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**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
THIRD DISTRICT**

DISTRICT COURT CASE NO. 3D2024-1223

MARIE JOSEPH,

Appellants,

v.

THE MOUNT SINAI HOSPITAL, INC., and  
MOUNT SINAI MEDICAL CENTER OF FLORIDA, INC d/b/a  
MOUNT SINAI MEDICAL CENTER,

Appellee.

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FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA  
CASE NO. 23-17164-CA-01

**APPELLEE MOUNT SINAI MEDICAL CENTER OF FLORIDA, INC.  
D/B/A MOUNT SINAI MEDICAL CENTER'S ANSWER BRIEF**

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## **STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

This is an appeal of the dismissal with prejudice of Appellant's claims of employment discrimination and hostile work environment against Appellee Mount Sinai Medical Center Of Florida, Inc. d/b/a Mount Sinai Medical Center ("MSMC").

On or about May 28, 2021, Appellant Marie Joseph ("Appellant") filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting violations under Title VII of the Civil Rights Act of 1965 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the Florida Civil Rights Act of 1992 ("FCRA"), naming The Mount Sinai Hospital, Inc. (the "Hospital") as her employer, but listing MSMC's Address. R. 82-83. <sup>1</sup>

On September 30, 2021, MSMC filed its Statement of Position in which it noted that it is not "The Mount Sinai Hospital, Inc." and that the proper entity is named "The Mount Sinai Medical Center". R. 85. <sup>2</sup>

On June 23, 2022, the EEOC issued Appellant a Determination and Notice of Rights letter making no determination as to the merits of the allegations in her

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<sup>1</sup> References to the record on appeal shall be referred to by the letter "R."

<sup>2</sup> In considering a motion to dismiss, court may consider an affidavit containing allegations showing that the claim must be dismissed. *See Wolfe v. Ruby*, 360 So. 3d 429, 431 (Fla. 1st DCA 2023); *see also Seminole Tribe of Florida v. McCor*, 903 So. 2d 353, 357 (Fla. 2d DCA 2005). Accordingly, the Trial Court properly considered declaration testimony in considering Appellee's Motion to Dismiss.

Charge of Discrimination and advising Appellant of her right to file a lawsuit within certain enumerated time limits under applicable law (the “Notice of Rights”). R. 88-92.

On May 23, 2023, Appellant filed her initial five-count complaint in the Eleventh Judicial Circuit In And For Miami-Dade County (the “Trial Court”) asserting claims of discrimination and hostile work environment under the FCRA against The Mount Sinai Hospital, Inc. (the initial complaint referred to hereafter as the “Original Complaint”). R. 10-24. Appellant did not name MSMC in the Original Complaint, nor did she serve MSMC with the Complaint. R. 86. Rather, the complaint was served on Tonya Moch with NRAI Services, Inc. who is not the registered agent for MSMC. R. 25, 86.<sup>3</sup>

On January 23, 2024, Appellant filed the First Amended Complaint (the “Amended Complaint”) adding MSMC as a defendant and adding an additional four counts (Counts V-IX) against MSMC. R. 38-66. This was the first time Appellant named MSMC as a defendant in this proceeding. The Amended Complaint was served on MSMC on February 15, 2024. R. 86. In the Amended Complaint, Appellant asserted the following claims against MSMC : (1) Count V – Race, National Origin, and Color Discrimination in violation of the FCRA; (2) Count VI – Age Discrimination in violation of the FCRA; (3) Count VII – Disability

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<sup>3</sup> Appellant obtained a default against the Hospital. R. 36.

Discrimination in violation of the FCRA; (4) Count VIII – Hostile Work Environment in violation of the FCRA; and (5) Count IX – Failure to Accommodate in violation of the FCRA.<sup>4</sup>

Specifically, in Counts V-IX of the Amended Complaint, Appellant asserted the following, in relevant part:

- Appellant was an employee of MSMC;
- Appellant is a black female of Haitian national origin;
- Appellant observed that many of her coworkers were white;
- Appellant observed that other “noticeably younger” employees were paid higher and progressed more quickly than Appellant;
- Appellant injured herself while on the job in March of 2014;
- Appellant was not chosen for a promotion;
- MSMC discriminated against Appellant on the basis of her race, national origin, color, age, and disability; and
- MSMC subjected Appellant to a hostile work environment.

