SUPREME COURT OF FLORIDA

DENEACE M. JOSHUA,

Petitioner,

v.

CITY OF GAINESVILLE,

Respondent.

_____/

CASE NO. 94,935

First District Court of Appeal
Case no. 98-893

APPENDIX
THE FLORIDA COMMISSION ON HUMAN RELATIONS
AMICUS CURIAE BRIEF

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CERTIFIED QUESTION OF GREAT IMPORTANCE

DOES THE SECTION 760.11(5), FLORIDA STATUES (1995), ONE YEAR STATUE 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 STATUES (1995), SO THAT AN ACTION FILED BEYOND THE ONE YEAR PERIOD IS TIME-BARRED?

SUMMARY OF THE ARGUMENT

The Milano case (infra) is wrongly decided because the Court ignored the plain meaning of the applicable statute which provides that the one year limitations period runs from the date of making a cause finding by the Florida Commission on Human Relations (FCHR).

Further, the FCHR is not required to complete its investigation within 180 days, or within any other time period, and does not lose jurisdiction unless a claimant files suit in a court of competent jurisdiction. Therefore, a one year statute of limitations does not run against a claimant unless the FCHR makes a cause finding, and then the one year runs from the date of the cause finding. A contrary reading of the applicable statute is in violation of a claimant's right to have the required statutory notice.

This legal position of the FCHR follows the past practice by the FCHR, and FCHR has the primary responsibility to interpret the applicable statute.

ARGUMENT I

THE PLAIN MEANING OF § 760.11(5) IS THAT THE ONE YEAR LIMITATION PERIOD MUST BE CALCULATED FROM THE DATE OF THE REASONABLE CAUSE FINDING BY THE FCHR.

It is the FCHR's position that the statute of limitations is 365 days from the date the FCHR makes a reasonable cause finding. The Circuit Court below relied upon the court's ruling in Milano v. Moldmaster, Inc., 703 So.2d 1093 (Fla. 4th DCA 1997), as controlling authority, which held that the one year statute of limitation begins to run on the 181st day following the filing of a complaint with the FCHR, even if the FCHR has not made a determination or issued a cause finding.

FCHR is the state agency charged with enforcement of Chapter 760, Florida Statutes (1997), which incorporates the Florida Civil Rights Act of 1992. An agency's opinion is entitled to great weight in the interpretation of the statute it is charged with enforcing. Public Employees Relations Comm'n v. Dade County Police Benevolent Ass'n., 467 So. 2d 987(Fla. 1985). See also Florida Public Employee's Council AFSCME v. Daniels, 642 So. 2d 813 (1st DCA 1994). FCHR's position is that the decision in Milano, supra, and its progeny failed to consider legislative intent in reaching its decision(s). The FCHR has not been an actual party to any of the decisions rendered to date.

The enumerated powers of the FCHR require the Commission to act upon complaints filed pursuant to the Florida Civil Rights Act of 1992, Section 760.06(5), Fla. Stat. (1997). Section 760.11(3) provides that the FCHR shall determine if reasonable cause exists to find that a discriminatory employment practice has occurred. It further provides that any civil action brought under the statute shall be commenced no later than one year after the date of determination of reasonable cause by FCHR (emphasis added). If a no cause determination is issued, complainant may not bring a civil action, but may petition for an administrative hearing.

Chapter 760 is a logical comprehensive statutory plan for handling discrimination charges through an administrative process, with litigation as a last resort. The statute of limitation provisions are set forth in three situations in Chapter 760. The first situation is where the Commission finds cause. The second situation where an action can be brought within one year is where the Final Order issued by the Commission finds a violation. The action can be brought within one year of the date of the Final Order. See § 760.11(7). The third situation is where an appellate court determines a violation has occurred, and remands the matter to the Commission for appropriate relief. The aggrieved party may bring an action within one year of the date of the court order as if there has been a reasonable cause determination. See §

760.11(13). This is a situation which, under normal circumstances, will be long after the issuance of a cause finding. It is the Commission's position that a plain reading of the statute requires an official act to take place before the one year limitation starts to run. After Milano, there need be no official act to commence the one year statute of limitation where the Commission is delayed more than 180 days in its investigation. This decision is contrary to legislative intent, which sought to provide a window of opportunity for a claimant to opt out of the administrative process, if FCHR is delayed more than 180 days in its investigation, and seek civil redress for a complaint. This provision for a complainant to remove a discrimination charge from this agency is also present in Title VII of the Civil Rights Act of 1964, as amended, which allows a complainant to file a civil action 180 days after initially filing a charge with the Federal Equal Employment Opportunity Commission (EEOC) because of a delay in EEOC's investigation.

