SUPREME COURT OF FLORIDA

DENEACE M. JOSHUA,

Petitioner,

CASE NO. 94,935

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

CITY OF GAINESVILLE,

Respondent.
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RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

Throughout this brief, the Petitioner, Deneace Joshua, shall be referred to as "Joshua" or "Petitioner." The Respondent, City of Gainesville, shall be referred to as the "City" or "Respondent."

The Amicus Curiae, the Florida Chapter of the National Employment Lawyers Association and the Florida Commission on Human Relations, shall be referred to respectively as "NELA" and "FCHR" or collectively as "Amicus Curiae."

The Record on appeal to the First District Court of Appeal contains only one volume. Therefore, all references to the First District Court of Appeal's Record are to volume one and shall be made solely by the letter "R" followed by the appropriate page number(s) and paragraph(s), if applicable. i.e. (R.__) or (R.__, ¶__).

Likewise, the Supreme Court Record contains only one volume. All references to the Supreme Court record are to volume one and shall be made solely by the Letters "S.Ct.R." followed by the appropriate page number(s). i.e. (S.Ct.R. __).

References to the briefs filed in this matter shall be as follows: the Petitioner's Brief on the Merits – the letter "P" followed by the appropriate page number(s) (P__); NELA's Amicus Curiae Brief – the letters "NELA" followed by the appropriate page number(s)(NELA__); and FCHR's Amicus Curiae Brief – the letters "FCHR" followed by the appropriate page number(s).

References to Respondent's Appendix shall be referred to by the letter "A" followed by the appropriate page number(s). i.e. (A.___).

CERTIFICATE OF TYPE SIZE AND STYLE

The type and styled used in this brief is 14 point Times New Roman.

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DOES THE SECTION 760.11(5), FLORIDA STATUTES (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?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This matter is on discretionary review to the Supreme Court as a certified question of great public importance from the First District Court of Appeal.

COURSE OF PROCEEDINGS

On January 20, 1998, Joshua filed a Complaint alleging a violation of the Civil Rights Act of 1992. (R. 1-8). On February 12, 1998, the City filed a Motion to Dismiss Complaint, Motion for Summary Judgment and Motion for Attorney's Fees. (R. 9-12). On February 26, 1998 a hearing was held on the matter and on February 27, 1998, the Court entered an order dismissing Joshua's Complaint with prejudice as time barred. (R. 19-20). Joshua timely appealed the Court's Order to the First District Court of Appeal. (R.21-23).

On February 17, 1999, the First District Court of Appeal entered an Order affirming the trial court's decision on the authority of Milano v. Moldmaster, 703 So.2d 1093 (Fla. 4th DCA 1997). (S.Ct.R.2). In so holding, the First District Court of Appeal has concurred with the Fourth District in finding that the one year limitation period for filing a civil action under the Florida Civil Rights Act begins to run at the expiration of the 180 day period in which the FCHR is to make a "reasonable cause" determination. (S.Ct.R. 1-9). Due to the importance of its holding, the First District Court of Appeal

has certified the aforementioned issue as a question of great public importance. (S.Ct.R. 8-9). On February 22, 1999, Joshua timely filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida.

DISPOSITION IN LOWER TRIBUNALS

On February 27, 1998, the Circuit Court for the Eighth Judicial Circuit, in and for Alachua County, Florida dismissed Joshua's Complaint with prejudice as time barred. On February 17, 1999, the First District Court of Appeal affirmed the Circuit Court's Order.

III. STATEMENT OF FACTS[1]

Joshua cites a litany of alleged factual matters and legal allegations in her Statement of Facts regarding the merits, or lack thereof, of her claim; however, the only relevant facts on this appeal relate to the timeliness of her Complaint, i.e., when Joshua filed her charge of discrimination, whether the FCHR made a determination of cause within 180 days of that date and when Joshua filed her civil court complaint. The rest of Joshua's Statement of Facts should be wholly disregarded as irrelevant to the matter on appeal.

