IN THE SUPREME COURT OF FLORIDA
CASE NO. 94,935
LOWER TRIBUNAL CASE NO.: 98-893

DENEACE M. JOSHUA,

Plaintiff/Petitioner,

vs.

CITY OF GAINESVILLE,

Defendant/Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL
TALLAHASSEE, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is Times New Roman Regular 14 point (western) and Times New Roman Italic 14 point (western).

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CERTIFIED QUESTION OF GREAT IMPORTANCE

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PRELIMINARY STATEMENT

Deneace M. Joshua was the plaintiff below and will be referred to herein as Joshua or Petitioner. The City of Gainesville was the defendant below and will be referred to herein as Defendant or Respondent. The Order appealed from is an Order granting a Motion to Dismiss based on the statute of limitations so there is no transcript of the court proceedings below. The record on appeal will consist of the Complaint, the Defendant's Motion to Dismiss, Appellant's Motion in Opposition and the Order granting the Motion to Dismiss entered on February 27, 1998. Designations to the record on appeal will be by the symbol, open parenthesis, capital letter R, period, the appropriate page number, and close parenthesis, i.e. (R.___).

STATEMENT OF THE CASE

On January 20, 1998, petitioner filed a Complaint in the Circuit Court of the Eight Judicial Circuit, in and for Alachua County, Florida, alleging a violation of the Florida Civil Rights Act of 1992 against her employer, the defendant, City of Gainesville, Florida (R.1-8). On February 12, 1998, defendant filed a Motion to Dismiss Complaint, Motion for Summary Judgment, and Motion for Attorney's Fees (R.9-12). On or about February 26, 1998, petitioner filed, by facsimile transmission, her Response and Memorandum of Law in Opposition to Defendant's Motion to Dismiss (R.13-18). A hearing was held before the Honorable Chester B. Chance, Circuit Judge, on February 26, 1998, at 3:00 p.m. (R.19-20). On February 27, 1998, the trial court entered an Order dismissing petitioner's complaint with prejudice. On March 5, 1998, petitioner timely filed her Notice of Appeal (R.21-23). On February 17, 1999, the First District Court of Appeal entered an Order affirming the Judgment of the Circuit Court, but certified a question of great importance (R.____).

STATEMENT OF THE FACTS

In filing its Motion to Dismiss and by moving for summary judgment, defendant has admitted the following facts as alleged in the Complaint;

1. Petitioner, an African-American female, is an employee of the defendant, City of Gainesville, and has been employed by the City of Gainesville on a full-time basis since October 1, 1979.

2. Defendant, City of Gainesville, is a person, as defined in section 760.02(6), Florida Statutes (1995), and an employer, as defined in section 760.02(7), Florida Statutes (1995).

3. Petitioner currently holds the position of Block Grant Financial Analyst and was promoted to that position in 1987.

4. In January 1995, Petitioner filed a complaint for discrimination with the Florida Commission on Human Relations (FCHR) alleging Respondent discriminated against her on the basis of race when the Respondent, acting through its authorized agents or employees, denied her an upgrade in her position.

5. On May 10, 1995, Petitioner's Supervisor, James Hencin, a white male, issued a written memorandum to Petitioner for alleged acts committed by her subsequent to the January, 1995, filing of her complaint for discrimination with the FCHR. The memorandum states: "You may consider this memo and our discussion on this date to be

a warning that further disruptive behavior on your part may be cause for disciplinary action."

6. This memo constituted the first warning of disciplinary action ever received by Petitioner in her 9 years of working for Supervisor James Hencin.

7. At all times herein described Respondent acted by and through its duly authorized servants, agents and employees who were acting within the scope of their employment.

8. Respondent, by and through its authorized servants, agents and employees, has wrongfully retaliated against Petitioner for making a formal complaint with the FCHR, charging Respondent with discrimination.

9. Petitioner's adverse treatment by Respondent, City of Gainesville, was based, in whole or in part, on retaliation for Petitioner's having filed a complaint for discrimination with the FCHR in violation of the Florida Civil Rights Act of 1992, § 760.10(7), Fla. Stat. (1995).

