IN THE SUPREME COURT OF FLORIDA

Case No.: SC01-2160

CORDETTE WOODHAM

Petitioner

vs.

BLUE CROSS AND BLUE SHIELD
OF SOUTH FLORIDA, INC.

Respondent

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

PETITIONER'S AMENDED BRIEF ON THE MERITS

SUBMITTED BY:
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STATEMENT OF THE CASE AND FACTS

i.

Nature of the Case

Petitioner, Cordette Woodham, ("Woodham") filed suit against Blue Cross Blue Shield of Florida, Inc. ("Respondent") under the Florida Civil

Rights Act, Chapter 760 Florida Statutes ("FCRA") on September 8, 1999 in the Eleventh Judicial Circuit. [R.: page 2].

The facts giving rise to the complaint stem from the Respondent's racial discriminatory practices against the Petitioner, an African American employee. The Petitioner began working for the Respondent as a senior claims examiner in Miami on or about September 1994. Prior to this time Woodham worked as a plan claims examiner in the Respondent's New York office. [R.: page 3].

Woodham's job responsibilities included processing medical claims, acting as a liaison between physicians and patients participating in Respondent's medical plan and reconciling the benefits paid to a provider with the treatment received by the patient. [R.: 4]. Woodham was overqualified for her Miami position given her previous work experience in New York. [R.: 4].

In light of her solid work experience, Woodham approached her immediate supervisor, Jackie Feijoo, and requested a promotion to the position of Quality Control Analyst on two separate occasions. [R.: pages 5-6]. The Quality Control Analyst position paid more than the claims examiner position and required additional job responsibilities [R. : page 5]. At the time Woodham requested the promotion she had devoted notable

overtime hours to her job and received favorable job evaluations from the Defendant. [R.: page 5].

Woodham was ultimately denied her second request for a promotion. The Respondent gave the second promotion to a non-minority employee with no prior experience as a claims examiner. The promoted employee had previously worked as a lower ranked customer service representative and lacked the years of training, experience and years of service that Woodham possessed. [R.: page 6]. The Respondent's promotion decision contradicted its own policy on filling open positions as provided in the *Blue Cross Blue Shield Employee Handbook*.

" The major consideration for filling open positions is the applicant's qualifications including applicable experience, education/training, present job performance and length of service… ."

Blue Cross Blue Shield Employee Handbook, page 6, [R.: page 6].

In an effort to be considered for future promotions Woodham requested additional work assignments from her immediate supervisor, Jackie Feijoo. Ms. Feijoo routinely offered extra work assignments to non-minority employees thereby foreclosing further opportunity for Woodham to fairly compete for other promotions. [R.: page 6].

Following a July 1997 meeting wherein the Respondent allocated a considerably larger amount of work assignments to non minority employees,

Woodham took the initiative to speak with Jackie Feijoo about the obvious disparity. Woodham informed Ms. Feijoo that she felt discriminated against on the basis of race given the uneven distribution of work assignments. [R. page 7]. Following the discussion, Ms. Feijoo failed to take any ameliorative steps to resolve the problem, although required to do so according to the Respondent's Employee Handbook. *The Blue Cross Blue Shield Employee Handbook* provides in pertinent part on page 29:

"The employee should bring the problem or concern to the attention of his supervisor within 10 work days following its occurrence, or when the employee should reasonably have first become aware of its occurrence, explaining the nature of the problem or concern and suggest a solution if he/she chooses. At this point, it is normally the responsibility of management to attempt to resolve the problem and concern based upon its merits. …"

[R. page 7].

In direct retaliation for opposing such unlawful conduct, Woodham's immediate supervisor, Jackie Feijoo, gave her a negative rating for productivity on her next job appraisal. [R.: page 7]. Upon receiving the negative rating Woodham disputed the findings with Suzie Reizen, a higher Blue Cross Blue Shield Manager. The negative rating was irrefutably baseless and subsequently retracted by Suzie Reizen. Reizen conceded that Woodham had actually exceeded her productivity requirement for that review period. [R. page 7]. After noting the Plaintiff's positive

productivity record Suzie Reizen directed Jackie Feijoo to immediately retract the low rating. [R. : page 8].

Following the appraisal incident, the Respondent further subjected Woodham to a tirade of unlawful retaliation. Both Suzie Reizen and Jackie Feijoo offered Woodham a raise of merely 3% in 1997. Prior to Woodham's resistance to unlawful discrimination the Respondent offered Plaintiff a 4% raise in 1996. Ms. Reizen and Ms. Feijoo represented to the Petitioner that all other employees were offered a lower raise for 1997 and encouraged Woodham to accept it. However, Woodham learned from her co-workers that higher raises had been offered and sought to dispute the offer. [R.: page 8]. Woodham requested to speak with Suzie Reizen about the lower raise offer, but was ignored.

On more than one occasion, the Respondent harassed the Petitioner when she sought leave for medical reasons. On October 31, 1997 the Petitioner put in a request for Paid Personal Leave for November 5, 6,7, and 11. Her supervisors advised her to produce a note evidencing her true need for the time off. [R. :page 8]. Woodham learned though her co-workers that her supervisors loudly stated in the office that if she failed to remit a doctor's note that she would be fired. [R. : page 8]. Woodham also learned that her supervisors actually called her dentist to verify that she had been treated.

Woodham's primary care physician also warned her that her employer had called the medical office. Woodham's physician regrettably informed her that his receptionist, in breach of his confidentiality policy, revealed to her employer that she had been treated for various digestive disorders. [R.: page 9].