It is FCHR's position that the one year statute of limitation runs from the determination of a cause finding, and not the termination of the 180 day period that gives claimant the right to file suit, if FCHR has not taken action within the 180-day period.

There are more than 1,500 pending cases filed with FCHR, which would be

time-barred from further prosecution by claimants, if the decision in Milano is upheld. This is a matter of great concern to the Commission which is charged with the duty of carrying out its duties pursuant to Chapter 760.

The Commission's position is buttressed by the very language of the pertinent provisions of the statutory subsections. Without question, the statute provides in § 760.11(3) that the permitted civil action may be brought under the statute no later that one year after the date of determination of reasonable cause by the Commission.

Second, if the Commission itself issues a Final Order finding a violation and giving relief pursuant to § 760.11(7), without the intervention of an appellate court, the Petitioner can again accept the relief given by the Commission, or sue in court within one year of the date of the Final Order, as if there has been a reasonable cause determination.

In the third situation, found in § 760.11(13), where the one year statute of limitation applies where an appellate court determines a violation has occurred, and the court remands the matter to the Commission for appropriate relief, the aggrieved party has the option to accept the relief by the Commission or may bring an action within one year of the date of the court order as if there has been a reasonable cause determination.

In these three one year limitation provisions the statute always reverts to the language as if there had been a reasonable cause determination. Milano, supra, changes the first of these one year periods, contrary to the specific language of the statute, when it holds that the one year statute of limitation begins to run on the 181st day following the filing of a complaint with FCHR, even if FCHR has not made a determination or issued a cause finding. If Milano had been decided correctly, the one year limitation would run from the date the Commission found reasonable cause, no matter when that date would occur. Consider the other hypothetical situations permitted under the statute. Suppose that a petitioner files a petition for relief from a no cause finding and the Division of Administrative Hearings Administrative Law Judge finds that the Petitioner's rights have been violated. The case then goes to the Commission, and the Commission accepts the Recommended Order of the Administrative Law Judge, and finds a violation in favor of the Petitioner in its Final Order, which Respondent then appeals to an appropriate District Court of Appeal, which remands back to the Commission pursuant to § 760.11(13) for the awarding of relief. The one year period would run from the date of the Court order.

In the event that the administrative process stops with the Final Order of the Commission, pursuant to § 760.11(7), the one year runs from the date of the

Commission's Final Order. The Petitioner can accept the relief awarded by the Commission, or go to court, but cannot do both. If the Petitioner goes to court the Commission loses jurisdiction over the case.

The Commission never loses jurisdiction over a case if it is investigating a case, but a cause finding has not yet been entered, even if the period of 180 days has been exceeded, since by the statute, jurisdiction is lost by the Commission only if the petitioner files a lawsuit, as previously described. See Farancz v. St. Mary's Hospital, Inc., 585 So. 2d 1151 (Fla. 4th DCA 1991).

ARGUMENT II

PURSUANT TO CH. 760 THE FCHR NEVER LOSES JURISDICTION OF THE PETITIONER'S CLAIM EVEN IF THE INVESTIGATION TAKES LONGER THAN 180 DAYS, UNLESS THE PETITIONER ELECTS TO BRING SUIT, AND IT IS NOT MANDATORY FOR THE FCHR TO COMPLETE ITS INVESTIGATION WITHIN 180 DAYS OF THE FILING OF THE COMPLAINT, OR WITHIN ANY OTHER TIME PERIOD.

The court in the Milano decision opined that the statute required that the Commission make a determination of reasonable cause within 180 days of filing the complaint, because the word "shall" is used in connection with this requirement of finding cause.

