

IN THE SUPREME COURT OF FLORIDA

CORDETTE WOODHAM,

Petitioner,

Case No. SC01-
2160

V.

Lower Tribunal No. 3D00-2277

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Respondent.

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

ANSWER BRIEF OF RESPONDENT, BLUE
CROSS AND BLUE SHIELD OF FLORIDA, INC.

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DESIGNATION OF THE PARTIES AND REFERENCES TO THE RECORD

For this Court's convenience, the following are the designations of the parties and references to the record used in the Answer Brief. Petitioner, Cordette Woodham, is referred to in this Brief as "Woodham" or "Petitioner". Respondent, Blue Cross and Blue Shield of Florida, Inc., is referred to in this Brief as "Blue Cross" or "Respondent".

References to the record on appeal are abbreviated as "R. ____", followed by the appropriate page number of the record. References to the Appendix to this Brief are abbreviated as "A. ____", followed by the number in which the document is designated in the Appendix. Specific page cites to the Appendix are also provided where possible.

STATEMENT OF CASE AND FACTS

A. Nature of Case

The essential facts properly at issue before this Court are as follows.¹ Woodham resigned from the employ of Blue Cross and Blue Shield of Florida, Inc. ("Blue Cross") on or about November 3, 1997. (R. 10; 36). Woodham filed her original charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC") on June 17, 1998 against Blue Cross. (R. 3; 15-16). Woodham's original charge did not request that the charge be dual filed with the Florida Commission on Human Relations ("FCHR"). (R. 16). In addition, the space at the top of Woodham's original charge of discrimination, where a complainant normally would indicate the state or local agency with which the complaint should be dual filed, was left blank. *Id.* Nowhere on the face of the original charge of discrimination did Woodham indicate that her charge should be dual filed with the FCHR. *Id.* On January 15, 1999, the EEOC contacted Woodham's attorney and requested that Woodham sign an amended charge of discrimination which represented the EEOC's version of the

¹While Woodham devotes a substantial portion of her Statement of Case and Facts to factual issues regarding the merits of her lawsuit, these factual issues were never reached by the trial court, which granted summary judgment on purely procedural grounds. Accordingly, those facts are not appropriate for this Court's consideration.

alleged discriminatory events. (R. 3). On February 23, 1999, Woodham, through her attorney, sent a letter to the EEOC, accompanied by the signed, amended charge of discrimination, requesting that Woodham's original charge be considered with the amended charge, "as the EEOC's version [i.e. the amended charge] was quite abbreviated." (R. 3; 26). This letter and the amended charge of discrimination was received by the EEOC on March 3, 1999. (R. 27). The amended charge of discrimination, filled out by the EEOC, does reference the FCHR in the appropriate space on the face of the charge. (R. 28). The box requesting dual filing is also checked. *Id.*

On July 22, 1999, the EEOC dismissed Woodham's charge of discrimination and issued Woodham a right-to-sue notice. (R. 30). Specifically the EEOC determined that "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." *Id.*

The FCHR has no record of a charge ever being filed by Woodham. (R. 109-110). Indeed, after an exhaustive search of both its computer records and its actual hard-copy paper records, the FCHR was unable to locate any record of a charge filed by or on behalf of Woodham. (R. 109). Woodham, likewise, has provided no evidence that her charge was ever received by the FCHR. While Woodham asserted in the lower

court that the EEOC filed an affidavit stating that Woodham's charge "was processed for dual filing," (R. 115), a proper review of the record indicates otherwise. (R. 136-37). The affidavit of Elsa Urquiza of the EEOC states that Woodham's charge was checked off for dual filing with the FCHR, that it is the EEOC's custom and practice to file all charges with the FCHR, and that the transmittal of a charge from the EEOC to the FCHR is done via EEOC Form 212. *Id.* This same affidavit, however, provided by Woodham in support of her case, actually states that after a diligent search of the documents contained in the EEOC's charge file the EEOC has been unable to locate any such transmittal form with respect to Woodham's charge. *Id.* Thus, Woodham has provided no evidence that her charge was "forwarded" or ever received by the FCHR.

B. Course of the Proceedings

On September 8, 1999, Woodham filed her complaint in the Circuit Court, Eleventh Judicial Circuit, Dade County, Florida, alleging racial discrimination and retaliation in violation of the Florida Civil Rights Act of 1992, as amended, Ch. 760, Fla. Stat. ("FCRA"). (R. 1-30). On March 2, 2000, Blue Cross filed Defendant's Motion for Summary Judgment and Statement of Undisputed Facts, and Defendant's Memorandum of Law in Support of its Motion for Summary Judgment. (R. 47-110). On June 2, 2000, Woodham filed Plaintiff's Motion and

Incorporated Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and Affidavit of Elsa Urquiza. (R. 113-161).

Blue Cross moved for summary judgment on three separate grounds: (1) Woodham's claims of discrimination were time-barred because she failed to direct-file a charge of discrimination with the FCHR within 365 days of the last discriminatory act as required by the FCRA; (2) even if the Court found that dual filing a charge with the EEOC satisfies the statutory requirements of filing a charge with the FCHR under the FCRA, Woodham's claims were still barred by failure to properly request dual filing and by Woodham's failure to indicate an intent to dual file her charge of discrimination with the FCHR; and (3) even assuming Woodham properly requested dual filing of her charge of discrimination so as to satisfy the FCRA filing requirements, Woodham's claim was barred by her failure to request an administrative hearing within 35 days of the EEOC's "no cause" determination, as required by the FCRA. (R. 101-103).

C. Disposition of the Lower Tribunal

On August 2, 2000, the trial court entered an order granting Blue Cross' motion for summary judgment. (R. 172-178). The court specifically reserved ruling on the first two issues and based its decision on the third issue. (R. 173).

Specifically, the trial court held that, even if Woodham properly requested dual filing of her charge of discrimination with the FCHR, Woodham's claim was barred because she failed to request an administrative hearing within 35 days of the EEOC's "no cause" determination, as required by the §760.11(7), Fla. Stat. (R. 4-6). The lower court found that the determination received by Woodham from the EEOC was a "no cause" determination and operated as a "no cause" finding for the FCHR, thus triggering the requirement under the FCRA that Woodham request an administrative hearing within 35 days. (R. 5). Since Woodham failed to request such a hearing pursuant to § 760.11(7), the trial court found that her claim under the FCRA was barred and, therefore, dismissed her Complaint with prejudice. (R. 6).

The Third District Court of Appeal of Florida affirmed the trial court's order. (R. 179-192). In so doing, the appellate court, relying on the decision of the United States District Court for the Middle District of Florida in *Blakely v. United Servs. Auto Ass'n*, Case No. 99-1046-Civ-T-17F, 1999 WL 1053122 (M.D. Fla. 1999), held that a "no cause" determination issued by the EEOC operates as a "no cause" finding by the FCHR. (R. 181). In addition, the appellate court held that Woodham was required to pursue an administrative hearing within 35 days of receipt of the "no

cause" determination, notwithstanding Woodham's argument that she had received a "reasonable cause" determination by operation of law under § 760.11(8), after the lapse of the 180-day period for FCHR action.² (R. 183-186). It is the first such holding which has been certified as a question of great public importance, and it is in conflict with the holding of the Second District Court of Appeal's decision in *Cisko v. Phoenix Medical Prod., Inc.*, 26 Fla. L. Weekly D1851 (Fla. 2d DCA July 27, 2001). (R. 193-196).