The relevant facts on this appeal are as follows:

On July 21, 1995, Joshua filed a complaint, FCHR No. 95-J838, alleging retaliation by the City with the Florida Commission on Human Relations ("FCHR"). (R.1, ¶5);

Joshua did not receive a determination of probable cause by the FCHR within 180 days of filing her complaint, i.e., on or before January 17, 1996. (R.3, ¶13);

On January 17, 1997, one year had passed since Joshua had failed to receive a determination of probable cause by the FCHR. (R. 9-12);

On January 20, 1998, Joshua filed a Complaint in the Circuit Court of the Eighth

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[1] The Circuit Court entered an Order dismissing the Petitioner's Complaint with prejudice. For purposes of a motion to dismiss, a defendant accepts all well pleaded facts as true. O'Neal v. Crumption Builders, Inc., 143 So.2d 344 (Fla. 1st DCA 1962). A defendant does not admit all facts enumerated in a Complaint as true as Joshua contends.

Judicial Circuit, in and for Alachua County, Florida, styled Joshua v. City of Gainesville, Case No. 98-236-CA-J. (R. 1-8);

On February 9, 1998, the City moved to Dismiss the Complaint as time barred, i.e., under Florida Statute §760.11, Joshua had one year from January 17, 1996 (180 days after July 21, 1995), or January 17, 1997, to file a civil action under the Florida Civil Rights Act, which she failed to do. (R. 9-12);

On February 27, 1998, the Honorable Chester B. Chance entered an order dismissing the Complaint with prejudice as time barred. (R.19-20); and

On February 17, 1999, the First District Court of Appeal entered an Order affirming the dismissal of Joshua's Complaint as time barred. (S.Ct.R. 1-9).

IV. SUMMARY OF THE ARGUMENT

Joshua filed a Complaint with the FCHR on July 21, 1995. The FCHR failed to timely act on that Complaint within 180 days of its filing; therefore, by operation of law, Joshua automatically obtained a determination of reasonable cause on January 17, 1996. Fla. Stat. §760.11(8). Joshua had one year, or until January 17, 1997, to file a civil action for a violation of the Florida Civil Rights Act of 1992. Fla.Stat. §760.11(4)(a); Milano v. Moldmaster, 703 So.2d 1093 (Fla. 4th DCA 1997). Joshua missed the January 17, 1997 deadline and filed her civil action more than a year late. Accordingly, her Complaint is time barred.

VI. ARGUMENT

STATUTORY FRAMEWORK OF FLORIDA STATUTE §760.10

Prior to 1992, Florida Statute §760.10 incorporated the procedural rules to be followed before initiating a civil cause of action. Florida Statute §760.10(12) provided as follows:

> (12) In the event that the commission fails to conciliate or take final action on any complaint under this section within 180 days of filing an aggrieved person may bring a civil action against the named employer, employment agency, labor organization, or joint labor-management committee, or, in the case of an alleged violation of subsection (5), the person, in any court of competent jurisdiction….

Fla.Stat. §760.10 (1983). Section 760.10(12) clearly mandated that the limitation period began to run after the FCHR failed conciliate or take final action within 180 days of the filing of the complaint. Fla.Stat. §760.10 (1983). However, the statute did not specifically provide when the limitation period would end. Therefore, in Hullinger v. Ryder Truck Rental, Inc., the Florida Supreme Court held that the general statute of limitations found in Florida Statute §95.11(3)(f) applied to actions for violations of the Civil Rights Act. Hullinger v. Ryder Truck Rental, Inc., 548 So.2d 231 (Fla. 1989).

STATUTORY FRAMEWORK OF FLORIDA STATUTE §760.11

After the Hullinger decision, the Florida Legislature amended Chapter 760 in 1992 to provide for the creation of the Florida Civil Rights Act of 1992. In amending the statute, the Legislature created new procedural rules to be followed before the institution of a civil cause of action. Fla. Stat. §760.11 (1995).

