SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

GERALDINE SEALE,

Petitioner,

v.

EMSA CORRECTIONAL CARE, INC.

Respondent.

CASE NO.: 96,908

LOWER TRIBUNAL NO.:2D98-04187

CIRCUIT COURT NO.: GC-G-98-804

ORIGINAL

# AMENDED REPLY BRIEF OF PETITIONER

RICHARD J. MANNO, ESQUIRE
P.O. Box 4979
Orlando, FL 32802-4979
(407) 420-1414
Fla. Bar No.: 0867837
Counsel for Petitioner

BILL McCABE, ESQUIRE
1450 West SR 434, #200
Longwood, FL 32750
(407) 830-8919
Fla. Bar No.: 157067
Co-Counsel for Petitioner

This is an Appeal from an Order of the Second District Court of Appeal, Lakeland, Florida, Opinion filed 9/29/99, affirming a Final Order from the Honorable Cecelia M. Moore, Circuit Judge of the Tenth Judicial Circuit in and for Polk County, Florida dated 9/23/98.

## TABLE OF CONTENTS

## TABLE OF CITATIONS

FLORIDA STATUTES:



OTHER CITATIONS:

## PRELIMINARY STATEMENT

The Petitioner, GERALD SEALE, shall be referred to herein, as "Seale"

The Respondent, EMSA CORRECTIONAL CARE, INC., shall be referred to herein as "EMSA"

The Honorable Judge Cecelia M. Moore, Circuit Judge, shall be referred to herein as "TC" (Trial Court).

References to the Record on Appeal shall be abbreviated by the letter "V" (Volume) and followed by the applicable volume and page number.

Petitioner's Initial Brief on the Merits shall be referred to by the letters "IB" followed by the applicable page number.

Respondent's Answer Brief shall be referred to by the letters "AB" followed by the applicable page numbers.

## STATEMENT CERTIFYING SIZE AND STYLE OF FONT

The font used in this brief is 12 Point Courier New.

**STATEMENT OF THE CASE and STATEMENT OF THE FACTS**

Seale denies EMSA's contention that Seale is attempting to raise factual issues which were not raised below (AB-1,2). Seale argued below:

> "Plaintiff argues that the language of Sec. 760.11(3) is not mandatory; the language places a good faith requirement on the FCHR to make its best efforts to make a determination within a 180 day period. But clearly, the FCHR is not divested of jurisdiction to continue an investigation beyond the 180 days nor does Sec.760.11(3) require or mandate that the complaining party commence her lawsuit within one year of the 181st day after the charge is filed. . ." (V1-34).

Seale also argued that if FCHR failed to enter a determination within 180 days, plaintiff had the option to opt out of the administrative process, but there was no requirement that plaintiff opt out, nor that there be any time frame invoked after the 180th day from the date the charge was filed (V1-33). On Appeal, that is the exact same argument that Seale is making (IB-18, 19).

EMSA next argues that Seale argued in the TC that the referral of a charge to the EEOC for investigation does not divest the FCHR of jurisdiction, but the EEOC's investigation and cause determination are not actions by the FCHR. EMSA argues that this contradicts Seale's argument on Appeal that the EEOC, acting on behalf of the FCHR, entered a notice of reasonable cause on 12/10/97 (AB-1). These statements are not inconsistent. F.S.

760.11(2)(1997) specifically authorizes FCHR to refer the charge to the EEOC for an investigation, and further provides that such referral

> " … does not divest the Commission's jurisdiction over the Complaint."

The work sharing agreement between FCHR and the EEOC for the fiscal year 1996, which is the year that Seale filed her Complaint, clearly provides that once an agency begins an investigation "it resolves the charge" (V1-60). In this case, the EEOC, acting on behalf of the FCHR pursuant to F.S. 760.11(2)(1997) and pursuant to the work sharing agreement between the FCHR and the EEOC, entered a notice of reasonable cause on 12/10/97.

