IN THE SUPREME COURT FOR THE STATE OF FLORIDA

JOHN ELLSWORTH,

Petitioner, Case No: SC 00-190

vs. 2d DCA Case No: 99-00828

POLK COUNTY BOARD OF
COUNTY COMMISSIONERS,

Respondent.
_____/

ANSWER BRIEF

_____

ON APPEAL FROM THE OFFICE OF THE
SECOND DISTRICT COURT OF APPEAL

_____

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner John Ellsworth's Statement of the Facts contains a number of facts that are irrelevant to the issue currently on appeal; however, Respondent Polk County Board of County Commissioners chooses to omit this section pursuant to Florida Rule of Appellate Procedure 9.210(c).

SUMMARY OF ARGUMENT

Ellsworth argues that the trial court erred in finding that the one-year statute of limitations provided in § 760.11(5) began to run once the Florida Commission on Human Relations failed to issue a finding within 180 days of the filing of his complaint. As support, Ellsworth asserts that the plain and ordinary meaning of chapter 760 compels a contrary result. Ellsworth claims that § 760.11(8) should be referred to exclusively without regard to any other statutory position. This argument must fail because it is contrary to the fundamental principles of statutory construction. Further, the logical interpretation of the statute supports the trial judge's findings.

Ellsworth also argues that the statute of limitations analysis utilized in Title VII cases should be applied to the Florida Civil Rights Act. However, the express time limitations in the Florida Civil Rights Act are dissimilar to Title VII, and

Ellsworth presents no evidence that the Legislature intended the Act to mirror Title VII procedurally. Florida courts have recognized that the 90-day time period to file suit under Title VII "is not a true statute of limitations," unlike the one-year period under the Florida Civil Rights Act.

Next, Ellsworth asserts that the dismissal of his claim violates due process in that the Commission failed to notify him of the statute of limitations period. As support, Ellsworth attempts to compare the Florida Civil Rights Act to the Unemployment Compensation Law. These two laws, however, are clearly distinguishable. The Florida Civil Rights Act does not violate due process, as aggrieved parties are entitled to notice and an opportunity to be heard at an administrative level. In addition, parties are permitted to bring a civil action if the Commission fails to conciliate the charge within 180 days.

Finally, Ellsworth argues that the trial judge erred in dismissing his complaint at this stage in the proceedings and without considering equitable tolling. Ellsworth is incorrect in his assertions that statute of limitations defense may not be raised in a motion to dismiss. Further, Ellsworth has not alleged any circumstances that would equitably toll the limitations period.

ARGUMENT

I.

WHETHER THE ONE-YEAR STATUTE OF LIMITATIONS NOTED IN § 760.11(5) FLORIDA STATUTES, COMMENCES AT THE EXPIRATION OF 180 DAYS FROM THE DATE OF A FCHR CHARGE WHEN NO FINDING HAS BEEN ISSUED BY THE FLORIDA COMMISSION ON HUMAN RELATIONS.

Judge Harvey Kornstein dismissed John Ellsworth's November 16, 1998 claim based on the Florida Civil Rights Act after determining that the statute of limitations had expired on August 10, 1998 (R 1/51). Judge Kornstein followed binding precedent in finding that the one-year statute of limitations outlined in § 760.11(5) began to run on August 10, 1997, when the Florida Commission on Human Relations failed to conciliate Ellsworth's claim within 180 days of the filing of the complaint (R 1/51).

The Second District Court of Appeal affirmed the dismissal of the claim, citing Joshua v. City of Gainesville, 734 So.2d 1068 (Fla. 1st DCA), review granted 735 So.2d 1285 (Fla. 1999). The Joshua court held that a claimant has one year to file a civil action in the event the claimant fails to receive determination of "reasonable cause" within 180 days of filing a complaint with Commission on

Human Relations under chapter 760. See id. at 1070-71. The Joshua court certified the following question as one of great public importance:

> Does the section 760.11(5), Florida Statutes (1995), one-year statute of limitations for filing civil actions "after the date of determination of reasonable cause by the Commission" apply also upon the Commission's failure to make any determination as to "reasonable cause" within 180 days as contemplated in section 760.11(8), Florida Statutes (1995), so that an action filed beyond the one-year period is time barred?

Id. at 1071.