R. 39-40, 53-63.

MSMC timely filed its Motion to Dismiss with Prejudice on March 4, 2023 (“Motion to Dismiss”). R. 67-92. After hearing oral arguments on MSMC’s Motion

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<sup>4</sup> In the Amended Complaint, Appellant asserted the same five counts against only the Hospital as in the Original Complaint, but labeled two of those five counts as Count IV. R. 47-52.

to Dismiss from both counsel for MSMC and counsel for Appellant on June 25, 2024, the Trial Court granted MSMC's Motion To Dismiss, ordering dismissal of all counts against MSMC with prejudice. R. 104-15.

### **STANDARD OF REVIEW**

A trial court's ruling on a motion to dismiss is subject to de novo review. *Mlinar v. United Parcel Serv., Inc.*, 186 So. 3d 997, 1004 (Fla. 2016). Questions surrounding the statute of limitations and whether a complaint relates back to the original filing date are also reviewed de novo. *See Hamilton v. Tanner*, 962 So. 2d 997, 1000 (Fla. 2d DCA 2007); *Kopel v. Kopel*, 229 So. 3d 812, 815 (Fla. 2017).

### **SUMMARY OF THE ARGUMENT**

The Trial Court correctly dismissed Appellant's claims against MSMC, Counts V-IX of the Amended Complaint, with prejudice. Appellant filed her Original Complaint in the Trial Court against the Hospital, not MSMC. After the statute of limitations ran on Appellant's claims, she then filed the Amended Complaint naming, for the first time, MSMC and restating the same allegations against MSMC as she did against the Hospital in an additional five counts. Because there is no relationship between the Hospital and MSMC, the claims against MSMC in the Amended Complaint do not relate back to the Original Complaint and, therefore, the Trial Court correctly dismissed Appellant's claims against MSMC with prejudice.

Second, as an additional ground for dismissal, MSMC also moved to dismiss the counts against MSMC in the Amended Complaint for failure to state a claim because Appellant failed to allege sufficient factual support for her claims of discrimination and hostile work environment. Specifically, the Amended Complaint is devoid of factual allegations that establish the elements of each count asserted against MSMC. The sum total of Appellant's factual allegations against MSMC are: (1) she is a black female of Haitian national origin; (2) she was injured while working; (3) she generally observed that employees who look younger than her were paid higher wages and/or promoted more quickly; (4) she was told that her thinking may be "old;" and (5) she was not selected for a promotion. These general allegations do not satisfy Appellant's burden to plead distinct facts supporting the necessary elements that Appellant suffered adverse treatment compared to similarly situated individuals outside her protected class(es) and that such adverse treatment was in any way related to her protected characteristics. Additionally, Appellant's general statement that she was qualified for a promotion is nothing more than a conclusory statement, which is insufficient to meet the requisite pleading standard.

Regarding her claim of hostile work environment, Appellant fails to allege any instances of unwelcome harassment that significantly altered her work conditions, as is required to sufficiently plead a claim of hostile work environment.

Instead, Appellant relies on the general assertion that she suffered harassment based on her race.

Lastly, Appellant's claim for failure to accommodate fails because she does not plead any allegations regarding her alleged accommodation request or demonstrating that MSMC failed to engage in an interactive process.

Overall, the Amended Complaint lacks the necessary factual specificity to support any of the claims asserted, warranting a dismissal of all counts against MSMC.

For these reasons, the Trial Court did not commit a reversible error in dismissing Appellant's claims against MSMC with prejudice, and this Court should affirm the Trial Court's dismissal with prejudice of all claims against MSMC.