Specifically, the Florida Legislature deleted Florida Statute §760.10(12) and created Florida Statute §760.11 which enumerates the procedures and limitations periods applicable to obtaining civil relief. As in the former statute, §760.11 still provides that the limitations period begins to run, at the latest, after the FCHR fails to make a reasonable cause determination within 180 days after a complaint if filed. Fla.Stat.§760.11(8). However, unlike before, Florida Statute §760.11 expressly ends the statute of limitations time period after one year. See Fla. Stat. §§760.11(8) and (4) (1995).

The mandatory procedural framework for filing a civil action for damages under the Florida Civil Rights Act of 1992 is well-defined. [2] First, the aggrieved party must file a complaint with the Florida Commission on Human Relations ("FCHR") within 365 days of the alleged violation. Fla. Stat. §760.11(1) (1995). Once the complaint if

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[2] The Attached flow chart delineates the mandatory procedural process of Florida Statute §760.11. (A.10-13). Pursuant to the Statute, any variance in the procedure will result in the aggrieved party losing his/her ability to pursue his/her claim.

filed, the FCHR must investigate the charges and make a reasonable cause determination within 180 days – the Commission "shall" investigate and "shall" determine if there is reasonable cause. Fla.Stat. §760.11(3) (1995). During that 180 day period, one of two things will occur; the FCHR will either make a determination of reasonable cause – "cause" or "no cause" - or it will fail to make any determination. In either case, the Florida Legislature has clearly provided what will happen next.

In the event the FCHR decides within the 180 day timeframe that there is reasonable cause to believe that a discriminatory practice has occurred, the aggrieved party "may" bring a civil action within one year or file for an administrative hearing within 35 days of the determination of reasonable cause. Fla. Stat. §§760.11(4) and (5) (1995). The word "may" unquestionably signifies that it is not mandatory for the aggrieved party to pursue his/her rights – he/she can stop prosecuting the case at any time. However, if the aggrieved party wants to proceed, the statute unequivocally sets forth the requisite procedural process that must be followed, i.e., file a civil suit within a year or ask for an administrative hearing within 35 days of the FCHR's "cause" determination.

One the other hand, if during that 180 day period the FCHR finds that no reasonable cause exists, the aggrieved party "may" file for an administrative hearing within 35 days of the determination. Fla.Stat. §760.11(7) (1995). Again, the word

"may" makes it clear that it is not mandatory for the aggrieved party to pursue his/her rights – he/she can stop prosecuting the claim at any time. However, if the aggrieved party elects to go forward, the statute sets out the mandatory procedure that must be complied with, i.e., file for an administrative hearing within 35 days of the FCHR's "no cause" decision.

In the event the FCHR does nothing, i.e., makes no determination during the 180 days after a complaint is filed, Florida Statute §760.11(8) provides that the aggrieved person "may" proceed (under subsection (4)) just as if the Commission had determined there was reasonable cause. Fla.Stat. §760.11(8) (1995). The statute creates a legal fiction that puts an aggrieved party who does not receive a decision from the FCHR during the 180 day period in the shoes of a party who received a cause determination. [3] Again, the word "may" points out that the aggrieved party is not required to exercise

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[3] The Legislature has also created a similar legal fiction in §760.11(7) and (13). In both sections, the Legislature provided in pertinent part that a complainant "may" after receiving a final or court order bring "a civil action under subsection (5) as if there had been a reasonable cause determination." This language in effect allows the party to treat the final or court order as a "reasonable cause determination" - the legal fiction. In doing so, the Legislature was able to harmonize this language with the language in §760.11(5) that "[a] civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause [the final or court order] by the commission." If the final or court order is not considered to be the "determination of reasonable cause," the sections of the statutes would make no sense because by the time the complainant was referred to §760.11(5) from §760.11(7) and (13) the actual determination of reasonable cause either has not occurred or in most instances occurred over a year before §760.11(5) became applicable to him/her.

his/her rights – he/she can abandon the case at any time. However, if the aggrieved party decides to pursue his/her rights, the statute sets forth the mandatory procedural mechanism that must be adhered to.