Three supervisors including, Jackie Feijoo, Suzie Reizen and Ferman Gonzalez from Human Resources, advised the Petitioner that the Respondent would not pay her for her accrued sick time because she was treated in "outpatient clinics" as opposed to an inpatient hospital. [R. : page 10]. The Petitioner informed her supervisors that the *Blue Cross Blue Shield Employee Handbook* did not require her to receive treatment as an inpatient in order to benefit from her accrued sick leave. Despite the Petitioner's best efforts to recoup her accrued sick leave her supervisors refused to pay her .

Thereafter, Woodham contacted the Blue Cross Blue Shield headquarters in Jacksonville, Florida and reported the behavior of the regional Miami division. [R.: pages 9-10]. In response to the headquarters' directive, Woodham's supervisors paid her for two sick days, but neglected to pay her for the remaining two. [R. : pages 9-10].

Following this dispute, Ferman Gonzalez, Suzie Reizen and Jackie Feijoo purported to verbally fire Woodham, even though she submitted a

letter of resignation to her supervisors two weeks prior based on a hostile working environment. [R. : page 10].

ii.Course of Proceedings

In direct response to the Respondent's unlawful discrimination Woodham filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), on June 17, 1998 which was immediately processed for dual filing with the Florida Commission on Human Relations ("FCHR") in accordance with the EEOC's policy and the workshare agreement entered into between both investigative agencies ("both investigative agencies hereinafter jointly referred to as the commission"). [R. : page 3].

The commission investigated the Petitioner's charge for over 300 days without rendering any decision as to whether reasonable cause existed to believe that discrimination occurred. [R. : page 115]. Since the commission's statutorily prescribed investigative period of 180 days expired and the commission failed to conciliate the matter or make a determination as to the charge, The Petitioner requested a "Right To Sue Letter".

Thereafter, Woodham received an EEOC form dated July 22, 1999, informing her that she had the right to bring suit in either federal or state court within 90 days. The form also contained a marked box next to the following language:

"The EEOC issues the following determinations: Based upon its investigation, the EEOC is unable to conclude that the information obtained established 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"

Upon receipt of her EEOC "unable to conclude" form Petitioner filed a lawsuit under the FCRA pursuant to Fla. Stat. § 760.11(8), (4). These provisions contained in Chapter 760 provide:

"In the event the 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." (emphasis added).***

Paragraph (8) of Florida Statute § 760.11 .

"In the event that the commission determines that there is reasonable Cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may ***either***
(emphasis added)*:*

> (a)Bring a civil action against the person named in the complaint in Any court of competent jurisdiction; ***or*** Request an administrative hearing under ss. 120.569 and 120.57." ***(emphasis added)***

Paragraph (4) of Florida Statute § 760.11 .

Thereafter, the Respondent filed a motion for summary judgment arguing, inter alia, that the Petitioner should be barred from bringing her lawsuit pursuant to Fla. Stat. § 760.11(7) which requires a person who receives a no cause finding from the commission to request an administrative hearing with the commission within 35 days of receipt of the negative finding. [R.: pages 47-100]. Woodham disagreed with the Respondent's position that a request for an administrative hearing was applicable because the EEOC form did not constitute a "no cause decision by the commission" and because the statutory period of 180 days for the commission to render a determination expired. Thereafter, Woodham filed a Motion and Memorandum of Law in Opposition to Defendant's Motion For Summary Judgment. [R. : pages 113-135]

iii. Disposition In The Lower Tribunal

On July 28, 2000 the lower court granted the Respondent's Motion For Summary Judgment based solely upon its finding the Plaintiff had to request an administrative hearing within 35 days of receiving a "no cause finding". [R. Order on Defendant's Motion For Summary Judgment pages 172-178 and attached hereto in the Appendix as Exhibit 1]. The Third District Court of Appeal affirmed the lower court's decision on May 30, 2001, denied

Woodham's Motion for Rehearing and Rehearing En Banc on September 12, 2001, but certified this case as being in conflict with Cisko v Phoenix Medical Products, Inc., 26 Fla. L Weekly D 1851, 2001 WL 844675 (Fla. App. 2 Dist.). The Third District Court of Appeal also granted Woodham's request and certified a question of great public importance:

"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 ["FCHR"] AND THE EQUAL 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 ESTABLISHED 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" ?

iv.

Standard of Review and Construction of the Florida Civil Rights Act.

Because the instant case directly implicates the Woodham's due process rights under the Fourteenth Amendment of the United States Constitution, this Court may review this matter de novo. Gulf Pines Memorial Park Inc. v. Oaklawn Memorial Park Inc, 361, So.2d 695 (Fla.1978); Key Haven Associated Enterprises Inc. v. Board of Trustees Of The Internal Improvement Trust Fund, 427 So.153 (Fla. 1982) (The Supreme Court of

Florida consistently holding that the district court of appeal is the proper forum in which to address constitutional issues and has the power to review such issues de novo).

"Decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act which is patterned after Title VII." Harper v. Blockbuster Entertainment Corp., C.A. (Fla. 1998), cert. denied, 119 S.Ct. 509, 142 L.E.D. 2d 422 (1998).

Even if this Court decided to review this matter under the standard for summary judgment, the lower court's order should be reversed where genuine issues of material fact exist. Fla. R. Civ. P. 1.510. Upon motion for summary judgment the evidence should be reviewed in a light most favorable to the non moving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, S.Ct. (1986).

SUMMARY OF ARGUMENT

Woodham's cause of action cannot be barred under section 7 of Chapter 760 because section 7 is wholly inapplicable to the case at bar. As a preliminary matter, it should be emphasized that the Petitioner did not receive a "no cause" determination by the commission as contemplated under the Florida Civil Rights Act. The EEOC merely remitted an untimely

"unable to conclude" and "Notice of Suit Rights", also referred to as form 161, to the Petitioner.

