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 REPLY BRIEF

GARY L. PRINTY
FLORIDA BAR ID NO.363014
The Law Office of Gary L. Printy
1301 Miccosukee Road
Tallahassee, Florida 32308-5068
Telephone: (850) 877-7299
FAX: (850) 877-2211

Counsel for Petitioner
Deneace M. Joshua

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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

CERTIFIED QUESTION OF GREAT IMPORTANCE

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?

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?

The application of a 545-day statute of limitations to claims brought under section 760.11, Florida Statutes (1995), was err. The holding in *Milano v. Moldmaster, Inc.*, 703 So. 2d 1093 (Fla. 4th DCA 1997) incorrectly interpreted § 760.11(8), Fla. Stat. (1995), to create a statute of limitations. This interpretation flowed from the ambiguous use of the term "may" by the Legislature in writing the legislation. The Legislature used the term "may" for a reason. The more compelling reason is that the complainants were to have the option of litigating their claims without delay after the passage of 180 days or exercise the other provisions of the statutory scheme realizing it would take a longer period of time to resolve their claims. At best, the argument advanced by the Respondent

to support *Milano* suggests nothing more than the statutory language employed by the Legislature was ambiguous.

For example, on the one hand, Respondent takes comfort and cites to the fact that the "shall" contained in § 760.11(3) Fla.Stat. (1995), is mandatory because the word "shall" means mandatory. On the other hand, the Respondent, being fully aware that the Legislature has used "shall" when it means "shall" in this statutory construction, then bases its entire argument on the fact that "may" also means "shall" in § 760.11(8), Fla. Stat. (1995). *See* page 20 of Respondent's Brief on the Merits. The fact that Respondent takes such comfort in this Legislative schizophrenia is probably the clearest sign of the weakness of its argument.

Petitioner contends that, in light of this inconsistent statutory scheme, the argument that this Court's decision in *Hullinger v. Ryder Truck Rental, Inc.*, 548 So. 2d 231(Fla. 1989), is no longer applicable, is less persuasive. The court below and Respondent argue that *Hullinger* is no longer good law because the specific statute of limitations language each sites in § 760.11(8), Fla. Stat. (1995), must control over the general statutory language of § 95.11(3), Fla. Stat.(1995), creating a four-year statute of limitations relied upon by this Court in *Hullinger*. Petitioner cannot find support for the conjecture that a specific statute of limitations is created at all in § 760.11(8), Fla. Stat. (1995), because of the use of that term, "may." For example, in comparing § 760.11(4), Fla. Stat. (1995),

to § 760.11(8), Fla. Stat. (1995), the Legislature said in subsection (4) that "any civil action brought under § 760.11, Fla. Stat. (1995), must be commenced no later than one year after the determination of reasonable cause by the Commission." However, there is no limitation of time within which the Florida Commission on Human Relations (FCHR) must determine "reasonable cause." The limitation period provided by the Legislature for "reasonable cause" determinations has no front end limitation period within which FCHR must make the "reasonable cause" determination.

Under § 760.11(4), Fla. Stat., in cases where FCHR makes an actual finding of "reasonable cause," a civil complaint could conceivably be brought beyond even the 4-year limitation period contemplated and created under this Court's decision in *Hullinger*. In other words, without a front-end limitation period within which the FCHR must render a "reasonable cause" determination, aggrieved parties who wait with FCHR beyond the 180-day period with the hope of obtaining a "reasonable cause" decision, and then receive such a determination, could file suit within one year after receiving this decision from FCHR. An aggrieved party filing a belated administrative review under § 760.11(4), Fla. Stat. (1995), is not prejudiced by this passage of time.

However, a similarly situated aggrieved party proceeding under § 760.11(8), Fla. Stat. (1995), could ignore § 760.11(4), Fla. Stat. (1995), and file an action on the 181st day after filing her complaint for discrimination with the FCHR because § 760.11(8), Fla.

Stat. (1995), states she may proceed as if she had received a reasonable cause determination contemplated in § 760.11(4), Fla. Stat. (1995). There is no specific reference to any initial period in which FCHR must make its determination of reasonable cause. Respondent and the courts following *Milano* argue that this Court should read into the law a mandatory, 180-day period of FCHR administrative processing coupled with a requirement that the aggrieved party must then file suit within 365days thereafter. Hence, the 545-day statute of limitation. This reading, however, would undermine the legislative intent of the 1992 changes to Chapter 760, Florida Statutes, and result in punishing those unfortunate victims of discrimination who, proceeding *pro se*, have waited for FCHR to "do its job" beyond that 180 period. This was not the legislative intent. Rather, the intent was to have more, not less, administrative involvement and to give those aggrieved persons who are ready to file suit the option of going forward after FCHR failed to issue a "reasonable cause determination" within 180 days of administrative processing.