Ellsworth presents a number of arguments in challenging the statute of limitations issue that led Judge Kornstein to dismiss his claim. First, Ellsworth argues that the plain and ordinary meaning of statute requires reversal. Second, he asserts that any ambiguity regarding the statute of limitations issue should be resolved in favor of the aggrieved party. Third, Ellsworth maintains that the statute of limitations analysis governing Title VII claims should be applied to the present case. Fourth, Ellsworth argues that the dismissal of his claim constitutes a denial of procedural due process. Fifth, Ellsworth claims that his claim was subject to equitable tolling and should not have been dismissed at this stage in the proceedings. These arguments will be addressed in turn.

A. The Court Did Not Ignore the Plain and Ordinary Meaning of Chapter 760.

Under the Florida Civil Rights Act of 1992, an aggrieved party may file a complaint with the Florida Commission on Human Relations ("Commission") within 365 days of an alleged violation of the Florida Civil Rights Act. See § 760.11(1), Fla. Stat. (1997). After a complaint is filed, the Commission shall determine if there is reasonable cause to support the discriminatory charge within 180 days of the filing of the complaint. See § 760.11(3), Fla. Stat. (1997). The statute also provides:

> (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. (1997).

Subsection (4) provides two options for the complaining party in the event the Commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act. See § 760.11(4), Fla. Stat. (1997). The party may bring a civil action against any party named in the complaint or, alternatively, the party may request an administrative hearing pursuant to §§ 120.569 and 120.57. See id.

Any civil action brought under the statute is governed by the provisions of § 760.11(5). Subsection (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. (1997).

In the case at hand, Ellsworth filed a complaint with the Commission on February 11, 1997 (R 1/9). Because the Commission had failed to conciliate Ellsworth's claim within 180 days of the filing of the complaint, he was permitted to file a lawsuit on August 10, 1997. See § 760.11(8), Fla. Stat. (1997). Ellsworth did not file a lawsuit based on the claim until November 16, 1998, more than one year after he was entitled to file suit under § 760.11(8) (R 1/1).

The Florida courts have repeatedly found that the one-year statute of limitations outlined in § 760.11(5) begins to run in the event the Commission fails to make a "reasonable cause" finding with 180 days of the filing of a complaint. See, e.g., Milano v. Moldmaster, Inc., 703 So.2d 1093 (Fla. 4th DCA 1997). In Milano, the Fourth District reviewed the dismissal of a complaint that had been filed pursuant to the Florida Civil Rights Act. See id. at 1094. Milano filed a complaint with the Commission on April 8, 1994, alleging that her employer had wrongfully terminated her employment based on her disability. See id. The

Commission did not issue a reasonable cause determination within 180 days, and Milano filed suit more than one year after the 180 days had expired. See id.

The employer moved to dismiss the action, claiming that the complaint was time-barred based on the one-year statute of limitations outlined in § 760.11(5). See id. The trial court agreed and therefore dismissed the action. On appeal, the Fourth District affirmed the dismissal and declared that "any other interpretation of the foregoing subsections, read together, would not be reasonable." Id.

Recent cases from other courts have followed the Milano decision. In Joshua v. City of Gainesville, the First District was faced with an appeal that was "factually indistinguishable" from Milano in all material respects. See 734 So.2d 1068 (Fla. 1st DCA), review granted 735 So.2d 1285 (Fla. 1999). The First District agreed with the Milano decision, concluding that the trial court properly dismissed the Florida Civil Rights Act claim as time-barred.[1] See also Adams v. Wellington Reg'l Med. Ctr., 727 So.2d 1139 (Fla. 4th DCA 1999) (affirming the dismissal of Florida Civil Rights Act complaint as time-barred, but certifying question as to whether the one-year statute of limitations applies when the Commission fails to conciliate the charge); Digiro v. Pall Aeropower Corp., 19 F.Supp. 2d 1304 (M.D.

[1] Unlike the plaintiff in Joshua, Ellsworth had the benefit of the Fourth District court's construction of the pertinent provisions of the Act in Milano, which was decided before Ellsworth's one-year statute of limitations expired. See Joshua, 734 So.2d at 1070 n.3.

Fla. 1998) (noting that "the one-year limitation on bringing a civil action begins to run at the end of the 180-day period in which the Florida commission has to determine whether reasonable cause exists").