The EEOC form , on its face, does not prohibit the Petitioner from directly filing a civil action. The EEOC form indicates that the EEOC was "unable to conclude". As such, the purported notice provides no definitive conclusion to its investigation, nor does it ensure that a thorough investigation even took place. The only statement that the EEOC makes unequivocally is, " [t]his does not certify that the respondent is in compliance with the statutes." Of significant import, the EEOC form fails to comply with the notice requirements provided in § 760.11(3), Florida Statute, and as such, is defective. Under section three of the Florida Civil Rights Act, the commission has an affirmative duty to inform the aggrieved person of his or her "available options" whether or not "there is reasonable cause". The EEOC form at issue in this case is devoid of any language advising Woodham of her options under the Florida Civil Rights Act. Moreover, as most courts in Florida hold, the EEOC form issued in this case is not the equivalent of a Florida Commission on Human Relations' final determination and does not carry the effect of an adverse determination. Most courts agree that the language used by the EEOC in its "unable to conclude" form is contradictory and operates as a nullity.

The Third District Court of Appeal's reliance upon Blakely v. United Servs. Auto Ass'n., No. 99-1046-Civ-T-17F, 1999 WL 1053122 (M.D. Fla. 10/4/99), in support of conclusion that "unable to conclude" equals "no cause" directly conflicts with no less than three Middle District decisions and two decisions from the Second District Court of Appeal, Cisko v. Phoenix Medical Products Inc., Case No.: 2D00-311- L.T. No.: 99-4241 CA HDH, Westlaw citation, 2001 WL 844675 ((Fla. App. 2 Dist.), hereinafter cited as 2001 WL 844675 and Jones v. Lakeland Regional Medical Center, 201 Fla. App. Lexis 15796, Nov. 9, 2001; both attached hereto in the Appendix of Cases.

The Second District Court of Appeal rejected the Defendant's position, holding that the EEOC form did not constitute a "determination" under the Florida Civil Rights Act "FCRA". The court, in applying a liberal construction of the Act, stated that the EEOC form "does not definitively state that the complaint is being dismissed because it does not have merit, and [t]he additional language which explains that [n]o finding is made as to any other issues that might be construed as having been raised by this charge added to the confusion regarding whether the EEOC's action [was] final." Cisko, 2001 WL 844675 at pg. 2. The Court also held that the EEOC form

failed to "inform a claimant of what rights he or she possesses upon dismissal of her complaint." Id. [1]

The Federal Courts construing the meaning of the EEOC's "unable to conclude" form under the Florida Civil Rights Act have likewise rejected the notion that the form equals a "no cause determination". See Ward v. City of Jacksonville Beach, *discussed Infra*, No. 300-Civ-510 J-25TJC, U.S. District Court, Middle District of Florida, March 26, 2001, quoting Judge Henry Lee Adams, Jr. ("The language contained in the Dismissal and Notice of Rights, read as a whole, is at best, vague. Given the vagueness of the language, the Court finds that the Dismissal and Notice of Rights does not constitute a '"no cause"' determination.); Beckman v. AT&T Universal Card Services Corp., Case No. 98-211-Civ-J 10B U.S. District Court, Middle District, June 29, 1999, *discussed infra*, (holding that the "unable to conclude language used by the EEOC was not sufficient to constitute a "no cause" determination.) Motry v. The Devereux Foundation, Inc., Case No. 99-1457-Civ. U.S. District Court, Middle District of Florida, April 21, 2000

[1] See also a recent decision by the Second District Court of Appeal, Jones v. Lakeland Regional Medical Center, Case No. 2D01-290, 2001 Fla. App. Lexis 15796, Nov. 9, 2001) (holding an EEOC dismissal and notice of rights form "does not amount to a "no cause finding" under the Florida Civil Rights Act and that under the 1999 "Worksharing Agreement" the FCHR is still required to accept the EEOC finding and issue its acceptance of the same.

Judge Patricia F. Fawsett, *discussed infra*. (the EEOC determination was not the equivalent of a FCRH determination, and that even if it could be treated as a FCRH determination it was of no consequence because it "occurred more than 180 days" after the charge was filed.").

The opinion rendered by Judge Patrica F. Fawsett is noteworthy because she not only held that EEOC form deficient on its face, finding that it was not equal to a FCHR determination and failed to comply with the notice requirements of § 760.11 (3) Fla. Stat., but also found it inapplicable because it has been issued more than 180 days after the claimant filed the charge of discrimination.

Pursuant to the Florida Civil Rights Act and Judge Fawsett's ruling, Woodham automatically received her right to bring suit when the commission failed to conciliate or make a reasonable cause finding within a statutorily prescribed period of 180 days. The language employed by the Florida Legislature in subsections four and eight of the FCRA is permissive not mandatory. It provides a claimant with the option of directly pursing redress in a court of law when the commission fails to render a decision within the statutory 180 day-period.

In this case, the commission failed to make a finding even after the passing of 300 days. Therefore, on day 181, (4) and (8) of § 760.11 were

triggered, thereby vesting Woodham with a statutory finding of discrimination and the right to file her lawsuit in state court. Put more plainly, Woodham did in fact receive a "reasonable cause determination", created for her benefit by operation of the Florida Civil Rights Act. The constructive finding of discrimination and the statutory right to file a civil action are inextricably bound by sections four and eight of the Act.

The lower courts have erred by ruling Woodham received a statutory right to sue on day 181, but lost this vested right once the EEOC issued an untimely notice. Such construction of the Florida Civil Rights Act completely swallows sections four and eight of the statute and defeats its remedial purpose.

