IN THE
SUPREME COURT
OF FLORIDA

GERALDINE SEALE,	)	
	)	
Petitioner,	)	
	)	**Case No. SC96908**
v.	)	
	)	
EMSA CORRECTIONAL CARE, INC.,	)	
	)	
Respondent.	)	
	)	

FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT
Case No. 2D98-04187

RESPONDENT'S BRIEF

Respectfully Submitted on behalf of
EMSA Correctional Care, Inc.

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CERTIFICATION OF TYPE SIZE AND STYLE

The size and style of type used in this Brief is Times New Roman Regular 14 point.

PRELIMINARY STATEMENT

For ease in reference, Respondent EMSA Correctional Care, Inc., which was the defendant and appellee below, will be referred to throughout this brief as "EMSA." Petitioner Geraldine Seale, who was the plaintiff and appellant below, will be referred to as "Seale."

Additionally, citations to the record on appeal shall be referred to by the letter "R" followed by the appropriate page number, for instance: (R. 3). Citations to the transcript shall be referred to by the letter "T" followed by the appropriate page number, for instance: (T. 3). Citations to the Initial Brief of Petitioner shall be referred to by "Pet. Brief" followed by the appropriate page number, for instance: (Pet. Brief, p. 3).

I. STATEMENT OF THE CASE AND FACTS

At the very outset, it should be noted that the statement of the case and facts submitted by Seale appears to attempt to raise factual issues which were not raised below. For instance, although Seale attached a copy of the *Worksharing Agreement Between Florida Commission on Human Relations and the Equal Employment Opportunity Commission for Fiscal Year 1996* to Plaintiff's Opposition to Defendant's Dispositive Motion for Summary Judgment and Memorandum of Law, (R. 30-77) submitted to the appellate court, she did not raise the provisions she discusses in her statement of the case and facts in the trial court. Compare *Pet. Brief,* pp. 1-2 with (R. 30-38; T. 1-15). More importantly, although Seale states that, in the trial court, she argued that the referral of a charge to the EEOC for investigation does not divest the Florida Commission of jurisdiction, her statement of the case and facts on appeal conveniently omits the fact that she also argued to the trial court that "the EEOC's investigation and cause determination are not "actions" by the FCHR." Compare *Pet. Brief*, pp. 5-6 (emphasis supplied) with (R. 33). Now, on appeal and to this Court, Seale appears to take the exact opposite position, arguing that "acceptance by the EEOC of Seale's discrimination charge was acceptance of all potential state law claims under F.S. 760." *Pet. Brief*, pp. 6-8 (emphasis supplied). Thus, to the extent that Seale is attempting to raise new facts and/or arguments on appeal, EMSA objects and submits that this Court may not consider facts or arguments

which were not presented to the trial court. See, Wildwood Properties, Inc. v. Archer of Vero Beach, Inc., 621 So. 2d 691 (Fla. 4th DCA 1993); Nixon v. Halpin, 620 So. 2d 796 (4th DCA 1993).

Apart from the above, EMSA respectfully submits the following statement of the case and facts is an accurate depiction of what occurred below:

Seale filed her *Complaint and Demand for Jury Trial* (hereinafter "Complaint") in the lower court on March 19, 1998. (R. 1-9). The Complaint contains one count alleging that EMSA violated the Florida Civil Rights Act of 1992 (hereinafter "FCRA") on the basis of handicap as defined by Section 760.01-.11, Florida Statutes (1995). (R. 1-9). Plaintiff's Complaint alleged that she filed a timely written charge of discrimination with the EEOC and Florida Commission on Human Relations; that the charge was dual filed; that more than 180 days have passed since the Appellant filed her charge; and that she filed this action pursuant to Section 760.11(4), (5) and (8), Florida Statutes (1995). The Complaint did not allege that Seale filed the lawsuit within the applicable limitations period. (R. 1-9).

EMSA timely filed its Answer to the Plaintiff's Complaint, asserting that it was without sufficient knowledge or information to form a belief as to the truth of the allegations regarding Seale's performance of conditions precedent. Additionally, EMSA asserted the defense that Seale's claims are barred by the applicable statute of limitations.

Subsequently, EMSA discovered by requesting copies of the investigative files from the Florida Commission on Human Relations (hereinafter "Florida Commission"), and the Equal Employment Opportunity Commission (hereinafter "EEOC"), that Seale failed to timely file this action. (R. 15-27). Thus, on August 10, 1998, EMSA moved for summary judgment on the basis that Seale's claim is time barred and notified Seale that its summary judgment motion would be heard on September 23, 1998. (R. 15-29).

EMSA's motion set forth the following undisputed facts: Seale initially filed her charge of discrimination with both the Florida Commission and the EEOC on February 28, 1996, as demonstrated by the charge transmittal forms from the Florida Commission to the EEOC and from the EEOC to the Florida Commission, as well as Seale's counsel's letters dated February 26, 1996, transmitting Seale's charge for filing to both the Florida Commission and the EEOC. (R.15-27). The Florida Commission did not make a reasonable cause determination. Seale filed this action on March 19, 1998. (R. 15-27).

Based upon these undisputed facts, EMSA argued that Seale had one year from August 26, 1996, in which to file a civil action pursuant to the FCRA. That is, Seale had from August 26, 1996 to August 26, 1997, to file this action. (R. 15-27, 78-84). She failed to do so. Instead, she filed her lawsuit nearly a year late. Accordingly, EMSA's motion argued that Seale's action is time barred; there is no genuine issue of material fact

to be tried; and EMSA is entitled to a judgment in its favor as a matter of law. (R. 15-27, 78-84).

On September 21, 1998, EMSA filed Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, setting forth its arguments in greater detail. (R. 78-84). Thereafter, Seale filed Plaintiff's Opposition to Defendant's Dispositive Motion for Summary Judgment and Memorandum of Law (hereinafter "Plaintiff's Opposition"). (R. 30-77). Plaintiff's Opposition conceded the undisputed fact that the FCHR never entered any cause determination. (R. 30). Additionally, although Seale did not concede that she filed her charge of discrimination with the FCRA on February 28, 1996, as EMSA asserted, she did concede that the charge was filed with the FCRA on March 12, 1996, and that the FCRA acknowledged receipt of the charge on April 1, 1996. (R. 31). Seale now concedes on appeal that her charge was, in fact, filed with the FCHR on February 28, 1996, rather than on March 12, 1996. (Initial Brief, p. 2-3).

Essentially, Plaintiff's Opposition argued that the Florida Commission could take more than 180 days to make a determination, and that, for various reasons, "equitable considerations should be utilized by the Court to prevent penalizing Seale for the FCHR's lack of due diligence." (R. 30-77). Seale never introduced any evidence or testimony to support her claim for "equitable tolling" or to otherwise raise a genuine issue

of material fact, despite having ample time to do so. EMSA filed a reply to Plaintiff's Opposition refuting the arguments made by Seale. (R. 85-96).

On September 24, 1998, the Court heard EMSA's motion as scheduled, (T. 1-15), and entered an order granting the motion. (R. 100-01). The lower court ruled that there was no genuine issue of material fact and that Seale's action is barred, as a matter of law. (R. 100-01). Seale then filed a notice of appeal without first requesting that the trial court enter a final order. (R. 102-04).

On September 29, 1999, the Second District Court of Appeals affirmed the trial court's order in a per curiam opinion, citing to Joshua v. City of Gainesville, 734 So.2d 1068 (Fla. 1st DCA 1999).

Seale then filed a Notice to Invoke Discretionary Jurisdiction. This Honorable Court accepted jurisdiction by Order dated February 3, 2000. Seale served her initial Brief upon EMSA by mail on February 28, 2000. EMSA now timely files this Reply Brief.

II. SUMMARY OF THE ARGUMENT

Seale improperly raises factual issues and legal arguments which she did not raise below. Moreover, the trial court correctly ruled that Seale's action is time barred due to her failure to file suit within the one-year limitations period provided under the Florida Civil Rights Act ("FCRA"). Seale's arguments to the contrary are without merit. The plain and unambiguous terms of the FCRA, the controlling case law and the legislative history clearly support the trial court's ruling. Accordingly, the trial court's order granting summary judgment in favor of EMSA must be affirmed.

