SUPREME COURT OF FLORIDA

DENEACE M. JOSHUA

Petitioner,

vs.

CITY OF GAINESVILLE,

Respondent.
_____/

CASE NO.: 94,935

District Court of Appeal,
1st District - No. 98-893

THE FLORIDA CHAPTER OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AMICUS CURIAE BRIEF

Cynthia N. Sass, Esquire
Florida Bar No.: 0691320
BOLE & SASS
100 South Ashley Drive
Suite 1180
Tampa, FL 33602
Telephone: (813) 221-9515
Facsimile: (813) 229-0194

Gail M. Flatow, Esquire
Florida Bar No: 104620
THE LAW OFFICE OF
GAIL M. FLATOW
2024 W. Cleveland St.
Tampa, FL 33606
Telephone: (813) 251-2200
Facsimile: (813) 251-2445

On Behalf of the National Employment
Lawyers Association-Florida Chapter

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SUMMARY OF ARGUMENT

The Fourth District Court of Appeal's finding in Milano v. Moldmaster, Inc., 703 So.2d 1093 (Fla. 4th DCA 1997) that the statute of limitations for filing civil actions in discrimination cases begins to run after 180 days even if the Florida Commission on Human Relations (hereinafter "FCHR") does not issue a determination, is wrong for three reasons. First, the plain and ordinary meaning of the language in the Florida Civil Rights Act of 1992 is contrary to this finding. Second, the Fourth District Court of Appeal's holding in Milano denies a complainant the procedural due process guaranteed by the Florida and U.S. Constitution. And third, the legislative history of the administrative processes for Title VII of the Civil Rights

Act of 1964, 42 U.S.§2000, *et seq.*, after which the Florida Civil Rights Act of 1992 is patterned, requires the statute of limitations to begin to run only after the complainant receives notice of a reasonable determination by the FCHR. The holding in Milano disregards this notice requirement. Accordingly, this Court should overrule Milano and find that the statute of limitations for filing a civil action is one year after the complainant receives notice from the FCHR of a reasonable cause determination.

ARGUMENT I

THE PLAIN AND ORDINARY MEANING OF THE LANGUAGE IN THE FLORIDA CIVIL RIGHTS ACT OF 1992 PRECLUDES FINDING, AS THE FOURTH DISTRICT COURT OF APPEAL DID IN MILANO, THAT THE STATUTE OF LIMITATIONS FOR FILING CIVIL ACTIONS IN DISCRIMINATION CASES BEGINS TO RUN AFTER 180 DAYS IF THE FLORIDA COMMISSION ON HUMAN RELATIONS HAS NOT ISSUED A DETERMINATION.

Whenever possible, statutory language and construction must be given their plain and obvious meaning. Maryland Casualty Co. v. Sutherland, 125 Fla. 282, 169 So. 2d 679 (1936). The language and statutory construction of the Florida Civil Rights Act of 1992 make clear that the one-year statute of limitations for filing a complaint begins **after** the FCHR issues a reasonable cause finding.

Section 760.11(5) in its relevant provisions provides:

> 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**. (Emphasis added.)

This statutory command is not ambiguous. It explicitly states the complainant

has one year **after** the FCHR issues its determination to begin civil proceedings.

The following statutory subsection complements the rule regarding when the statute of limitations commences.

Section 760.11(8) provides:

> In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person **may** proceed under subsection (4), as if the commission determined there was reasonable cause.

On its face, this provision permits a complainant to proceed as if the FCHR had found reasonable cause when the FCHR fails to issue a determination within the 180 days anticipated by the statute.

However, the language of Chapter 760 neither states nor suggests that if the FCHR fails to make a determination or to conciliate within 180 days of the filing of the complaint, it is **mandatory** for the aggrieved person to proceed as if the FCHR had determined reasonable cause. In fact, the word "may" as used in Section 760.11(8) must be construed to mean an aggrieved person is permitted, not required, to file suit in Court or request an administrative hearing if the FCHR fails to make a determination or to conciliate within the statutorily provided 180-day period.