ARGUMENT

I. AN EEOC FORM CONTAINING THE FOLLOWING LANGUAGE IS NOT THE EQUIVALENT OF A "NO CAUSE" DETERMINATION UNDER THE FCRA, AND THEREFORE DOES NOT REQUIRE WOODHAM TO SEEK REVIEW OF THE EEOC'S DISMISSAL AND NOTICE OF RIGHTS: "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."

In Cisko v. Phoenix Medical Products, Inc., 2001 WL 844675 the Second District Court of Appeal held that an EEOC form referring to the

"unable to conclude language" as posited above, and identical to the language used in the EEOC form issued to Woodham, did not amount to a no cause determination under the Florida Civil Rights Act. Id. at 2.

The facts presented in Cisko are identical to the facts in the instant matter. As in the Woodham case, the claimant in Cisko did not request an administrative hearing within thirty-five days after receiving an EEOC "Dismissal and Notice of Rights", but proceeded to directly file a civil action.

In light of its decision that the EEOC form was not the equivalent of a finding under the FCRA the court also held that the claimant was not required to seek review of any agency decision under section § 760.11(7). Id. at 2-3.

In applying a "liberal construction" of the Florida Civil Rights Act pursuant to section 760.01(3) of the Act, the Second District Court found that section 7 requires "a specific finding of lack of reasonable cause before an individual is stripped of her right of access to the courts for redress against discrimination." Id. In construing the plain words used by the EEOC in its form, the court held that "unable to conclude" failed to provide a specific finding of lack of reasonable cause:

"An indication by the EEOC that it was "unable to conclude" that there was a violation of the Act does not rise to the level of a finding that the EEOC did not have reasonable cause to believe that a violation occurred. This finding could reasonably be interpreted as indicating that the EEOC did not have sufficient information from which to make a determination. It does not definitively state that the complaint is being dismissed because it does not have merit. The additional language which explains that ' "[n]o finding is made as to any other issues that might be construed as having been raised by the charge" ' adds to the confusion regarding whether the EEOC's action is final. Furthermore, EEOC Form 161 does not inform a claimant of what rights she possesses upon dismissal of her complaint." Id.

As in Cisko, the EEOC form in the instant case is devoid of any "specific finding of lack of reasonable cause". Additionally, the form could be interpreted to mean that the EEOC simply was without information to make a decision. The form does not indicate any evidentiary basis upon which the statement was made. In fact, there is no basis to believe that the EEOC completed an investigation. The form does not state any clear findings, although it disclaims any certification that the Respondent is in compliance with the statutes. The form, on it face, is nebulous at best.

Lastly, the form fails to inform Woodham of the rights or options she could pursue in the event of a true dismissal. To the contrary, the form is misleading because it encourages a claimant to file suit within 90 days or risk waiver of suit rights. The Third District Court has opined that this notice applies only under federal law. If this is so, the EEOC is unquestionably defective because it fails to provide any notice of rights under the FCRA.

After rejecting the defendant's argument that the EEOC form constituted a "finding" the court noted that the claimant was entitled to file her lawsuit, so long as she did so within the applicable statute of limitations, which in the Cisko case, as well as in the case sub judice, is four years. Id. at 3, also See Joshua, 24 Fla. L. Weekly S641.

Following its opinion in Cisko, the Second District Court of Appeal recently held that a dismissal and notice of rights form issued by the EEOC does not amount to a "no cause" finding under the Florida Civil Rights Act. Jones v. Lakeland Regional Medical Center, Case No. 2D01-290, 2001 Fla. App. Lexis 15796, Nov. 9, 2001; opinion attached hereto in the Appendix of cases). [2] Also significant, the court found that the EEOC determination

[2] Because the Second District Court resolved the case under Jones, it must be assumed that the EEOC notice at issue in Jones contained the "unable to conclude" language use in form 161.

could not carry the same effect as an adverse determination by the FCHR under the 1999 "Worksharing Agreement". Id. In sum, the court noted that under the Worksharing Agreement, each agency shall make its own finding and that the EEOC agrees to provide the FCHR with notice of its final action on all dual filed charges. In turn, the Agreement provides that the FCHR agrees to "timely" issue its final action after determining whether the EEOC decision is "acceptable" to the FCHR. Id. Based upon the Agreement, the court found that the EEOC's determination did not have the same effect as an adverse determination by the FCHR.

In applying this finding to the instant matter, there is no evidence in the record suggesting that the FCHR "accepted" the EEOC's determination and then in a "timely" manner issued its final action upon acceptance of the EEOC's notice. In the Woodham case, there could not have been a timely acceptance or rejection of the EEOC's finding, because the EEOC did not issue its form until 300 days after receiving Woodham's complaint. In light of these facts, the EEOC form in the instant case should also be rejected.

The facts in Jones are identical to the facts at bar. The lower court dismissed the claimant's case, finding that she failed to request an administrative hearing within thirty-five days after receiving and EEOC

"unable to conclude" form. The Second District Court reversed the lower court, with all justices concurring.

No less than three federal decisions construing the same EEOC form discussed above are in harmony with Cisko. It is well settled in Florida that federal decisions construing Title VII remedial law are applicable to cases construing the Florida Civil Rights Act. "Decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act, which is patterned after Title VII. quoting Harper v. Blockbuster Entertainment Corp., C.A. (Fla. 1998) cert. denied, 119 S.Ct. 509, (1998). As such, the following cases provide ample authority.