Under that process, if the aggrieved party wishes to pursue his/her claims, he/she must proceed as if the Commission had made a reasonable cause determination. Fla. Stat. §760.11(8) (1995). This means that the aggrieved party "may" bring a civil action within one year or file for an administrative hearing within 35 days after the fictional cause determination, i.e., within one year or 35 days after the 180 day period ends. Fla. Stat. §§760.11(4) and(5) (1995). Again, use of the word "may" demonstrates that the aggrieved party is not forced to pursue his/her rights – he/she can stop prosecuting the case at any time. However, if the aggrieved party wants to go forward, he/she must file a civil action within one year or ask for an administrative hearing within 35 days after the 180 day period from the date the complaint was filed expires.

Therefore, reading the foregoing sections together, when the FCHR fails to make a reasonable cause determination within 180 days, the one-year limitation for filing a civil action begins to run at the expiration of the 180 day period in which the Commission was to make a reasonable cause determination. Milano v. Moldmaster, Inc., 703 So.2d 1093 (Fla. 4th DCA 1997).

C. JOSHUA FAILED TO TIMELY FILE HER CIVIL ACTION

Taking the relevant allegations of Joshua's Complaint as true, her civil action is time barred. Joshua filed her complaint or charge with the FCHR on July 21, 1995. The FCHR failed to take action during the next 180 days. When the 180 day period expired on January 17, 1996, Joshua was entitled to proceed as though the FCHR had ruled in her favor. Fla.Stat. §760.11(8) (1995). Thus, on January 17, 1996, Joshua had three courses of action open to her: 1) do nothing; 2) request an administrative hearing within 35 days; or 3) file a civil lawsuit on or before January 17, 1997. Joshua chose option number three. However, instead of filing her civil action on or before January 17, 1997, she waited until January 20, 1998, more than a year after the statute of limitations had expired. Consequently, Joshua's civil action is time barred. Fla.Stat. §760.11(8) and (4) (1995).

RESPONSE TO PETITIONER'S AND AMICUS CURIAES' ARGUMENTS

Hullinger v. Ryder Truck Rental is inapplicable.

[4]

Joshua argues that the case of Hullinger v. Ryder Truck Rental, Inc., 548 So.2d 231 (Fla. 1989) determines the appropriate statute of limitations in this matter. In Hullinger, this Court held that the general statute of limitations period found in Florida Statute §95.11(3)(f) was applicable to the Florida Civil Rights Act. However, the proposition that Hullinger applies to the Florida Civil Rights Act of 1992 is without merit. First, Hullinger was decided prior to the Civil Rights Act of 1992 and the explicit time limitations found in Florida Statute §760.11. See Fla.Stat. §760.11 (1995). Therefore, Hullinger is no longer good law. Second, it is well-settled that a specific statute of limitations which addresses a particular subject matter overrides a more general statute of limitations even if the specific statute provides for a shorter period of time. Sheils v. Jack Eckerd, 560 So.2d 361 (Fla. 2d DCA 1990); Dubin v. Dow Corning Corp., 478 So.2d 71 (Fla. 2d DCA 1985); see generally, Florida State University v. Hatton, 672 So.2d 576 (Fla. 1st DCA 1996); Tallahassee Democrat, Inc. v. Florida Bd. of Regents,

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[4] The FCHR agrees that under the Florida Civil Rights Act of 1992 the four year statute of limitations imposed by Hullinger is not applicable. (FCHR 10).