III. ARGUMENT

A. SEALE MAY NOT RAISE ARGUMENTS ON APPEAL WHICH SHE DID NOT MAKE IN THE TRIAL COURT.

At the outset, it should be noted that Seale may not contest the summary judgment entered against her on grounds which she did not bring to the attention of the trial court in opposition to EMSA's motion for summary judgment. See, Wildwood Properties, Inc. v. Archer of Vero Beach, Inc., 621 So. 2d 691 (Fla. 4th DCA 1993); Nixon v. Halpin, 620 So. 2d 796 (4th DCA 1993). Doing so may be grounds to not consider the merits of the appeal. Gladstone v. Smith, 729 So.2d 1002 (Fla. 4th DCA 1999)(even when an appeal may have merit, a failure to adhere to the record on appeal can be fatal). It is axiomotic that arguments not made in the lower court may not be raised on appeal.

In the present appeal, a comparison of the arguments presented in Seale's Brief to this Court with those she presented to the trial court will show that her arguments below were quite different from those she makes here. For instance, Plaintiff's Opposition, which she filed in the trial court, briefly claimed that the Florida Commission did not have to make a cause determination within 180 days, that it therefore retained jurisdiction beyond 180 days, and that the EEOC's Notice of Right to Sue triggered the one-year limitations period under the FCRA. (R. 33-34). However, she provided nothing further to support her position. In fact, the main point she asserted in the trial court was that "equitable considerations" should excuse her belated filing because, she claimed, the "common practice" before Milano was to assume that the one-year limitations period did not begin to run until the EEOC issued a Notice-of-Right-to-Sue regardless of the provisions of the FCRA.

Now, on appeal and to this Court, Seale has abandoned all of her "equity" arguments and, instead, goes into extensive arguments which she did not raise below in support of her claim that subsection (4) of section 760.11 of the FCRA should be interpreted as permissive, that is, as providing that the Florida Commission should, but does not have to, make a cause determination within 180 days. For the first time on appeal and now to this Court, she argues that the subsection (4) is similar to Title VII's provisions and, thus, should be interpreted in accordance with Title VII. (Pet. Brief, pp.

23-25). Similarly, on appeal and now to this Court, Seale claims for the first time that the facts of this case are distinguishable from those in the controlling cases of Milano and Joshua. In the lower court, she claimed that Milano was simply wrong. Compare Pet. Brief, pp. 21-23 with (R. 30-77; T. 1-15). Suffice it to say, the entire thrust of Seale's argument on appeal and to this Court is not what she presented to the trial court. Therefore, EMSA respectfully submits that Seale's arguments should be rejected outright, and the trial court's order should be affirmed. Wildwood, 621 So. 2d 691.

B. THE TRIAL COURT CORRECTLY RULED THAT SEALE'S ACTION IS TIME BARRED, AS MATTER OF LAW, BECAUSE SHE FAILED TO FILE SUIT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.

1. Overview of the Applicable Law.

The Florida Civil Rights Act of 1992 ("FCRA") prescribes very specific administrative and civil remedies for discriminatory actions prohibited under its provisions. See, §760.11. Fla. Stat. (1995). First, any person aggrieved by a violation of the FCRA must file a complaint with the Florida Commission on Human Relations ("Florida Commission"). §760.11(1), Fla. Stat. (1995). The Florida Commission is then charged with investigating the complaint. §760.11(1)-(3), Fla. Stat. (1995). Specifically, **"[w]ithin 180 days of the filing of the complaint, the commission shall determine if there is reasonable cause** to believe that discriminatory practice has occurred in

violation of the Florida Civil Rights Act of 1992." §760.11(3), Fla. Stat. (1995) (emphasis supplied).

There are only three (3) ways in which an aggrieved person can ultimately file a civil action under the FCRA:

1) If the Florida Commission Finds Reasonable Cause:

If the Florida Commission finds reasonable cause to believe a violation has occurred, the aggrieved party may either bring a civil action or request an administrative hearing. §760.11(4), Fla. Stat. (1995). Specifically, the statute provides that:

> (4) 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.
>
> The election by the aggrieved person of filing a civil action or requesting an administrative hearing under this subsection is the exclusive procedure available to the aggrieved person pursuant to this act.

§760.11(4), Fla. Stat. (1995) (emphasis supplied). In other words, if the Florida Commission finds reasonable cause, the aggrieved party may choose to either file a civil action or request an administrative hearing. §760.11(4)(a)-(b), Fla. Stat. (1995). No further remedy or option is provided in the statute.

Subsection five (5) then describes the procedure if a party chooses to file a civil action, and subsection six (6) describes the procedure if a party chooses to request an administrative hearing. §760.11(5)- (6), Fla. Stat. (1995). Subsection five (5), provides that "**[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.**" §760.11(5), Fla. Stat. (1995) (emphasis supplied). Similarly, subsection six (6) provides that "[a]n administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission. §760.11(6), Fla. Stat. (1995).

2) <u>If the Florida Commission Finds there is Not Reasonable Cause</u>:

If the commission determines that there <u>is not reasonable cause</u> to believe that a violation of the FCRA has occurred, the Florida Commission must dismiss the complaint. §760.11(7), Fla. Stat. (1995). The aggrieved party then has the option of requesting an administrative hearing. §760.11(7), Fla. Stat. (1995). If the aggrieved party requests an administrative hearing, then the statute provides the aggrieved person with the right to go to court if the hearing officer finds that a violation has occurred. §760.11(7), Fla. Stat. (1995). More specifically, if the aggrieved party requests an administrative hearing to challenge a no cause determination and prevails, the aggrieved party may choose to file

suit within one year of the administrative order finding a violation, just as if there had been a reasonable cause determination. §760.11(7)(c), Fla. Stat. (1995).

3) If the Florida Commission Makes No Determination Either Way:

> **(8) 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.**

§760.11(8), Fla. Stat. (1995) (emphasis supplied).

In other words, if the Florida Commission fails to determine whether there is reasonable cause within 180 days after the aggrieved party files his or her complaint, the aggrieved party once again has the option to either bring a civil action within one year thereafter **or** request an administrative hearing within 35 days thereafter, just as she could have if the Florida Commission had issued a finding of reasonable cause. §760.11(4) - (6) & (8), Fla. Stat. (1995). Nothing else is permitted by the statute's terms. No other civil remedy or option is provided, nor could there be: the statute explicitly mandates that the two remedies provided in Section 760.11(4) are the exclusive remedies available.

All courts addressing this issue agree. Ellsworth v. Polk County Board of County Commissioners, 25 Fla.L.Weekly D155, 1999 WL 1259002 (Fla. 2d DCA 1999)(citing to Joshua); Adams v. Wellington Regional Medical Center, Inc., 727 So.2d 1139 (Fla. 4th DCA 1999)(citing to Milano, the court held that the plaintiff was subject to the one-

year limit commencing after the expiration of the 180 days to file a civil action); Joshua v. City of Gainesville, 734 So.2d 1068 (Fla. 1st DCA 1999)(citing to Milano, the court held that the plaintiff was subject to the one-year limit commencing after the expiration of 180 days to file a civil action); Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1997) ("the one year limitation on filing a civil action began to run at the expiration of the 180 day period in which the commission was to make a reasonable cause determination."); accord Crumbie v. Leon County School Board, 721 So. 2d 1211 (Fla. 1st DCA 1998) (per curiam affirmed); Digrio v. Pall Aeropower Corp., 19 F. Supp. 2d 1304 (M.D. Fla. 1998); Kalkai v. Emergency One, 717 So. 2d 626 (Fla. 5th DCA 1998) (per curiam affirmed). Thus, the one (1) year period for filling a civil action provided for in Section 760.11,(4)-(5) & (8), begins to run on the 181st day after the filing of the complaint if the Florida Commission has not issued a determination. §760.11(4)-(5) & (8), Fla. Stat. (1995); Adams, 727 So.2d 1139; Ellsworth, 25 Fla.L.Weekly D155; Joshua, 734 So. 2d 1068; Milano, 703 So. 2d 1093; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio, 19 F. Supp. 2d 1304.