### **LEGAL MEMORANDUM**

#### **I. Appellant's Claims Against MSMC Are Time-Barred.**

##### ***A. Appellant filed her claims against MSMC after the expiration of the statute of limitations.***

Before an individual can file a claim against an employer under the FCRA, the individual must first exhaust all administrative remedies by filing a charge of discrimination with the Florida Commission on Human Relations ("FCHR") or dual-filing such charge with the Equal Employment Opportunity Commission ("EEOC"). Fla. Stat. §§ 760.07, 760.11(1). *See Sunbeam Television Corp. v. Mitzel*, 83 So. 3d 865, 873-74 (Fla. 3d DCA 2012). Where, as here, an individual dual-files a charge

of discrimination with the EEOC, the individual must receive a Notice of Rights letter from the EEOC before the individual can assert claims under the FCRA in state or federal court. *See* Fla. Stat. §§ 760.11(1), (5); *see also Woodham v. Bue Cross and Blue Shield of Fla.*, 829 So. 2d 891, 893-94 (Fla. 2002) (filing with the EEOC operates as a dual-filing with the FCHR pursuant to the EEOC/FCHR workshare agreement and filing party can file FCRA claims in court after receiving notice of rights from EEOC). A complaint alleging violations under the FCRA must be filed within one (1) year of the date the administrative agency's (EEOC) determination. Fla. Stat. § 760.11(5). *See also Millan v. Morning Coffee LLC*, 23-CV-80845, 2023 WL 4788112, at \*3 (S.D. Fla. July 27, 2023) (dismissing as time-barred claims under the FCRA where the plaintiff did not file suit within one year of receiving determination letter from EEOC). Here, Appellant did not file her claims of FCRA violations against MSMC within one year of receiving the Notice of Rights and, therefore, may not maintain her FCRA claims against MSMC.

The Court need only consider the relevant timeline of events to see that Appellant's claims against MSMC are time-barred. The timeline of relevant events is as follows:

1. May 28, 2021, Appellant dual-files her Charge of Discrimination with the EEOC/FCHR. R. 81-82.

2. On September 21, 2021, MSMC files its Statement of Position and states, among other things, that MSMC is not “The Mount Sinai Hospital, Inc.” R. 85
3. June 23, 2022, the EEOC issues the Notice of Rights. R. 88-92
4. May 23, 2023, Appellant files the Original Complaint against the Hospital. R. 10-24.
5. June 23, 2023, Statute of Limitation of Appellant’s claims under the FCRA runs.<sup>5</sup>
6. January 23, 2024, Appellant files the Amended Complaint adding MSMC as a defendant in additional Counts V-IX. R. 38-66.

This timeline of events clearly shows that Appellant’s claims against MSMC are barred by the statute of limitations.

***B. The claims against MSMC in the Amended Complaint do not relate back to the date Appellant filed the Original Complaint.***

Appellant argues that her claims against MSMC in the Amended Complaint relate back to the date she filed the Original Complaint. The relation back doctrine, however, is not applicable because MSMC does not share an identity of interest with the Hospital.

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<sup>5</sup> Or, applying a three-day mailing period, the statute of limitations on Appellant’s FCRA claims expired on June 26, 2023.

Generally, “[a]n amended complaint does not relate back to the original filing date where it has the effect of adding a new party to the cause of action.” *Patel v. Sch. Bd. of Volusia Cnty.*, 813 So. 2d 135, 136 (Fla. 5th DCA 2002). The relation-back doctrine may apply where the separate parties have a sufficient “identity of interest” such that “addition will not prejudice the new party.” *Castro v. Linfante*, 307 So. 3d 110, 113 (Fla. 3d DCA 2020). The relation back doctrine, however, does not apply where “an amendment seeks to add an entirely new party to the action after the statute of limitations has expired.” *Castro*, 307 So. 3d at 113.

Parties may have a sufficient “identity of interest” where the newly-added party is related to the original party and “knew or should have known that the plaintiff had made a mistake . . . as concerns the correct identity of the defendant so that the added party was deemed to have suffered no prejudice by being tardily brought in or substituted as a party.” *Rayner v. Aircraft Spruce-Advantage Inc.*, 38 So. 3d 817, 820 (Fla. 5th DCA 2010). “The gist of the exception is that the relation-back doctrine applies when the new defendant is essentially *one in the same* as the existing defendant.” *Russ v. Williams*, 159 So. 3d 408, 410 (Fla. 1st DCA 2015) (emphasis added). Moreover, a plaintiff may establish that the newly-added party is not prejudiced by being added as a defendant through showing that “the new party had knowledge of the lawsuit prior to expiration of the statute of limitations.” *Id.*