Ellsworth asks this Court to examine each subsection of the statute separately, claiming that a determination by the Commission must be made before triggering the one-year limitation period. Specifically, he argues that the one-year statute of limitations does not begin to run if the Commission fails to issue a reasonable cause determination within 180 days because of the plain and ordinary meaning "that a 'determination' must have been made for it to apply" (Initial Brief/10). However, this argument was rejected as unreasonable by the Milano court.

The Milano court found that "[t]here is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless." See 703 So.2d at 1094 (quoting Lewis v. Connors Steel Co., 673 F.2d 1240, 1242 (11th Cir. 1982)). The court determined that another other interpretation of the relevant subsections would not be reasonable. See id.

Ellsworth's argument also must fail due to the fundamental principle of statutory interpretation that statutes be interpreted to facilitate the achievement of their goals in accordance with reason and common sense. See Department of

Commerce v. Hart, 372 So.2d 174 (Fla. 2d DCA 1979). "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. . . . [and] courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992) (emphasis in original). It is impossible to examine each subsection separately, especially when the subsections are cross-referenced.

Ellsworth attempts to explain the "purpose" for each of the relevant subsections, maintaining that "[t]he purpose of § 760.11(5), Florida Statutes (1997) is to put closure to a claim which was investigated by the Florida Commission, and merit is found" (Initial Brief/10-11). This is simply not the case. Subsection (5) applies to "*any* civil action brought under this section," which inherently includes instances in which the Commission fails to issue a cause determination. Polk County asserts that the plain language of subsection(5) simply provides the procedures and remedies of civil actions under the Florida Civil Rights Act, including the applicable statute of limitations.

Finally, Ellsworth maintains that there is a clear distinction between the Legislature's use of "may" in § 760.11(8) and "shall" in § 760.11(5). This argument has been repeatedly rejected by the Florida courts. See, e.g., Joshua v.

City of Gainesville, 24 Fla. L. Weekly 550 (Fla. 1st DCA Feb. 17, 1999). The basis for difference is obvious: an aggrieved party is not ***required*** to file suit under the statute. However, if a party does bring suit, then the claim must be commenced within a specific period of time (i.e., the mandatory one-year statute of limitations outlined in § 760.11(5)). As such, the mandatory "shall" is a necessary provision of § 760.11(5).

The trial court correctly interpreted the one-year statute of limitations and dismissed Ellsworth's claim as untimely.

B. There Is No Ambiguity in Chapter 760 Involving Instances in Which the Commission Fails to Issue a Reasonable Cause Determination Within 180 Days.

Ellsworth's next argues that the ambiguity in § 760.11(5) and § 760.11(8) should be resolved in favor of the aggrieved party when the Commission fails to issue a reasonable cause determination within 180 days. Ellsworth maintains that § 760.11(8) does not reference § 760.11(5), and therefore "§ 760.11(8) should be referred to exclusively without regard to any other statutory provision" (Initial Brief/13).

As previously stated, "all parts of a statute must be read together in order to achieve a consistent whole. . . . [and] courts must give full effect to all statutory

provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992) (emphasis in original). Although § 760.11(8) does not reference § 760.11(5), the provisions of subsection (5) apply to "*any* civil action" brought under the Florida Civil Rights Act, which includes instances in which the Commission fails to issue a reasonable cause determination.

The argument that the statutory provisions must be read "exclusively" would also create an interpretation that "would not be reasonable." Milano, 703 So.2d at 1094. Ellsworth also argues:

> If the Milano interpretation of these subsections are correct then the majority of claims will never be investigated by the Florida Commission on Human Relations due to an aggrieved parties' fear that if he or she does not act within the one year Statute of Limitations by filing suit, their claim will be waived. This will essentially work to divert complaints away from the administrative system into the judicial system. This, in essence, will work to defeat the purpose of the administrative procedure provided in § 760.11, and will work only to flood the judicial system with Florida Civil Rights Act claims.

(Initial Brief/14-15).

The Milano decision does not necessarily divert complaints away from the administrative system and "flood the judicial system with Florida Civil Rights Act claims." Rather, an aggrieved party is still entitled to request an administrative hearing pursuant to § 760.11(4)(b) if the Commission fails to determine that there

is reasonable cause to believe that a discriminatory practice occurred. See, e.g., Finn v. City of Holly Hill, DOAH No. 99-2864 (Feb. 2, 2000) (finding the request for an administrative hearing to be time-barred under the analysis of Milano v. Moldmaster, Inc.). The party must choose within the period specified by the Legislature whether to pursue civil or administrative remedies.