FCHR's referral of the Complaint to the EEOC pursuant to the work sharing agreement does not constitute "agency action" within the meaning of F.S. 120.52, F.S. 760.11(2)(1997). When the EEOC does make its determination that there is reasonable cause to believe that a discriminatory practice has occurred, that may or may not constitute a determination by the FCHR. If an aggrieved party requests the FCHR to review the EEOC's findings within 35 days from the date of the findings, then the FCHR has jurisdiction to do that, although the FCHR must "accord substantial weight to any findings and conclusions of any such agency", F.S. 760.11(2)(1997). However, if, as in the case at bar, no party requests the FCHR to review the EEOC's Notice of Reasonable Cause,

then that Notice of Reasonable Cause would constitute the determination of the FCHR that a discriminatory practice has occurred and would trigger the one year time period for filing civil actions as set forth in F.S. 760.11(5)(1997).

EMSA argues that their Motion for Summary Judgment set forth certain undisputed facts including the fact that the FCHR did not make a reasonable cause determination (AB-2). Although the FCHR did not make a reasonable cause determination, the EEOC, on behalf of the FCHR, pursuant to F.S. 760.11(2)(1997) and the work sharing agreement, did make a reasonable cause determination on 12/10/97 (V1-39).

EMSA argues that in Seale's opposition to EMSA's Motion for Summary Judgment, Seale conceded the undisputed fact that FCHR never entered any cause determination (AB-3). What Seale stated was:

> "On December 10, 1997, the EEOC issued a cause determination and notice of right to sue (see attachment "A") to Ms. Seale, which the plaintiff argues triggered the one year statute of limitations pursuant to Fla.Stat. 760 …" (V1-31).

## POINT I

**DOES SECTION 760.11(5), FLORIDA STATUTES (1997), 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 AND DETERMINATION AS TO "REASONABLE CAUSE' WITHIN 180 DAYS AS CONTEMPLATED IN SECTION 760.11(8) FLORIDA STATUTES (1997), SO THAT AN ACTION FILED BEYOND THE ONE YEAR PERIOD IS TIME BARRED?**

Contrary to EMSA's assertions (AB 6-8), Seale's position

before the TC and Seale's position on this Appeal are one and the same. That argument, very simply, is that the FCHR does not have to make a cause determination within 180 days, and if it does not, the aggrieved party is not required to file suit within one year from that 180 days period, or forever lose their right to file suit. Rather, that party has the option of either filing suit within one year after the 180 days, F.S. 760.11(8)(1997) or that party may do what Seale did in the case at bar, allow the administrative agency to continue with its investigation, and then, depending on the results of the investigation, either file suit within one year from the date of the determination of reasonable cause, as permitted by F.S. 760.11(4)(1997), or request an administrative hearing, F.S. 760.11(4)(b)(1997).

Seale has no quarrel with EMSA's statement of the law (AB 8-12) s it related to (1), if the FCHR finds a reasonable cause (AB 9, 10), (2) if the FCHR finds there is not reasonable cause (AB 10, 11). The issue on this Appeal is what happens if the FCHR makes no determination either way. Although there is no statute that so states, EMSA contends that if the FCHR fails to conciliate or determine whether there is reasonable cause within 180 days after the aggrieved party files his/her Complaint, then the aggrieved party <u>must</u> elect one of two options: (1) either bring a civil action or (2) an administrative hearing, just as she could if the

FCHR had issued a finding of reasonable cause (AB-11). Seale respectfully disagrees, and submits that EMSA's argument completely overlooks the fact that the Legislature utilized the permissive word "may" in F.S. 760.11(8)(1997). Rather, Seale submits that when 180 days has gone by and the FCHR has not yet made a determination as to whether or not there is reasonable cause on a complaint filed with them, the aggrieved party may elect not to wait any longer and proceed under F.S. 760.11(4)(1997), by filing a civil action or requesting an administrative hearing as set forth by EMSA, **OR** the aggrieved party may do nothing and allow the FCHR to continue its investigation and to attempt to resolve any disputes between the parties. This is exactly what happens under Federal law, see 29 C.F.R. 1601.28, Forbes v. Reno, 893 F.Supp. 476 (U.S.D.C. WD PA 1995).