In Beckman v. AT&T Universal Card Services Corp., No. 98-211-Civ-J-10B, 6/29/99, the United States District Court for the Middle District of Florida denied a defendant's motion to dismiss a FCRA claim based upon the defendant's argument that an EEOC right to sue letter containing language identical to the language used by the EEOC in this case, constituted a "no cause determination". In construing the language set forth below, the court ruled, " [t]he Defendant emphasizes the first sentence of this passage and reads it as a "no cause" determination. Taken out of context, the court might agree; but the second sentence clearly negates that

interpretation. The two sentences cancel each other. Whatever the language means, it is not sufficient to constitute a "no cause" determination." Id. at 2 "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained established violation 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 bee raised by this charge." Id. at 2

In applying Beckman to case at bar, the language used by the EEOC in its form notice does not constitute a "no cause" determination. (See Beckman and other cited cases attached hereto in the Appendix).

In Motry v. The Devereux Foundation, Inc., No. 99-1457-CIV-ORL-19B (M.D. Fla. April 21, 2000), The Honorable Patricia C. Fawsett denied the defendant's motion to dismiss a civil action brought under the Florida Civil Rights Act, finding that there was no evidence in the record "that the EEOC's ["no cause"] determination was the equivalent of an FCHR determination." Id. at 2 The court emphasized that the record did not "reflect" any determination made by the Florida Commission on Human Relations with respect to the claimant's charge. Id. at 2 Of significant importance, Judge Fawsett gave no credence to the EEOC determination, ruling that even if it "was the equivalent of an FCHR determination, such

determination occurred ***more than 180 days*** after the discrimination complaint was filed." (emphasis added). Id. at 3 As such, Motry provides authority for the rejection of an untimely EEOC determination.

Judge Fawsett also ruled that "Even if the EEOC determination could be construed as the FCHR's determination, such determination was defective because it did not comply with the notice requirements of § 760.11(3), Florida Statutes." Id. at 3 (court's footnote). Under subsection three, the commission has a duty to inform the aggrieved person of her "available options", whether or not "there is reasonable cause". Failure to do so renders any purported "determination" defective. Id.

Similarly, The Florida Supreme Court ruled that the Legislature intended that claimants be informed "of the next possible steps that can be taken" by the commission. Joshua v. City of Gainsville, 768 So.2d (Fla.2000) (citing subsections 3 and 4 of §760.11 Fla. Stat.) Joshua also opines, inter alia, that barring claimants from seeking redress under the FCRA without affording notice violates a claimant's procedural due process rights. Id

II. MATERIAL FACTS EVIDENCING PLAINTIFF'S EXHAUSTION OF HER ADMINISTRATIVE REMEDIES UNDER THE FLORIDA CIVIL RIGHTS ACT EXIST, THEREBY PRECLUDING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT.

The Respondent contends that the EEOC form sent to Woodham is in fact, a "no cause determination". Woodham disputes this contention and

construes the EEOC "unable to conclude" form as a neutral statement, devoid of any definitive finding of "no cause" . [R. Plaintiff's Motion and Incorporated Memorandum of Law In Opposition to Defendant's Motion For Summary Judgment, pg 113-135 and Order on Defendant's Motion For Summary Judgment, pg. 172-178] The form does not prove that the EEOC conducted an investigation, nor does it provide notice to Woodham of her options under the Florida Civil Rights Act. The EEOC's "unable to conclude" decision is confusing and cannot be interpreted as the equivalent of a state finding. See Cisko v. Phoenix Medical Products, Inc., 2001 WL 844675 and Jones v. Lakeland Regional Medical Center, 2001 Fla. App. Lexis 15796 *discussed supra;* Ward v. City of Jacksonville Beach, No. 3000-Civ-510-J-25TJC, Middle District, Florida, 3/26/2001, *discussed supra*; Motry v. Devereux Foundation, Inc., No. 99-1457-Civ U.S. District Court, Middle District, Florida, 4/21/2000 *discussed supra*; and Beckman v. AT&T Universal Card Corp., No. 98-211-Civ-J-10B U.S. District Court, Middle District, June 29, 1999, *discussed supra.*

Woodham also urges this Court to find that the commission committed agency error by failing to render a reasonable cause decision within the 180 day period prescribed in Fla. Stat.§760.11 (8). Despite written correspondence and numerous telephone messages left with the

EEOC, the EEOC failed to issue its "unable to conclude form" even after the passing of 300 days from the date Woodham filed the discrimination charge. [R. Third District Court Opinion 179-192].

Based upon the statutorily prescribed period, the EEOC's purported determination was not only facially defective, but untimely as well. Motry,, No. 99-1457-Civ U.S. District Court, Middle District, Florida, 4/21/2000. As such, upon expiration of the 180 day investigation period, the commission failed to issue finding. By operation of law, Woodham received a statutory finding a discrimination under § 760.11 (8), and (4).

III. THE ISSUANCE OF AN UNTIMELY EEOC "UNABLE TO CONCLUDE NOTICE" DOES NOT DIVEST WOODHAM OF HER VESTED STATUTORILY–CREATED "REASONABLE CAUSE DETERMINATION" AND RIGHT TO FILE A CIVIL ACTION UNDER § 760.11(8)

The Defendant is not entitled to Summary Judgment on the basis that the Plaintiff failed to request an administrative hearing within thirty-five (35) days of receiving an "unable to conclude" notice from the EEOC prior to filing her lawsuit. The EEOC form issued to Woodham did not operate as a definitive finding, nor was it issued within the statutorily prescribed period.