Ellsworth also argues that an aggrieved party who is unable "to afford entry in the judicial system on an immediate basis (i.e. within 18 months) . . . . will be forever penalized according to Milano" (Initial Brief/15). However, statutes of limitations are not enacted to enable a party to "gather resources" to file suit. "Statutes of limitations are enacted to bar claims which have been dormant for a number of years and which have not been enforced by persons entitled to enforcement." Employers' Fire Ins. Co. v. Continental Ins. Co., 326 So.2d 177, 181 (Fla. 1976). Despite being entitled to file suit after the Commission failed to issue a finding within 180 days, Ellsworth failed to file suit with the statute of limitations and the trial court properly dismissed the action.

C. It Is Not Appropriate to Apply the Statute of Limitations Analysis Utilized by Title VII Claims to Those Arising Under Chapter 760, Florida Statutes.

Ellsworth next argues that because the Florida Civil Rights Act was patterned after Title VII, it is appropriate to apply the same statute of limitations analysis. This argument was not raised to the trial court, and Polk County asserts that it has been waived for appellate purposes. See Tillman v. State, 471 So.2d 32 (Fla. 1985) (noting that "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved").

Even if this Court finds that this issue has been preserved, it cannot support reversal. Ellsworth apparently believes that an aggrieved party should receive "notification of the statute of limitations before the statute of limitations begins to run" (Initial Brief/16). However, the express statutory provisions of chapter 760 do not provide for notification of the statute of limitations if the Commission fails to conciliate the charge within 180 days. This is in direct contrast to Title VII, in which a notice of right to sue letter is required prior to commencement of a civil action.

Although Ellsworth is correct in stating that the Florida Civil Rights Act is patterned after Title VII,[2] there are clear differences between the two. In fact, many of the obvious differences concern the necessary procedures and accompanying time deadlines for bringing charges. Compare 42 U.S.C. § 2000e-5(e)(1) (1994) (noting that "[a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice"), with § 760.11(1), Fla. Stat. (1997) (stating that an aggrieved party "may file a complaint with the commission within 365 days of the alleged violation").

The Milano court recognized the differences between Title VII and the Florida Civil Rights Act. In fact, the court noted that the 90-day limitation that a plaintiff has to file suit under Title VII "is not a true statute of limitations." Milano, 703 So.2d at 1095. The court went on to state:

> There is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless. Plaintiff should be required to assume some minimum responsibility himself for an orderly and expeditious resolution of his dispute.

Milano, 703 So.2d at 1093 (quoting Lewis v. Connors Steel Co., 673 F.2d 1240, 1242 (11th Cir. 1982)).

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[2] See Weaver v. Leon County Classroom Teachers' Ass'n, 680 So.2d 478 (Fla. 1st DCA 1996).

The plain language of the Florida Civil Rights Act does not parallel the time limitations outlined in Title VII, and therefore Ellsworth's attempts to utilize the Title VII analysis in this regard should be rejected.

D. The Court's Decision Does Not Deprive the Appellant of Due Process.

Ellsworth next argues that the trial court's decision cannot stand on appeal because it deprives him of procedural due process. Again, this argument was not raised to the trial court below, and Polk County asserts that it has been waived. See Tillman, 471 So.2d at 32 (noting that "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved"). If this Court determines that Ellsworth has not waived this issue for appeal, the decision of the Second District Court of Appeal should nevertheless be approved.

Ellsworth's protected property interest, if any, arose solely as a result of rights created by chapter 760 and did not flow from either the Florida or United States Constitutions. "[S]tate law based rights constitutionally may be rescinded so long as the elements of procedural--not substantive--due process are observed."

Jacobi v. City of Miami Beach, 678 So.2d 1365, 1367 (Fla. 3d DCA 1996) (citing McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)). Due process is met if "one adequate method of judicial review of the orders of administrative agencies is set up." Bath Club, Inc. v. Dade County, 394 So.2d 110, 113 (Fla. 1981).