²As discussed in Respondent's Motion to Strike Portions of Petitioner's and Amicus Curiae's Briefs, this latter holding is not before the Court for review, as it was not certified as a question of great public importance, and it is not in conflict with the holding of any other district court of appeal.

SUMMARY OF ARGUMENT

While this Court has not yet requested jurisdictional briefs in this case, the record reflects that, after Woodham filed her charge of discrimination with the EEOC, neither Woodham nor the EEOC transmitted the charge of discrimination to the FCHR. Because Woodham failed to satisfy this threshold requirement, her claim would be barred on that ground. Therefore, it would be improvident for the Court to consider the effect of the EEOC's "no cause" determination in this case. Nonetheless, even if the Court assumes jurisdiction in this case, Woodham's cause of action under the FCRA is barred because Woodham failed to request an administrative hearing within 35 days of receiving a "no cause" determination from the EEOC. Until she sought a rehearing of the Third District Court of Appeal's decision, Woodham never contested the lower court's decision that the determination received by the EEOC operates as a "no cause" determination of the FCHR under the agencies' work-sharing agreement. Further, there is ample legal authority, as well as the EEOC's own explanation concerning its 1995 changes to the "no cause" language, which mandates a finding that the EEOC's "no cause" operates as an FCHR "no cause," so as to require that Woodham request an administrative hearing within 35 days as required by the plain language of the FCRA, § 760.11(7), Fla. Stat. Since Woodham

did not request such a hearing, her subsequent cause of action under the FCRA is barred and the lower court's decision to grant Blue Cross' summary judgment motion should be affirmed.

While Woodham argues that the Florida Supreme Court's recent decision in *Joshua v. City of Gainesville* is applicable to this case, the *Joshua* decision is distinguishable on its facts. First, *Joshua* involved statute of limitations issues, issues that are not present in this case. In addition, the procedural due process interests of fair notice and opportunity to be heard, which formed the basis for the *Joshua* decision, are not implicated in this case as Woodham received fair notice from the EEOC, unlike the plaintiff in *Joshua*, and Woodham was not deprived of the opportunity to be heard based on agency inaction, as was the plaintiff in *Joshua*. To the contrary, it was Woodham's own inaction, rather than agency inaction, which deprived Woodham of the opportunity to be heard when she failed to comply with the explicit provisions of § 760.11(7), Fla. Stat., and request an administrative hearing.

Woodham also argues that the *Joshua* decision allows a plaintiff to bring a cause of action as a matter of right after 180 days, even if the Commission subsequently makes a determination of no reasonable cause. Such an argument miscomprehends the holding of the *Joshua* case. In fact, the

language of the *Joshua* case, favoring the exhaustion of the administrative remedies of the FCRA before a civil action is brought, clearly supports Blue Cross' position that Woodham must follow the plain language of § 760.11(7) when a "no cause" determination is issued before bringing suit. Any result other than requiring a person who receives a "no cause" determination to abide by the provisions of § 760.11(7), even if the "no cause" is issued more than 180 days after the charge of discrimination is filed, subverts the statutory administrative exhaustion process and its purpose of preventing frivolous lawsuits from reaching the courts.

For all of these reasons, this Court should find that the Third District Court of Appeal of Florida correctly affirmed the trial court order granting Blue Cross' motion for summary judgment and dismissing Woodham's FCRA cause of action.

ARGUMENT

- I. BECAUSE WOODHAM RECEIVED A DETERMINATION OTHER THAN REASONABLE CAUSE, SHE WAS REQUIRED TO PURSUE AN ADMINISTRATIVE HEARING WITHIN 35 DAYS OF THE DATE OF THAT DETERMINATION UNDER § 760.11(7).**

While the certified question on appeal addresses whether the EEOC's "no cause" determination operates as a "no cause" determination under § 760.11(7) so as to trigger the administrative hearing requirements of that section, the Court need not even determine the effect of an EEOC "no cause"

determination in light of the language contained in § 760.11(7), Fla. Stat., which states:

If the commission determines that there is **not reasonable cause** to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause...

§ 760.11(7), Fla. Stat. (emphasis added). Thus, § 760.11(7) creates dichotomy between those complaints of discrimination for which reasonable cause has been found to exist, and those situations in which reasonable cause has not been found. When a complaint is dismissed under the latter circumstance, i.e., when a determination other than reasonable cause is made, the aggrieved person must seek an administrative hearing within 35 days of the date of the determination. Here, neither Woodham nor NELA claim that Woodham received a determination of reasonable cause. Accordingly, because a determination other than reasonable cause was made in this case, Woodham was required to exhaust her administrative remedies in accordance with § 760.11(7), Fla. Stat. Woodham's failure to comply with this requirement results in her FCRA claim being barred. As explained below, however, even if the Court were to construe § 760.11(7) as requiring a "no cause" determination, the EEOC's determination is just that. Thus, because the EEOC

determination at issue in this case is a "no cause" determination for FCRA purposes, Woodham was required to seek an administrative hearing within 35 days of that determination.

II. EVEN IF WOODHAM PROPERLY REQUESTED DUAL-FILING OF HER CHARGE WITH THE EEOC AND THAT DUAL-FILING SATISFIES THE FILING REQUIREMENTS OF THE FCRA, WOODHAM'S CLAIM IS BARRED BECAUSE SHE FAILED TO REQUEST AN ADMINISTRATIVE HEARING WITHIN 35 DAYS OF RECEIVING A "NO CAUSE" DETERMINATION FROM THE EEOC.

In its Order granting summary judgment, the trial court reserved ruling on two issues: (1) whether Woodham's claims of discrimination were time-barred because she failed to direct-file a charge of discrimination with the FCHR within 365 days of the last discriminatory act as required by the FCRA; and (2) even if the Court found that dual filing a charge with the EEOC satisfied the statutory requirements of filing a charge with the FCHR under the FCRA, whether Woodham's claims were still barred because she failed to properly request dual filing or indicate an intent to dual file her charge of discrimination with the FCHR. As to these two issues, Woodham has presented no evidence indicating that she ever direct-filed or dual filed a charge of discrimination with the FCHR.

To the contrary, all of the evidence in the record suggests that the FCHR never received a charge of discrimination from Woodham or from the EEOC. Accordingly, because these two threshold issues have not been addressed, yet could be determinative of the outcome of this case, Blue Cross respectfully suggests that the Court's assumption of jurisdiction over this case to consider the issues briefed below would be improvident.