2. The Trial Court Correctly Determined that the Material Facts were Undisputed.

There were three (3) material facts relevant to the issue of whether Seale's action was time-barred, all of which were undisputed: 1) Seale filed her charge of discrimination with the Florida Commission on February 28, 1996; 2) the Florida Commission did not

make a cause determination within 180 days; and 3) Seale filed this lawsuit on March 19, 1998. In short, there was no dispute regarding any material fact, and the trial court correctly determined that this case was amenable to summary judgment. Wills, 351 So. 2d 29.

3. The Trial Court Correctly Applied the Law to the Undisputed Facts.

Based upon these undisputed facts, the FCRA's unambiguous terms, and the compelling case law, the Florida Commission had 180 days from February 28, 1996, that is, until August 26, 1996, in which to make a determination. §760.11(3)-(5) & (8), Fla. Stat. (1995); Adams, 727 So.2d 1139; Ellsworth, 25 Fla.L.Weekly D155; Joshua, 734 So. 2d 1068; Milano, 703 So. 2d 1093. The Florida Commission did not make a determination within 180 days, thus, Seale had from August 26, 1996, until August 26, 1997, in which to file a civil action pursuant to the FCRA. §760.11(4)-(5) & (8), Fla. Stat. (1995); Adams, 727 So. 2d 1139; Ellsworth, 25 Fla.L.Weekly D155; Joshua, 24 Fla.L.Weekly D550; Milano, 703 So. 2d 1093; Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio, 19 F. Supp. 2d 1304. Seale failed to do so. Instead, Seale waited until March 19, 1998, to file suit, that is, until approximately seven (7) months after the one-year limitations period expired. Accordingly, the trial court reasonably, logically and correctly determined that her action is time barred, as a matter of law, and EMSA is entitled to a judgment in its favor. The statute's own terms, the case law and, as will be

discussed, infra, the statute's legislative history, clearly support the trial court's decision. Fla. R. Civ. P. 1.510; §760.11(3)-(5) & (8), Fla. Stat. (1995); Milano, 703 So. 2d 1093; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio, 19 F. Supp. 2d 1304.

C. SEALE'S ARGUMENTS TO THIS HONORABLE COURT THAT THE TRIAL COURT ERRED ARE WITHOUT MERIT.

As will be established below, Seale's arguments to this Honorable Court that the trial court erred as a matter of law when it granted EMSA's summary judgment are without merit.

Seale argues that the FCRA does not really require the Florida Commission to make a determination within 180 days, but it simply directs the Florida Commission to do so. Seale then makes a leap in logic, arguing that, since the Florida Commission is only 'directed' to make a determination within 180 days, "[c]ommon sense dictates that the [Florida Commission] still has jurisdiction to determine if there is reasonable cause to believe that discriminatory practice [sic] has occurred." (Pet. Brief, p. 14, 25). Plaintiff's reason for this is that "it is unreasonable to think" that the Florida Commission could perform all of the functions they are directed to perform pursuant to the statute within 180 days. (Pet. Brief p. 15, 25). Additionally, Seale cites to the case of Farancz v. St. Mary's Hospital, Inc., 585 So. 2d 1151 (Fla. 4th DCA 1991), for the proposition that the case "clearly establishes that the [Florida Commission] has jurisdiction beyond

180 days to continue to investigate . . ." (Pet. Brief pp. 12,15,16, 21, 26). In citing to Farancz, Seale argues that if the Florida Commission fails to make a determination within 180 days, the aggrieved party has the option of either filing suit, or waiting for some undefined period for the Florida Commission to make a determination. Seale then claims that the EEOC's notice of right to sue and other actions trigger the running of the statute of limitations under the FCRA because the EEOC acts as the agent of the Florida Commission when it issues a notice of right to sue or takes other actions. Seale finally argues that the FCRA unconstitutionally deprives a complaining party of notice of the requirement to file a civil action within one year.

As more fully set forth below, Seale's arguments are contrary to the terms of the FCRA, the rules of statutory construction, the FCRA's legislative history, the controlling case law and, thus, are without merit.

1. The FCRA's Terms, Controlling Case Law and the Legislative History Clearly Establish that the One-Year Limit to File A Civil Action Applies If the Commission Fails to Make A Determination Within 180 Days and, As A Result, Seale's Arguments Are Without Merit.

a. A Reasonable Interpretation of the FCRA's Terms Clearly Establishes that A One-Year Limit to File A Civil Action Applies If the Commission Fails to Make A Determination Within 180 Days

At the outset, it is important to identify the general rules of statutory construction that apply in order to determine the proper interpretation and meaning of a statute such

as the FCRA. Courts must first look to the language of the statute itself. See, Dole v. United Steelworkers of America, 494 U.S. 26, 34, 110 S. Ct. 929, 108 L. Ed. 2d 23 (1990) ("'On a pure question of statutory construction, our first job is to try to determine congressional intent, using traditional tools of statutory construction.' [citation omitted] 'Our starting point is the language of the statute,' [citation omitted]"). **If the language of the statute is plain and unambiguous, the sole function of the court is to interpret it according to its terms**. Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917). Courts are bound to assume that the legislative purpose of a statute is expressed by the ordinary meaning of the words used in the statute. See, INS v. Cardoza-Fonseca, 480 U.S. 421, 431, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (citations omitted).

If the plain language of a statute is clear, the courts then look to the legislative history only to determine whether there is a clearly expressed legislative intention which is contrary to the legislative language, and which would require the court to question the strong presumption that the legislative body expresses its intent through the language it chooses. See, INS, 480 U.S. at 431.

Apart from reading the plain and ordinary meaning of the statute and looking to the legislative history, courts also apply other principles of statutory construction. This Court stated:

> It is, of course, **a general principle of statutory construction that the mention of one thing implies the exclusion of another**; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, . . . it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. (emphasis added)

Thayer v. State, 335 So.2d 815 (Fla. 1976).

It is also a well-settled principle of statutory construction that a **permissive term such as 'may' is to be read "according to the context and surrounding circumstances," which may yield the conclusion that the permissive term is to be construed as a mandatory term**. See Allied Fidelity Insurance Co. v. State, 415 So.2d 109 (Fla. 3d DCA 1982)(emphasis added). Specifically, it is well-known that:

> **an imperative obligation is sometimes regarded as imposed by a statutory provision notwithstanding that it is couched in permissive, directive, or enabling language**. Thus, where a statute says a thing... '**may**' be done[,] . . . the courts may construe it to mean that is **must** be done. (emphasis added)

Comcoa v. Coe, 587 So. 2d 474 (Fla. 3d DCA 1991) *citing to* 49 Fla.Jur.2d Section 18 (1984).

Importantly, as this Court has recently held, "**it is [also] axiomatic that all parts of a statute are to be read together to achieve a consistent whole**" and to facilitate the achievement of their goals in accordance with reason and common sense. Progressive Southeastern Insurance Co. v. Young, 2000 WL 144188 (Fla. 2000)(emphasis supplied); Alderman v. Unemloyment Appeals Comm. 664 So.2d 1160, 1161 (Fla. 5th DCA 1995).

"**Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another**." Progressive Southeastern Insurance Co. v. Young, 2000 WL 144188 (Fla. 2000)(emphasis supplied); Forsythe v. Longboat Key Erosion Control District, 604 So.2d 452, 455 (Fla. 1992).

In the instant case, the following statutory provisions (emphasis supplied therein) need to be construed in accord with the above-cited rules of construction in order to determine their full and proper effect:

Section 760.01(3) "Purposes:"

> The Florida Civil Rights Act of 1992 shall be construed according to the **fair import of its terms**[.]