314 So.2d 164 (Fla. 1st DCA 1975). Therefore, because Florida Statute §760.11 specifies the applicable time period for bringing a civil cause of action under the Florida Civil Rights Act of 1992, Florida Statute §95.11(3)(f) is inapplicable.

Florida Statute §760.11 Clearly Provides the Procedural Process to Follow Where the Commission Does Not Issue a Determination of Reasonable Cause Within 180 Days.

Joshua contends that Florida Statute §760.11 does not adequately address the situation where a party files a complaint with the FCHR and fails to receive a determination of cause within 180 days. (P. 6) That argument is spurious. Florida Statute §760.11(8) lays out in detail the procedures to be followed in that situation.

Deference to FCHR Does Not Require the Court to Overrule the Clear Mandate of Florida Statute §760.11.

While a reviewing court should ordinarily defer to the interpretation given a statute by the agency responsible for its administration, such deference does not allow an agency to override the Legislature's power to set a statute of limitations. In 1992, the Legislature revised the Florida Civil Rights Act to include specific limitations for filing civil actions. Those statutory limitations are unequivocal. Therefore, any interpretation different from the clear wording of the statute would be unreasonable and erroneous, and thus, not entitled to deference. Legal Environmental Assistance Foundation, Inc. v. Board of

County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994).

The One Year Statute of Limitations Begins to Run After and Actual or Fictional "Determination of Reasonable Cause."

The FCHR contends that the one year statute of limitations does not begin to run until after the Commission issues a determination of reasonable cause. (FCHR 2-7). The FCHR relies on the wording in §760.11(5) which states that a complainant may file a civil action within "1 year after the date of determination of reasonable cause by the commission." In making this argument, the FCHR segregates that language, i.e., a complainant may file a civil action within "1 year after the date of determination of reasonable cause by the commission," from other relevant provisions of the statute. However, proper statutory construction embraces a statute as a whole by giving full effect to all sections and construing related terms and provisions in harmony with one another. See Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452 (Fla. 1992)("Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.")

The verbiage of §760.11(5) cited by the FCHR is not an introductory statement which stands alone and is applied to all situations. Rather, §760.11(5) is part of a comprehensive procedural process which is both strict and mandatory. In fact, a complainant only reaches §760.11(5) after satisfying one of four other sections of the

statute: 1) the complainant receives a determination of reasonable cause within 180 days and decides to bring a civil action (Fla.Stat.§760.11(3) and (4)); 2) the complainant fails to receive a reasonable cause determination within 180 days, treats the failure as a "determination of reasonable cause" and elects to bring a civil action (Fla.Stat. §760.11(8) and (4) (1995)); 3) the complainant receives a determination of no cause and requests an administrative hearing, the Commission eventually enters a final order finding a violation, the complainant considers the final order as a "determination of reasonable cause" and then elects to bring a civil action (Fla.Stat. §760.11(3) and (7) (1995)); and 4) the complainant appeals a final order of the Commission, the court finds a violation and remands to the Commission whereupon the complainant construes the court order as a "determination of reasonable cause" and files a civil action (Fla.Stat.§760.11(13) (1995)). In only one of these scenarios does the complainant actually reach §760.11(5) by receiving an actual versus an implied or fictional "determination of reasonable cause." In the others, the complainant is presumed to have received a "determination of reasonable cause" so that the language of §760.11(5) can be harmonized.

If the §760.11(5) one year limitation period were read literally as the FCHR argues, the provisions in §760.11(7), (8) and (13) would be rendered meaningless. For example, under §760.11(7) a complainant never receives an actual determination of reasonable cause and therefore the one year period referred to in §760.11(5) would never

begin to run. Likewise, pursuant to §760.11(8), a complainant is not issued a "real" determination of cause; thus, the one year limitation of §760.11(5) would never be triggered. Lastly, under §760.11(13), the actual "determination of reasonable cause," if any, would most likely have come over a year before the complainant even reached §760.11(5). Consequently, the claim would be barred by §760.11(5) before the complainant even had an opportunity to bring a civil action.