EMSA next contend that all Courts addressing this issue agree with EMSA's position (AB 12,13). In response thereto, Seale would state that the case of Milano v. Mold Master, Inc., 703 So.2d 1093(Fla. 4th DCA 1997), relied upon so heavily by EMSA (AB-12), is distinguishable from the case at bar because, in Milano, supra, the aggrieved party became impatient and chose not to allow the FCHR to continue its investigation, but instead elected to proceed under F.S. 760.11(4)(1997). Since Milano chose not to wait for the FCHR to render its decision, then Milano was required to file his

Complaint within one year from the 180 day time period as set forth in F.S. 760.11(8)(1997). That is not what happened in this case. In the case at bar, Seale elected to allow the FCHR to continue with its investigation, through the EEOC, as permitted by F.S. 760.11(2)(1997), and the work sharing agreement between FCHR and EEOC, Seale then filed her Complaint well within one year from 12/10/97, the date the EEOC found reasonable cause to believe that violations of the statutes occurred (V1-39), in accordance with F.S. 760.11(4)(a)(1997) and 760.11(5)(1997).

The remaining cases that EMSA relies upon, including the cases of Ellsworth v. Polk County Board of County Commissioners, 25 FlW. D155(Fla. 2nd DCA 1999), Adams v. Wellington Regional Medical Center, Inc., 727 So.2d 1139 (Fla. 4th DCA 1999), Crumbie v. Leon County School Board, 721 So.2d 1211 (Fla. 1st DCA 1998), and Kalkie v. Emergency One, 717 So.2d 626 (Fla. 5th DCA 1998), lend no guidance to this Honorable Court because none of those cases state any of the facts, and simply affirm per Milano, supra. Additionally, both Ellsworth v. Polk County Board of County Commissioners, supra and Adams v. Wellington Regional Medical Center, supra, certify the same question that is before this Honorable Court in this case as a question of great public importance. Review was granted by this Honorable Court in Ellsworth v. Polk County Board of County Commissioners, supra, 735

So.2d 1285 (Fla. 1999).

Similarly, in Joshua v. City of Gainesville, 734 So.2d 1068 (Fla. 1st DCA 1999), another case relied upon by EMSA in their Answer Brief (AB-12), the First DCA certified the question which is set forth as Point I hereinabove, to be a question of great public importance, Joshua v. City of Gainesville, supra at 1071. That case is still pending before this Honorable Court. Furthermore, the Petitioner would respectfully submit that the facts in Joshua v. City of Gainesville, supra, are distinguishable from the facts in the case at bar, for the same reason as the facts in Milano v. Mold Master, Inc., supra, are distinguishable from the facts in the case at bar. Again, in Joshua v. City of Gainesville, supra, the FCHR also never rendered a decision one way or the other, and the Claimant filed her Complaint more than one year after the 180 day time period arose. Thus, in Joshua, supra, as in Milano, supra, the Plaintiff elected not to wait for the FCHR to render its decision, and therefore was required to file their Complaint within one year from the 180 time period per F.S. 760.11(8)(1997). Again, however, in the case at bar, although Seale "may" file suit within 180 days of the filing of the Complaint since the FCHR failed to conciliate or determine whether there was reasonable cause within 180 days of the filing of the Complaint, Seale elected not to, but instead chose to allow the FCHR to continue to try to resolve the

Complaint, and make a determination whether or not there was reasonable cause. It is only after the FCHR made a determination of reasonable cause, through its agent, the EEOC, that Seale elected to file her Complaint in the case at bar. This clearly makes Seale's claim distinguishable from both Milano and Joshua, supra.