Section 760.06(8) "Powers of the commission:"

> To furnish . . . assistance . . . **to facilitate progress**[.]

Section 760.07 "Remedies for unlawful discrimination:"

> If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for damages for equitable relief and damages provided for in this section **may** be initiated only **after the plaintiff has exhausted his or her administrative remedy**.

Section 760.11(1) "Administrative and civil remedies; construction:"

> Any person aggrieved by a violation of ss. 760.01-760.10 **may file a complaint with the commission within 365 days.**

* * * *

* * * *

Section 760.11(4):

> In the event the commission determines that there is reasonable cause to believe that discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person **may either**: (a) bring a civil action . . . **or** (b) request an administrative hearing[.]
>
> The election by the aggrieved person of filing a civil action or requesting an administrative hearing under this subsection is the **exclusive procedure available** . . . pursuant to this act.

Section 760.11(5):

> In **any civil action brought under this section**, the court may issue an order prohibiting the discriminatory practice[.]
> * * * *
>
> **A civil action brought under this section shall be commmenced** no later than 1 year after the date of determination[.]
>
> * * * *
>
> * * * *

Section 760.11(8):

> In the event the commission fails to . . . determine whether there is reasonable cause for any complaint under this **section within 180 days of filing of the complaint, an aggrieved person may proceed under subsection (4)[.]**

In her initial Brief to this Court, as noted earlier, Seale attempts to make several arguments to justify her argument that the FCRA's terms allow a complaining party to sit

and wait an indefinite period for the Commission to make a determination and still retain the right to file a civil action. Seale's arguments fail miserably. Rather, below, EMSA will establish that the statute itself easily rebukes Seale's arguments. The statutes' terms also easily resolve the question of whether a one-year limitation applies to the filing of a civil action in the event the Commission fails to make a determination within 180 days: the answer is a resounding "yes."

To begin with, Seale argues that the use of the term "may" in 760.11(8) means the Legislature intended to accord a permissive meaning to "may" and, thus, intended to offer a complaining the party with the option to proceed under 760.11(4) or to wait indefinitely. Seale's argument is totally illogical and unsupported by the statute's terms. To the contrary, the clear and unambiguous terms of Section 760 easily establish that the Legislature's use of **"may"** is to be accorded a **mandatory** meaning (i.e. **"shall"** or **"must"**). Quite compellingly, through the statute's own terms, the Legislature loudly spoke that the term **"may"** means **"shall."** Florida Statute, Section 760.11(1)------a procedurally-oriented statutory subsection akin to subsection 760.11(8)----cogently proves this point. The Florida Legislature stated in that subsection:

> Any person aggrieved by a violation of ss. 760.01-760.10 **may file a complaint with the commission within 365 days of the alleged violation**[.] (emphasis added)

There, the Legislature used the term '**may**.' It is clear, though, that the term **"may"** means **"must."** Most assuredly, it is indisputable that in order to timely exhaust the administrative requirements under the FCRA, an aggrieved person (a.k.a. "charging party") **must** file a complaint (i.e. charge of discrimination) with the Commission within 365 days of the alleged unlawful employment practice. If a complaint is not filed within 365 days, it is indisputable that the aggrieved person's claim is **time-barred** and cannot be pursued in court. See Greene v. Seminole Electric Cooperative, Inc., 701 So.2d 646 (Fla.5th DCA 1997)(court found because plaintiff filed complaint with Commission on June 16, 1994, then all claims prior to June 16, 1993 were time-barred and, thus, could not be brought in court). Digiro v. Pall Aerospace, 19 F.Supp.2d 1304 (M.D.Fla. 1998). Thus, it is conspicuously evident that by using "**may**" in Section 760.11(8), the Legislature intended to accord a **mandatory** meaning (i.e. "**shall**" or "**must**") to the term.

The reasonableness and logic of the conclusion that the term **"may"** in 760.11 actually means **"shall** or **"must"** is vividly exhibited by examining the results if the Legislature intended to accord the term "may" with a permissive meaning, as Seale would have this Court believe. If Seale's position is adopted, then the following comical folly would result: an aggrieved person can either file a charge of discrimination within 365 days of the alleged unlawful employment practice or just 'sit and wait' and decide to file

a charge at anytime, even if she files a charge 5,000 days after the alleged violation. No person of reasonable mind can claim such an open-ended right to file a charge exists under the FCRA. If this were the case, the entire statutory scheme of the FCRA will be thrown into disarray and be rendered useless. In fact, there would be no need for the statute. Complaining parties could merely wait years and then go straight to court without filing a charge with the Commission. Obviously, such a result would be absurd.

Just as absurd is the following result that would occur if Seale's argument is adopted: the 35-day requirement for requesting an administrative hearing would similarly be rendered without meaning or legal effect. Again, a complaining party could wait years before requesting an administrative hearing.[1] Certainly, the Legislature did not intend such unreasonable and illogical results. It is clear the Legislature's use of the term "**may**" in Section 760.11 was intended to be accorded a mandatory meaning such as '**shall**' or '**must**.'

Because the only reasonable and logical interpretation of the term **'may'** is that it is used in a mandatory sense (i.e. **"shall"** or **"must"**), then by reading the terms of Section 760 together as a whole, the interpretation of Section 760.11(8) is greatly

[1] Seale's argument begs the following rhetorical question: why would the Legislature include specific time limits for pursuing a civil action (one-year after 180 days) or to request an administrative hearing (35 days after 180 days) if it did not intend to require complaining parties to follow the statutory procedure?

simplified. By reading Section 760.11(4)-(5) & (8) together and by construing the term **"may"** as **"shall,"** it is clear the Legislature specifically and explicitly intended these subsections to furnish the sole procedure for pursuing a civil action. To wit, if the Commission fails to issue a determination within 180 days, then 760.11(8) mandates a complaining party to timely pursue the remedies available under 760.11(4). These remedies (i.e. civil action or administrative hearing) are the exclusive remedies available under the FCRA. See 760.11(4) The time limits for pursuing these exclusive remedies are then discussed in the following subsections, 760.11(5)-(6). Subsection 760.11(5) mandates that any "civil action filed under this section **shall** be commenced within one year after the date of determination[.]" (emphasis supplied) Subsection 760.11(6) similarly mandates that any request for an administrative hearing "**must** be requested no later than 35 days after the date of determination[.]" If one of these exclusive remedies provided for is not timely satisfied, then the complaining party forever loses the right to pursue the claim. Indeed, no other remedy exists. In short, by reading these statutory terms together, the FCRA's procedural process is clear, unambiguous and mandatory: timely file a civil action within one year after the180 day period expires or the claim is forever time-barred.

Compellingly, the Florida Supreme Court's recent opinions support EMSA's position that the FCRA's statutory provisions must be read together as a whole to achieve

a full and proper effect. See Progressive Southeastern Insurance Co. v. Young, 2000 WL 144188 (Fla. 2000)(in a case involving a similar statutory ambiguity as at issue here, the Court found the Legislature provided specific direction in one subsection of the statute at issue but failed to do so in another subsection; thus, **this Court stated that it must read those subsections together to arrive at a consistent and harmonious interpretation of the statute**; this Court further stated that **reading those subsections in harmony led to a logical, consistent statutory interpretation**.)(emphasis supplied); Talat v. Aetna Casualty, 2000 WL 232303 (Fla. 2000)(This Court indicated that a **proper construction of a statute requires it to be read as a whole to avoid an expansive and illogical reading** of the statute)(emphasis supplied).

