SUPREME COURT OF FLORIDA

Case No.: SC01-2160

CORDETTE WOODHAM,

Petitioner,

vs.

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Respondent

ON REVIEW OF A CERTIFIED QUESTION FROM
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF HUMAN RESOURCE ASSOCIATION OF PALM BEACH COUNTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Christine D. Hanley, Esquire
Florida Bar No.: 969737
David H. Spalter, Esquire
Florida Bar No.: 966347
CHRISTINE D. HANLEY & ASSOCIATES, P.A.
1000 Southern Boulevard, Second Floor
West Palm Beach, Florida 33405
Telephone: 561/659-5646
Facsimile: 561/659-1260

Counsel for *Amicus Curiae* Human Resource
Association of Palm Beach County

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INTRODUCTION AND SUMMARY OF ARGUMENT

This brief is submitted on behalf of the Human Resource Association of Palm Beach County (hereafter "HRPBC"). HRPBC was formed in 1966 to encourage the exchange of ideas, the discussion of problems and the dissemination of information relating to the field of human resources, by and between its members representing over 150 companies in Palm Beach County Florida. HRPBC is a chapter of the Society for Human Resource Management ("SHRM"), a national organization which is the leading voice of the human resource profession.

While this brief will address in some detail the legal authorities supporting the conclusion reached by the Third District Court of Appeals below, and furthered by Respondent, Blue Cross and Blue Shield of Florida, Inc., HRPBC's primary objective is to highlight the far-reaching and troubling impact that a ruling in favor of Petitioner would bring about. This appeal will not merely resolve a discrete question raised by a peculiar set of facts. Rather, it will determine whether employees will be permitted to circumvent the Florida Civil Rights Act's ("FCRA") limitations periods and prohibition against the filing of civil actions grounded upon claims lacking a reasonable foundation.

The procedures and limitations applicable to claims under the FCRA are relatively straightforward. Following the timely filing of a charge of discrimination with the FCHR within three-hundred and sixty-five (365) days of the alleged discriminatory act, an investigation takes place, the outcome of which determines the nature and time limitations of the available remedies. If a determination of "reasonable cause" is issued, a civil action must be filed within one year. Florida Statute 760.11(5). If a determination of "no reasonable cause" is issued, the only avenue available to the employee is to request an administrative hearing within thirty-five (35) days of the determination. Florida Statute 760.11(7). Finally, in the event that the FCHR fails to make a determination after one hundred eighty (180) days have passed since the filing of the charge, a four-year statute of limitations applies. See Joshua v. City of Gainesville, 768 So.2d 432 (Fla. 2000).

These procedures and limitations evince the Florida Legislature's support for two policies that are of major import to HRPBC and its member companies. First, they demonstrate the Legislature's intent to limit, if not altogether prevent, the filing of unfounded employment discrimination claims in Circuit Court. Second, they show the Legislature's desire to expedite the filing of claims under the FCRA,

and thereby avoid litigation over stale and antiquated disputes, absent unreasonable delay by the investigating agency.

Petitioner's position is that these procedures and limitations can be avoided through the simple act of dual filing a charge with both the FCRA and the Equal Employment Opportunity Commission ("EEOC"). As its primary point, Petitioner argues that the EEOC's standard "Dismissal and Notice of Rights" form (stating that the EEOC is "unable to conclude" that a violation of the statutes has occurred) is not a "no cause" determination under the FCRA and, therefore, does not trigger the thirty-five day window to seek the limited remedy of an administrative hearing. Secondarily, Petitioner seems to suggest that even a finding of "reasonable cause" by the EEOC would not act as "reasonable cause" finding under the FCRA, and thus would not require the filing of a civil action within one year. Consequently, Petitioner would have this Court find that the EEOC is powerless to affect her rights under the FCRA and, consequently, a four-year statute of limitations applies to <u>all</u> dual filed charges.