None of those factors exist in this case. Here, in the Amended Complaint Appellant has not added a party with the same identity of interest as the Hospital; rather, Appellant has named an entirely new party – MSMC – that is wholly unrelated to the originally named party – the Hospital. MSMC does not share the necessary “identity of interest” with the Hospital that would support a finding that the Amended Complaint relates back to the Original Complaint. To the contrary, the Hospital and MSMC are two entirely distinct entities with no connection whatsoever. *See* R. 85-86. MSMC and the Hospital do not share any parent, subsidiary, executive, personnel, bank account, address, or even registered agent. *Id.* MSMC and the Hospital are not even located in the same state. *Id.*

By adding MSMC as a defendant in the Amended Complaint, Appellant added an entirely new party after the statute of limitations has run on her claims, making the relation-back doctrine unavailable and her claims against MSMC time-barred. *See Patel*, 813 So. 2d at 136 (noting “[a]n amended complaint does not relate back to the original filing date where it has the effect of adding a new party to the cause of action.”); *see also Castro*, 307 So. 3d at 113 (“The relation back doctrine generally does not apply when an amendment seeks to add an entirely new party to the action after the statute of limitations has expired.”); *Russ*, 159 So. 3d at 411 (holding that the relation-back doctrine did not apply where the case did not “involve two corporate entities that are effectively one in the same entity . . .”).

Lastly, application of the relation back doctrine to the Amended Complaint would prejudice MSMC. In the context of the relation-back doctrine, lack of prejudice “requires a showing that the new party had knowledge of the lawsuit prior to the expiration of the statute of limitations.” *Rayner*, 38 So. 3d 820. Appellant has not made such a showing. Moreover, MSMC was not made aware of this lawsuit until six months *after* the expiration of the statute of limitations.<sup>6</sup> R.85-86; *see Rayner*, 38 So. 3d at 820 (noting that, for the “identity of interest” exception to apply, the new party must also have had knowledge of the litigation prior to the expiration of the statute of limitations period). The statute of limitations on Appellant’s FCRA claims against MSMC expired on June 23, 2023; Appellant did not file her FCRA claims against MSMC until six months after the expiration of the statute of limitations. Accordingly, claims against MSMC are time-barred and the trial court properly dismissed Appellant’s claims against MSMC, Counts V-IX of the Amended Complaint, with prejudice.

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<sup>6</sup> MSMC’s response to Appellee’s Charge of Discrimination is not sufficient to overcome this prejudice standard such that MSMC is considered to have had notice of Appellant’s claims in the Trial Court. *See Rayner*, 38 So. 3d at 820 (rejecting the argument that lack of prejudice is demonstrated where the additional party “was placed on notice that it might be sued shortly before the statute of limitations expired”). Rather, “it is knowledge of the litigation itself which puts a person on notice of the need to defend against the lawsuit.” *Id. see also Patel v. School Bd. Of Volusia Cnty.*, 813 So. 2d 135, 136 (Fla. 5th DCA 2002) (“A claim is not necessarily a lawsuit . . . [and it] does not follow that a lawsuit will always be filed [following notice of a claim].”)

***C. Appellant’s argument regarding equitable estoppel is not applicable.***

In the Appellant Brief, Appellant argues that equitable estoppel prevents MSMC from asserting a statute of limitations defense and that MSMC “through its own actions and representations” led her to believe that MSMC and the Hospital are the same entity. This argument must fail because Appellant does not provide any information as to the alleged “actions and representations” MSMC took that led her to this conclusion.

“The doctrine of equitable estoppel typically applies to avoid a statute of limitations defense where the injured party recognized the basis for the suit but the party that caused the injury induced the injured party to forbear from filing suit during the limitations period.” *Rubio v. Archdiocese of Miami, Inc.*, 114 So. 3d 279, 281 (Fla. 3d DCA 2013) (citing *Major League Baseball v. Morsani*, 792 So. 2d 1071, 1078 (Fla. 2001)). As the Florida Supreme Court stated, the “prime purpose of the doctrine of equitable estoppel . . . is to prevent a party from profiting from his or her wrongdoing.” *Morsani*, 792 So. 2d at 1078.