Here, because Seale essentially claims Section 760.11(8) contains a latent ambiguity, EMSA contends this Court should also read the subsections contained within Section 760.11 as a whole. After doing so, it is evident the most harmonious, logical and statutorily-consistent interpretation is that the one-year limitation for filing a civil action mandatorily applies to any complaints filed with the Commission for which no determination has been made after 180 days. Thus, this Court should reject Seale's arguments and affirm the trial court's grant of EMSA's summary judgment.

b. Controlling Case Law Clearly Establishes that A One-Year Limit to File A Civil Action Applies If the Commission Fails to Make A Determination Within 180 Days

The Florida courts and the Department of Administrative Hearings[2] further support the conclusion that a one-year limitation applies here. The courts have unanimously held that the 760.11(4)-(6) & (8) statutory procedure limits the filing of civil actions to one year after the end of the 180 day period. Ellsworth v. Polk County Board of County Commissioners, 25 Fla.L.Weekly D155, 1999 WL 1259002 (Fla. 2d DCA 1999)(citing to Joshua v. City of Gainesville); See Adams v. Wellington Regional Medical Center, Inc., 727 So.2d 1139 (Fla. 4th DCA 1999)(citing to Milano, the court held that the plaintiff was subject to the one-year limit commencing after the expiration of the 180 days to file a civil action); Joshua v. City of Gainesville, 734 So.2d 1068 (Fla. 1st DCA 1999)(citing to Milano, the court held that the plaintiff was subject to the one-year limit commencing after the expiration of 180 days to file a civil action); Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1997) ("the one year limitation on filing a civil action began to run at the expiration of the 180 day period in which the commission was to make a reasonable cause determination."); accord Crumbie v. Leon County School Board, 721 So. 2d 1211 (Fla. 1st DCA 1998) (per curiam affirmed).

Significantly, Florida's Division of Administrative Hearings ("DOAH") also follows the 760.11(4)-(6) & (8) statutory procedure to limit the filing of a request for an

[2]Florida Department of Administrative Hearings (DOAH) is authorized to hear an aggrieved person's complaints if the administrative remedy is timely elected pursuant to 760.11(4)-(6).

administrative hearing to 35 days. See Finn v. City of Holly Hill, DOAH Case No. 99-2864, 2000 WL 248405 (Fla.Div.Admin.Hrgs. 2000)(Petitioner filed charge of discrimination on June 2, 1998. DOAH Officer found that 180 days after petitioner filed his charge of discrimination (i.e. December 15, 1998), the FCHR had not investigated the petitioner's charge. As of January 19, 1999, which was 35 days after December 15, 1998, petitioner failed to request an administrative hearing. Petitioner requested hearing on June 7, 1999, over 174 days after the 35-day deadline for making the request under Section 760.11(6). DOAH's Officer stated the "**unrefuted facts of this case clearly indicate that petitioner's request for administrative hearing is untimely and therefore barred**[.]")(emphasis supplied).

In sum, the opinions of the Florida courts and DOAH support the conclusion that a civil action **must** be filed within one year after the expiration of the 180 day period if the Commission fails to make a determination within that 180 day period. Otherwise, any such action will be time-barred.

c. Legislative History Clearly Establishes that A One-Year Limit to File A Civil Action Applies If the Commission Fails to Make A Determination Within 180 Days

In the event further support is needed to establish that a one-year limitation applies here, the Florida Legislature's *Staff Analysis* provides it. In the Florida Legislature's *Staff Analysis* regarding CS/SBs 1368 & 72, dated February 6, 1992, revised February 18,

1992, it is clear the Legislature intended to limit the time period for bringing a civil action to one year after the expiration of the 180 day period. In the *Staff Analysis* section entitled "Present Situation," it is stated that Section 760.01-760.10 constituted the Human Rights Act of 1977 which provided:

> Any person aggrieved by a violation of the Act may file a complaint with the commission within 180 days of the alleged violation. If the commission fails to conciliate or to take final action on a complaint within 180 days of the filing of the complaint, the complainant can institute a civil action in court.

Contrastingly, in the *Staff Analysis* section entitled "Effect of Proposed Changes"(emphasis added), it states:

> The bill would enact the Florida Civil Rights Act of 1992, which would **make changes in the. . . complaint resolution procedures, and in the remedies available to an aggrieved person.**
>
> * * * * *
>
> **A civil action must be commenced within 1 year after the date of the determination[.]**

By reading these sections together, the Legislature's *Staff Analysis* establishes that the Legislature knew it was changing the 1977 law to include a <u>new</u> <u>complaint procedure</u> and <u>new</u> <u>remedies</u>. Whereas in the 1977 Act, the law stated that if the Commission <u>fails</u> <u>to</u> <u>take</u> <u>final</u> <u>action</u> (i.e. fails to make a determination) on a complaint within 180 days, the complaining party can file a civil action without limitation, the 1992

Act specifically provides a one-year limitation in 760.11(4)-(5) & (8). By dramatically changing this limitation period, it is clear the Legislature intended to provide a specific time limit to pursue a civil action under Section 760.11(8) if the Florida Commission fails to make a determination within 180 days. A more critical reading of the changes contained in the 1992 Act further establishes that the Legislature obviously contemplated a one-year limitation on filing a civil action if the Florida Commission fails to make a determination within 180 days:

First, as stated, unlike the 1977 Act, the 1992 Act contains a specific one-year limitation for "**a civil action** brought under **this section[**.]" See 760.11(5)

Second, unlike the 1977 Act, the 1992 Act contains subsection 760.11(8) which directs a complaining party to the exclusive remedies available under 760.11(4)-(6) if the Commission fails to make a determination within 180 days on "**any complaint under this section**."

Third, the Legislature repeatedly uses the term **"section"** throughout 760.11, including 760.11(5) and (8).[3]

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[3] The use of the term **"section"** in those subsections can only refer to Section 760.11 entitled "**Administrative and civil remedies; construction**."(emphasis added) This statutory construction is further supported by the fact that the Legislature used the term "**subsection**" in 760.11(6)-(8) & (13) to identify those particular, more limited provisions. As will be established in the body, use of the term **"section"** in 760.11(5) and (8) provides compelling proof that the one-year limitation for filing a civil action contained in 760.11(5) also applies to 760.11(8).

Therefore, by critically reading together these specific terms and provisions which were not contained in the 1977 Act, the Legislature clearly intended to require an aggrieved person who timely filed "any complaint[] under **this section** [i.e. 760.11]" within 365 days of the alleged violation to also timely exhaust the exclusive "civil remedies" available for filing "a civil action under **this section** [i.e. 760.11]." Stated differently, because subsections 760.11(4)-(5) and (8) are within the same section (i.e. 760.11) and because a complaining party has filed a complaint under that same section, it is only logical that the one-year limitation for bringing a civil action under that same section must also apply. In short, the one-year limitation for filing a civil action "under . . . section [i.e. 760.11]" engulfs and encompasses 760.11(8).[4] Thus, it is indisputable that if the Commission failed to issue a determination within 180 days after the filing of

[4] Again, no other interpretation is reasonable or logical. A different interpretation would beg the following rhetorical questions: why would the Legislature include and reference the term "**section**" in subsections 760.11(5) and (8), thereby tying the two subsections together for the purposes of defining a specific remedial procedure if the Legislature intended otherwise? Further, why would the Legislature include both subsections within the same section entitled "Administrative and civil remedies; **construction**" if the Legislature intended the time limitation contained in 760.11(5) to be statutorily interpreted exclusively and separate from 760.11(4) & (8)? Moreover, why would the Legislature specifically incorporate 760.11(4) and, by implication, 760.11(5)-(6) into 760.11(8) if it did not intend such a statutory construction?

the initial complaint of discrimination, the Legislature intended to limit the filing of a civil action to one-year thereafter. No other Legislative intent can be derived.[5]

As a result of the foregoing analysis, EMSA respectfully contends it is clear that Section 760.11(4)-(6) & (8) specifically limits civil actions to one-year after the 180 day period expires, even if the Commission has failed to make a determination. The statute's own terms, the controlling case law, and the statute's legislative history provide clear, unambiguous authority on this point. Seale's arguments to the contrary have no merit. As a result, the trial court's order granting EMSA summary judgment must be affirmed.