As is demonstrated below, the outcome proposed by Petitioner is contrary to the EEOC's perspective regarding its own investigative procedures. The EEOC's regulations and internal enforcement guidelines show that its form containing the "unable to conclude" statement is a "no cause" determination that triggers the

thirty-five day period. HRPBC will also show the extent to which the policies underlying the limitations periods set forth in the FCRA would be undermined by the result suggested by Petitioner.

For these reasons, HRPBC requests that this Court rule in favor of the Respondent and affirm the decision of the Third District Court of Appeals.

ARGUMENT

I. A DETERMINATION BY THE EEOC EXPRESSING THAT IT IS "UNABLE TO CONCLUDE" THAT A VIOLATION OF THE STATUTES HAS OCCURRED CONSTITUTES A "NO CAUSE" DETERMINATION THAT TRIGGERS THE THIRTY-FIVE DAY PERIOD IN WHICH AN ADMINISTRATIVE HEARING MUST BE SOUGHT UNDER THE FCRA.

The Third DCA below held, and federal courts have likewise held, that when a charge is dually-filed with both the EEOC and the FCHR, a determination by one agency operates as a determination by both. See, e.g., Blakely v. United Servs. Auto Ass'n, 1999 U.S. Dist. LEXIS 17723 (M.D.Fla. 1999) (EEOC dismissal and "no cause" determination equivalent to FCHR "no cause" finding); Dawkins v. Bellsouth Telecommunications, Inc., 53 F.Supp.2d 1356 (M.D.Fla. 1999) (EEOC "no cause" determination operates as a "no cause" determination by the FCHR). These decisions are well reasoned and consistent with the purpose of the Worksharing agreement between the EEOC and the FCHR, which provides that: "once an agency begins an investigation it resolves the charge." See 1998 Worksharing Agreement Between FCHR and EEOC, attached hereto as Exhibit A.[1]

[1] Petitioner asserts that the decision of the Second District Court of Appeals in Jones v. Lakeland Regional Medical Center, 2001 Fla. App. LEXIS 15786 (Fla. 2nd DCA 2001), which interpreted a Worksharing Agreement between the EEOC and the FCHR, is significant and should be considered by this Court. However, that case interpreted provisions of the 1999 Worksharing Agreement. Notably, the charge filed in this action was subject to the 1998 version of the Worksharing Agreement which, as the Second DCA noted, did not contain the cited provisions. Moreover, the provisions the court in Jones relied upon have been deleted in the current version of the Worksharing Agreement. See Worksharing Agreement for Fiscal Year 2002, Attached hereto as Exhibit B.

Certainly, if an EEOC determination made upon a dual-filed charge did not "stand in the shoes" of an FCHR determination, the EEOC would be powerless to "resolve" such charges.

Petitioner asserts that, the EEOC's role in investigating and resolving FCRA claims notwithstanding, its standard "Dismissal and Notice of Rights Form" ("EEOC Form 161") providing that it was "unable to conclude" that a violation of the statutes occurred, does not constitute a 'no cause' determination that triggers the obligation to seek an administrative hearing within 35 days under the FCRA. This assertion is grounded upon the fact that EEOC Form 161 does not contain the words "no cause" or "no reasonable cause." This is a form over substance argument that ignores the EEOC's stated explanation (set forth in its internal guidelines and Compliance Manual) of the role Form 161 plays in its procedures for resolving charges. Such an approach is inappropriate, as "an agency's interpretation of its own regulations has traditionally been accorded considerable respect." Beach v. Great Western Bank, 692 So.2d 146, 149 (Fla. 1997); see also, Humana, Inc. v. Dep't of Health and Rehab. Serv., 492 So.2d 388, 392 (Fla. 4th DCA 1986) ("the agency's interpretation of its own rule is entitled to great weight and persuasive force in the appellate court.").