Under the Florida Civil Rights Act , Fla. Stat. § 760.11 (8), and (4), ("FCRA") Woodham is permitted to file her lawsuit, without the need to

exhaust any further administrative remedies, as if the commission determined that reasonable cause that a discriminatory practice occurred because the commission failed to conciliate or make a determination whether there is reasonable cause within one hundred and eighty (180) days of the filing of the charge. Paragraph (8) of Florida Statute § 760.11 provides in pertinent part:

"In the event the 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." (emphasis added).***

Paragraph (4) of Florida Statute § 760.11 provides in pertinent part:

> "In the event that the commission determines that there is reasonable Cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may ***either" (emphasis added):***
>
> "(b)Bring a civil action against the person named in the complaint in Any court of competent jurisdiction; ***or (emphasis added)***
> (c)Request an administrative hearing under ss. 120.569 and 120.57."

In applying the language and intent of the FCRA to the instant set of facts the Plaintiff should be free to bring her civil action pursuant to section (8) of Florida Statute § 760.11.

Significantly, the language employed by the Florida Legislature in section (4), as noted above, is permissive not mandatory. Section (4) gives a claimant the option of either bringing an action immediately upon determination of reasonable cause or requesting an administrative hearing. The Petitioner elected to bring her claim after expiration of the one hundred eighty (180) days. Thus, under section(8) as noted above, Petitioner automatically received a determination of reasonable cause by operation of law.

The Respondent relies upon Florida Statute § 760.11(7) which treats any person who has received a "no cause" finding by the commission as an "aggrieved person" who may not bring a lawsuit without first requesting the administrative hearing. [R: pages 63-65].

However, section seven of Florida Statute § 760.11 is not applicable in the instant case because the commission failed to conciliate or determine whether reasonable cause on Woodham's charge existed within one hundred and eighty (180) days following the filing of the charge. Because the agency failed to reach a determination within the statutory one hundred and eighty (180) days, Woodham is able to proceed under paragraphs (4) and (8) of Florida Statute § 760.11 "as if the commission determined that there was reasonable cause."

To accept the Defendant's position would run afoul of the protection afforded to claimants under Fla. Stat. § 760.11 (8) and (4). Moreover, to apply the requirements of an administrative hearing, despite the commission's failure to make any determination as to reasonable cause within the prescribed one hundred and eighty (180) day period, would completely swallow provisions (8) and (4) of Florida Statute § 760.11. The Defendant's application of paragraph (7) under Fla. Stat. § 760.11 is wholly incompatible with an entire reading of the Florida Civil Rights Act. The Respondent cannot circumvent the plain statutory time limit imposed under the Florida Civil Rights Act. An untimely EEOC notice should simply be rejected by this Court in accordance with the terms of section eight and the remedial purpose of the Florida Civil Rights Act. See also, Motry v. Devereux Foundation, Inc., No. 99-1457-Civ U.S. District Court, Middle District, Florida, 4/21/2000 *discussed supra*.

According to the Defendant, it is perfectly reasonable for a claimant to: (1) file a charge with the commission; (2) wait over three hundred days for a response, but receive no determination from the commission; and (3) ultimately file a civil action upon receiving "suit rights" only to have that suit dismissed because the EEOC issued an "unable to conclude" note, in conjunction with its suit rights, after expiration of the one hundred and eighty (180) period. Such a reading of the Florida Civil Rights Act renders it null and void.

IV. DIVESTING WOODHAM OF HER STATUTORY RIGHT TO FILE A CIVIL ACTION VIOLATES THE REMEDIAL PURPOSE AND LEGISLATIVE INTENT BEHIND THE FLORIDA CIVIL RIGHTS ACT.

In Joshua v. City of Gainesville , 768 So.2d 432 (Florida, Aug. 31,2000) the Supreme Court of Florida made specific findings that apply to the case at bar and control the analysis and application of the provisions contained in the Florida Civil Rights Act.

Surprisingly, the Third District Court of Appeal states in its opinion that Joshua "does not mandate a different result." For example, the Third District Court posits that "[t]he language of section 760.11 is unambiguous and concludes that its decision "does not require any rewriting of the statute."[Woodham v. Blue Cross and Blue Shield of Florida, Inc., Case No. 3D00-2277 May 30, 2001, pg 6, Record, pages 179-192] However, this court must have overlooked the Florida Supreme Court's findings as to the clarity of FCRA.

The Supreme Court of Florida found that the Florida Civil Rights Act "does not provide clear and unambiguous guidance to those who file complaints under its provisions nor to those who are brought into court on allegations of violating its terms." Joshua, 768 So.2d at 2-3 . The Supreme Court further emphasized that the Florida Civil Rights Act is remedial,

patterned after Title VII of the Civil Rights Act of 1964 and "requires a liberal construction to preserve and promote access to the remedy intended by the Legislature." Id. (The Honorable J. Quince holding that the one-year limitations period for filing a civil action in a discrimination case under the Florida Civil Rights Act is inapplicable when the commission fails to make "any determination as to reasonable cause within the prescribed period of 180 days", and that a four-year limitations period applies instead; abrogating Milano v. Moldmaster, Inc., 703 So.2d 1093.)

In Joshua, Honorable J. Quince explains that courts are to look at the actual language used in the statute, and if the language is unclear, apply the rules of statutory construction in order to determine the statute's intent. Id., The Florida Supreme Court citing State v. Iacovone, 660 So.2d 1371 (Fla.1995); Miele v. Prudential-Bache Secs., Inc., 656 So.2d 470 (Fla.1995); Holy v. Auld, 450 So.2d 217-219 (Fla.1984). "One rule of construction provides ' In statutory construction a literal interpretation need not be given the language used when to do so would lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity'." Quoting Joshua, 768 So.2d 432 at 3 of 7.(Fla. Aug. 31, 2000), citing Las Olas Tower Co. v. City of Fort Lauderdale, 742 So.2d 308, 312 (Fla.4th DCA 1999), review granted, No. SC95674, 761 So.2d 330 (Fla. Mar. 20, 2000).