In Brooks v. Anastasia Mosquito Control, 148 So.2d 64 (Fla. 1st DCA 1963) citing Florida State Racing Commission v. Bourquardez, 42 So.2d 87 (Fla. 1959) the Court recognized that the legislature is presumed to know the plain and ordinary meaning of the word "may" as being a permissive term that means something different from the mandatory term "shall."

In Milano, the Fourth District Court of Appeal upheld the trial court's interpretation of subsection 760.11(8). The trial court had decided that the one-year limitation on filing an action commenced at the end of the 180-day period, whether or not the FCHR issued a determination. In conclusory fashion, the Fourth District Court of Appeal agreed with the trial court that this subsection, read with other subsections addressing time limits, starts the clock ticking on the statute of limitations.

This analysis is wrong for two reasons. First, it is clear that subsection 760.11(8) addresses actions an aggrieved party **may** take after the 180-day period has run. But that is all this subsection considers. It does not address, either implicitly or explicitly, the relationship between the 180-day determination period and the statute of limitations. Subsection 760.11(8) simply gives complainants an option to proceed under subsection 760.11(4), but that option is unrelated to when the statute of limitations begins to run. The Fourth District Court of Appeal read more into the subsection than the legislature wrote. There is no basis for the Fourth District Court of Appeal's interpretation of the words on the page.

Second, when this subsection is read as an inextricable part of the whole statute, it is impossible to find support for the Fourth District Court of Appeal's holding. Sections 3 and 4 of 760.11 illustrate this point.

Section 760.11(3) instructs the FCHR to determine and notify within 180 days of the filing of a complaint whether "there is reasonable cause to believe that discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992...." It further states that "[W]hen the commission determines whether or not

there is reasonable cause, the commission by registered mail shall promptly notify the aggrieved person and the respondent of the reasonable cause determination, the date of such determination, and the options available under this section."

Even if this subsection of the statute did not explicitly require the FCHR to notify a complainant of its determination, a requirement the Fourth District Court of Appeal disregarded in Milano, the following subsection anticipates that notice will be provided.

It states:

> In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either:
>
> (a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or
>
> (b) Request an administrative hearing under ss. 120.569 and 120.57. Fla Stat. §760.11(4)(a)(b).

It would not make sense to give an aggrieved person options for responding to the FCHR's determination if it were not also anticipated that the aggrieved person would be notified of the decision to which he or she was supposed to respond. Thus, sections three and four of the statute, read together, contemplate notification by the FCHR before the statute of limitations begins to run.

This analysis is supported by contrasting the statutory construction of Sections 760.11(5) (7) & (13) with 760.11 (8). See Alderman v. Unemployment Appeals Comm'n, 664 So.2d 1160, 1161 (Fla. 5th DCA 1995)(All parts of a statute should be read together to facilitate the achievement of their goals in accordance with reason and

common sense.)

In subsections 760.11(5), (7) and (13) the legislature provided for a one-year statute of limitations for bringing a civil action. Section 760.11(5) 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." Section 760.11(7) provides for a one-year statute of limitations for bringing a civil action after the FCHR issues a final order determining that a violation of the Florida Civil Rights Act of 1992 has occurred. Finally, in subsection 760.11(13), the legislature provides for a one-year statute of limitation for bringing a civil action after judicial review of a final order of the FCHR. In contrast, subsection 760.11(8) does not contain a statute of limitations provision for commencing a civil action when there has been no determination by the FCHR. The subsection is permissive, rather than restrictive, in that all it requires is the complainant to wait 180 days before taking some action.

Further the language of subsection 760.01(3) requires the Court to construe the Florida Civil Rights Act of 1992 "... according to the fair import of its terms and shall be liberally construed to further the general purposes...." The general purposes of this act are "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity ... and to promote the interests, rights and privileges of individuals within the state." Fla. Stat. §760.01(2). The reason for liberal construction is to allow an individual ample opportunity to pursue civil rights claims. To find that a person has one year to bring a civil action even when

no determination has been issued, as the Court did in Milano, undermines the purpose of the Act, and is contrary to the statute's requirement that the terms be liberally construed.

Because the words in the statute on their face, and the parts of the statute read as a whole clearly indicate that the statute of limitations should not commence until after an FCHR determination, this Court should overturn Milano.