A historical review of the EEOC's procedural guidelines relating to the issuance of "no cause" determinations demonstrates that EEOC Form 161 (with the "unable to conclude" box checked) is, in fact, a "no cause" determination. In 1987, the EEOC Compliance Manual provided the following guidance on dismissals:

> Types of Dismissals – EEOC procedures provide for three types of dismissals. The first type, covered in § 4.3, involve jurisdictional or coverage considerations such as timeliness, standing, or whether the respondent is subject to the statutes. The second type, covered in § 4.4, relates to actions or status of the charging party/complainant. The third type occurs when a no cause finding becomes final, i.e., either when the review request period expires or when a review is completed (see § 4.5 – note that Form 161 is not used in such cases).

EEOC Compliance Manual, Section 4.1 (10/87) (emphasis added).[2] As indicated in this provision, at that time the EEOC did not use Form 161 when it issued a determination of "no cause," but rather issued a substantive letter of determination.

In June of 1995, the EEOC changed its policy in this regard, as confirmed by its "Priority Charge Handling Procedures," which provide as follows:

> Elimination of Substantive "No Cause" LODs[3]
>
> Substantive "no cause" determinations will no longer be used. Instead, the parties will be informed in a short-form determination that the investigation failed to

[2] The cited portions of the EEOC Compliance Manual are attached hereto as composite Exhibit C.
[3] "LOD" stands for "Letter of Determination."

> disclose a violation. These determinations will not include particularized factual findings, but rather will use the following uniform language which is included in the dismissal form approved on May 1, 1995, and a copy of which is attached as Attachment B:
>
> > Based upon the Commission's investigation, the Commission is **unable to conclude** that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge.

Id. at p. 11 (emphasis added).[4] This change in the method of issuing a "no cause" determination was further reflected when the EEOC next revised Section 4 of its Compliance Manual to provide as follows:

> Types of Dismissals – There are three types of dismissals. The first type, covered in § 4.3, involves jurisdictional or coverage considerations, such as timeliness, standing, or whether the respondent is subject to the statutes. The second type, covered in § 4.4, relates to the actions or status of the charging party/complainant. The third type occurs upon the issuance of a no cause finding (see § 4.5).

EEOC Compliance Manual, Section 4.1 (11/96). Notably, and consistent with the "Priority Charge Handling Procedures," this revised version of Section 4 removes

[4] A complete copy of the EEOC's Priority Charge Handling Procedures is attached hereto as Exhibit D.

the prior prohibition against the use of EEOC Form 161 in cases in which a determination of "no cause" is made.[5]

Thus, it is evident, based upon the EEOC's procedural guidelines and regulations, that EEOC Form 161, with the "unable to conclude" box checked, communicates and constitutes a "no reasonable cause" determination. Despite the EEOC's express language, Amicus Curiae National Employment Lawyers Association, Florida Chapter, offers another somewhat tortured explanation, suggesting that in

> April of 1995, the EEOC abandoned its previous policy of issuing 'no cause' determinations in cases where reasonable cause was not established, and instead initiated a policy of dismissing such charges without particularized findings.

Brief Amicus Curiae of NELA, p. 5. This explanation is simply incorrect, as the current EEOC Compliance Manual continues to list "no cause" findings as one of three types of dismissals it issues. Moreover, the EEOC's own published statistics show that, despite the change in form, "no cause" determinations are still issued by the EEOC. Indeed, these statistics confirm that approximately sixty percent of all charges filed between 1996 and 2000 have resulted in "no cause" findings. See EEOC Enforcement Statistics and Litigation (published on www.eeoc.gov), a copy

[5] The current version of Section 4, issued in April 1997, is attached hereto as part of Composite Exhibit C.

of which is attached hereto as Attachment D. The statistics do not refer to any dismissals "without particularized findings."

Therefore, the written guidance from the EEOC supports the Third DCA's conclusion that an EEOC Form 161 with the "unable to conclude" box checked is a "no cause" determination that triggers the limitations set forth in the FCRA.