EMSA next states that there were three material facts relevant to the issue of whether Seale's action was time barred (AB-13). Seale disagrees. EMSA leaves out one very material fact which, as argued hereinabove, distinguishes the facts in the case at bar from Joshua, supra, and Milano, supra, and that is that the FCHR through its agent, EEOC, pursuant to F.S. 760.11(2)(1997) and the work sharing agreement, made a determination that there was reasonable cause to believe that a discriminatory practice had occurred on 12/10/97 (V1-39).

Contrary to EMSA's assertions Seale does not contend she has an undefined period for the FCHR to make a determination. Rather, there is a four year statute of limitations for filing an employment discrimination case under the FCHR, Francz v. St. Mary's Hospital, Inc., 585 So.2d 1151(Fla. 4th DCA 1991). F.S. 95.11(3)(f) (1997).

EMSA, after going to great lengths to argue that a Court must interpret a statute according to its plain meaning (AB-16) then

goes on to argue that the word "may" in 760.11(8)(1997) really means "shall" (AB 21-23). The word may when given its ordinary meaning denotes the permissive term, not the mandatory term of "shall" Fixel v. Clevenger, 285 So.2d 687 (Fla. 3rd DCA 1973).

Contrary to EMSA's assertions, Seale does not contend that she can wait and file a charge 5000 days after the alleged violation (AB 22, 23). A discrimination claim is clearly limited by the four year statute of limitations found in F.S. 95.11(3)(f)(1997)(four year statute of limitations for an action found on a statutory liability).

Seale respectfully submits that to accept EMSA's argument would in effect eliminate the FCHR and render it useless and meaningless. Because of the heavy volume of the FCHR, Seale seriously questions whether or not the FCHR has ever been able to complete an investigation within 180 days. If the FCHR's jurisdiction is cut off after 180 days, and an aggrieved party has no right to elect the option for FCHR to continue its investigation, as Seale did in this case, then it is respectfully questioned whether the FCHR would ever be able to timely render a decision. Clearly, that cannot be the Legislative intent. Furthermore, that is not how the Federal Statute is interpreted, Forbes v. Reno 893 F.Supp. 476 (U.S.D.C. (WD Pa 1995), 29 C.F.R. 1601.28.

If the Legislature intended to provide a specific time limit to file suit under F.S. 760.11(8) if the FCHR failed to make a determination within 180 days as argued by EMSA (AB-29), they would have used the word “shall” instead of “may” in F.S.760.11(8)(1997).

EMSA next contends that Seale’s attempts to distinguish the cases of Milano and Joshua are wholly without merit (AB 32-34). Again, as previously argued both Joshua, supra and Milano, supra are distinguishable on its face from the facts in the case at bar because the aggrieved party was impatient and did not wish to wait for the FCHR to render its decision after the expiration of the initial 180 day period. Therefore, when they filed their Complaint more than one year from the 180 day time period, it was filed late. In the case at bar, however, Seale was not impatient, and elected to allow the FCHR, through its agent, the EEOC, per the work sharing agreement, to complete its investigation. Seale then timely filed her Complaint within one year from 12/10/97, when the EEOC, as agent for FCHR, made its determination of reasonable cause F.S. 760.11(5)(1997).

EMSA next argues that the issue of whether or not the FCHR is mandated or simply directed to complete its investigation within 180 days is, at best, a red herring, and had no relevance whatsoever to the issue in this case (AB 35-37). Seale disagrees. If the FCHR is simply directed, but not mandated, to complete it’s

investigation within 180 days under F.S. 760.11(3)(1997), that means that the FCHR continues to have jurisdiction over a complaint beyond the 180 day period. If the FCHR has jurisdiction over the Complaint beyond the 180 day period, then it completely supports Seale's argument that if the FCHR has not yet made a decision within 180 days, then Seale or any other aggrieved party may (1) do nothing and allow the FCHR to continue its investigation and attempt to resolve any disputes between the parties and is not required to either file suit within one year of the initial 180 day period, or request an administrative hearing within thirty five (35) days of the initial 180 day period, as so vigorously argued by EMSA in this case.