Obviously, the Legislature did not intend to create three meaningless sections in the statute. To avoid that, the Legislature fashioned an implied or fictional determination of reasonable cause thereby providing the complainant with a time certain within which to pursue a civil action. Hence, the one year limitation period begins to run whenever an actual or implied reasonable cause determination manifests itself.

The Word "shall" as Used in Florida Statute §760.11 is Mandatory, Not Directory.

Florida Statute §760.11(3) provides in pertinent part that "the commission **shall** investigate the allegations in the complaint" and that "[w]ithin 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." Fla.Stat.§760.11(3) (1995)(emphasis added). FCHR contends that the word "shall" as used in the statute is merely directory rather than mandatory. (FCHR 8-9)

While there is no fixed construction of the word "shall," its normal usage has a mandatory connotation. Neal v. Bryant, 149 So.2d 529 (Fla. 1962); S.R. v. State, 346 So.2d 1018 (Fla. 1977). "Its interpretation depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute." S.R. v. State, 346 So.2d at 1019. However, "[w]here a property right, rather than an "immaterial matter," or a matter of "substance" rather than a "matter of convenience" is involved, the word "shall" will be strictly construed." Concerned Citizens of Putnam County for Responsive Government v. St. John's River Water Management District, 622 So.2d 520 (Fla. 5th DCA 1993), citing Neal, 149 So.2d at 532. Moreover, "when the statute provides a procedure to redress noncompliance, it will be deemed mandatory and the result prescribed by the statute will be enforced." In re Forfeiture of One 1984 Ford Van v. Blanchett, 521 So.2d 244 (Fla. 1st DCA 1988).

Analyzing the word "shall" in the present case begins with the premise that "shall" is mandatory, i.e., the FCHR is required to investigate and determine whether reasonable cause exists within 180 days of the filing of the Complaint. See Concerned Citizens, 622 So.2d at 523. Moreover, the Legislature is presumed to have used the word "shall" with full awareness of its common, ordinary meaning. In re Forfeiture of One 1984 Ford Van, 521 So.2d at 247.

Next, the court must look to see if the intent of the Legislature as expressed in the

statute obligates the court to find that "shall" is directory rather than mandatory. Concerned Citizens, 622 So.2d at 523. Where the use of "shall" and "may" are in close juxtaposition, courts generally find that the words are to be accorded their natural meaning since it is fair to infer that the Legislature understood the difference and intended the natural meaning. In re Forfeiture of One 1984 Ford Van, 521 So.2d at 247; see also, Sepe v. Sepe, 421 So.2d 27 (Fla. 3d DCA 1982)(Legislative intent may be gleaned from the juxtaposition of the mandatory "shall" and the permissive "may."). In Florida Statute §760.11, the Florida Legislature clearly uses the terms "shall" and "may" in close juxtaposition throughout the statute. Moreover, there is no pattern in the statute which would lead one to conclude that "shall" is merely directory. On the contrary, the overall statutory framework establishes that "shall" is intended to be mandatory. First, if it were not intended to be a mandatory command, there would be no reason to impose the 180 day limit on the FCHR - the Legislature could have just said that the FCHR shall investigate the complaint and make a determination of whether reasonable cause exists. Second, if "shall" is not a mandatory time command, there is no need to provide for non-compliance – the Legislature did not have to provide what would happen if the FCHR failed to make a determination within 180 days. There is no patent or latent intent on the part of the Legislature that the word "shall" is to be construed as directory. Accordingly, it is mandatory, not permissive.

The Legislative Intent Does Not Favor FCHR's Interpretation.

The FCHR states that it was the Legislature's intent "to provide a window of opportunity for a claimant to opt out of the administrative process if FCHR was delayed in its investigation." (FCHR 4). This argument is untenable. While it may be the FCHR's opinion as to what the Legislature intended, there is no supporting evidence in any Legislative records or even the statute itself. And, absent Legislative history or express statements in the statute, the Legislative intent must be gleaned from the provisions of the statute interpreted as a whole.