10. Petitioner has satisfied all conditions precedent to bringing a lawsuit and has exhausted all administrative remedies by filing a second complaint alleging retaliation by Respondent with FCHR on July 21, 1995.

11. On September 27, 1996, the charge was wrongfully dismissed by the FCHR. On October 18, 1996, the charge was reinstated.

SUMMARY OF THE ARGUMENT

This Court has previously held there is a four-year statute of limitations which applies to discrimination cases brought under the Florida Civil Rights Act. The Fourth District Court of Appeal has determined that amendments to the Act passed after the Florida Supreme Court decision now impose a statute of limitations of eighteen months. The Fourth District Court of Appeal decision did not address the prior ruling of this Court and does not explain why it is no longer applicable. This Court should reject the reasoning of the Fourth District Court of Appeal and hold there is at least a four-year statute of limitations as applies to all statutorily created liabilities in Florida.

ARGUMENT

DOES THE SECTION 760.11(5), FLORIDA STATUES (1995), ONE-YEAR STATUTE OF LIMITATIONS FOR FILING CIVIL ACTIONS "AFTER THE DATE OF DETERMINATION OF REASONABLE CAUSE BY THE COMMISSION" APPLY ALSO UPON THE COMMISSION'S FAILURE TO MAKE ANY DETERMINATION AS TO "REASONABLE CAUSE" WITHIN 180 DAYS AS CONTEMPLATED IN SECTION 760.11(8), FLORIDA STATUTES (1995), SO THAT AN ACTION FILED BEYOND THE ONE-YEAR PERIOD IS TIME-BARRED?

Joshua filed her *pro se* complaint of retaliation on July 21, 1995, alleging retaliation in violation of section 760.10, Florida Statutes. Section 95.11(3)(f) provides:

> Limitations other than for the recovery of real property.–Actions other than for recovery of real property shall be commenced as follows:
>
> . . .
>
> (3) WITHIN FOUR YEARS.–
>
> . . .
>
> (f) An action founded on a statutory liability.

In the complaint for discrimination filed with the Florida Commission on Human Relations (FCHR) and this civil Complaint now before the court, Joshua alleges that in April and May of 1995, her supervisor retaliated against her because she had previously

filed a separate complaint of discrimination against Respondent. On January 20, 1998, Joshua filed a civil complaint in the circuit court of Alachua County alleging violation of § 760.10, Fla. Stat. (1995). Joshua's civil action was filed two and a half years after the filing of her initial complaint of retaliation with the Florida Commission on Human Relations. Joshua filed her civil complaint without having received a determination of reasonable cause by the FCHR.

Joshua contends her civil complaint was timely filed under any reasonable construction of § 760.11, Fla. Stat. (1995) and its application to the facts of this case. This position is contrary to the decision of the court below and the Fourth District Court of Appeal in *Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 (Fla 4th DCA 1997). The application of the statute of limitations contained in § 760.11, Fla. Stat. (1995) to the facts of this case demonstrate there is a latent ambiguity because the statute does not adequately address the situation where an individual files a complaint and does not receive a determination of cause within 180 days. It is clear that where the FCHR issues is determination within 180 days that the complainant has 1 year from that date to bring her civil action. *See* § 760.11(5), Fla. Stat. (1995) which states a civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission. Neither the *Milano* decision nor the statute

explicitly addresses the situation where there has not been a determination of reasonable cause by the commission.

A complainant, who, in good faith, has filed with the FCHR and is waiting for a resolution of that complaint by the FCHR, is not compelled or required by the statute to bring a civil action prior to a determination of probable cause. This statute merely states that a complainant ***may*** bring a civil action after 180 days has passed. If the Legislature had intended the result in *Milano*, it could have simply stated that the complainant must bring her civil action within 18 months of the date of filing her complaint. This Court should bear in mind that there were 5 years between the date of the amendments to Chapter 760, Fla. Stat. (1992) and the *Milano* decision in 1997. Presumably, all complaints filed after the effective date of this statute in 1992 were time barred within 18 months. However, apparently, no employer or civil defendant successfully raised this issue until the *Milano* decision. This suggests that civil litigants, plaintiffs and defendants alike, both felt constrained only by the time limitations set forth in the decision by this Honorable Court in *Hullinger v. Ryder Truck Rental, Inc.*, 548 So. 2d 231(Fla. 1989), or that reasonable plaintiff and defense attorneys reading the statute determined that may meant may and concluded that there literally was no statute of limitations in the situation where the commission had not made a determination of cause within 180 days.