The actual wording of the pertinent language, as found in § 760.11(3) and § 760.11(5), with underlining supplied, is as follows:

§ 760.11(3)

(3) Except as provided in subsection (2), the commission shall investigate the allegations in the complaint. Within 180 days of the filing of the complaint, the commission shall determine if there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992. When 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. (Emphasis added.)

§ 760.11(5)

(5) ...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. The commencement of such action shall divest the commission of jurisdiction of the complaint....

The rule of law in the State of Florida has long been that the word "shall" when found in a statute need not be mandatory if a different construction is needed to carry out the intent of the legislature, as found in different provisions of the same statute in parimateria with the phraseology in question, and when necessary to harmonize the statute. Lomelo v. Mayo, 204 So. 2d 550 (Fla. 1st DCA 1967). In Lomelo, supra, it was held that the word "shall" in a statute providing that an order be entered within 180 days in a water and sewer rate hearing, was directory rather that mandatory since there was nothing to indicate that the time requirement was intended as a limitation on the power to act. The Florida Supreme Court, after analyzing a

different statute, has also held that a 30 day provision within which a workers' compensation judge "shall" enter an order was directory only, and did not divest the judge of jurisdiction. Scotty Craft Boat Corp. v. Smith , 336 So. 2d 1150 (Fla. 1976).

(a) Legislative history of the statute of limitation in Fla. Stat. Ch. 760(1997)

There was no common law action for various kinds of discrimination in employment prior to 1977. Discrimination claims are all made pursuant to statute. The basic statute was amended by the Florida Civil Rights Act of 1992, to add the one year statute of limitation as found in the current statute. This amendment followed the Florida Supreme Court's decision in Hullinger v. Ryder Truck Rental, Inc., 548 So. 2d 231(Fla. 1989), which imposed a four year statute of limitation on the bringing of such lawsuits, when it was not possible in particular cases for the administrative process to resolve the issues. Because of the 1992 amendments, the four-year statute of limitations imposed by Hullinger is no longer applicable.

(b) The 180 day limitation within which the FCHR has to make a cause finding or a no cause finding should not be construed as requiring a mandatory loss of jurisdiction for the FCHR.

In this case, the word "shall", as used in § 760.11(3), directs the Commission to investigate a case to conclusion, and if it does not do so within 180 days, the aggrieved party "may" treat that failure as a finding of reasonable cause, and thereafter bring a

lawsuit within one year. See § 760.11(5). If a Petitioner opts to sue, the Commission is divested of jurisdiction and cannot continue to investigate or take any other action. There is nothing in this section which provides that the FCHR is divested of jurisdiction if a cause finding is not made within 180 days, and if the Petitioner does not elect to sue. In this sense, it functions much like the reverse of a point of entry in an administrative proceeding. In the Milano case, the Court essentially held that there was a penalty against the Petitioner for waiting for a reasonable cause finding, even though there is no such provision in the statute, or any warning to a claimant.

By the very wording of Chapter 760, the Commission only loses jurisdiction in the case of an aggrieved person who elects to sue. This is in accord with the basic tenet of the statute that the process is essentially administrative, that administrative remedies must be exhausted, and that court trials are only allowed after either an appellate court order, the Final Order of a Commission hearing panel, or the Commission itself has found reasonable cause. This means that the claims of aggrieved parties are pre-screened for merit before they can go to court, or if the FCHR does not find cause within 180 days of the filing of the charges of discrimination. The 180 day provision within which the Commission should decide to make a reasonable cause finding is only intended to speed the process up, and not

destroy the rights of an aggrieved party.

(c) The time limitations in Chapter 760 must be construed in congruity with the applicable EEOC statutes, in which case the end of the 180 day period for finding cause or no cause does not start a statute of limitation running.

The Florida Civil Rights Act, § 760.01(3), provides for the purposes and construction of the statute. It provides that the Act shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

Section 760.06(3) provides that the Commission is to promote the creation of, and to provide continuing technical assistance to local commissions on human relations and to cooperate with other agencies, including agencies of the federal government. Section 760.06(10), provides that the Commission is to become a deferral agency for the federal government and to comply with the necessary federal regulations to effect the Florida Civil Rights Act of 1992. This means that FCHR has a worksharing agreement with the Equal Employment Opportunity Commission, a federal government agency established by the United States Congress.