In order to succeed on an argument of equitable estoppel, Appellant must satisfy the following elements: “(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.” *Curci Village Condo. Ass’n v. Maria*, 14 So.

3d 1175, 1177 (Fla. 4th DCA 2009) (quoting *State v. Harris* 881 So. 2d 1079, 1084 (Fla. 2004)). Appellant has not provided any facts, information, or even allegations, that would satisfy any of the three elements of equitable estoppel. Appellant does not allege any facts indicating that MSMC caused or induced Appellant to refrain from filing suit within the limitations period. Without such allegations, equitable estoppel cannot save Appellant's claims against MSMC from the statute of limitations. *See Rubio*, 114 So. 3d at 281 (concluding "that equitable estoppel does not apply in this case because [the plaintiff] has not alleged any facts indicating that the [defendant] caused or induced him to refrain from filing suit within the limitations period"). Appellant's allegation of general concealment by MSMC and failure to state the specific conduct that mislead Appellant is insufficient to invoke equitable estoppel.

Furthermore, MSMC was forthright in disclosing to Appellant that it is not the Hospital. This fact was openly disclosed in MSMC's Statement of Position. R. 86. There was no subterfuge which is why Appellant cannot support its claim.

Therefore, Appellant's argument that equitable estoppel prevents MSMC from asserting its statute of limitations defense must fail.

## **II. Appellant Failed To State A Claim Against MSMC In The Amended Complaint.**

Alternatively, even if the claims against MSMC in the Amended Complaint relate back to the date of the Original Complaint, the Trial Court properly dismissed

Appellant's claims against MSMC with prejudice because Appellant did not plead sufficient factual allegations supporting any of the claims asserted against MSMC. A court may dismiss a complaint for failure to state a cause of action if, taking the complaint's well-pled allegations as true, the plaintiff fails to set forth facts establishing the elements of a cause of action. *See* Fla. R. Civ. P. 1.140(b)(6); *see also Lloyd v. Foremost Ins. Co.*, 478 So. 2d 1152, 1153 (Fla. 1st DCA 1985); *see also Horowitz v. Laske*, 855 So. 2d 169, 172-73 (Fla. 5th DCA 2003); *see also Barrett v. City of Margate*, 743 So. 2d 1160, 1162-63 (Fla. 4th DCA 1999).

Further, “[m]ere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be plead distinctly, definitively, and clearly.” *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1963); *see also K.R. Exch. Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 892-93 (Fla. 3d DCA 2010). “[A] complaint that simply . . . [contains] legal conclusions and theories does not establish a claim for relief.” *Toney v. C. Courtney*, 191 So. 3d 505, 507 (Fla. 1st DCA 2016). If a complaint cannot sustain the basic muster for stating a cause of action upon which relief can be granted, then it is appropriate for the court to enter an order of dismissal. *See Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 206 (Fla. 3d DCA 2003). *See also Barrett*, 743 So. 2d at 1162 (emphasis added) (“In Florida, every cause of action, whether derived from statute or common law, is comprised of

necessary elements which must be proven for the plaintiff to prevail . . . The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged.”); *Clark v. Boeing Co.*, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (“Pleadings must contain ultimate facts supporting each element of the cause of action).

***A. Appellant Fails to State a Claim for Race, National Origin, and Color Discrimination Under the FCRA.***

The factual allegations Appellant pled in the Amended Complaint to support her claims for race, national origin, and color discrimination in violation of the FCRA do not comply with the requirement to plead sufficient allegations of ultimate facts.

A proper pleading of a claim of race, national origin, or color discrimination under the FCRA requires allegations of ultimate facts showing that Appellant: (1) was a member of a protected class defined by race, national origin, or color (respectively); (2) was qualified for the job; (3) suffered an objectively serious adverse job action; and (4) was treated less favorably than a similarly-situated individual. *See Washington v. Florida Dep't of Revenue*, 337 So. 3d 502, 511 (Fla. 1st DCA 2022).

However, in the Amended Complaint, Appellant makes only two factual allegations that could conceivably be relevant to these four elements:

- i. Plaintiff is a black female, of Haitian national origin.” R. 39.

- ii. “The majority of the employees with whom Plaintiff worked were White or Hispanic.” R. 39. .