Attorneys experienced in employment law who practice in federal court would not be surprised to have complaints pending before the United State Equal Employment Opportunity Commission (EEOC) for more than 18 months while feeling the need to file a civil action in federal court. That is because in matters pending before the EEOC a complainant has the option to request a Notice of Right to Sue at any time after the initial waiting period which ranges from 60 days in age discrimination cases to 180 days in other cases. However, once an EEOC complainant requests and receives a Notice of Right to Sue, that complainant must then proceed directly into federal court within 90 days or the matter is time barred.

In *Milano*, the court sought to justify the need for a statute of limitations by quoting *Lewis v. Conners Steel Company*, 673 F.2d 1240, 1242 (11th Cir. 1982), for the proposition that, "There is no reason why a plaintiff should enjoy a manipulable, open-ended, time extension which could render the statutory limitations meaningless. Plaintiff should be required to assume some minimum responsibility himself for an orderly and expeditious resolution of a dispute." In the *Lewis* case, the issue before the court was the failure of the complainant to bring his civil complaint within the time period set forth in the Notice of Right to Sue. The complainant contended that his 9-year-old son had received the Notice of Right to Sue and lost it before complainant saw it.

Chapter 760, Florida Statutes, is patterned after the Federal Civil Rights law and federal case law interpreting Title VII and other civil rights cases is generally applicable to cases arising under analogous provisions of the Florida Act. *See Weaver v. Leon County Classroom Teachers Association*, 680 So. 2d 478, 480 (Fla. 1st DCA 1996). However, the one key difference is Chapter 760, Fla. Stat. does not provide for Notices of Right to Sue to create a time limitation as do federal statutes. Had the complainant in this case notified the FCHR that she was dismissing her administrative complaint in order to proceed in a civil court and then failed to bring her action within 1 year from that date, it would be a clear that she had triggered the statute of limitations contemplated in § 760.11(4), Fla. Stat. (1995).

However, the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes, expressly provides a limitation period on the right to seek civil or administrative relief ***only where the commission has issued*** a determination of reasonable "cause." When a "cause" decision has been reached the aggrieved party is given specific notice of her obligation to file suit and an explanation of available courses of action. There is no such notice or explanation provisions under § 760.11(8), Fla. Stat., at the expiration of 180 days informing the complainant that she must file within 365 days of the 180th day after she had filed with the commission. In fact, there is no notice whatsoever required to be given to the aggrieved complainant of the date upon which she or he even filed with the

commission, nor is there any required notice showing when the 180th day expired. The *pro se* complainant is without notice of the date that the complaint was even accepted or received for filing with the commission. The *pro se* complainant has no notice from the FCHR that a statute of limitations is running after the 180th day and is without notice that if the complainant fails to take action with 365 days from that 180th day, the aggrieved party's cause of action will be frequently lost forever.

In § 760.11(7), Fla. Stat. (1995), there is a specific provision that states "if the commission determines that there is not reasonable cause to believe a violation has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing within 35 days of the commission's action. In real terms, this means a person who has waited several years only to learn that the commission has determined her complaint does not show reasonable cause that a violation has occurred may still obtain review before the Division of Administrative Hearings. The purpose of allowing the Administrative Hearing supposedly is a more economical way for the unsuccessful aggrieved person to litigate her claim in some form of judicial proceeding. The administrative form triggers the full panoply of rights available to other administrative litigants including a hearing and final review by the commission and, ultimately, if the commission determines that aggrieved person did demonstrate a violation, the aggrieved person once again has the option of filing a civil action under §

760.11(5), Fla. Stat. (1995) as if there had been a reasonable cause determination. The court in *Milano* totally ignored the fact that an aggrieved person who has filed a charge of discrimination against her employer may wish to resolve this matter administratively, through the commission, without even hiring an attorney until the matter is ripe for judicial proceedings either in a civil or administrative setting.