2. Seale's Attempt to Distinguish the Controlling Cases of Milano and Joshua is Wholly Without Merit.

Given the FCRA's unambiguous terms and the compelling legislative history underlying the FCRA, it is evident Milano and Joshua were decided correctly.[6] Under

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[5] Indeed, if the Legislature intended to allow the Commission to retain jurisdiction or otherwise allow a complaining party to sit and wait for an indefinite period, it would not have amended the 1977 Act to include a "new complaint procedure" and "new remedies." Rather, the Legislature would have left the statute's complaint procedure and civil remedies in the 1977 Act untouched.

[6] Just to reiterate, in addition to Milano and Joshua, the First District Court of Appeal, the Second District Court of Appeal and the Fifth District Court of Appeal have indicated agreement with the Fourth District Court of Appeal's decision in Milano or Joshua by per curiam affirming decisions based upon Milano or Joshua. See Ellsworth, 25 Fla.L.Weekly D155; Adams, 727 So.2d 1139; See Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626. Additionally, the United States District Court for the Middle

the clear and unambiguous terms of the FCRA, the one-year limitations period on filing a civil action begins to run at the expiration of the 180-day period the Florida Commission has to make a determination. §760.11(4)-(6) & (8), Fla. Stat. (1995); Joshua, 734 So. 2d 1068; Milano, 703 So. 2d 1093; See also Adams, cited supra; Ellsworth, cited supra; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio, 19 F. Supp. 2d 1304. No other interpretation is logical nor reasonable.

Contrary to Seale's baseless assertions on appeal and to this Court, the instant case cannot be distinguished from the facts addressed in Milano or Joshua. In Milano, the Fourth District Court of Appeal affirmed the trial court's dismissal of the plaintiff's FCRA claim. Milano, 703 So. 2d 1093. There, the plaintiff filed a complaint with the Florida Commission on April 8, 1994, claiming that she was wrongfully terminated from her employment because of her disability. Milano, 703 So. 2d at 1093. Like here, the Florida Commission failed to issue a determination within 180 days. Milano, 703 So. 2d at 1093. Like here, more than one year after the expiration of the 180 day period, the plaintiff filed a civil action against her previous employer. Milano, 703 So. 2d at 1093. The trial court interpreted the provisions of the FCRA, and determined that the one-year limitation on filing a civil action began to run at the expiration of the 180-day period in

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District of Florida followed Milano in determining that a FCRA claim was time barred. Digrio, 19 F. Supp. 2d 1304.

which the commission was to make a determination. Milano, 703 So. 2d at 1093. Thus, the trial court dismissed the plaintiff's action because the statute of limitations had run. Milano, 703 So. 2d at 1093. The Fourth District Court of Appeal agreed, holding that any other interpretation of the FCRA would be unreasonable. Milano, 703 So. 2d at 1094. The facts in Milano are the same as here and, thus, the lower courts' findings are proper and must be upheld in accord with Milano.

Similarly, Seale's attempt to distinguish the instant case from Joshua fails miserably. In Joshua, it was undisputed, like here, that the plaintiff did not receive a determination by the Commission within 180 days of filing her complaint with the Commission. Like here, it was further undisputed in Joshua that the plaintiff failed to file a civil action within one year thereafter. Plaintiff filed her civil action over two-and-a-half years after filing her complaint with the Commission. Defendant contended that the statute's terms, when read together, required the plaintiff to file a complaint in court within one year after the 180 day period expired. Plaintiff argued that the general four-year statute of limitations should govern. The First District Court of Appeals agreed with the trial court that chapter 760 rather than the general statute of limitations controls. In so finding, the appeals court found that "as a general rule, a more specific statute covering a particular subject controls over another statute covering the same subject in more general terms." Joshua, 734 So.2d 1068, 1070 *citing to* Sheils v. Jack Eckerd Corp., 560

So.2d 361, 363 (Fla. 2d DCA 1990). As a result, the one-year limitation was applied.

As can be seen, Seale's attempt to distinguish the instant case from Milano and Joshua is without merit. The material facts of the instant case are totally indistinguishable from the facts contained in Milano and Joshua. Further, by asserting that she has the right to choose the fictitious option of, essentially, 'sitting and waiting' for the Commission to make a determination rather than elect one of the two explicit, exclusive remedies provided under Section 760.11(4), Seale is making a preposterous argument. Indeed, the fact that Seale's argument rests upon such fiction rather than reality speaks volumes about the argument's lack of merit.

3. Seale's Contention that the FCRA Maintains Jurisdiction of a Complaint After 180 Days Because It Is Not Required to Fully Investigate Within the 180 Day Period Is Not Only Irrelevant, But is Clearly Without Merit.

Seale's argument that the Florida Commission is simply directed to complete its investigation within 180 days is, at best, a red herring. It has no relevancy whatsoever to the issue in this case. What matters is that when the Florida Commission does not issue a determination within 180 days, the plaintiff's time for filing suit begins to tick and quits ticking one (1) year later. §760.11(4)-(5) & (8), Fla. Stat. (1995); Adams, 727 So.2d 1139; Joshua, 734 So. 2d 1068; Milano, 703 So. 2d 1093; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio 19 F. Supp. 2d 1304. As established earlier, the

plain and unambiguous language of the statute itself provides that if the Florida Commission fails to make a determination within 180 days, the plaintiff may **either** file suit within a year **or** request an administrative hearing within 35 days. It makes absolutely no difference whether the Florida Commission is required or simply directed to make a determination within 180 days. Regardless, if the Florida Commission fails to do so, the limitation period for filing suit begins to run at the end of the 180 days. Here, the Florida Commission did not make a determination within 180 days, the plaintiff did not file suit within a year, thus her action is time-barred. Id.

Further, apart from the above, Seale's argument that the Commission maintains jurisdiction after 180 days is simply wrong. Essentially, Seale argues that the Florida Legislature was "unreasonable" to direct the Florida Commission to perform the functions specified in the FCRA within 180 days, because Seale feels the functions cannot be performed in that time period. Thus, Seale says "common sense" dictates that the Florida Commission retains jurisdiction to perform these functions indefinitely. Simply put, Seale's argument is nonsensical at best, is not supported by any record evidence or controlling law, and flies in the face of the statute itself. The statute, in plain and unambiguous terms, requires the Florida Commission to perform certain functions, and says it "**shall**" do so within 180 days. As discussed above and as Seale herself acknowledges, the term "**shall**" is normally interpreted to be **mandatory** in nature.

Psychiatric Institute of Delray, Inc. v. Keel, 717 So. 2d 1042 (Fla. 4th DCA 1998) (citing S.R. v. State, 446 So. 2d 1018 (Fla. 1977); Black's Law Dictionary 1233 (5th Ed. 1979)). Given the plain language of the statute, the Florida Commission is required, not simply directed, to determine whether or not there is reasonable cause to believe a violation of the Florida Civil Rights Act of 1992 has occurred within 180 days of filing of the complaint. §760.11(3)(1995); Psychiatric Institute, 717 So. 2d 1042. Given this backdrop, as discussed earlier, the Florida Legislature's use of the term 'may' in Section 760.11(4)-(5) & (8) is logically and reasonably construed to require the filing of a civil complaint within one year after the 180 days have expired without the Florida Commission completing its investigatory function.

4. Seale's Contention that FCRA's Procedural Scheme Must Be Construed In the Same Manner as Title VII's Procedural Scheme Is Without Merit.

Seale's attempts to argue that the Commission retains jurisdiction indefinitely by requesting this Court to interpret the procedural prerequisites of filing suit under the FCRA in accord with Title VII of the Civil Rights Act of 1964. Seale's argument is wholly misplaced. Although, to a large extent, the Florida Civil Rights Act of 1992 is modeled after Title VII with regard to its substantive aspects, see, Brand v. Florida Power Corp., 633 So.2d 504, 508 (Fla. 1st DCA 1994), the Florida Legislature clearly decided to use a different procedural scheme in the Florida Civil Rights Act of 1992.