ARGUMENT II

IF THIS COURT APPROVES THE REASONING AND HOLDING IN MILANO, INDIVIDUALS WHO FILE DISCRIMINATION COMPLAINTS WITH THE FLORIDA COMMISSION ON HUMAN RELATIONS WILL CONTINUE TO HAVE THEIR PROCEDURAL DUE PROCESS RIGHTS VIOLATED.

1. Both the Florida and U.S. Constitution guarantee procedural due process.

The guarantee of procedural due process is a cornerstone of both federal and state constitutional law. Relevant to the issue at bar are the Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of the Florida Constitution. Section 1 of the Fourteenth Amendment states in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." Article 9 of the Florida Constitution echoes this command.[1]

Procedural due process has two essential components: notice and an

[1]Article 1, §9 of the Florida Constitution states: "No person shall be deprived of life, liberty or property without due process of law...."

opportunity to be heard. Courts have interpreted this to mean that before the state may deprive an individual of life, liberty, or property, the state must first give notice that it is considering whether a deprivation should occur, and then provide an opportunity for the individual to respond to the threatened deprivation.

The amount of process an individual must be provided has been the subject of much legal debate. The United States Supreme Court discussed at length and in-depth the constitutional requirements of procedural due process in Mathews v. Eldridge, 424 U.S. 319 (1976). Unlike in the instant case, which concerns the notice element of due process, the issue in Mathews focused on the opportunity to be heard. Despite the difference between the elements of due process emphasized in Mathews and those at issue in this case, the Court's analysis in Mathews is instructive because it illuminates the importance of the notice element to due process considerations.

In Mathews, the Court considered the amount of process an individual should receive in relationship to the deprivation that could occur. The question was not whether an individual would be afforded the opportunity to be heard; rather, it was how much of an opportunity to be heard would an individual receive. The Supreme Court said: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Id. at 333 (quoting Armstong v. Manzo, 380 U.S. 545 (1965)). Thus, Mathews instructs, if the opportunity to be heard, no matter how great or small that occasion, is the constitutionally mandatory vehicle through which an individual is afforded the opportunity to safeguard her rights, then notice is that individual's constitutionally

required ticket to ride.

2. The Fourth District Court of Appeal's holding in Milano denies individuals their ticket to ride.

As Mathews shows, an individual is denied procedural due process if she is not allowed a pre-deprivation hearing proportional to the potential loss. To get the constitutionally required hearing, the individual must first be notified that the government is considering depriving her of life, liberty or property. In Milano, the Fourth District Court of Appeal's statutory interpretation denies individuals in petitioner's position constitutionally required notice.

The Fourth District Court of Appeal's analysis is wrong because it fails to follow the implicit command of Mathews that a complainant is constitutionally entitled to notice. It twists the idea of notice, which means that a government actor notifies the complainant about all aspects of the process to which she is entitled, into self-notification.

The Fourth District Court of Appeal has previously addressed in analogous cases the issue of notice and its relationship to a statute of limitations, which is the specific issue being addressed here. In those instances, and contrary to its holding in Milano, the Court held that a claim was not time-barred when a complainant had not received timely notice from the state.

In Finney v. Florida Unemployment Appeals Commission, 587 So.2d 637 (Fla. 4th DCA 1991), the appellant failed to receive timely notice of a referee's decision regarding the availability of unemployment compensation benefits. Consequently, he failed to appeal the decision within the 20 days allowed by the rules.

The Appeals Commission refused to consider the appeal, stating that it lost jurisdiction when the complainant failed to file within the 20-day period allowed. The Fourth District Court of Appeal reversed the Appeals Commission's decision and remanded for an evidentiary hearing to determine questions of fact regarding the dates on which notice was mailed and received. The Court refused to uphold the Appeals Commission's decision for constitutional reasons. Referencing previous decisions, the Court said: "[T]his Court [has] held that where a complainant did not receive notice of the referee's decision, the Commission's dismissal of the appeal constituted a denial of due process." Id. at 638.