- A. Woodham never timely asserted that the EEOC's "no cause" determination does not act as a "no cause" determination under the FCHR so as to bar Woodham's FCRA claim for failure to pursue the administrative remedies set forth in Fla. Stat. § 760.11(7).**

Notwithstanding the lack of evidence that Woodham ever direct-filed or dual-filed her charge of discrimination with the FCHR, Woodham never contended, until she sought a rehearing in connection with the lower court's decision, that the determination that she received from the EEOC relative to her charge of discrimination did not constitute a "no cause" determination.³ Woodham now argues, however, that the

³In her Initial Appeal Brief submitted to the Third District Court of Appeal of Florida, Woodham refers several times to the EEOC's determination as a "no cause" finding. (A. 14 at 14; 23). Similarly, in her Reply Brief submitted to the Third District Court of Appeal, Woodham states: "[t]he Appellant does not argue that a 'no cause' determination does not trigger the requirement to request an administrative

following language contained in EEOC Form 161, otherwise known as a "Dismissal and Notice of Rights", does not amount to a "no cause" determination by the FCHR:

The EEOC issues the following determination: Based upon its investigation, the EEOC 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 issues that might be construed as having been raised by this charge.

(R. 30). Woodham asserts that she was under no obligation to pursue an administrative hearing under Fla. Stat. § 760.11(7) as a result of her receipt of the foregoing determination. Woodham's argument, however, is in direct contravention of the plain language of § 760.11(7), which provides, in relevant part, that:

If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of the determination of reasonable cause... *If the*

hearing. The Appellant argues before this Court, and argued before the trial court, that § 760.11(7) is entirely inapplicable in the case at bar since the commission failed to render the purported determination within the statutorily prescribed period of 180 days." (A. 15 at 4). Moreover, despite the existence of case law, which Woodham relied upon in her Initial Brief to this Court, holding that an EEOC "no cause" determination does not operate as a "no cause" determination under the FCHR, Woodham did not cite any of those cases in the briefs that she submitted to the Third District Court of Appeal.

aggrieved person does not request an administrative hearing within 35 days, the claim will be barred...
(emphasis added).

Fla. Stat. § 760.11(7). Moreover, at least two Florida district courts of appeal have held that a charging party's receipt of the aforementioned EEOC "no cause" determination triggers that party's duty to seek an administrative hearing under § 760.11(7). First, in the decision under review, the Third District Court of Appeal, relying on the United States District Court for the Middle District of Florida's decision in *Blakely v. United Servs. Auto Ass'n*, 1999 WL 1053122 (M.D. Fla. 1999), affirmed the trial court's holding and determined, among other things, that a "no cause" determination issued by the EEOC operates as a "no cause" finding by the FCHR. (R. 181). In addition the Fourth District Court of Appeal of Florida, in *Bach v. United Parcel Services*, 26 Fla. L. Weekly D2095 (Fla. 4th DCA Aug. 29, 2001), adopted the analysis of the Third District Court of Appeal in *Woodham*, and held that a party who receives a "no cause" determination from the EEOC must follow § 760.11(7), Fla. Stat., and exhaust the administrative remedy provided therein, prior to filing a lawsuit in a Florida court.

In *Blakely*, relied upon by the Third District Court of Appeal in the decision under review, the defendants moved to dismiss the plaintiffs' FCRA claims arguing, among other

things, that the claim was barred as a result of the plaintiffs' failure to seek an administrative hearing within 35 days of receipt of a "no cause" determination from the EEOC, which was charged with investigating the plaintiffs' FCRA claims. 1999 WL 1053122 at *4. Chief Judge Kovachevich of the United States District Court for the Middle District of Florida agreed. *Id.* In so doing, the *Blakely* court first acknowledged the symbiotic relationship between the EEOC and the FCHR resulting from the worksharing agreement between the two agencies, which allowed the EEOC to investigate FCRA claims and render determinations as to those claims. *Id.* at *3-4. Relying on its earlier decision in *Dawkins v. Bellsouth Telecommunications, Inc.*, 53 F. Supp. 2d 1356 (M.D. Fla. 1999), *aff'd*, 247 F. 3d 245 (11th Cir. Jan. 9, 2001), the *Blakely* court explained:

In *Dawkins*, an employee brought a claim under the ADA as well as the FCRA. Under the worksharing agreement between the EEOC and the FCHR, filing with one agency constituted filing with the other. As such, when the EEOC handed down a no-cause finding, the need to file for an administrative hearing within 35 days under the FCRA was triggered. That is, the EEOC's finding took the place of the FCHR's potential finding. The same set of facts present themselves in this case.

Id. at *4.

In *Watkins v. Sverdrup Technology, Inc.*, Case No. 94-30401/RV (N.D. Fla. July 31, 1996), *aff'd on other grounds*, 153 F.3d 1308 (11th Cir. 1998)(A. 9), the court was likewise confronted with the effect of an EEOC determination on a plaintiff's right to proceed with an FCRA action. The *Watkins* court ultimately concluded that a "no cause" determination issued by the EEOC was tantamount to a "no cause" determination by the FCHR. While the plaintiffs made much of the fact that Fla. Stat. § 760.11 made no mention of the effect of an EEOC determination, the court noted that Fla. Admin. Code § 60Y-5.002 specifically provided for the negotiation of agreements to refer FCHR complaints to other public agencies having the authority and resources to investigate alleged unlawful employment practices. Moreover, the *Watkins* court pointed to the language of Fla. Admin. Code § 60Y-5.002(4), which states: "[t]he referral agency shall report its action on the complaint to the Executive Director [of the FCHR]. Substantial weight shall be accorded to any final findings and orders of the referral agency." Accordingly, the court explained "[b]ecause the regulations grant referral agencies the authority to take 'action' on FCHR complaints and issue a [sic] 'final' findings and orders, it appears that referral agencies are empowered to issue 'no

cause' determinations within the meaning of Section 760.11."

The *Watkins* court further relied on the plain language of the worksharing agreement between the EEOC and the FCHR, which indicates that the EEOC has the power to issue "final action" and "cause determinations" with regard to age discrimination charges that are dual-filed with the EEOC and FCHR.⁴ In light of the regulations and the worksharing agreement, therefore, the *Watkins* court found by implication that the EEOC's no cause determinations apply to Florida Civil Rights Act claimants. In so finding, the court stated:

⁴While different Worksharing Agreements are entered into each fiscal year, such that the Worksharing Agreement applicable in *Watkins* would not have governed the processing of Woodham's charge of discrimination, the Worksharing Agreement that would have applied to Woodham's complaint of discrimination had she properly direct-filed or dual-filed her complaint similarly contemplates that the EEOC has the ultimate authority to resolve charges deferred to it for processing. Specifically, Woodham filed her original charge of discrimination on June 17, 1998. (R. 15-16). Thus, the Worksharing Agreement between the FCHR and the EEOC for Fiscal Year 1998, which was in operation from October 1, 1997 to September 30, 1998, would govern the processing of Woodham's charge of discrimination. Given that Woodham has acknowledged that the Worksharing Agreement at least governs the filing of her charge of discrimination, (Petitioner's Brief at 6), and because the Worksharing Agreement is a proper subject of judicial notice pursuant to Fla. R. Evid. 90.202(5), Blue Cross respectfully requests that the Court take judicial notice of the Fiscal Year 1998 Worksharing Agreement, which is included in the Appendix to this Brief and designated as "A. 13", in considering the certified question.