Chapter 760 provides that individuals are entitled to notice and an opportunity to be heard at an administrative level, as well the right to a civil action in the event that the Commission fails to conciliate a charge within 180 days. Even if the aggrieved party does not choose to bring a civil action, the party is still permitted to utilize the administrative channels.

Ellsworth's attempts to compare the Florida Civil Rights Act to the Unemployment Compensation Law are without merit. Unlike the Unemployment Compensation Law, the Florida Civil Rights Act permits an aggrieved party to seek judicial remedies in the event the Commission does not enter a finding within 180 days of the charge. The case at hand does not concern the situation in which the Commission failed to notify an aggrieved party of its findings, or failed to inform the party of its administrative options under Act. Rather, Ellsworth argues that the Commission was required to notify him of an impending limitations deadline.

There is nothing in chapter 760 that supports Ellsworth's position that the Commission was required to notify him of the statute of limitations to file a lawsuit while the investigation was ongoing. Any arguments that the Commission should advise parties of this fact after 180 days if the charge is not resolved should be taken up with the Legislature. Ellsworth's ignorance of the law cannot support reversal.

E. The Court Did Not Err in Dismissing Ellsworth's Claim at this Stage in the Proceedings.

Ellsworth's final argument on appeal concerns the timing of Judge Kornstein's order, and whether the complaint was properly dismissed at that stage in the proceedings. Ellsworth argues that the defense of statute of limitations is not properly raised on a motion to dismiss. Claiming that he was never notified by the Commission about the statute of limitations period, Ellsworth also contends that the limitations period should be equitably tolled. These arguments are without merit and cannot support reversal of Judge Kornstein's order.

Contrary to Ellsworth's assertions, the defense of statute of limitations may be raised in a motion to dismiss when its violation appears on the face of the complaint. See Koehler v. Merrill Lynch & Co., 706 So.2d 1370, 1372 (Fla. 2d DCA 1998). The case which Ellsworth cites for the opposite position predates the

amendment of Rule 1.110(d) of the Florida Rules of Civil Procedure. If the affirmative defense appears on the face of a prior pleading, then it may be asserted by motion. See Fla. R. Civ. P. 1.110(d).

Furthermore, Ellsworth has not alleged any acts or circumstances which would equitably toll the limitations period. Ellsworth argues that "he was never notified of any Statute of Limitations period" (Initial Brief/22). Ellsworth also alleges that "he was told by representatives of the Florida Commission on Human Relations that an investigation was going to take place soon" (Initial Brief/22).

Florida courts have found that claims arising from the Florida Civil Rights Act are subject to equitable tolling, but are limited to the acts and circumstances outlined in § 95.051. See Greene v. Seminole Elec. Coop., Inc., 701 So.2d 646 (Fla. 5th DCA 1997). In Greene, a claim was brought under the Act based on disability discrimination. See id. at 647. Following the dismissal of his complaint, Greene argued that the limitations period should be equitably tolled. See id. at 648. The Fifth District rejected this argument, stating that "the only acts or circumstances that will toll a limitations period are those enumerated in section 95.051(2)." Id. (citation omitted). Because Greene did not allege any acts or circumstances enumerated in § 95.051, equitable tolling did not apply.

Likewise, Ellsworth did not allege any acts or circumstances which would equitably toll the limitations period. Furthermore, the Commission did not have a duty to notify Ellsworth of any impending time deadlines. See Kourtis v. Eastern Airlines, 409 So.2d 139, 140 (Fla. 4th DCA 1982) (rejecting the argument that "instructions given appellant by labor department personnel be used to estop the Florida Human Relations Commission from enforcing the time periods provided in the statute"). The fact that alleged representations were made concerning the timing of the Commission's investigation are irrelevant to Ellsworth's civil action.[3]

CONCLUSION

The order on appeal should be affirmed in all respects.

Respectfully submitted,

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[3] It is unclear why these representations would support equitable tolling. If an aggrieved party wanted to utilize the administrative channels but was told by the Commission that the claim would not be investigated for a number of years, then it could be argued that this fact might compel the party to seek judicial remedies. In the case at hand, Ellsworth merely slept on his rights.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by U.S. Mail, to Merette L. Oweis, DiCesare, Davidson & Barker, P.A., Post Office Box 7160, Lakeland, FL 33807-7160, this _____ day of February, 2000.

_____
Attorney