The Word "may" in Florida Statute §760.11(8) Provides the Complainant with the Option of Pursuing His/Her Case Under §760.11(4) or Abandoning It.

Florida Statute §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 that there was reasonable cause.

NELA contends that the word "may" as used in §760.11(8) makes it permissive for an aggrieved party to proceed as if the FCHR had determined reasonable cause. The City concurs in that interpretation; however, it disagrees with NELA on what happens if a complainant fails to do so.

The framework of Florida Statute §760.11 provides a comprehensive procedural process for aggrieved individuals to follow – a process that gives a complainant the choice of prosecuting his/her claim or abandoning it. For example, Florida Statute §760.11(4) provides that the complainant **may** bring a civil action, an administrative hearing or do nothing, in which case he/she loses the right to pursue the claim. Florida Statute §760.11(7) states that the complainant **may** request an administrative hearing or do nothing, and if he/she decides to forego a hearing, the claim is lost. See McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998). Florida Statute §760.11(8) stipulates that the complainant **may** proceed as if the Commission had determined reasonable cause or do nothing, in which case he/she loses the right to pursue the claim. Milano v. Moldmaster, 703 So.2d 1093 (Fla. 4th DCA 1997). Thus, in every situation, the aggrieved party has the option of prosecuting or giving up his/her claim, but he/she cannot choose to ignore the statutory framework. If at any point the complainant fails to comply with the statutory framework, his/her claim under the Florida Civil Rights Act of 1992 will be barred.

The Time Frames and Procedures in §760.11 are Not Patterned After Title VII and Therefore It is Not Appropriate to Apply Title VII Law.

Both the FCHR and NELA contend that the Court should look to the federal law

under Title VII to interpret the limitation periods in Florida Statute §760.11. (FCHR 12-13; NELA 13-17). As a general proposition, federal case law interpreting Title VII is used in cases arising under analogous provisions of the Florida Civil Rights Act of 1992. However, the flaw in their argument is that the FCHR and NELA ignore the core concept of that proposition, i.e., that the terms of the statutes being analyzed must indeed be analogous. In this case, the relevant provisions of the Florida Civil Rights Act and Title VII are not analogous - throughout Florida Statute §760.11, the Florida Legislature created unique limitation periods and procedures for filing a claim under the Florida Civil Rights Act, whereas the time periods and procedures of Title VII are significantly different.

Specifically, the timeframes and procedures to be followed when the EEOC and/or the FCHR fail to make a determination within 180 days are strikingly dissimilar. Title VII provides that if the EEOC does not resolve a charge of discrimination within 180 days, the complainant may request the right to go to court. Thereafter, the complainant can commence a civil action within 90 days after receipt of the notice giving him/her the right to sue.[5] In contrast, Florida Statute §760.11 states that if the FCHR fails to make

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[5] 42 U.S.C. §2000e5(f)(1) provides:

> (f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of

charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and **within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge** (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the

a determination of reasonable cause within 180 days, the complainant may proceed as if he/she had received a determination of cause. Thus, unlike Title VII, a complainant need not request a "right to sue" because that right is codified in the procedural framework of §760.11. Similarly, in contrast to Title VII, under §760.11 the one year limitation period runs from the date of the actual or legally implied "determination of reasonable cause," rather than ninety days from the date the right to sue letter is received. The limitation periods and procedures of Title VII are not analogous to those in §760.11; therefore, federal case law interpreting Title VII is irrelevant. Moreover, as the Legislature is presumed to know the law when it enacts a statute, it logically follows that the Legislature intended the limitations and procedures of §760.11 to be different from Title VII since it did not use the same language or time periods.

> complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections [FN2] (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(emphasis added).