If FCHR continues to have jurisdiction beyond the 180 day period, then an aggrieved party can clearly wait until the FCHR completes its investigation, and may then either file suit within one year of the date that the FCHR determines that there is reasonable cause, or request an administrative hearing within thirty five (35) days after the FCHR has determined there is reasonable cause, and they are not limited by any time period triggered by the initial 180 day period.

On the other hand, if FCHR does not have jurisdiction to determine a Complaint after 180 days, then the Legislature would have stated so and the FCHR would advise aggrieved parties of that

fact when a claim is filed. However, no where in F.S. 760.11 does it state that the FCHR is divested of jurisdiction after its initial 180 days. At no time has the FCHR ever told anyone that they do not have jurisdiction to decide the claim after 180 days. Furthermore, although it was not the issue argued in Francz, supra, the case of Francz certainly implies that the FCHR has jurisdiction to decide a complaint beyond the initial 180 days.

EMSA next contend that Seale's contention that FCHR has jurisdiction beyond the initial 180 days, is because Seale feels that the functions cannot be performed in that time period (AB-36). Although that is one of the reasons, it is not the only reason that Seale is arguing that the FCHR has jurisdiction to make a determination beyond the initial 180 days. Those reasons are as follows:

(1) Although the Legislature utilized the word "shall" in F.S. 760.11(3)(1997), the use of mandatory words in the statute specifying the time within which duties of public officers are to be preformed may be construed as directory only and not mandatory, Lomelo v. Mayo, 204 So.2d 550 (Fla. 1st DCA 1967), Parker v. Sugarcane Growers Coop., 595 So.2d 1022 (Fla. 1st DCA 1992).

(2) The same result as argued by Seale is the result that has been reached under Federal law dealing with the EEOC, Forbes v. Reno, supra.

(3) Common sense dictates that the FCHR still has jurisdiction, even if they have not yet made a decision within 180 days, given the fact that the Legislature clearly intends the FCHR to use every means possible to resolve a discrimination complaint, see e.g. F.S.760.11(11)(1997).

(4) The case of Francz, supra, establishes that the FCHR has jurisdiction beyond its 180 days to continue to investigate to determine if there is reasonable cause to believe that a discriminatory practice has occurred.

EMSA next contends that it is improper for Seale to compare the procedural prerequisites of filing suit under F.S. 760.11 with filing suit under Title VII (AB 37, 38). Seale disagrees. If a Florida Statute is modeled after Federal law on the same subject, the Florida Statute will take on the same construction as is placed on its Federal prototype insofar as such interpretation is harmonious with the spirit and policy of the Florida Legislation, Smith v. Avatar Properties, Inc., 714 So.2d 1103 (Fla. 5th DCA 1998) Brand v. Florida Power Corp., 633 So.2d 504 (Fla. 1st DCA 1994).

Contrary to the EMSA's assertions in their AB (AB 37, 38), the procedures before the FCHR and the EEOC are very similar; hence, the work sharing agreement between the two agencies. Both have time limits within which a Complaint must be filed with the agency. Both then allow that at the end of 180 days, a party **may** file suit

(under Title VII, the party requests the right to sue letter first), but they do not have to. Under both agencies, a party has a certain time period within which to file suit after the agency has made a determination (EEOC - 90 days; FCHR - 1 year). Thus, although there may be some different time limitations under each act, the procedures under each act are quite similar.

EMSA contend that Seale's reliance on Francz for the proposition that the FCHR has jurisdiction beyond 180 days to continue to investigate to determine if there is cause, is without merit because Francz was decided prior to the enactment of the FCRA of 1992 (AB-39). Petitioner disagrees, because at the time that Francz was decided, the FCRA, and specifically F.S. 760.10(12)(1977) still provided that

> "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. . ."

despite the above referenced language, FCHR and Francz, supra, clearly had jurisdiction beyond the 180 days to continue to investigate.