This conclusion seems to be reinforced by the fact that the FCHR must be made aware of all of the EEOC's cause determinations, and that the FCHR may inform the EEOC if it does not concur with those determinations. These activities would be superfluous if the FCHR must make its own cause determinations for every dual filed complaint.

The *Watkins* court also explained the implications were it to reach a contrary conclusion, noting that:

if the EEOC's determination does not apply to FCHR claims, then most plaintiffs, whose FCHR claim, is initially processed by the EEOC pursuant to the worksharing agreement would be entitled to file suit regardless of an adverse EEOC determination, because the FCHR would rarely have the opportunity to review the EEOC's "no cause" finding and issue its own determination within the 180 days of the dual-filing. Additionally, as noted above, the FCHR would have to make its own cause determinations on every dual-filed complaint in order to avoid having its inactions be deemed a finding of reasonable cause. Such duplication would undermine the very purpose of the worksharing agreement.

In addition to the courts' decisions in *Bach*, *Blakely*, *Dawkins*, *Watkins* and the decision under review, discussed *supra*, several other courts have likewise reasoned that the worksharing agreement mandates that a finding by either the EEOC or the FCHR operates as a finding for the other agency as well. *Mulkey v. Equifax Card Servs. Inc.*, Case No. 94-1080-Vic.-T-25E (M.D. Fla., January 9, 1996) (copy of transcript, A. 8); *Long v. Health Tour Management, Inc.*, Case No. 8:01-CV-304-T-17-TGW (M.D. Fla. May 31, 2001)(copy of Order, A. 5);

Gorman v. Jim Palmer Trucking, Inc., Case No. 8:01-CV-170-T-MSS (M.D. Fla. Sept. 20, 2001)(copy of Order, A. 3); *Lynch v. Lexford Residential Trust*, 6:99-CV-1591-Orl-28KRS (M.D. Fla. Nov. 26, 2001)(copy of Order, A. 7); *Hamrick v. Standard Register Co.*, No. 96-3944-CA (Cir. Ct., 4th Cir., Duval County, September 2, 1997) (copy of Order, A. 4); *Lowe v. BTI Services, Inc.*, Case No. 97-4679 (Cir. Ct., 4th Cir., Duval County, July 20, 1998) (copy of Order, A. 6). Accordingly, under the FCRA, if the EEOC issues a finding of no reasonable cause, then, as required under the plain language of § 760.11(7), Fla. Stat., a plaintiff may not bring suit for violation of the FCRA unless the plaintiff first requests an administrative hearing pursuant to Fla. Stat. §§120.569 and 120.57.

Here, as in the foregoing cases, Woodham relies on the work-sharing agreement between the EEOC and FCHR to support her claim that her charge was dual-filed and, thus, properly filed under the FCRA. Petitioner's Brief at 6. Assuming that the work-sharing agreement allows dual-filing and assuming that filing a charge with the EEOC satisfies the filing

requirements of the FCRA,⁵ once the EEOC issued a "no cause" finding, Woodham was required to seek an administrative hearing within 35 days of the no cause determination and could only bring suit if an administrative law judge considered the no cause determination and then subsequently issued a finding that there was reasonable cause to believe the defendant violated the FCRA. Since Woodham clearly has not done so, her action under the FCRA is barred.

Woodham cannot reap the benefit of the work-sharing agreement through dual filing, let the EEOC investigate her claim, and then claim that the determination of the referral agency (EEOC) is not reviewable under Fla. Stat. § 760.11(7). This is especially true in a case, like this one, where the Woodham chose to bring a lawsuit only under the FCRA after the EEOC had exclusively done the investigative work on her claim. Such a result would render the FCRA administrative hearing provision meaningless as any plaintiff could then dual-file a

⁵As indicated at the outset, there is no evidence in the record that Woodham direct-filed a charge of discrimination with the FCHR or that her charge was dual-filed with the EEOC and the FCHR. Moreover, the lower court reserved ruling as to whether Woodham had accomplished either of these types of filing. Blue Cross assumes the existence of these facts only for the purposes of addressing the impact of an EEOC "no cause" determination on a plaintiff's right to bring an FCRA action.

claim through the EEOC, receive a "no cause," and then bring a claim under the FCRA without ever being subject to review of the FCHR or the FCRA provisions.

Many of the cases relied upon by Woodham which have concluded that a "no cause" finding by the EEOC does not serve as a "no cause" determination under the FCHR base this conclusion on a tortured reading of 760.01(3), Fla. Stat., which provides:

[t]he Florida Civil Rights Act shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provisions involved.

Fla. Stat. § 760.01(3).

For instance, in *Cisko v. Phoenix Medical Prod., Inc.*, 26 Fla. L. Weekly D1851 (Fla. 2d DCA July 27, 2001), the Second District Court of Appeal relied exclusively on the "liberal construction" language of § 760.01(3), Fla. Stat., in holding that the EEOC's "no cause" finding was not a "no cause" finding for FCHR purposes. In so holding, the *Cisko* court expressed concern that the EEOC "no cause" determination did not definitively state that the charging party's charge of discrimination did not have merit, and raised questions as to the finality of the determination by stating "[n]o finding is made as to any other issues that might be construed as having

been raised by this charge." Finally, notwithstanding the defendant's record evidence reflecting the submission of a letter from the FCHR to the complaining party advising that her charge was being delegated to the EEOC for processing and that she would have 35 days from the EEOC's letter of determination to seek review of the EEOC's findings,⁶ the *Cisko* court somehow found that the plaintiff would not have sufficient notice of the rights she possessed upon the dismissal of her complaint.

The reasoning of *Cisko* deficient for several reasons. First, while EEOC Form 161 does not explicitly identify the reason for its determination, the "no cause" language which is employed definitively informs the reader that the EEOC has not acted favorably on the claim. Moreover, while the *Cisko* court expressed doubt as to whether EEOC Form 161 clearly conveyed the finality of the "no cause" determination, the form is

⁶Because, as explained above, the FCHR never received a complaint of discrimination from Woodham, through direct-filing, dual-filing or otherwise, the FCHR would not have had the occasion to issue a similar deferral letter in this case. The Fiscal Year 1998 Worksharing Agreement between the EEOC and the FCHR states, however, that: "[w]ithin ten calendar days of receipt, each Agency agrees that it will notify the Charging Party and Respondent of the dual-filed nature of each such charge it receives for initial processing and explain the rights and responsibilities of the parties under the applicable Federal, State or Local Statutes." (A. 13 at pg. iii).

titled "Dismissal and Notice of Rights" and explicitly states: "THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASONS..." (R. 30). In reading this language, there could be no doubt that the EEOC's determination was final. Furthermore, as indicated above, claimants receive notice at the outset of the charge processing period not only that their charge will be processed by the EEOC, but also that they must at least take some action within 35 days of an EEOC determination to preserve their rights. Finally, the *Cisko* court professed confusion as to whether the EEOC "Dismissal and Notice of Rights" constituted a "determination". As explained in the following section of this Brief, the EEOC only issues a Dismissal and Notice of Rights to apprise charging parties of the "no cause" determination. As elaborated upon below, the EEOC Commissioners instructed field offices to cease issuing letters of determination in favor of holding informal pre-determination conferences with charging parties, at which such parties are orally informed of the reasons for the "no cause" determination. Thus, even according to the statutory language the liberal construction that it is due under 760.01(3), Fla. Stat., the conclusion is inescapable that an EEOC "no cause" determination serves as an adequate substitute for an FCHR "no cause" determination so as

to require the recipient of such a determination to seek an administrative hearing within the 35 day period specified in § 760.11(7), Fla. Stat.