In applying the rule of statutory construction discussed above in the Joshua case, The Court reasoned that even though the statutory scheme favors "exhaustion of administrative remedies prior to court action" the legislature was fully aware that the commission did not always make a determination within the 180 days following the filing of the complaint" and that the legislature also knew of " the confusion engendered by the prevailing statutory law and judicial decisions regarding discrimination claims in existence at the time it created the Florida Civil Rights Act in 1992."[3] Joshua, 768 So.2d 432 at 5 of 7.(Fla. Aug. 31, 2000), citing Schwartz v. Geico General Ins. Co., 712 So.2d 773, 774 (Fla. 4 DCA 1998) ("The legislature is presumed to know the existing law when it enacts a statute")(quoting Williams v. Jones, 326 So.2d 425, 437 (Fla.1975).

In light of the inherent confusion still present within the current statutory scheme of Chapter 760, the Florida Supreme Court rejected the defendant's reliance upon a strict application of the statute of limitations where the

[3] The Florida Supreme Court emphasized that the legislature failed to remedy the inherent confusion and conflict in Chapter 760 regarding the commission's failure to act within 180 days despite its knowledge that prior to the revision to Chapter 760 the Court reversed a trial court's dismissal of a discrimination case based upon a statutory limitation where again, the commission failed to act of the plaintiff's claim within the 180 days of filing. (discussing Hullinger v. Ryder Truck Rental, Inc., 516 So. 2d 1148 (5 DCA 1987) at S644, reversed by the Florida Supreme Court, citations omitted.)

commission failed to make a reasonable cause determination within the 180 days. The Court made unequivocally clear that the defendant's position failed to "take into account the claimant's right to fair notice and opportunity to be heard." Joshua, 768 So.2d 432 at 6 of 7.(Fla. Aug. 31, 2000),

A. Prohibiting Woodham From Seeking Redress Under the Florida Civil Rights Act Where the Commission Failed To Act Within the 180-Day Limit and Failed To Take the "Necessary Steps" Of Notifying Her About the Status Of Her Claim Within The 180-Day Period Would Constitute a Deprivation of Petitioner's Constitutional Rights.

In Joshua the Court found that the commission has an affirmative duty to notify claimants when the 180 day period has expired. Id. Upon finding that Joshua enjoyed a constitutionally protected property interest the Court further determined that in cases where the 180 day period for notification of reasonable cause has expired, that claimants have a right to notice and opportunity to be heard. Of most import, the Court held where no such notice is given, the claimant's individual procedural due process rights are violated. Id.

In ultimately reaching this decision, the Florida Supreme Court found authority from the United State Supreme Court in Logan v. Zimmerman Brush, Co., 455 U.S. 422, 102 S.Ct. 1148 (1982). In Logan, the claimant was required to file his cause of action alleging discrimination within 180 days from the time of the alleged incident. Id. Similar to the procedural steps followed in Florida, the commission responsible for resolving claims in Illinois had 120 days to

investigate the claim and render a decision. The Illinois Commission failed to render a decision within the 120 day period, but instead set a fact-finding conference on the 125th day of the statutory investigative period. The employer sought a writ prohibiting the claimant from participating in the fact-finding conference in light of the expiration of the 120 period which the Supreme Court of Illinois subsequently granted. The United States Supreme Court reversed the Illinois Supreme Court, holding that Logan's claim was a "constitutionally protected property interest and that Logan" was entitled to avail himself of further administrative processing despite the commission's " mishandling of his claim." Id. at 430, 102 S.Ct. 1148.

Based upon its determination of the legislative intent behind the Florida Civil Rights Act, the commission's failure to render a reasonable cause decision within the 180 day investigative period, and the United States Supreme Court's holding in the Logan case, the Florida Supreme Court determined that the Florida Civil Rights Act, sections 760.01-760.11 (1995) "was created to protect [the property interest found by the US Supreme Court] , and that "violations of the Act are themselves deprivations of a property interest." Joshua, 768 So.2d 432 at 3 of 7.(Fla. Aug. 31, 2000),at 6 of 7.[4]

[4] The 14th Amendment of the United State Constitution provides in pertinent part: " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State

The Honorable J. Quince's findings as to the purpose of the Florida Civil Rights Act and the duty engendered under its provisions are set forth below in pertinent part:

"Prohibiting claimants from seeking redress for statutory violations of this interest prior to allowing them sufficient procedural due process—both notice and the opportunity to be heard—constitutes a deprivation of constitutionally protected rights. As in Logan, this case involves administrative inaction and error. Joshua's constitutionally protected rights should not be denied because the Commission failed to giver her adequate notice. … Since the Legislature had undertaken to address the problem of discrimination, we believe that its agents should take the necessary steps to protect the interests of the claimants who fall within its purview. ***The Commission should take that step by providing some type of notice to claimants within the 180 days of filing regarding the statute of their clients."(emphasis added).*** Id.

Under the rule enunciated by the Florida Supreme Court, when the commission fails to make a reasonable cause within the required 180 period, such failure constitutes agency error. As such, claimants are not bound by the one-year statute of limitations under Chapter 760, but may enjoy a four-year statute of limitations under section 95.11(3) Florida Statute.

The issues implicated in the case at bar fall within the ambit of the Florida Supreme Court's decision in Joshua v. City of Gainesville (citation omitted). The Joshua decision is the only authority that addresses the issue of whether administrative time limits should apply when the commission fails to

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deprive any person of life, liberty, or property without due process of law; … ."

comply with its prescribed investigative period of 180 days. The Florida Supreme Court has answered this question with a resounding no.