Appellant relies on these two factual allegations to conclude that “Defendant has engaged in discrimination against Plaintiff because of Plaintiff’s Race, National Origin, and Color.” R. 53. This simply is not enough for Appellant to satisfy the requisite pleading standard.

The Amended Complaint is entirely devoid of factual allegations that Appellant was treated less favorably than a similarly-situated individual outside of her protected class. Indeed, Appellant does not identify a single similarly situated individual. Without factual allegations supporting each element of her claim, including facts regarding similarly situated individuals, Appellant does not meet the pleading standard and her discrimination claims must be dismissed. *See Lewis v. Sch. Bd. of Palm Beach Cnty., Florida*, 18-CV-81442, 2019 WL 13256827, at \*2 (S.D. Fla. Apr. 9, 2019) (dismissing the plaintiff’s claim for race discrimination under the FCRA where the complaint failed to allege the existence of similarly-situated employees, outside of the plaintiff’s protected class, who were treated more favorably); *see also Henderson v. Dade Cnty. Police Benev. Ass'n, Inc.*, 14-20321-CIV-MORENO, 2014 WL 3591600, at \*8 (S.D. Fla. July 18, 2014) (dismissing the plaintiff’s claim for race discrimination under the FCRA where the complaint failed

to allege facts supporting its conclusory allegations that similarly-situated employees were treated more favorably than the plaintiff).<sup>7</sup>

Accordingly, Appellant failed to allege sufficient facts supporting essential elements of her claim for race, national origin, and color discrimination against MSMC, and the Trial Court properly dismissed Count V of the Amended Complaint with prejudice.

***B. Appellant failed to State a Claim for Age Discrimination Under the FCRA.***

To properly plead a claim of age discrimination under the FCRA, the Appellant must have alleged facts showing that (1) she was qualified for the position; and (2) she lost the position to a younger employee. *See Lewis*, 2019 WL 13256827, at \*3 (S.D. Fla. Apr. 9, 2019).<sup>8</sup> Again, Appellant relied on bare-bones conclusions to support her claim of age discrimination against MSMC in Count VI of the Amended Complaint.

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<sup>7</sup> This Court has stated that it will look to federal case law to interpret the FCRA. *Johnson v. Great Expressions Dental Ctrs. Of Fla, PA*, 132 So. 3d 1174 (Fla 3d DCA 2014) (“Because the FCRA is patterned after Title VII of the federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., we look to federal case law as well as Florida decision to interpret the statute.”).

<sup>8</sup> “Courts employ the same analysis when evaluating age discrimination under the [federal Age Discrimination in Employment Act] and FCRA.” *Ivory v. Nemours Foundation*, Case No. 3, 21-cv-423, 2022 WL 1689079, at \*4 (M.D. Fla. May 26, 2022) (quoting *Cardelle v. Miami Beach Fraternal Order of Police*, 593 Fed. Appx. 898, 901 n.6 (11th Cir. 2014)).

The only factual allegations in the Amended Complaint related to the elements of an age discrimination claim under the FCRA are that:

- iii. She “observed” that seemingly younger employees were “paid higher and progressed more quickly to better positions.” R. 39.
- iv. Her supervisor indicated Appellant’s “thinking” may be too “old” for the higher position. R. 39.
- v. She was able to perform the essential functions and duties of the higher position. R. 39.
- vi. She was denied a promotion on the basis of her age. R. 39.

Appellant failed to allege facts showing that she (1) was qualified for the position; and (2) lost the position to a younger employee. Specifically, Appellant’s single conclusory allegation that she was qualified for the higher position, without supporting factual allegations, is insufficient to sustain her claim. *See Pouyeh v. Bascom Palmer Eye Inst.*, 613 Fed. Appx. 802, 811 (11th Cir. 2015) (dismissing the plaintiff’s discrimination claim under the FCRA where the plaintiff failed to allege facts supporting his conclusory allegation that he was qualified for the position); *see also Betancourt v. Margaritaville Hollywood, Beach Resort, L.P.*, 18-CV-62538, 2019 WL 2119611, at \*3 (S.D. Fla. Mar. 29, 2019) (dismissing the plaintiff’s discrimination claim under the FCRA where the complaint lacked factual allegations showing how the plaintiff was qualified for the position).