The reasoning of the Second District Court of Appeal of Florida in *Jones v. Lakeland Regional Medical Center*, 2001 WL 1386595 (Fla. 2d DCA Nov. 9, 2001), is likewise defective. First, the *Jones* court erroneously adopts *Cisko's* finding that an EEOC "no cause" determination does not constitute a "no cause" determination for FCHR purposes. Second, the *Jones* court wrongly interprets the Fiscal Year 1999 Worksharing Agreement as requiring the FCHR to issue its own findings, agreeing with the EEOC only if its findings were acceptable to the FCHR.⁷ The *Jones* court apparently ignored language contained in the Fiscal Year 1999 Worksharing Agreement, also included in the Fiscal Year 1998 Worksharing Agreement, which states:

Normally, once an agency begins an investigation, it resolves the charge. Charges may be transferred between the EEOC and the Florida Commission on Human

⁷The *Jones* court noted that the language it relied upon in concluding that the FCHR must adopt the findings of the EEOC in order for such findings to constitute a "no cause" determination was not contained in the 1998 Worksharing Agreement. As explained in footnote 4 of this Brief, the Fiscal Year 1998 Agreement would govern the processing of Woodham's charge of discrimination. Accordingly, the issue presented in *Jones* would not be implicated here.

Relations within the framework of a mutually agreeable system. Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III...

Fiscal Year 1998 Worksharing Agreement Between the EEOC and the FCHR. (A. 13).

The remaining federal district court opinions relied upon by Woodham are similarly unavailing. Those cases simply declare the EEOC's "no cause" language confusing without attempting to reconcile the EEOC's role in receiving and resolving charges of discrimination on behalf of the FCHR pursuant to the Worksharing Agreement. Accordingly, in light of the foregoing, this Court should hold that Woodham's EEOC "no cause" determination was tantamount to a "no cause" determination under the FCHR, such that Woodham's failure to seek and administrative hearing within 35 days of that determination renders her FCRA claim barred.

B. The 1995 changes to the "no cause" language on EEOC Form 161 did not change the effect of that language as a "no cause" determination on the merits.

The cases relied upon by Woodham in arguing that an EEOC "no cause" determination is not tantamount to an FCHR "no cause" determination are further undermined when one examines

the reasons for and effect of the EEOC's 1995 change to the "no cause" language. In its brief, Amicus Curiae, the National Employment Lawyers Association, Florida Chapter ("NELA"), alludes to the 1995 change in contending that the following language does not constitute a "no cause" determination so as to trigger the administrative hearing requirements under § 760.11(7):

Based upon its investigation, the EEOC 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 issues that might be construed as having been raised by this charge.

Specifically, NELA asserts that the foregoing language does not amount to a "no cause" determination by misconstruing a passage from a secondary source, which indicates that "effective as of 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." NELA Brief at 5 (citing LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 29, at 1240, n. 219 (3rd Ed. 1996); *Daily Lab. Rep.* (BNA) at E-5 (Apr. 20, 1995)). When taken out of context this passage may appear to support Woodham's argument that the language now contained in EEOC

Form 161 does not constitute a "no cause" determination on the merits. A review of EEOC Commission Meeting minutes, however, in which the reasons for the change were discussed in detail, clearly establishes that the language instituted in 1995 retained its status as a "no cause" determination on the merits.

Between December 1994 and March 1995, the Charge Processing Task Force of the EEOC compiled a report recommending, among other things, that the EEOC "eliminate the substantive 'no cause' letter of determination in cases where the appropriate investigation of the charge has not established reasonable cause to believe that discrimination has occurred." (A. 10 at pp. 5-6). The report recommended the adoption of alternative language, including the aforementioned language recited above (A. 10 at pp. 5-6). The report further indicated that its recommendation could be implemented by vote of the EEOC Commissioners. (A. 10 at pg. 6).

Thereafter, on April 19, 1995, a Special Commission Meeting of the EEOC was convened to consider the recommendations of the Charge Processing Task Force. (A. 11). During that meeting, EEOC Vice Chairman Paul M. Igasaki

explained the rationale for the change in the "no cause" language as follows:

I think that the main reason for doing this, one, is to make sure we've gotten input from external parties who have dealt with our system. There are more than a few cases in which letters of determination have resulted in misuse of those letters by court authorities in making assumptions or judgments based upon our initial findings or our resolution of charges brought before us. That wasn't the intention, nor is it the power that the agency has, so that's one issue we're trying to address with it.

The second is the question of resources. They're taking time to formalize and elaborate. They amount to or may appear to be particularized fact finding, which we are not trying to do if we're truly practicing priority case handling. We should stop investigating as soon as we know there's no violation, not necessarily finding every fact that would be relevant to a case once we know enough not to proceed.

And finally, I think we do want to make sure that at all stages of the investigation, at all stages of our process, as I stated up front, the sharing of information is essential and that charging parties and respondents both should get as much information as they can, including being told why we are not going to proceed with the case. We simply believe that the letter of determination is not the best or the favored vehicle to provide that information.

(A. 11 at pp. 44-45).

During the course of the April 19, 1995 meeting, EEOC Commissioner Joyce E. Tucker expressed concerns relative to the impact of the elimination of the "no cause" determination on state fair employment practice agencies, stating:

... there are certain FEPAs who cannot dismiss their cases based on a no determination finding of the Commission.

I think Philadelphia has 2,000 cases that if we make a determination those are dual file cases that will activate. They will have to investigate those cases even though under the dual filing relationship EEOC investigates what it gets, the FEPAs investigate what they get. If we vote on this, Philadelphia or Pennsylvania get those 2,000 cases if we make that kind of decision. And we don't know what impact it has on other FEPAs, but despite that fact I still have problems with it.

(A. 11 at pp. 61-62). In other words, Commissioner Tucker was concerned that the revised language meant that the EEOC was not going to make any determination as opposed to making a "no cause" determination, but without a rationale. (A. 11 at pp. 63-65). Furthermore, prior to voting for the change in the "no cause" language, Commissioner Silberman clarified that a vote in favor of changing EEOC Form 161 to reflect the current "no cause" language would result only in the elimination of the rationale, but not in the elimination of the determination that there was "no cause." (A. 11 at pg. 67).