Chapter 760 is patterned after 42 U.S.C. § 2000(e), commonly referred to as Title VII of the Civil Rights Act of 1964, as amended. Federal case law interpreting

Title VII is generally applicable to cases arising under analogous provisions of the Florida Act. See Weaver v. Leon County Classroom Teachers Ass'n, 680 So. 2d 478 (Fla. 1st DCA 1996), and Harper v. Blockbuster Entertainment Corp., 139 F. 3d 1385 (11th Cir. 1998). Under Title VII, aggrieved persons satisfy their exhaustion of remedies obligation by filing with the EEOC and waiting until they receive their right to sue letter in order to bring an action in court. There is no requirement to file suit within any limitation period until after the EEOC processing requirement is satisfied. There are no time limitations within which EEOC has to conduct investigations, because any such restriction would inevitably place undue pressure on EEOC to conduct hasty or incomplete investigations and would encourage it to render premature reasonable cause determinations. See EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (3d Cir. 1984), and Forbes v. Reno, 893 F. Supp. 476 (Pa.W.D. 1995). See also Tuft v. McDonnell Douglas, 10 FEP Cases 929, (8th Cir. 1975), where a 120-day requirement was interpreted as a recommendation rather than a mandate.

ARGUMENT III

THE MILANO DECISION DEPRIVES PETITIONERS OF ESSENTIAL PROCEDURAL DUE PROCESS IN THAT THE ONE YEAR STATUTE OF LIMITATION CAN RUN AGAINST A PETITIONER WITHOUT THE COMMISSION BEING ABLE TO GIVE THE REQUIRED STATUTORY

NOTICE TO A PETITIONER AS PROVIDED BY THE LEGISLATURE.

The statute is clear that the one year limitation in § 760.11(5) is calculated from the date of determination of reasonable cause. Pursuant to § 760.11(3), the Commission must give notice by registered mail to both a petitioner and respondent when a determination of reasonable cause is made. Under the Milano decision, the one year limitation period runs without notice to any of the parties.

In the situation where an appellate court has remanded to the Commission for a grant of relief, the one year runs from the date of the court order, and in the situation where the one year runs from the date of the Final Order of the Commission at the end of the usual administrative process, all parties are again notified of these significant events by copies of orders sent by ordinary mail.

If an aggrieved claimant reads the statute after the Milano decision, he or she is not advised in any fashion that the one year limitation under Milano runs from the end of the 180 day period within which the Commission is supposed to make a decision, instead of the date of the finding of reasonable cause. In fact they are advised that the one-year limitation runs from the date of the issuance of the finding of cause.

There is still another reason that the holding in Milano should be changed. Section 760.11(3) also provides that the parties must be given their options to proceed

administratively or go to court, in writing, by registered mail along with the finding of reasonable cause. After Milano, there is a good possibility that this mailing will not happen in many cases.

It can reasonably be inferred that the legislature intended that written notice be given in all three situations where the one year limitation applies, and that to do otherwise would deprive claimants of procedural due process. See Mathews v. Eldridge, 424 U.S. 319 (1976).

ARGUMENT IV

PREVIOUS DECISIONS OF THE FLORIDA COMMISSION ON HUMAN RELATIONS HAVE FOLLOWED THE RATIONALE URGED UPON THE COURT IN THIS BRIEF.

The Florida Commission on Human Relations has held that the Commission is divested of jurisdiction when an aggrieved person has commenced a lawsuit. Longariello v. Monroe County Public Schools, Florida, 20 F.A.L.R. 760, FCHR Order No. 97-046 (1997). The Commission has further held that if there is a no cause finding by the Commission, that an aggrieved claimant has the right to take further action by filing a petition for administrative relief within 35 days of the issuance of the no reasonable cause order, no matter how long the matter has been pending before the Commission for an investigation. Wilson v. Scotty's, ___F.A.L.R____, FCHR Order

No. 98-032 (1998).

CONCLUSION

The one year statute of limitation should run from the date the Commission makes a cause finding, and not from the termination of the 180 day period that gives claimant the right to file suit only if FCHR has not taken action within the 180 day period.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I , Dana Baird, hereby certify that this appendix was duly mailed by U.S. Mail to the following addressees, on the____day of April 1999:

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