Moreover, Appellant failed to allege that a substantially younger employee was in fact selected for the promotion she sought, a requirement to properly plead discriminatory failure to promote. *See Ray v. City of Opa-Locka, Fla.*, 12-CV-21769, 2012 WL 4896162, at \*2 (S.D. Fla. Oct. 15, 2012) (dismissing the plaintiff's claim for age discrimination where the plaintiff had failed to allege that the person ultimately selected for the higher position was substantially younger than the plaintiff).

Accordingly, Appellant failed to state a claim for age discrimination against MSMC, and the Trial Court properly dismissed Count VI of the Amended Complaint with prejudice.

***C. Appellant Failed to State a Claim for Disability Discrimination Under the FCRA.***

To properly plead a claim of disability discrimination under the FCRA, Appellant must have alleged facts showing that (1) she had a disability; (2) she was qualified for the position; and (3) she was unlawfully discriminated against on the basis of her disability. *See Evans v. Cnty. of Alachua*, 937 So. 2d 693, 694 (Fla. 1st DCA 2006). To support her claim of disability discrimination, Appellant alleged only that she suffered a workplace injury in 2014 and was therefore “disabled.” R. 39. Appellant did not allege any facts, however, showing that (1) she had a disability; and (2) she was qualified for her position

First, Appellant has not alleged any facts showing that her alleged injury constituted a covered “disability” for purposes of stating a claim under the FCRA. For an injury to be considered a disability under the FCRA, the disability must somehow limit one or more major life activity. *See Garcia v. Goodwill Indus. of S. Florida, Inc.*, 18-25042-CIV, 2019 WL 6052814, at \*3 (S.D. Fla. Nov. 15, 2019) (dismissing claim of disability discrimination under the FCRA where the complaint was “entirely devoid of factual allegations explaining or showing how the alleged [disability] limits—let alone substantially limits—any of [the plaintiff’s] major life activities (employment related or otherwise.”); *see also Oviedo v. Bozzuto & Associates, Inc.*, 21-21772-CIV, 2021 WL 5883139, at \*4 (S.D. Fla. Dec. 13, 2021) (dismissing the plaintiff’s claim for disability discrimination under the FCRA where, in part, the plaintiff had failed to plead any facts about the nature of her impairment or the limitations the impairment allegedly caused).<sup>9</sup> The Amended Complaint does not contain any allegations related to even a potential limitation of Appellant’s major life activities.

Second, Appellant’s conclusory allegation that she “possessed the requisite skills and qualifications” for her position, without supporting facts, is insufficient to state a claim of disability discrimination. *See Betancourt*, 2019 WL 2119611, at \*3

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<sup>9</sup> “As applied to discrimination based on a handicap, the FCRA is construed in conformity with the federal Americans with Disabilities Act.” *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 925 (Fla. 4th DCA 2007).

(dismissing the plaintiff's disability discrimination claim under the FCRA where the complaint lacked factual allegations showing how the plaintiff was qualified for the position).

Accordingly, Appellant's conclusory allegations that she was "disabled" and qualified for her position are insufficient to state a claim for disability discrimination against MSMC, and, therefore, the Trial Court properly dismissed Count VII of the Amended Complaint with prejudice.

***D. Appellant Failed to State a Claim for Hostile Work Environment Under the FCRA.***

To properly plead a claim of hostile work environment under the FCRA, Appellant must have alleged facts that (1) she belongs to a protected group; (2) she has been subject to unwelcome harassment; (3) the harassment was based on one or more of her protective characteristics; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatorily abusive working environment; and (5) her employer is responsible for such environment under either a theory of vicarious or of direct liability. *Oviedo*, 2021 WL 5883139, at \*2.<sup>10</sup> The Amended Complaint is devoid of factual allegations

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<sup>10</sup> A claim of hostile work environment under the FCRA is analyzed under the same framework as parallel federal laws. *See Oviedo*, 2021 WL 5883139, at \*2. *See also Carter v. Cellco Partnership*, Case No. 8:15-cv-1033, 2016 WL 8981056, at \*2 (M.D. Fla. March 23, 2016) ("Since the FCRA essentially mirrors Title VII, Florida courts look to federal case law construing Title VII when ruling on FCRA claims.").

of each element necessary to sufficiently plead a claim of a hostile work environment.