The respondent and the court in *Milano* have suggested a statute of limitations should be implied under § 760.11(8), Fla. Stat. In essence, the *Milano* decision implies that Chapter 760, Fla. Stat., should be construed to abbreviate the four -year statute of limitations for matters founded upon a statutory liability where the commission has not issued a determination, even though the FCHR has not notified complainants by registered mail of the end of the processing period, and has not informed complainants of their option to leave their charge with the commission for further processing or file suit within 365 days after the 180th day of filing. This cannot be the intent of this legislation. In this case, there is no conflict between the 1992 changes to Chapter 760, Fla. Stat., and the existing law stated by This Court in *Hullinger* because the Legislature only changed one specific limitation period in 1992 and made no other changes. The only change to a limitation period was when cause determinations were rendered. The Legislature was silent with respect to the vast majority of those cases where cause decisions have not been rendered other than to state an option allowing complainants to proceed to file suit

if they so desired. It is the exercise of this option by Petitioner Joshua in this case, two and a half years after the date of filing her complaint which is at issue. It is patently unfair to a *pro se* litigant or even litigants represented by experienced employment lawyers to hold them to the *Milano* standard of construction of Chapter 760, Fla. Stat., when, for over 5 years, there was no such interpretation on the books.

Furthermore, the respondent cannot identify any compelling reason for This Court to adopt the construction announced in *Milano* as the law of this state. There is no good reason why an employer who may have violated the rights of its employee is anymore prejudiced by the passage of four years than litigants in a common, fender-bender personal-injury case. In fact, in the normal employment case it is the employee, not the employer, who will be prejudiced by the passage of time; the employer is the custodian of all of the important documents in the case. The employer has the employment applications on file, personnel records, applications of those who applied for positions and who were not accepted, etc. The employee does not have access to any of this information except through discovery or through obtaining a copy of the file compiled by the FCHR after the FCHR has closed the file.

WHEREFORE, in the absence of a clear statement of legislative intent that the four -year statute of limitations contained in *Hullinger* is being repealed, this Honorable Court should hold as a minimum that *Hullinger* still applies in the situation where there

has been no determination of probable cause and that the Petitioner, Deneace M. Joshua, had at least four years from the date she filed her complaint for discrimination within which to bring her civil action. Alternatively, this Honorable Court should recognize that under the statutory scheme in Chapter 760, Florida Statutes (1995) there are multiple ways in which an aggrieved person may obtain a hearing either in civil, circuit court or an administrative forum regardless of how much time has passed solely depending upon what actions the commission takes. A belated finding of cause by the commission triggers a hearing under § 760.11(7) Fla. Stat. (1995), in the same manner that a timely finding of cause triggers the right to a hearing under this same statutory provision. Likewise, a belated finding of no cause triggers the right to a hearing under § 760.11(7), Fla. Stat. (1995) just as a timely determination of no cause would under that statutory provision. The 18 months statute of limitations found by the court in *Milano* was cut from the whole cloth of that court's misapplication and misconstruction of the provisions of § 760.11, Fla. Stat. (1995). Accordingly, This Court should answer the certified question in the negative.

CONCLUSION

Petitioner, Deneace M. Joshua, respectfully requests This Court accept jurisdiction of this matter and enter a decision rejecting the decision in *Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 (Fla 4th DCA 1997), vacate the decision below and remand this cause to the circuit court for further proceedings on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by U.S. Mail to H. Jack Klingensmith, Esquire and Elinor E. Baxter, Walters Levin Brown Klingensmith Milonas & Thomison, P.A., Post Office Box 1479, 15 Ringling Boulevard, Suite 900 (34236), Sarasota, Florida 34230-1479; Dana Baird, General Counsel, Miles Lance, Assistant General Counsel and Evelyn D. Golden, Assistant General Counsel, Florida Commission on Human Relations, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida 32303-4149; and Cynthia N. Sass, President-Elect, FL-NELA, Bole & Sass, 100 South Ashley Drive, Suite 1180, Tampa, Florida 33602 , this 22nd day of March, 1999.

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