The Florida Supreme Court recognizes that the Florida Civil Rights Act contains unclear and ambiguous guidance to claimants. Moreover, as the Court noted in Joshua, the Florida Legislature was aware that the commission did not always comply with the 180-day investigative time limit and the ensuing confusion such non-compliance caused when claimants later filed civil actions:

"When this provision of the act was promulgated, the Legislature was well aware of the fact that the Commission did not always make a determination within the 180 days following the filing of the complaint, as had occurred in Hullinger. The Legislature was also aware that complainants could, pursuant to the statute, file a civil action after that 180-day period had expired. It follows that the Legislature was fully aware of the confusion engendered by the prevailing statutory law and judicial decision regarding discrimination claims in existence at the time it created the Florida Civil Rights Act in 1992."

Quoting Joshua , 768 So.2d 432 at 3 of 7.(Fla. Aug. 31, 2000).

In light of the inherent confusion created when the commission failed to reach a reasonable cause determination within the prescribed 180-day period, the Petitioner in the instant case should not be penalized. The Petitioner looked to the plain import of Fla. Stat. §760.11(4) and(8) providing her an immediate remedy , triggered by operation of the law when the commission failed to render a timely finding.

Lastly, as determined by the Honorable J. Quince, the Florida Civil Rights Act was "created to protect" a property interest and that violations

of the Act constitute deprivations of a property interest. Joshua , 768 So.2d 432 at 3 of 7.(Fla. Aug. 31, 2000). As such, a claimant cannot be penalized because of agency error. To do so would allow violation of the claimant's "right to fair notice and opportunity to be heard." Id.

In applying the Court's finding to the case at bar , prohibiting Woodham from seeking redress under the Florida Civil Rights Act, where the commission failed to act within the 180-day limit and failed to take the "necessary steps" of notifying Woodham about the status of her claim within the 180-day period, would constitute a deprivation of Petitioner's constitutional rights.

As in Joshua, the commission committed agency error by failing to remit a timely finding. The EEOC "unable to conclude notice" is not the equivalent of a state determination and cannot be substituted. Moreover, the mere remittance of an untimely EEOC notice cannot retroactively divest Woodham of her vested rights to bring a civil action under § 760.11 (8). The notion that life can be breathed into a stale "unable to conclude" EEOC notice frustrates the remedial purpose of the Florida Civil Rights Act and contradicts the plain meaning of the 180 day limitations period embodied in the Act. To be clear, § 760.11 (8) does not vest a statutory finding of discrimination only upon the commission's "infinite failure" to make a FCRH determination. Our legislature had the foresight to make such "failure" specifically time-bound and limited to

180 days "of the filing the complaint". The 180 day period lapsed in this case and, as such, Woodham received her statutory finding of discrimination. If this Court were to apply the rational of the lower courts, it would appear that a claimant's vested statutory right to sue under the Florida Civil Rights Act is written in disappearing ink.

Other than the four-year statute of limitations imposed by the Supreme Court of Florida in Joshua, there is no authority for barring Woodham's civil action.

In closing, the Petitioner references Justice Ramirez's quote of the remedial purpose of the Florida Civil Rights Act, as properly noted in his dissent. [R. 192 May 30, 2001 Opinion]:

> "The purpose of the Florida Civil Rights Act is " ' to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status …
> ' "§ 760.01(1), Fla. Stat. (1999). The legislature has declared that the Act
> ' "shall be liberally construed to further the general purposes stated in this section… § 760.01(3), Fla. Stat. (1999)…' "

CONCLUSION

For the reasons discussed herein, Petitioner, Cordette Woodham, respectfully requests that this Honorable Court reverse the lower court's grant of summary judgment to the Respondent, the Third District Court's affirmation of the same and award the Petitioner attorney fees. Petitioner specifically

requests that this Court hold: (1) that an EEOC "dismissal and notice of rights" form containing the "unable to conclude" language at issue in this case is not the equivalent of a FCHR's determination under the FCRA; (2) Woodham properly filed her civil action as she never received a "no cause determination" as contemplated under the FCRA; (3) Woodham was vested with a "statutory finding a reasonable cause" and right to file her civil action under the FCRA upon the commission's failure to render a determination within 180 days of the filing of Woodham's charge; And (4), an untimely "no cause determination" issued after the statutorily prescribed investigative period of 180 days lapses does not trump the statutory finding of discrimination and vested right to file a civil action under sections (8) and (4) of § 760.11 and therefore cannot divest a claimant of his or her option to directly file a civil action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Amended Brief on the Merits was furnished via US Mail on November,___, 2001 to **Patrick D. Coleman** of Coffman, Coleman, Andrews & Grogan , PO Box 40089 Jacksonville, FL, 32203.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P.9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

_____
Lisa F. Kemp

APPENDIX

EEOC Dismissal and Notice of Rights Issued to Woodham EXHIBIT 1

Trial Court Order EXHIBIT 2

REFERENCED CASES

Cisko v. Phoenix Medical Products Inc., Cse No. 2D00-311 L.T. No 99-4241 CA HDH, 2001 WL 844675 (Fla. App. 2 Dist.) EXHIBIT 3

Jones v. Lakeland Regional Medical Center, 2001 Fla. App. Lexis 15796 EXHIBIT 4

Ward v. City of Jacksonville Beach, No. 300-Civ-510 J-25TJC, U.S.Middle District, 3/26/20001 EXHIBIT 5

Beckman v. AT & T Universal Card Service Corp., Case No.: 98-211-Civ-J 10B U.S. Middle District, 6/29/1999 EXHIBIT 6

Motry v. The Devereux Foundation, Inc., Case No. 99-1457-Civ U.S. District Court Middle Dist. 4/21/2000. EXHIBIT 7