II. THE OUTCOME PROPOSED BY PETITIONER WOULD ALLOW EMPLOYEES TO STRATEGICALLY CIRCUMVENT THE TIME AND REMEDY LIMITATIONS SET FORTH IN THE FCRA.

This dispute arises from the use of a curious (and increasingly popular) strategic tactic. Petitioner apparently had no intention of pursuing claims under the federal discrimination statutes. Nonetheless, rather than simply filing with the FCHR, the agency with the primary responsibility for investigating charges under the FCRA, she initiated her claim by filing a charge with the EEOC – a federal agency. Scrutiny of this paradoxical approach reveals its purpose – to ensure that her charge would be investigated by the EEOC, rather than the FCHR.

The preference for an EEOC investigation is directly related to that agency's use of the words "unable to conclude" in its standard adverse determinations (conveyed by Form 161). As is reflected in Petitioner's argument, employees believe that, because this language is used instead of "no reasonable cause," the EEOC's adverse determination, unlike an adverse determination by the FCHR, can

never divest employees of the right to file a circuit court action, and instead require that they pursue an administrative hearing that must be sought within 35 days if they wish to obtain further review of their claim. This is the classic "having one's cake and eating it too" approach – employees wish to maintain the right and ability to satisfy the FCRA's administrative prerequisites by placing their charge in the hands of the EEOC, while at the same time avoiding the potential limitations that the FCRA intended to result from an adverse administrative finding.

If this Court affirms the Third DCA, the distinction between the language used in the FCRA's and EEOC's adverse determinations will appropriately be treated as one of form, rather than substance. However, if this Court rules that the EEOC Form 161 (containing the "unable to conclude" language) does not constitute a determination of "no cause" under the FCRA, employees would be able, through tactical "forum shopping" at the administrative level, to satisfy the requirement of exhausting their administrative remedies, while at the same time avoiding any administrative finding that might ultimately prevent them from proceeding to court. Indeed, as Petitioner's position is that a Form 161 is the functional equivalent of a circumstance in which the administrative agency makes no determination at all, this tactic would ensure that FCRA claims arising from dual filed charges investigated by the EEOC would always be subject to the extended four-year statute of limitations.

Petitioner's position, if found to be correct, would render the Worksharing relationship between the FCHR and EEOC wholly ineffectual. A meaningful and effective Worksharing agreement providing for deferral of the task of investigating charges the FCRA is only possible if adverse determinations by the EEOC are regarded as having the same impact on FCRA rights and obligations as adverse determinations by the FCHR.

The result advocated by Petitioner is also contrary to, and would effectively thwart the intent of the Florida Legislature as reflected in the administrative prerequisites and limitations periods set forth in the FCRA. These administrative prerequisites and limitations periods reveal a dual legislative purpose. First, as this Court noted in its decision in Joshua v. City of Gainesville, 768 So.2d 432, 436-37 (Fla. 2000), "the Legislature wanted persons who believe they have been the object of discrimination to go through the administrative process before bringing a circuit court civil action." However, also apparent is the Legislature's desire to provide a clear and expedient procedure for claims once the administrative procedure is complete. To this end, the FCRA requires that actions based upon claims with a reasonable foundation be filed within one year of determination (rather than the four-year period applicable when no determination is made), and denies immediate access to the circuit courts (instead providing only administrative appeal rights) when claims are deemed as lacking a reasonable foundation.

Thus, the FCRA is designed to ensure that, once a meaningful administrative investigation has been completed, employers are protected from both stale and meritless claims. In this regard, the FCRA's limitations are consistent with the fundamental purpose behind all statutes of limitations, as this Court has articulated:

> A prime purpose underlying statutes of limitation is to protect defendants from unfair surprise and stale claims: "As a statute of [limitations], they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court."

Major League Baseball v. Morsani, 790 So.2d 1071 (Fla. 2001) (quoting Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976)).