The fact that the Legislature instructed "reasonable cause" recipients to file suit one year after the determination of reasonable cause by the FCHR is instructive in this case because persons who do not receive "reasonable cause" determinations are to be punished for allowing their claims to remain pending with FCHR a year beyond the 180-day processing period. This is precisely what happened to the petitioner in this case. This is not what the Legislature envisioned when it developed and passed changes to

Chapter 760, Fla. Stat. in 1992. The Legislature could not have intended that their administrative scheme to prevent an increase in the filing of civil lawsuits would, in actuality, compel the filing of civil lawsuits, further clogging the court system. The intent was to allow greater leeway to administratively resolve lawsuits.

The current judicial landscape post *Milano*, compels the aggrieved party to file a charge of discrimination, wait 180 days and then proceed immediately to circuit court because FCHR cannot review the matter on a timely basis. Since *Milano*, FCHR is no longer given the opportunity to complete its administrative processing of charges, and charges of discrimination are no longer left with FCHR for administrative resolution. The concept that charges of discrimination would be informally resolved during the 180-day conciliation period has been judicially written out of the statute as a practical matter. These are the practical and real life results of *Milano* which are clearly not the results envisioned by the Florida Legislature in 1992 when it changed Chapter 760, Fla. Stat. with the hope of reducing, not increasing, the number of discrimination lawsuits filed in the state.

Respondent argues that Chapter 760, Fla.Stat. (1995), gives the aggrieved party a clear choice: Either file a civil lawsuit sometime after the 180-day period has run and before the 545th-day, or abandon the claim. Respondent ignores the issue of letting the FCHR process the claim. It is an interesting situation that the Respondent has created;

a situation where the Florida Legislature continues to authorize the existence of, and fund, the Florida Commission on Human Relations while seemingly removing from it the duty to perform any worthwhile function other than to receive charges of discrimination in the mail.

Moreover, Respondent does not address the scenario where the FCHR does make a reasonable cause determination on the 364th day after the filing of the complaint for discrimination. Under the statutory scheme, which Respondent contends is so clear and comprehensive, the complainant would have one year from the date that reasonable cause determination was issued. In other words, that defendant would have 729 days within which to bring a civil action. The rationale of *Milano* was simply incapable of addressing that situation and, yet, clearly, it is contemplated by the statute. Additionally, there is nothing in the language of the comprehensive, statutory scheme which mandates a claim be dismissed by the Florida Commission on Human Relations on the 546th day after filing.

Secondly, Respondent also ignores the situation where a complainant receives a determination that there is not reasonable cause to find a violation exists. Chapter 760, Fla. Stat., allows the complainant in that case to proceed with an administrative hearing and obtain a final order from the FCHR. If the final order of the FCHR is that the initial determination was incorrect and there is, in fact, reasonable cause to proceed, the parties

then would have another year in which to bring the action, even though everyone admits that the proceeding could take longer than the 4 years contemplated by *Hullinger*.

Finally, the simple fact is the court in *Milano* made a mistake. In *Milano*, the court relied upon *Lewis v. Conner*, 673 F.2d 1240 (11th Cir. 1982), which involved the receipt of a Notice of Right to Sue. There is no dispute that the receipt of a Notice of Right to Sue by the complainant compels her to bring her lawsuit in the time period designated within that Notice of Right to Sue, commonly 90 days. In the Notice it is stated that this suit must be filed within 90 days. Here, the Legislature uses "shall" on those occasions when it means "must" or "mandatory" and it uses "may" in situations which Respondent contends means "shall" or "mandatory." The mere fact that such an argument could exist as to the plain, ordinary meaning of "may" in this context, is the ultimate evidence of the flaw in Respondent's argument. It is quite conceivable the Legislature used "may" because they meant "may."

Finally, the argument that the specific statute prevails over the general statute is not applicable in this case. If the Legislature had used the term "shall" or "must" instead of "may," you clearly would have a specific statute that the language of § 760.11(8), Fla. Stat. (1995), prevailing over the general statute of § 95.11(3), Fla. Stat. (1995). However, because the Legislature chose not to use the word "shall" or "must," as it did in § 95.11, Fla. Stat. (1995), the two statutes cannot be compared. The clear and specific

language of § 95.11(3) Fla. Stat. (1995), controls over the ambiguous language of § 760.11(8), Fla. Stat. (1995).

CONCLUSION

For the reasons fully set forth above, this Honorable Court should answer the certified question in the negative, quash the Opinion below and remand this case to the trial court with directions that the Order granting respondent's motion to dismiss the complaint be set aside and the matter be allowed to proceed.

Respectfully submitted,

GARY L. PRINTY
FLORIDA BAR NO. 363014
Law Office of Gary L. Printy
1301 Miccosukee Road
Tallahassee, Florida 32308-5068
Telephone (850) 877-7299
FAX: (850) 8772211

Attorney for Petitioner
Deneace M. Joshua

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 2nd day of June, 1999.

GARY L. PRINTY
FLORIDA BAR NO. 363014
Law Office of Gary L. Printy
1301 Miccosukee Road
Tallahassee, Florida 32308-5068
Telephone: (850) 877-7299
FAX: (850) 877-2211

Attorney for Petitioner
Deneace M. Joshua