 180 days of filing a complaint with the Florida Commission, regardless of whether an express finding of cause has been found.[212] In fact, the FFHA expressly states that "[t]his subsection does not prevent any other legal or administrative action provided by law."[213] This model has not resulted in an overwhelming increase in housing discrimination claims, nor has it divested the Florida Commission of the opportunity to investigate and remedy egregious violations of the statute.[214]

1. A Comparison of Pending Legislation

Legislative changes are currently underway to completely eliminate the administrative remedies currently required under the FFHA.[215] A new bill introduced as HB 175 passed by way of unanimous vote in both chambers as SB 374.[216] SB 347, enrolled on March 12, 2020, and pending action by the Governor, will allow a civil action

> regardless of whether . . . a complaint with the Florida Commission [has been filed], the [Florida] Commission has resolved a complaint if the aggrieved person chose to file one, or any particular amount of time has passed since the . . . complaint [was filed] with the [Florida] Commission.[217]

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209. *See* FLA. STAT. §§ 760.34–.37 (2019).
210. *See id.*; FLA. STAT. § 760.11.
211. *See* FLA. STAT. § 760.34.
212. *Id.*
213. *Id.* § 760.35(d).
214. *See* 2019 CIRCUIT CIVIL FILINGS, *supra* note 72, at 1.
215. *See* Fla. H.R. Comm. on Human Rel., HB 175 (2020) Final Bill Analysis 1 (Mar. 24, 2020), http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0175z.CJS.DOCX&DocumentType=Analysis&BillNumber=0175&Session=2020.
216. *See* Fla. S. Comm. on Gov't. Oversight & Acct., SB 374 (2019) Staff Analysis 1 (Dec. 6, 2019), http://www.flsenate.gov/Session/Bill/2020/374/Analyses/2020s00374.go.PDF.
217. *Id.*

The bill limits an aggrieved person from filing a civil action in only one of two instances.[218] The first instance is if the claimant has consented to a conciliation agreement or if a hearing has already been commenced by an administrative law judge.[219]

The difference between the administrative mandates in like discrimination statutes is attributable to issues of federal funding.[220] For more than a decades time, the HUD has cautioned that the Florida court's interpretation of the FFHA is inconsistent with federal law that allows victims to file suit regardless of whether a complaint has been filed with HUD.[221] Florida's continued failure to make this change has "caused Florida law not to be certified [by HUD] as substantially equivalent to federal law," and thereby threatened hundreds of thousands of dollars currently used to conduct investigations each year.[222]

The FCRA recently underwent its own legislative changes through the enactment of Florida House Bill 255, signed into law by Florida Governor Ron DeSantis on June 30, 2020.[223] While the amendment affects seven sections of the FCRA, no pertinent change was made that would provide relief to the issues raised in this Comment.[224] Conversely, the new law requires a plaintiff be "promptly notified" of rights on the occasion that the Florida Commission fails to render a determination within its statutory period and defines a statute of limitations in such instance.[225] While the statute was previously silent on the issue, case law had previously held a claim to be viable in such instance for up to four years.[226] HB 255 amended the FCRA to mandate a civil action be filed within 365 days of the failure to

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218. *Id.*

219. *Id.*

220. *Id.*

221. *See* Fla. S. Comm. on Gov't. Oversight & Acct., SB 374 (2019) Staff Analysis, at 5; Brendan Rivers, *Fla. Bill Would Make It Easier For Victims of Housing Discrimination to File Civil Claims*, WJCT NEWS (Mar. 29, 2019), http://news.wjct.org/post/fla-bill-would-make-it-easier-victims-housing-discrimination-file-civil-cases.

222. Mathew Dietz, *Changes to Florida Statutes that Effect Civil Rights and Fair Housing in Florida*, DISABILITY INDEP. GRP. (Mar. 22, 2020), http://www.justdigit.org/changes-to-florida-statutes-that-effect-civil-rights-and-fair-housing-in-florida; *see also* Rivers, *supra* note 221.

223. *See* Fla. H.R. Comm. Sub. for HB No. 225 (2020), http://www.flsenate.gov/Session/Bill/2020/255/BillText/er/PDF.

224. *See id.*

225. *Id.*

226. *See id.*; Joshua v. City of Gainesville, 768 So. 2d 432, 434 (Fla. 2000).

render a determination before such claims are barred.[227] While this change may harmonize the statute of limitations amongst determinations made by the Florida Commission, it further distinguishes employment discrimination from Florida's other statutes.[228]

VII. CONCLUSION

For decades, litigating under the FCRA has been a legal minefield that plaintiffs are forced to navigate differently based on where they reside.[229] Florida continues to delineate access to justice under the FCRA based on arbitrary geography bounds to the detriment of its northern residents.[230] As pending legislation is on track to eliminate the administrative mandates under Florida's other discrimination statutes, the employment law sector continues to await any action that could result in some relief.[231]

227. *See* Comm. Sub. H.B. No. 255, Pub. L. No 2020–153, Fla. Laws 760 (2020).

228. *See id.*

229. *See* FLA. STAT. § 760.11 (2019); WORKSHARE AGREEMENT, *supra* note 5, at 1; Ballman, *supra* note 92.

230. *See* WORKSHARE AGREEMENT, *supra* note 5, at 1–6.

231. *See* Rivers, *supra* note 221.