EMSA next argue that by concluding that the FCHR only has 180 days to complete its investigation furthers the purpose of the FCHR rather than thwarting it because it requires FCHR to bring a speedy resolution to any complaint filed with them (AB-40, 41). Seale

disagrees. Seale cannot possibly imagine how limiting the FCHR to 180 days to complete its investigation can further its purposes when, because of the vast case load that they have and because of the efforts the Legislature wants the FCHR to go to, to try to resolve issues, F.S. 760.11(1)(1997). In fact, this case is a perfect example. The original Complaint was filed on 2/26/96, yet a determination was not made until 12/10/97, nearly 21 months after the initial claim was filed.

EMSA next contend that Seale's argument that the EEOC acts as the FCHR agent when issuing a Notice of Right to Sue is without merit (AB 43-46). In so arguing, EMSA completely overlooks the work sharing agreement between EEOC and FCHR wherein it states:

> "Normally, once an agency begins an investigation, it resolves the charge." (V1-60).

Furthermore, the transmittal letters to both the FCHR and EEOC clearly establish that

> "pursuant to the work sharing agreement, this charge is to be initially investigated by the EEOC." (V1 20,21).

If the EEOC, in issuing its Notice of Determination, is not acting as agent for the FCHR, then what is the purpose of the work sharing agreement?

Furthermore, in Dawkins v. Bellsouth Telecommunications, Inc. 53 F.Supp. 2nd 1256 (M.D. Fla. 1999), the Court held that, under the

work sharing agreement between EEOC and FCHR, a no cause determination by the EEOC as to a duly filed administrative complaint operated as a no cause determination by FCHR, thus triggering the administrative appeal deadline of FCRA as to the FCHR claim.

EMSA attempts to distinguish Dawkins, supra, by claiming that even if a determination by the EEOC could act as a determination by the FCHR, the EEOC must still issue that determination within the 180 day period (AB-45, 46). Seale disagrees, and would contend that the EEOC as the FCHR, continues to have jurisdiction beyond the initial 180 day period, if the aggrieved party elects to allow the EEOC to continue to have jurisdiction beyond the 180 day period.

**POINT II**

**THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT PLAINTIFF FAILED TO FILE SUIT WITHIN THE ONE YEAR LIMITATIONS PERIOD WHEN F.S. 760.11(5)(1997) PROVIDES THAT A CIVIL ACTION MAY BE COMMENCED NO LATER THAN ONE YEAR AFTER THE DATE OF DETERMINATION OF REASONABLE CAUSE BY THE COMMISSION, AND PLAINTIFF'S COMPLAINT WAS FILED WITHIN ONE YEAR FROM THE DATE THE FCHR, THROUGH ITS AGENCY, THE EEOC, MADE A DETERMINATION OF REASONABLE CAUSE.**

Petitioner adopts and realleges the argument set forth under Point II of the Initial Brief (IB 29-31).

**POINT III**

**THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITIONER/PLAINTIFF'S COMPLAINT.**

Petitioner adopts and realleges the argument set forth under Point III of the Initial Brief (IB-32).

## CONCLUSION

Petitioner adopts and realleges the Conclusion as set forth in the Petitioner's Initial Brief (IB-33).

Respectfully submitted.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this _____ day of April, 2000 to: Richard J.Manno, Esq., P.O. Box 4979, Orlando, FL 32802 and John M. Hament, Esq., 1800 Second St., Suite 970, Sarasota, FL 34236.

_____
BILL MCCABE, ESQ.
Fla. Bar No: 157067
1450 West SR 434, #200
Longwood, FL 32750
(407) 830-9191
Co-Counsel for Petitioner