The differences in the Fourth District Court of Appeal's holdings in Finney[2] and Milano are inexplicable. The issue of notice and the procedural context in which it arises in each case are almost identical. In both cases a complainant filed a claim with a government commission. In Finney, the state fulfilled its statutory and constitutional obligations by notifying the complainant of its decision and the time remaining for the complainant to file an appeal. In Milano, and in the case at bar, the state completely failed to fulfill its statutory and constitutional obligations when it neglected to inform the complainant of its findings and the time remaining for the complainant to file a complaint in state court. In response, the Fourth District Court of Appeal in Finney correctly referenced due process considerations because the complainant did not receive **timely** notice. In Milano, however, the Court did not

[2] See also Robinson v. Florida Unemployment Appeals Commission, 526 So.2d 198 (Fla. 4th DCA 1988).

even consider constitutional due process considerations even though the complainant received **no** notice at all. Conflicting conclusions from analogous facts cannot be reconciled. The fundamental difference between the cases – no notice as opposed to untimely notice -- serves only to strengthen the argument that the Fourth District Court of Appeal denied the appellant in Milano -- and in the instant case – procedural due process.

The distinction the Court has made is between giving notice late, in which case a due process violation occurs, and giving no notice at all, in which case the Court shifts the burden to the complainant to provide her own procedural due process through self-notification. In shifting the burden of responsibility for notification to the complainant, the Court asks the complainant to write her own ticket to ride. It is not reasonable in any instance to ask a complainant to assume the state's constitutional obligation to give notice, but it is especially unfair to ask a complainant to write her own ticket to ride when she has no way of knowing when the clock will begin ticking on her opportunity to be heard.

Because the Fourth District Court of Appeal's holding in Milano violates the procedural due process requirements of the United States and Florida constitutions, it should be overturned.

ARGUMENT III

BECAUSE CHAPTER 760 IS PATTERNED AFTER TITLE VII, IT IS APPROPRIATE TO APPLY THE SAME STATUTE OF LIMITATIONS ANALYSIS, WHICH REQUIRES NOTIFICATION OF AN ADMINISTRATIVE DECISION BEFORE THE STATUTE OF LIMITATIONS BEGINS TO RUN.

Chapter 760 is patterned after Title VII. Accordingly, federal case law interpreting Title VII is generally applicable to cases arising under analogous provisions of the Florida Civil Rights Act of 1992. See Weaver v. Leon County Classroom Teachers Ass'n., 680 So. 2d 478, 480 (Fla. 1st DCA 1996): Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996).

Under § 760.01, *et seq.*, Florida Statutes, the FCHR exists to prevent and resolve employment discrimination problems. The goal of the Equal Employment Opportunity Commission (hereafter "EEOC") is no different. See. 42 U.S.C. §2000e-5(a); see also Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 357-59, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977); Moteles v. University of Pennsylvania, 730 F. 2d 913, 917 (3d Cir. 1984) cert. denied, 469 U.S. 855, 105 S. Ct. 179, 83 L. Ed. 2d 114 (1984). Congress established the EEOC on twin premises: that "administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases" and that "the sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditure of judicial resources in already heavily overburdened ... courts." Moteles, 730 F. 2d at 917 (citing Title VII legislative history). The result of these goals is 42 U.S.C. §2000e-5(b) which directs the EEOC to investigate charges of employment discrimination and "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The intent of Chapter 760 in creating the FCHR was no different.

Significantly, administrative involvement frequently leads to administrative

delay and under 42 U.S.C. §2000e-5, Congress settled on 180 days as the medium between the need for the aggrieved party to be able to file suit and need for the administrative process to "work."

42 U.S.C. §2000e-5(f)(1) provides that if, after 180 days the EEOC has not either resolved the charge of discrimination or filed a civil action of its own, then the employee is not required to await further administrative action and may proceed to request the right to go to court. There is no time limitation, however, on receipt of the notice informing the employee of his or her right to go to court nor is there any time limitation attached to the period in which administrative claims can remain pending with the EEOC. Instead, the only time limitation is after the employee receives his or her notice that he or she may proceed to court, the employee must commence the civil action within 90 days after receipt of the notice, which could be years after the administrative charge has been pending with the EEOC.