The Amended Complaint does not include a single allegation of any fact suggesting that Appellant suffered unwelcome harassment that was so “severe or pervasive” as to alter the terms and conditions of her employment. Appellant instead pleads only conclusory allegations that MSMC “targeted” Appellant because of her race and that MSMC’s alleged conduct was “so severe or pervasive that a reasonable person in [Appellant’s] position would find the work environment to be hostile or abusive.” R. 59-60. Such parroting of the elements of a cause of action is insufficient to survive a motion to dismiss for failure to state a claim. *See Turnberry Vill. N. Tower Condo. Ass’n, Inc. v. Turnberry Vill. S. Tower Condo. Ass’n, Inc.*, 224 So. 3d 266, 267 (Fla. 3d DCA 2017) (noting a “mechanical recitation of the elements of the cause of action . . . is insufficient to withstand a motion to dismiss.”). Therefore, the Trial Court properly dismissed Count VIII of the Amended Complaint with prejudice.

***E. Appellant Fails to State a Claim for Failure to Accommodate Under the FCRA.***

To properly plead a claim of failure to accommodate under the FCRA, Appellant must have plead facts to show that (1) she was a qualified individual with a disability; (2) she made a specific request for a reasonable accommodation; and (3) her employer failed to provide a reasonable accommodation, or engage in the

requisite interactive process in order to identify a reasonable accommodation. *See Oviedo*, 2021 WL 5883139, at \*3. In the Amended Complaint Appellant alleges she suffered a workplace injury and “requested accommodation for a new position at work.” R.40. However, Appellant did not plead any facts regarding the alleged request for an accommodation (*i.e.* the position she sought as an accommodation, to whom she made the request, etc.). *See Oviedo*, 2021 WL 5883139, at \*4 (dismissing claim of disability discrimination where the plaintiff “does not say whether he made his request orally or in writing, telephonically, electronically, or in person, during or outside of work hours, and most importantly, he does not allege the contents of his request or [his manager’s] response.”).

Crucially, Appellant also failed to allege facts showing that MSMC did not provide her with a reasonable accommodation or otherwise engage in the requisite interactive process. *See Anderson v. Werner Enterprises, Inc.*, 8:18-CV-48-T-36JSS, 2018 WL 3729043, at \*3 (M.D. Fla. Aug. 6, 2018) (dismissing the plaintiff’s claim for failure to accommodate where the plaintiff failed to allege that the employer had failed to accommodate the plaintiff’s disability); *see also Okafor v. Infuserve Am., Inc.*, 8:21-CV-2007-JLB-MRM, 2023 WL 3563600, at \*15 (M.D. Fla. Mar. 6, 2023) (noting that the plaintiff had failed to show that she made a specific request for an accommodation and that her employer failed to provide a reasonable accommodation).

Accordingly, the Trial Court properly dismissed Count IX of the Amended Complaint with prejudice.

### **CONCLUSION**

Based on the foregoing, the Trial Court's Order dismissing all claims against MSMC in the Amended Complaint with prejudice does not constitute a reversible error. MSMC, therefore, respectfully requests that this Court affirm the Trial Court's dismissal of all claims asserted against MSMC in the Amended Complaint with prejudice and dismissal of MSMC as a defendant from this case with prejudice.

Dated: November 1, 2024.

Respectfully submitted,

**COZEN O'CONNOR**

*/s/ Arielle S. Eisenberg*

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**CERTIFICATE OF SERVICE**

I certify that on November 1, 2024, a copy hereof has been electronically filed using the Florida Courts E-Filing Portal, and furnished via the Portal to the following counsel of record by electronic mail: Counsel for Appellant Marie Joseph, Anthony M. Georges-Pierre [agp@rgph.law](mailto:agp@rgph.law).

*/s/ Arielle S. Eisenberg*  
Arielle S. Eisenberg

**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to Fla. R. App. P. 9.210(a)(2) that the font used herein is Times New Roman, 14 point, and that this Answer Brief complies with the Rule.

*/s/ Arielle S. Eisenberg*  
Arielle S. Eisenberg