The meaning of the "no cause" language implemented in April 1995 was further explored at a February 8, 1996 EEOC Commissioner's meeting at which Commissioner Tucker was given an opportunity to express her concerns relative to the 1995 change in the EEOC's "no cause" language. (A. 12). At the

February 1996 meeting, Commissioner Tucker clarified what she had voted against at the April 1995 meeting, stating:

... I voted against eliminating the substantive no cause letter. There was no reason to vote against not continuing to have no cause, because we have agreed that we were not going to eliminate cause and no cause. So that wasn't the issue.

The only issue was were we eliminating the substantive no cause letter of determination. I said no, because I think parties are entitled to receiving from the Commission in writing detailed rationale for why we have determined that we are going to dismiss their charge.

(A. 12 at pg. 15). In response to Commissioner Tucker's concerns, Chairman Casellas clarified the meaning of the current "no cause" language in the following exchange with Commissioner Tucker:

COMMISSIONER TUCKER: When we say that we are unable to conclude, but respondent, well we are not certifying that respondent is in compliance. We are saying that that is a no cause determination? That's a no cause?

CHARIMAN CASELLAS: Yes, we have concluded that that language constitutes a finding of no cause and that there is no statutory requirement that we use any special language to so accomplish that.

COMMISSIONER TUCKER: So when we say, and I want to be clear because it's important here, when we say we are unable to conclude that there has been a violation of the statutes, and then we turn around and say but this does not certify respondent is in compliance, we are saying that is a no cause. And I can't understand that. It just is not logical.

CHAIRMAN CASELLAS: Well, well, what we are saying is that Form 161 constitutes a finding on the merits.

* * *

CHAIRMAN CASELLAS: - as you know, I instructed the Director of the Office of Program Operations to advise the field, to the extent there exists any confusion ... that Form 161 determination is finding on the merits of the charge. So I think that the issue has now been clarified.

(A. 12 at pp. 19-20). Thus, certainly after the February 1996 EEOC Commission meeting, there is no doubt that the revised "no cause" language retained its status as a "no cause" determination on the merits.⁸ Accordingly, based upon the legal authority discussed *supra*, and the EEOC's clarification of the meaning of the revised "no cause" language, the EEOC

⁸NELA urges the Court to rely on *Cortes v. Maxus Exploration Co.*, 758 F. Supp. 1182 (S.D. Tex. 1991), *aff'd*, 977 F. 2d 195 (5th Cir. 1992), to determine the contents of a "no cause" determination. *Cortes* was decided prior to the EEOC's 1995 revision to the "no cause" language and, thus, the "no cause" determination in that case included a Dismissal and Notice of Rights and a letter of determination reciting the reasons for the agency's determination. As set forth in the foregoing exchange, the EEOC no longer issues letters of determination, opting instead to advise charging parties of the reasons for their determination during predetermination interviews. As indicated above, however, the EEOC did not intend the elimination of the letter of determination to strip the "no cause" determination of its effect as a "no cause" determination on the merits. Rather, the EEOC merely eliminated the letter of determination to prevent it from being used as evidence in litigation. Accordingly, the *Cortes* decision is not persuasive in determining the effect of the EEOC's current "no cause" determination.

determination that Woodham received was a "no cause" determination. Accordingly, she should have pursued an administrative hearing within 35 days of receipt of that determination. Because she failed to do so, her FCRA claims are barred.

C. The *Joshua* case is inapposite here, but even if it were applicable, Woodham was accorded all of the process she was due.

Referring to the Florida Supreme Court's recent decision in *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. August 31, 2000), Woodham argues that prohibiting her from proceeding with an FCRA action constitutes a violation of her constitutionally protected procedural due process rights. In an attempt to somehow compare her situation with the situation faced by the plaintiff in *Joshua*, Woodham reads more into the *Joshua* decision than is warranted.

In *Joshua*, the plaintiff filed a charge of discrimination with the FCHR. *Id.* at 433-434. The FCHR, however, never responded to Joshua's claim, and she eventually brought suit, albeit three years after filing her original charge of discrimination. The lower courts dismissed Joshua's claim as time-barred, applying the "180 day plus one year" statute of limitations period prescribed in *Milano v. Moldmaster, Inc.*,

703 So.2d 1093 (Fla. 4th DCA 1997). *Id.* at 434. In reversing the decision of the lower courts, the *Joshua* court noted that the case involved "administrative inaction and error," and that denying Joshua notice and the opportunity to be heard because of such error by enforcing a shorter statute of limitations, constituted a violation of Joshua's constitutionally protected property rights. *Id.* at 439. The Court then simply held that "the statute of limitations for causes of action based on statutory liability, section 95.11(3)(f), applies to situations where the Commission has not made a reasonable cause determination within 180 days." *Id.* at 439.

In this case, there is no issue of the applicable statute of limitations before the Court. Therefore, *Joshua* is inapposite. Indeed, as the Third District Court of Appeal in this case pointed out: "[n]owhere does *Joshua* address or grant aggrieved persons the ability to disregard subsection 7 administrative hearing requirement nor does it allow a lawsuit after receipt of a 'no cause' determination, albeit beyond the 180-day period." (R. 186). Even if this Court found that the *Joshua* decision did have some impact on the issues before the Court, the issues and concerns underlying the *Joshua* decision

are not present in this case. The *Joshua* court based its decision on a "claimant's right to fair notice and an opportunity to be heard." 768 So. 2d at 438. The procedural due process issues of fair notice and opportunity to be heard are not implicated by the facts of this case.

Here, Woodham received a determination from the EEOC which, as discussed above, operated as a determination from the FCHR. Moreover, had Woodham properly dual-filed or direct-filed her charge of discrimination with the FCHR, in accordance with the Worksharing Agreement which Woodham acknowledges governs the processing of her charge of discrimination, she would have received additional notice in the form of a letter from the FCHR notifying her that her charge was being processed and resolved by the EEOC, and that she would have 35 days from the EEOC's determination in which to seek an administrative hearing to challenge such findings. See A. 13 at pg. iii. Thus, unlike the plaintiff in *Joshua*, who never received notice of any decision, Woodham did receive notice of the EEOC's decision. Furthermore, Woodham was not deprived the opportunity to be heard. Once she received a no cause determination, Woodham had the option of requesting a hearing within 35 days of the determination and subsequently proceeding to a hearing before an administrative law judge, as

provided in § 760.11(7). Woodham chose not to avail herself of this option. Thus, Woodham was not deprived of the opportunity to be heard based on agency inaction, but, instead, because of her own inaction. Accordingly, the procedural due process considerations implicated in the *Joshua* case clearly are not present in this case.

III. IF THE COURT HOLDS THAT A "NO CAUSE" DETERMINATION HAS NO EFFECT AFTER 180 DAYS, THE PROVISIONS OF § 760.11(7), FLA. STAT., WOULD BE RENDERED MEANINGLESS.