Indeed, these concerns are of particular relevance in the context of employment related claims. In today's dynamic workplace, where turnover is commonplace, a period exceeding one year is a functional eternity. In the course of three to four years, the reasons for individual employment decisions (even if well documented) often are difficult to articulate. Such reasons, though entirely legitimate, may be lost in memories that are eroded by time, clouded by a morass of subsequent employment decisions, or simply unavailable as managers change jobs and residences.

Stale employment claims are also problematic due to the nature of the remedies. The primary source of damages available under the FCRA is backpay which, of course, accrues throughout the period predating the filing of a civil action. If employees are permitted to extend the limitations period through strategic tactics, such damages may be increased (subject to minimal mitigation efforts) prior to the deadline for filing a lawsuit.

For these reasons, it is not at all surprising that the U.S. Supreme Court and other federal courts have echoed this Court's rationale for limitations periods when discussing those applicable to federal employment discrimination claims. See, e.g., Delaware State College v. Ricks, 101 S.Ct. 498, 503, 449 U.S. 250, 256-7 (1980) (limitations periods under Title VII of the Civil Rights Act of 1964 exist "to

protect employers from the burden of defending claims arising from employment decisions that are long past."); Lewis v. Conners Steel Company, 673 F.2d 1240, 1243 (11th Cir. 1982) ("legislative purpose undergirding [Title VII's limitations period] is a protection to the employer and is plainly there for its benefit alone.").

Certainly, these important purposes should not be so easily undermined through strategic manipulations. Employees who, by their own choice, elect to dual file, and thereby trigger a deferral of their charges to the EEOC, should be subject to the same limitations as would be applied if the charges were investigated by the FCHR. If the investigating agency (EEOC or FCHR) finds merit in the claim, their lawsuits should be promptly filed within one year. If the agency is unable to find an evidentiary basis for the claim (however that inability is articulated by the agency), the employee should be required to prevail in an administrative appeal before being permitted to clutter the circuit courts with suits lacking any evidentiary basis. This is what the legislature intended, and the option of dual filing should not create a loophole that permits this purpose to be evaded.

CONCLUSION

For the foregoing reasons Amicus Curiae Human Resource Association of Palm Beach County respectfully requests that this court rule in favor of the Respondent and affirm the decision of the Third District Court of Appeal.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this _____ day of December, 2001 to: Lisa Fletcher-Kemp, Esq., Fletcher-Kemp, P.A., 3800 S. Ocean Drive, Suite 217A, Hollywood, Florida 33019; Gary Printy, Esq., 1301 Miccosukee Road, Tallahassee, Florida 32308-5068; Patrick Coleman, Esq., and Jason Sammis, Esq., 2065 Herschel Street, P.O. Box 40089, Jacksonville, Florida 32203-0089; Archibald Thomas III, Esq., 1301 Gulflife Drive, Gulflife Tower 1640, Jacksonville, Florida 32207; Richard E. Johnson, Esq., 314 W. Jefferson Street, Tallahassee, Florida 32301; Aaron D. Lyons, Esq., and Andrew S. Hament, Esq., 499 S. Harbor City Boulevard, Suite 201, Melbourne, Florida 32901; Allan H. Weitzman, Esq., and Arlene K. Kline, Esq., 1 Boca Place, Suite 340 West, 2255 Glades Road, Boca Raton, Florida 33431.

_____
Christine D. Hanley, Esquire
Florida Bar No.: 969737
David H. Spalter, Esquire
Florida Bar No.: 966347

CERTIFICATE OF COMPLIANCE

Petitioners hereby certify that the Brief of Human Resource Association of Palm Beach County as *Amicus Curiae* in Support of Respondent complies with the font requirements outlined in Fla. R. App. P. 9.210(2). This brief is typed in Times New Roman 14 point.

_____
Christine D. Hanley, Esquire
Florida Bar No.: 969737
David H. Spalter, Esquire
Florida Bar No.: 966347

EXHIBIT "A"

EXHIBIT "B"

EXHIBIT "C"

EXHIBIT "D"