The One Year Statute of Limitations under Milano is not Violative of the Due Process Clause.

Both the FCHR and NELA allege that the one year statute of limitations in Milano violates a complainant's due process right to notice. (FCHR 13-15; NELA 8-13). Procedural due process requires notice and an opportunity to be heard before the government deprives an individual of a property interest. Boddie v. Connecticut, 401 U.S. 371 (1971). Thus, to determine if procedural due process has been violated, a court must decide: 1) whether an individual possesses a constitutionally protected property interest; 2) whether the individual would be deprived of that interest; and 3) if the individual were deprived, whether the government provided constitutionally sufficient procedures before the deprivation occurred. Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Property interests are not created by the United States Constitution, but rather stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564 (1971). It is axiomatic that there can be no denial of due process if there is no property interest implicated. Neither the FCHR nor NELA has identified any property interest implicated by Florida Statute §760.11 because there is none. See Washburn v. Sauer-Sundstrand, Inc., 909 F.Supp. 554 (N.D.Ill. 1995)(The Plaintiff failed to identify any liberty or property interest of which they had been deprived by application of the time

limitations in the ADA and Title VII).

Even if the FCHR and NELA could pinpoint a constitutionally protected property interest under the Florida Civil Rights Act, a complainant is afforded constitutionally adequate notice and an opportunity to be heard.[6] Florida Statute §760.11 itself notifies individuals of the time limitations which must be complied with in order to pursue a claim under the Act. Nevertheless, the FCHR and NELA contend that this statutory notice is inadequate and that a complainant must also receive personal notice to comport with due process requirements. However, due process does not require personal notice, it only requires adequate notice. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Florida Statute §760.11 provides adequate notice on its face. Fla.Stat. §760.11(8) (1995). It is a fundamental rule that every person is presumed to know the law. See In re Will of Martell, 457 So.2d 1064 (Fla. 2d DCA 1984); Green v. Quincy State Bank, 368 So.2d 451 (Fla. 1st DCA 1979). Therefore, where a statute provides notice by its own terms, the statute cannot be said to deprive an individual of due process. See Jackson Lumber Co. v. McCrimmon, 164 F. 759, 764 (N.D.Fla. 1908)(Personal notice is not required where the statute itself provides adequate notice and an opportunity to be heard).

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[6] FCHR and NELA concede that Florida Statute §760.11 provides an adequate opportunity to be heard and only challenge the adequacy of the Statute's notice provision when the Commission fails to make a determination of cause within 180 days.

Florida Statute §760.11 facially provides adequate notice to complainants of their procedural rights. Moreover, all persons are charged with constructive knowledge of the provisions of §760.11. Accordingly, there is no due process violation when a complainant fails to receive personal written notice of the procedures and time limitations codified in § 760.11.[7]

[7] Even if the FCHR violated Joshua's constitutional right to due process by failing to provide her with notice that she had to bring a civil action within one year after the Commission failed to make a determination of reasonable cause, the City is not responsible for the constitutional deprivation and can still assert and prevail in this action on the grounds that the statute of limitation barred Joshua's complaint. Joshua's recourse for the alleged violation of constitutional due process would be a suit against the FCHR.

VII. CONCLUSION

Based on the foregoing, the City requests that this Court enter an Order denying jurisdiction over this matter and affirming the First District Court of Appeal's opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to Gary L. Printy, Esquire, 1301 Miccosukee Road, Tallahassee, Florida 32308-5068; Dana Baird, Esquire, 3325 John Knox Road, Building F, Suite 240, Tallahassee, Florida 32303-4149; Cynthia N. Sass, Esquire, 100 South Ashley Drive, Suite 1180, Tampa, Florida 33602; Gail M. Flatlow, 2024 W. Cleveland St., Tampa, Florida 33606 and Michael B. Duncan, Esquire, P.O. Drawer 1579, Panama City, Florida 32402 on this ___ day of May, 1999.

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