Woodham also argues that, a result of this Court's decision in *Joshua*, and §§ 760.11(4) and 760.11(8), Fla. Stats., she is automatically vested with a reasonable cause determination after the passage of 180 days, which cannot be divested by the subsequent issuance of a no cause determination. As Blue Cross argued in its Motion to Strike Portions of Petitioner's and Amicus Curiae's Brief ("Motion to Strike"), which was filed on November 26, 2001, this issue is beyond the scope of the question certified by Third District

Court of Appeal of Florida, which certified only the following as a question of great public importance⁹:

WHETHER A CLAIMANT MUST PURSUE THE ADMINISTRATIVE REMEDIES PROVIDED IN SECTION 760.11(7), FLORIDA STATUTES, WHEN THE CLAIMANT HAS FILED A COMPLAINT UNDER THE FLORIDA CIVIL RIGHTS ACT WITH THE FLORIDA COMMISSION ON HUMAN RELATIONS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION JOINTLY, AND HAS RECEIVED AN EEOC "DISMISSAL AND NOTICE OF RIGHTS" STATING: "BASED UPON ITS INVESTIGATION, THE EEOC 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 ISSUES THAT MIGHT BE CONSTRUED AS HAVING BEEN RAISED BY THIS CHARGE."?

Woodham v. Blue and Blue Shield of Florida, Inc., 2001 WL 1041025 (Fla. 3rd DCA Sept. 12, 2001). Notably, the certified question nowhere references the effect of the passage of 180 days on a party's right to file a lawsuit. Furthermore, the only courts that have addressed whether an aggrieved person who receives an EEOC "no cause" determination after 180 days has elapsed, but before filing a lawsuit, is nonetheless required to pursue an administrative hearing pursuant to § 760.11(7), have concluded that the aggrieved person is subject to the administrative hearing requirements of that section.

⁹To date, the Court has not ruled on the Motion to Strike. Therefore, in the paragraphs that follow, Blue Cross has addressed the effect of a "no cause" determination issued after the passage of 180 days, but before the institution of a lawsuit.

See *Woodham v. Blue Cross and Blue Shield of Florida, Inc.*, 793 So. 2d 41 (Fla. 3d DCA 2001); *Bach v. United Parcel Services*, 26 Fla. L. Weekly D2095 (Fla. 4th DCA Aug. 29, 2001). Thus, there is no conflict among the Florida district courts of appeal on this issue.

Assuming that the Court exercises its jurisdiction to decide this issue, however, the statutory reading urged by Woodham would render a provision of the FCRA, § 760.11(7), completely meaningless and ignore the plain language of that subsection. Moreover, contrary to the argument propounded by Woodham and NELA, such an interpretation is not compelled by this Court's decision in *Joshua*. To the contrary, the *Joshua* decision noted the legislative intent that an aggrieved person exhaust his or her administrative remedies prior to filing a lawsuit. Thus, the *Joshua* decision actually supports Blue Cross' position that Woodham was required to seek an administrative hearing following her receipt of a "no cause" determination, even where the determination issued beyond the 180 day period referenced in § 760.11(8), Fla. Stat.

Woodham relies on the language of § 760.11(8), Fla. Stat., which states that if the Commission, i.e the FCHR, "fails to conciliate or determine whether there is reasonable cause within 180 days of filing the complaint, an aggrieved

person may proceed under subsection (4) as if the commission determined that there is reasonable cause." § 760.11(7), Fla. Stat. Section 760.11(4), Fla. Stat., in turn, states that if the FCHR "determines that there is reasonable cause to believe that a discriminatory practice has occurred . . . the aggrieved person may either" bring a civil action or request an administrative hearing. Thus, Woodham argues, based on the aforementioned statutes and the *Joshua* decision, after the passage of 180 days she is automatically vested with a reasonable cause determination, which could not be divested by the EEOC's subsequent no cause determination.

Section 760.11(7), Fla. Stat., plainly states that if the Commission determines that there is no reasonable cause to believe that there is a violation of the FCRA, the Commission shall dismiss the complaint. At that point, the aggrieved person may request an administrative hearing. § 760.11(7), Fla. Stat. "If the aggrieved person does not request an administrative hearing within 35 days, the claim will be barred." *Id.* Thus, once the Commission determines that no reasonable cause exists, this provision is triggered. The provision does not state that the no cause decision must be made within 180 days of filing the complaint in order for the provision to have effect. It simply states that once the no

cause determination is issued, the aggrieved person must take certain steps or their claim is barred.

The trial court and the Third District Court of Appeal of Florida accepted the foregoing argument in disposing of Woodham's FCRA claims. (R. 172-178; R. 179-192). In so doing, the Third District Court of Appeal summed up the remedies available to a complaining party under § 760.11, Fla. Stat., as follows:

The language of section 760.11 is unambiguous. Each subsection contemplates application in one of three different scenarios: When the FCHR issues a "cause" determination subsection 4 outlines the aggrieved person's remedies; when the FCHR issues a "no cause" determination, the aggrieved person must follow the administrative procedures in subsection 7; and when the FCHR does not act, the aggrieved person must follow subsection 8. Under the plain language of section 760.11(7), which contains no time frame for receipt of a determination, Woodham was required to request an administrative hearing upon receipt of the "no cause" determination.

(R. 184). Thus, the Third District explained, an aggrieved person could only file a lawsuit where: (1) he or she received a determination of reasonable cause that a discriminatory practice occurred, § 760.11(4), Fla. Stat.; or (2) the aggrieved person does not receive any FCHR determination. § 760.11(8), Fla. Stat. (R. 185-86). The court explained, however, that the option of pursuing a lawsuit is foreclosed

once a 'no cause' determination is received, regardless of how untimely it may be." (R. 186).

The Third District's decision is further bolstered when one considers the obvious purpose and legislative intent of § 760.11(7), which is to prevent frivolous lawsuits from reaching the courts. Thus, if the Commission finds that there is no reasonable cause to find a violation of the statute, a complainant is required to go through the extra step of requesting an administrative hearing to ensure that her claim is not frivolous. If after such a hearing an administrative law judge finds that a violation of the FCRA has occurred, the complainant then has the option of bringing her case to court. Section 760.11(7), Fla. Stat. If the complainant does not prevail at the hearing, or if the complainant fails to request such a hearing, her FCRA claim is barred, thereby protecting the judicial system from frivolous claims that have not satisfied the administrative review safeguards in place under the statute.

While Woodham and NELA argue that, pursuant to *Joshua*, Woodham was "vested" with a reasonable cause determination entitling her to bring a lawsuit after the passage of 180 days, not only was that not the holding of the *Joshua* court, but Woodham's and NELA's argument cannot be reconciled with

the *Joshua* decision. The *Joshua* court examined the situation where, as here, the FCHR fails to make any determination within 180 days of filing a charge of discrimination. *Joshua*, 768 So. 2d at 436. The *Joshua* court concluded that § 760.11(8), which allows an aggrieved person to proceed to court if they have not received a determination within 180 days, is permissive in nature and does not require a complainant to proceed to court after 180 days have elapsed. *Id.* Indeed, the court stated that when the FCRA is read as a whole, it is clear that "the Legislature wanted persons who believe that they have been the object of discrimination to go through the administrative process prior to bringing a circuit court civil action." *Id.* Further, "the Legislature's desire that aggrieved persons avail themselves of the remedies provided by the Commission prior to seeking court action is made clear in section 760.07." *Id.* at 437. The Court ultimately stated that:

Thus, despite the language of section 760.11(8), which allows a complainant to proceed to circuit court without a reasonable cause determination, the entire statutory scheme seems to favor exhaustion of administrative remedies prior to court action. It would appear contrary to that scheme to require a person to proceed to court without any indication from the Commission of the progress, or lack

thereof, in investigating the complaint filed with that body.