This history of the 180-day waiting period under the EEOC rules is an important backdrop to the passage of the Florida Act Civil Rights Act of 1992 and the 180-day period inserted into § 760.11(8). The 180-day waiting period for filing civil actions under Title VII has been the subject of many cases but it has not been reasonably disputed that the 180-day period was the balance Congress believed needed to be struck between the administrative process and the administrative delay. See 42 U.S.C. §2000e5(f)(1). As the Court in Spencer v. Banco Real, S.A., 87 F.R.D. 739, 744-45 (S.D.N.Y. 1980), acknowledged, in the worse case scenario, i.e., when the EEOC can take absolutely no action on a case for the entire 180 days, an employee

may simply bring her suit after that time passes, and is in no worse position than those employees who do not receive right-to-sue letters.

From these and other cases decided on the 180-day "waiting period," the principle has been set forth that the purpose of the 180-day period was to further "substantive purposes [such as]: the promotion of dispute resolution through accommodation rather than litigation." Weiss v. Syracuse Univ., 522 F. 2d 397, 411 (2d Cir. 1975). The 180-day rule was devised to assist complainants whose claims had been pending at the EEOC for this period and to create a balance that Congress believed needed to be struck between unreasonable delays in EEOC processing and an aggrieved party's need to go forward with his or her claims.

Significantly, interpreting federal or state law, there is no case that has been located nationwide except Milano that suggests that immediately after the 180-day period has expired, a 365-day limitation period starts to run within which suit must be filed. A rule of this type, like that suggested in Milano, would have the effect of depriving both litigants and human rights commissions like the FCHR and the EEOC, operating primarily on insufficient resources, from the reasonable opportunity to investigate and resolve discrimination claims and would require prospective litigants to prematurely decide, on the 180th day after the administrative charge was filed, whether they intend to file suit.

It would be a travesty of justice for aggrieved employees, such as the Petitioner in the case at bar, to have to sacrifice their right under the law to have the FCHR investigate and process their charges in favor of the premature filing of civil suit. This

was certainly not the intention of the Florida Legislature when it passed § 760.11(8) and permitted aggrieved persons whose claims had not been resolved at the FCHR to proceed to court, if they desired.

From a review of the Legislative History cited above, it is clear that the statute of limitations under subsection760.11 (8) on civil actions alleging employment discrimination runs one year from the date the FCHR notifies a complainant of the reasonable cause determination.

CONCLUSION

The Fourth District Court of Appeal's holding in Milano should be overturned because it misinterprets a Florida statute, disregards constitutional procedural due process requirements, and ignores legislative intent. The consequence to employees in the state of Florida is diminished opportunity to successfully vindicate civil rights' violations. For this very important reason, the Florida Supreme Court should overrule the Fourth District Court of Appeal's holding in Milano.

Respectfully submitted this _____ day of March, 1999.

_____
Cynthia N. Sass, Esquire
Florida Bar No.: 0691320
BOLE & SASS
100 South Ashley Drive
Suite 1180
Tampa, FL 33602
Telephone: (813) 221-9515
Facsimile: (813) 229-0194

_____
Gail M. Flatow, Esquire
Florida Bar No: 104620
THE LAW OFFICE OF
GAIL M. FLATOW
2024 W. Cleveland St.
Tampa, FL 33606
Telephone: (813) 251-2200
Facsimile: (813) 251-2445

On Behalf of the National Employment
Lawyers Association-Florida Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of the foregoing has been furnished by U.S. Mail to the following addressees, on this _____ day of March, 1999. I **CERTIFY** that same has been typed in Times New Roman, Font Size 14 and saved to diskette in WordPerfect 5.1.

Gary L. Printy, Esquire
1301 Miccosukee Road
Tallahassee, Florida 32308

H. Jack Klingensmith, Esquire
Elinor E. Baxter
Walters, Levin, Brown, Klingensmith,
Milonas and Thomison
15 Ringling Blvd., Suite 900
Sarasota, Florida 34236

Dana Baird, General Counsel
Florida Commission on Human Relations
3325 John Knox Road
Building F
Suite 240
Tallahassee, Florida 32303- 4149

_____
Attorney