Contrary to Seale's assertions, the complaint procedures under the FCRA are very different than those under Title VII. For example, unlike Title VII, the FCRA provides that if the Florida Commission fails to make a determination within 180 days, the complaining party may file suit within one year or request an administrative hearing within 35 days. Conversely, under Title VII, if the EEOC has not completed its investigation in 180 days, the complaining party may request a notice of right to sue. However, under Title VII, the complaining party must obtain a right to sue first before filing suit, and must file suit within 90 days of receiving a right to sue. See, Forbes v. Reno, 893 F. Supp. 476 (W.D. Pa. 1995) (Title VII does not require EEOC to conclude its investigation within 180 days or automatically issue a notice of right to sue, rather, right to sue is issued only upon complainant's request in writing if the investigation is still pending after 180 days), affirmed 91 F.3d 123 (3rd Cir. 1996) (per curiam).

The FCRA is procedurally quite different. The FCRA does not require the issuance of any notice of right to sue prior to filing suit and does not limit the period for filing suit to 90 days after such a notice if right to sue is issued. It allows the aggrieved party to either go directly to court or to an administrative hearing if no determination is made within 180 days. §760.11(4)-(5) & (8), Fla. Stat. (1995); Adams, 727 So.2d 1139; Joshua; Milano, 703 So. 2d 1093; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio 19 F. Supp. 2d 1304. Therefore, Seale's argument that merely because the

FCRA is substantively patterned after Title VII, then the law interpreting Title VII's procedural requirements is applicable to the FCRA is fallacious.

5. Seale's Contention that the Farancz case Is Controlling Is Without Merit.

Seale's contention that the case of Farancz v. St. Mary's Hospital, Inc., 585 So. 2d 1151 (Fla. 4th DCA 1991)---which she continuously cites to in her Brief---- establishes that the Florida Commission has jurisdiction beyond 180 days to continue to investigate to determine if there is cause is entirely without merit. In fact, Farancz is no longer persuasive law.[7] Farancz was decided prior to the enactment of the Florida Civil Rights Act of 1992. Farancz interpreted the Human Rights Act of 1977, which differed significantly from the FCRA in its present form. Farancz was decided when the Human Rights Act of 1977 did not provide for any limitations periods for filing suit. The applicable statute of limitations during that time was four (4) years under the general limitations statute. Moreover, as Seale acknowledges, Farancz did not address the issue of whether or not the Florida Commission had jurisdiction beyond 180 days. Thus, Farancz could not possibly establish that the FCHR has jurisdiction beyond 180 days. In short, Farancz has no application to this case whatsoever. The limitations period

[7] The fact that the recent Fourth DCA cases of Adams and Milano did not even discuss the Fourth DCA case of Farancz v. St. Mary's Hospital, Inc. when determining whether the one-year limit to file a civil action under the FCRA applies to a situation arising under Section 760.11(8) further establishes that Farancz is no longer persuasive.

discussed in Farancz no longer applies. Rather, after October 1, 1992, the FCRA specifically, clearly and unequivocally provides its own limitations period.

6. Seale's Contention that the FCRA's Purpose Will Be Undermined If the FCRA's Time Limitations Are Strictly Construed Is Without Merit.

Seale's contention that the Commission must retain jurisdiction beyond 180 days because, otherwise, the FCRA's purpose and function would be undermined is also without merit. Clearly, the 180-day time frame set forth in the FCRA is meant to bring a speedy resolution to any complaint filed with the Florida Commission, and to ensure that there is a definite period for pursuing any civil action (1 year after 180 days) or administrative hearing (35 days after 180 days). In other words, the FCRA properly protects employees who promptly assert their rights to be free from discrimination, while also protecting employers from the burden of defending claims arising from employment claims that are long since past. See generally §760.11(4)-(5) & (8), Fla. Stat. (1995); Adams, 727 So.2d 1139; Joshua, 734 So. 2d 1068; Milano, 703 So. 2d 1093; accord Crumbie, 1998 WL 852541; Kalkai, 717 So. 2d 626; Digrio 19 F. Supp. 2d 1304; Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431(1980) (explaining that employee discrimination limitations periods guarantee the protection of the civil rights laws to those who promptly assert their rights, while protecting employers from the burden of defending claims arising from employment decisions long since past).

Thus, interpreting the 180 days as mandatory furthers the purposes of the FCRA rather than thwarting its purposes. Under Seale's interpretation, the FCRA would still have jurisdiction of her claim to this day, which would be an absurd result. This is just the type of result the Florida Legislature intended to avoid by explicitly including in the FCRA specific time limits for pursuing a civil action.

7. Seale's Contention that an Aggrieved Party Can Wait Indefinitely to File Suit is Without Merit Because the FCRA's Terms Provide Certainty and Finality

As discussed earlier, if a complaining party does not timely exhaust 760.11(4), the claim is lost forever. No other remedy is provided. See EMSA's arguments contained under Section B, subsection 1 above.

Notwithstanding this, to the extent Seale continues to argue that the limitations period for filing a civil action runs indefinitely until the Florida Commission issues a determination, as discussed earlier, Seale's position is directly contrary to the statute's terms. Indeed, if the Florida Legislature had intended the FCRA to have such a broad, unlimited meaning, it would have said so. The Legislature certainly knows how to write such a provision into a statute.[8]

[8]For example, in the medical malpractice statutes, the legislature provided that during the 90-day period after the claimant notifies potential defendants of his or her claim, "the statute of limitations is tolled" §766.106(4), Fla.Stat.(1997).

Contrastingly and contrary to Seale's position, the Florida Legislature's intent to specifically limit the time periods within which a complaining party can seek redress is unambiguously exhibited throughout the FCRA. In particular, the Florida Legislature explicitly or by reference included a specific one-year limit on the filing of civil actions under the FCRA in at least **four (4) separate statutory subsections**. In addition, the Florida Legislature explicitly or by reference included specific, shorter limitations for seeking redress through the administrative process in at least another **three (3) separate statutory subsections**. The Legislature also included specific time limits within which to file the initial charge of discrimination. As a result, the Florida Legislature's obvious intention was to explicitly limit the time periods to seek civil or administrative redress to achieve certainty, definiteness and finality.

Recently, the Florida Supreme Court stated it requires that certainty and finality be achieved when construing statutes of limitations. This policy is favored to achieve swift, efficient legal process and to avoid injustice. Totura & Company v. Williams, 2000 WL 183308 (Fla. 2000)(this Court opined that the statute of limitations is to promote justice by preventing surprises and to avoid faded memories, lost evidence or disappearing witnesses); Silvestrone v. Edell, 721 So.2d 1173 (Fla. 1998)(in defining finality, **this Court indicated its intent to delineate the boundaries of finality to prevent an extension of the limitations period for an indefinite amount of time**.

In doing so, this Court recognized the prudential need to "**provide certainty and reduce litigation over when the statute of limitation starts to run.**" Id. at 1175 & fn.2.)(emphasis supplied).

Given the above, contrary to Seale's position that a complaining party can wait for an indefinite period for the Commission to make a determination, EMSA's position is sound, logical and reasonable and in accord with this Court's policy. EMSA's position promotes the policy favoring certainty and finality and promotes efficiency of the legal process.

8. Seale's Contention that the EEOC's Acts as the Florida Commission's Agent when issuing a Notice of Right to Sue is Without Merit.

At the outset, Seale's claim that the EEOC was acting on behalf of the Florida Commission when it entered its "notice of reasonable cause" on December 10, 1997, (See Pet. Brief, p. 5-6) directly contradicts Seale's arguments to the trial court. Seale argued below that the EEOC's notice of dismissal dated December 10, 1997, triggered the one-year statute of limitation pursuant to Fla. Stat. § 760." (R. 33). However, Seale acknowledged herself that the EEOC's investigation of her charge pursuant to the work sharing agreement between the EEOC and the Florida Commission "does not divest the [Florida Commission] of jurisdiction of Seale's claim or the application of State Law;" that the work sharing agreement "clearly states that the EEOC and the [Florida

Commission] each designate each other as it's [sic] agent for purposes of receiving and drafting charges, but not for investigative purposes; and that the "**EEOC's investigation and cause determination are not "actions" by the [Florida Commission**]." (R. 32-33) (emphasis supplied). In short, Seale clearly contradicts her own argument below and now contradicts it yet again on appeal and to this Court.