Joshua, 768 So. 2d at 437.

Similarly, NELA's argument that the Third District Court of Appeal's opinion creates an incentive for complainants to "race to the courthouse" after the passage of 180 days to avoid having to avail themselves of the administrative hearing requirement of § 760.11(7), Fla. Stat., is unavailing. To the extent that such a practice would occur, it is simply the result of the complaining party attempting to evade the administrative process, which the *Joshua* court clearly favored. Thus, while a complainant *may* bring a cause of action if the FCHR does not make a determination on a charge within 180 days, the complainant is not required to. If the complainant does not, then the administrative process continues until the administrative remedies are exhausted, i.e. the FCHR makes a decision, or the complainant decides to bring a civil action. If the FCHR makes a decision before a complainant brings a civil action, however, then the complainant must abide by the decision. If the determination is one of reasonable cause, then the one-year limitations period from the reasonable cause determination is triggered and the complainant must bring her civil action within one

year. If the determination is one of no reasonable cause, the complainant must then request an administrative hearing as required by § 760.11(7). While in the latter circumstance, the complaining party no longer has a right to maintain a civil suit, the only "loss" that party is sustaining is the right to maintain a frivolous lawsuit. The maintenance of frivolous lawsuits is precisely what the FCRA's administrative scheme is designed to prevent, as it requires a complaining party to seek administrative review of a determination of no reasonable cause, and only if reasonable cause is found during this secondary review mechanism may a complaining party then file a lawsuit.

The statute would be ineffective as a screen for frivolous lawsuits if this Court were to accept Woodham's argument that after 180 days she can bring a civil action as a matter of right even if a subsequent "no cause" determination is made. The Court would essentially be reading *Joshua* to require the EEOC or FCHR to cease investigating charges, as any determination reached would be meaningless. Such a decision would, in addition to allowing frivolous claims to go forward, contravene the Legislature's stated preference for administrative exhaustion prior to court action. As the lower court stated in its order, the

administrative provisions of the FCRA allow a claimant to proceed to court only in limited circumstances, and the provisions are in place for the purpose of keeping baseless claims from ending up in the judicial system. (R. 177).

Finally, although the lower court reserved ruling on the question whether Woodham actually filed a charge with the FCHR, the undisputed facts of this case clearly show that the FCHR did not physically receive a charge of discrimination from Woodham. (R. 109-10). Thus, Woodham should not be permitted to argue that she has a right to proceed with her action as a matter of right if the FCHR does not render a decision on her charge within 180 days, when it is clear that the FCHR never even received her charge of discrimination.

CONCLUSION

Given the absence of evidence indicating that Woodham either direct-filed or dual-filed a charge of discrimination with the FCHR, Blue Cross respectfully suggests that the assumption of jurisdiction in this case would be improvident. Should the Court elect to accept jurisdiction, the Court should affirm the Third District Court of Appeal's decision in this case for the following reasons. First, because a determination other than reasonable cause was made in this case, Woodham was required to timely pursue an administrative

hearing in accordance with § 760.11(7), Fla. Stat. Because Woodham failed to seek such a hearing, her FCRA claim is barred. Second, until she sought a rehearing of the Third District's decision, Woodham had never challenged the lower court's finding that a "no cause" determination by the EEOC triggers the provisions of § 760.11(7), Fla. Stat., requiring Woodham to request an administrative hearing within 35 days. Since Woodham never requested such a hearing, the plain language of the statute clearly bars her civil action. Third, the *Joshua* decision is completely distinguishable on its facts as this case raises none of the procedural due process concerns implicit in the *Joshua* decision. Finally, Woodham's reliance on the *Joshua* decision is misplaced as the *Joshua* holding expresses a preference for administrative exhaustion and consequently does not support the argument that a plaintiff may ignore the provisions of § 760.11(7) even if she receives a no cause determination more than 180 days from filing her charge of discrimination.

For all of the aforementioned reasons, and the reasons outlined in the trial court's order and the decision of the Third District Court of Appeal currently under review, Blue Cross respectfully requests that this Court affirm the Third District Court of Appeal's decision and award Blue Cross its

reasonable costs and attorney's fees associated with defending this appeal.

Respectfully submitted this 14th day of December, 2001.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Defendant's Answer Brief was served via UPS Next Day Air Tracking No. 1Z 375 072 22 1003 490 2 this 14th day of December, 2001 upon:

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Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Courier New 12-point font.

Patrick D. Coleman

APPENDIX

<u>Document No.</u>	<u>Description</u>
1	Conformed Copy of Trial Court Order on Defendant's Motion for Summary Judgment entered on August 2, 2000
2	Opinion of the Third District Court of Appeal of Florida rendered on May 30, 2001
3	<i>Gorman v. Jim Palmer Trucking, Inc.</i> , Case No. 8:01-CV-170-T-MSS (M.D. Fla. Sept. 20, 2001)
4	<i>Hamrick v. Standard Register Co.</i> , Case No. 96-3944-CA (Cir. Ct. 4 th Cir., Duval County, July 20, 1998)
5	<i>Long v. Health Tour Management, Inc.</i> , Case No. 8:01-CV-304-T-17-TGW (M.D. Fla. May 31, 2001)
6	<i>Lowe v. BTI Services, Inc.</i> , Case No. 97-4679 (Cir. Ct., 4 th Cir., Duval County, July 20, 1998)
7	<i>Lynch v. Lexford Residential Trust</i> , Case No. 6:99-CV-1591-Orl-28KRS (M.D. Fla. Nov. 26, 2001)
8	<i>Mulkey v. Equifax Card Servs., Inc.</i> , Case No. 94-1080-Vic-T-25E (M.D. Fla. 1996)
9	<i>Watkins v. Svredrup Technology, Inc.</i> , Case No. 94-30401/RV (N.D. Fla. 1996), <i>aff'd on other grounds</i> , 153 F.3d 1308 (11th Cir. 1998)
10	Certified copy of the Equal Employment Opportunity Commission ("EEOC") Charge Processing Task Force Report compiled between December 1994 and March 1995
11	Certified copy of the April 19, 1995 Minutes of an EEOC Special Commission

Meeting to Consider the Recommendations
of the Charge Processing Task Force

Appendix 1

- 12 Certified copy of the February 8, 1996
Minutes of an EEOC Commissioners Meeting
- 13 Fiscal Year 1998 Worksharing Agreement
between the EEOC and the FCHR
- 14 Initial Brief for the Appellant submitted
to the Third District Court of Appeal of
Florida
- 15 Reply Brief for the Appellant submitted
to the Third District Court of Appeal of
Florida.

Appendix 2