Regardless, apart from the above, Seale's argument that the EEOC's determination could trigger the statute of limitations under the FCRA is without support. In fact, as discussed, the clear language of the FCRA itself contradicts Seale's argument. Moreover, the predominant, controlling case law indicates that an EEOC action does not act as an action by the Florida Commission. See, e.g., Weaver v. Florida Power & Light, 1996 WL 479117 (S.D.Fla. 1996) affirmed 124 F.3d 221 (11th Cir. 1997)(where the Eleventh Circuit Court of Appeals affirmed the district court's decision that "even if the worksharing agreement between the EEOC and FCHR applied, it **does not exempt Plaintiff from her statutory filing requirements with the FCHR.**" Eleventh Circuit further affirmed the district court's decision which found "there is [no] basis to read [the plaintiff's position that a filing with the EEOC equals a filing under the FCHR] . . . into the [worksharing] agreement because the **FCHR was not granted authority** to enter into agreements with other agencies [i.e. EEOC] **to abrogate statutory requirements[.]**")(emphasis added); Zarnick v. Painewebber, Inc., 5 AD Cases 830

(M.D. Fla. 1995) (implicitly recognizing that the EEOC's notice of right to sue did not trigger the statute of limitations under the FCRA, rather, the charging party could still file a charge of discrimination with Florida Commission even though EEOC had already issued notice of right to sue). Interestingly, a state agency cause determination does not trigger the 90-day time period for filing suit under Title VII, thus, the only logical conclusion is that neither agency's determination triggers action by and through the other. E.g. Brooks v. Hartford, Inc., 715 F. Supp.1034 (D. Kan. 1989) (cause notice from state agency did not trigger 90 days under Title VII, notice had to come from EEOC, not state agency).[9]

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[9]EMSA is aware of the case Dawkins v. BellSouth Telecommunications, 53 F.Supp.2d 1356 (M.D.Fla. 1999). This case is unavailing. Even if a determination by the EEOC could act as a determination by the Florida Commission, the EEOC must still issue that determination within the 180 day period as required by the FCRA. The EEOC does not have any more authority to act beyond that 180 day time period than the Florida Commission. The Florida Commission has only 180 days in which to act. Nothing in the FCRA or EEOC allows the EEOC to abrogate the FCRA's statutory filing requirements. To the contrary, the case law clearly states that neither agency can abrogate these statutory requirements. See Weaver v. Florida Power & Light, cited supra. In the present case, the EEOC issued its notice of right to sue on December 19, 1997. This was nearly a year-and-a-half after the 180 day time period for the Florida Commission to issue a cause determination had expired on August 26, 1996. Moreover, it was four (4) months after the one (1) year statute of limitations under the FCRA expired on August 26, 1997. Thus, the EEOC's notice of right to sue could not possibly trigger the statute of limitations which had already run when it was issued. Nor can it trigger the statute of limitations because the EEOC-governed Title VII and the FCRA have entirely different procedural schemes. Further, to allow the EEOC's late notice of right to sue to trigger the FCRA's statute of limitations would render the FCRA's entire procedural scheme meaningless and a folly. The Florida Legislature did not intend such a result.

In sum, there is absolutely nothing in the FCRA, Title VII, the work sharing agreement between the Florida Commission and the EEOC, or in any controlling authority which indicates that the statute of limitations under the FCRA begins to run when the EEOC issues a notice of right to sue outside of the FCRA's specific limitations period. Thus, Seale's claim that the EEOC's Notice of Right to Sue here ------issued outside of the limitations period------triggered the one year limitations under the FCRA is without merit. The EEOC cannot abrogate the FCRA's specific, exclusive limitations period. As a result, the trial court correctly rejected Seale's argument.

9. Seale's Argument that FCRA Unconstitutionally Fails to Provide An Aggrieved Person with Notice of the Requirement to File A Civil Action Within One Year Is Without Merit

Seale attempts to argue that the FCRA is unconstitutional to the extent it does not notify a complaining party that a civil action must be filed within one year if the Commission fails to issue a determination within 180 days. Seale's argument is, again, without merit. Essentially, Seale argues that procedural due process has not been afforded.

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).

Property interests are not created by the United States Constitution, but rather, are derived from a separate source such as state law. Board of Regents v. Roth, 408 U.S. 564 (1971). No denial of due process occurs if there is no property interest implicated. Here, the FCRA implicates no property interest. Indeed, Seale has not identified such an interest, nor can she.

Assuming, *arguendo*, a constitutionally-protected property interest under the FCRA could be identified, the FCRA meets and exceeds the procedural due process requirements that notice and an opportunity to be heard be provided. The FCRA specifically and unambiguously notifies aggrieved individuals of the specific time limitations which must be complied with in order to pursue a civil action or an administrative claim under the Act. Thus, procedural due process is certainly achieved here.

Florida courts agree that the FCRA passes constitutional muster and the FCRA provides sufficient due process. McElrath v. Burley, 707 So.2d 836 (Fla.1st DCA 1998)(**Court found the FCRA did not unconstitutionally restrict access to courts**; court further found that FCRA's procedure for bring employment discrimination claims

(i.e. can only go through administrative process if no cause found) was constitutional; **moreover, court found that FCRA satisfied the right to due process on its face** by providing complaining parties with the right to administrative and judicial appellate review)(emphasis supplied). Therefore, Seale's argument that the FCRA does not provide complaining parties with sufficient notice of the requirement to pursue a civil remedy under the Act is without merit.

D. ANY MODIFICATION OR CHANGES TO FLORIDA STATUTES, SECTION 760 MUST BE MADE BY THE FLORIDA LEGISLATURE

In the event this Court does not agree with the positions taken by the First, Second, Fourth and Fifth District Courts of Appeal, this Court should defer to the Legislature to make any changes or modifications to the statute. Clearly, the Legislature is the proper body to make changes regarding statutory notice requirements. This Court concurs. See Brown v. State, 629 So.2d 841, 843 (Fla. 1994)(This Court found that "statutes . . . must include sufficient guidelines to put those who will be affected on notice[.] When the Legislature fails to provide guidelines, this Court cannot step in and guess about legislative intent. Such a practice would constitute judicial legislating, a practice neither our Constitution nor this Court allows. The precision required of statutes must come from the Legislature."); Overstreet v. State, 629 So.2d 125 (Fla. 1993)(This Court found that "if the Legislature did not intend the results mandated by the statute's plain language,

then the appropriate remedy is for it to amend the statute." The Court further found such a statute is not subject to judicial alteration.).

IV. CONCLUSION

Based on the foregoing, the trial court correctly granted summary judgment in favor of EMSA, as Seale's action is time-barred as a matter of law under the FCRA. Seale's arguments that the trial court erred as a matter of law by finding that her civil action was not timely filed within one year after the 180 day period expired under Section 760.11(4)-(5) & (8) are wholly without merit. The FCRA's own terms, the controlling authority from the First, Second and Fourth District Court's of Appeal and the Department of Administrative Hearings, and the compelling legislative history underlying the FCRA support EMSA's position that the Florida Legislature intended the one-year statute of limitations for filing a civil action to apply if the Commission failed to issue a determination within 180 days. No other conclusion is reasonable or logical. No other conclusion can be harmonized with the statute's specific, explicit terms. No other conclusion will achieve certainty and finality. No other conclusion will further the intent and purposes of the FCRA.

Therefore, EMSA respectfully requests this Honorable Court affirm the trial court's decision in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail to Richard J. Manno, Morgan, Colling & Gilbert, P.A., Attorney for Appellant, P.O. Box 4979, Orlando, Florida 32801, and Bill McCabe, Shepherd, McCabe & Cooley, Co-Counsel for Appellees/Plaintiffs, 1450 State Road 434 West, Suite 200, Longwood, Florida 32750 on March ___, 2000.

JOHN M. HAMENT