ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CORDETTE WOODHAM,

Petitioner,

BLUE CROSS AND BLUE SHIELD OF SOUTH FLORIDA INC.,

RESPONDENT
_____/

CASE NO. SCO1-2160

L.T.N. 3D00-2277

FILED
THOMAS D. HALL
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BY

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

AMENDED REPLY BRIEF OF PETITIONER, CORDETTE WOODHAM

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TABLE OF AUTHORITIES-Page ii Page

U.S. SUPREME COURT

FEDERAL CASES

Page

STATE CASES

Page

FLORIDA STATUTE

FLORIDA RULES OF APPELLATE PROCEDURE

I. PETITIONER'S REPLY TO RESPONDENT'S ARGUMENT RELATING TO THE RECITAL OF FACTS AND DUAL FILING.

The Respondent argues in its answer brief that the facts presented in the Petitioner's Statement of Case and Facts are "not appropriate for this Court's Review". This is simply not so. The Petitioner properly recited the facts of the case sub judice pursuant to Rule of Appellate Procedure, 9.210 (b)(4) which provides in pertinent part that the initial brief shall contain :

"A statement of the case ***and of the facts***, which shall include the nature of the case, the course of proceedings and the disposition in the lower tribunal... ." (emphasis added).

Given the constitutional implications of this case, this Court has discretion to review the facts de novo, if deemed appropriate. Gulf Pines Memorial Park Inc. v. Oaklawn Memorial Park Inc., 361 So.2d 695 (Fla. 1978).

The Respondent also disputes that Woodham dually filed her charge of discrimination, although the Third District Court of Appeal held that Woodham properly effected dual filing by filing her charge with the Equal Employment Opportunity Commission ("EEOC"). Woodham v. Blue Cross and Blue Shield of Florida Inc., 793 So.2d 41 (Fla. 3rd DCA May 30, 2001); see also McKelvy v. Metal Container Corp., 854 F.2d 448 (11th Cir. 1988) (the filing a charge of discrimination with any single agency constitutes filing

with the other,). Thus, Woodham perfected dual filing upon filing with the EEOC. [1] The workshare agreement between the FCHR and the EEOC for the fiscal years 1998/1999 specifically provide that the EEOC and FCHR are designated agents for the other for the purpose of receiving, drafting and ***filing*** charges. (emphasis added). [2]

"In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving drafting, and filing charges, including those that are not jurisdictional with the agency that initially receives the charges.... ." EEOC/FCHR Workshare Agreement 1998.

The record reveals that Woodham properly filed her charge of discrimination on June 17, 1998 with the EEOC. As such, dual filing was automatically completed under the 1998 workshare agreement. The Respondent's representation that this issue has not been addressed is patently untrue. This issue was briefed for the Third District Court of Appeal. On this

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[1] The Respondent devotes a substantial portion of its answer to the question of "dual filing". As a preliminary matter, the Petitioner respectfully notes that she seeks no review of this issue and agrees with the Third District Court of Appeal's finding that dual filing was perfected. Woodham v. Blue Cross and Blue Shield of Florida Inc., 768 So.2d 432(Fla. 3rd DCA May 30, 2001); See also Sharon Patterson v. Wal-Mart Stores Inc. 13 Fla. L. Weekly Fed D143 Dec 12, 1999 and Desai v. Tire Kingdom, Inc. 944 F. Supp 876 (both holding Florida is a deferral state and the EEOC and FCHR have entered into a workshare arrangement which means that filing with a single agency constitutes dual filing M.D. Fla. 1996).

2. This Court may take judicial notice of the Workshare Agreements under Florida's evidence Code, Rule 90.202 (5)

one issue, the appellate court agreed with the Petitioner that dual filing occurred:

"Before bringing her lawsuit, Woodham filed a discrimination charge against the BCBS with the United States Equal Employment Opportunity Commission ["EEOC"]. This action operated as a dual filing with the Florida Commission on Human Relations ["FCHR"], pursuant to the EEOC/FCHR workshare agreement. See Love v. Pullman Co., 404 U.S. 522 (1972); Wells Fargo Serv., Inc. v. Lehman, 25 Fla. L. Weekly D 2307 (Fla. 3 DCA Sept. 27, 2000); Sweeney v. Florida Power & Light Co., 725 So. 2d 380 (Fla 3 DCA 1998)." quoting Woodham v. Blue Cross and Blue Shield of Florida Inc., 793 So.2d 41(Fla. 3rd DCA May 30, 2001)

Moreover, the Petitioner filed an affidavit submitted by the EEOC with both the lower court and the Third District Court of Appeal. [R. pg 136] The EEOC affidavit, signed by Elsa Urquiza, the EEOC Enforcement Manager, affirms under oath that Woodham's charge was checked off for dual filing and immediately processed. Per the EEOC's request for an abbreviated set of facts, Woodham filed an amended charge. The amended charge conspicuously shows that Woodham checked the boxes for filing with both the EEOC and the FCHR. Of significant note, Woodham's amended charge "relates back" to the date of the initial filing with the EEOC. Green v. Burger King Corp. 728 So.2d 371 (Fla. 3 DCA 1999) Therefore, whether through initial filing with the EEOC pursuant to the workshare agreement, or through her amended filing with both agencies, her charge was "dually" filed on June 17, 1998.

Under the governing agreements, the EEOC and FCHR are charged with administering claims of discrimination. The Respondent seems to argue that Woodham failed to properly file her charge simply because the EEOC was unable to locate its remittal form, 212. Surely Woodham is not responsible for either agency's handling of forms. Form 212 is entirely under the custody and control of the EEOC, not the claimant. Woodham cannot be penalized due an agency's misplacement of its form. Moreover, this administrative issue has no bearing upon Woodham's proper filing. Woodham did all that was required of a claimant by timely filing her charge of discrimination. The mishandling of Woodham's charge only bolsters her position that her rights have been sacrificed due to agency error and inaction.

II. WOODHAM DID NOT RECEIVE A "NO CAUSE" DETERMINATION BY THE FCHR, AND AS SUCH § 760.11(7) IS ENTIRELY INAPPLICABLE.

The certified question on appeal, in conjunction with the certified conflict with Cisko v. Phoenix Medical Products Inc, 26 Fla. L. Weekly D, 1851 (Fla. 2DCA July 27, 2001) first calls into question the plain import of the words "unable to conclude", whether such language denotes a definitive finding based upon the merit of a claimant's charge of discrimination, and whether such language informs a claimant of his or her rights upon

"dismissal" of a charge. The effect of the EEOC "unable to conclude" form can only be determined after these preliminary issues are resolved.

The Respondent argues that this Court need not even determine the effect of an EEOC unable to conclude determination based upon its reading of § 760.11(7), Fla. Stat. (Respondent's answer brief pg. 9).The Respondent reads this portion to the statute to mean that if any determination other than reasonable cause is made, the aggrieved person must seek an administrative hearing within 35 days of the "determination". Such a reading is completely at odds with the plain language used in the statute.

§ 760.11(7), Fla. Stat. clearly requires the FCHR to make a determination that there is "not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred... ." This portion of the statute is devoid of any language permitting the FCHR to dismiss charges based upon inconclusive findings, such as "unable to conclude". As the court in Cisko correctly noted:

"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."

Cisko v. Phoenix Medical Products Inc, 26 Fla. L. Weekly D, 1851 (Fla. 2DCA July 27, 2001)

The Respondent's construction of § 760.11(7), Fla. Stat is neither based upon the plain directive of the statute or its remedial purpose. The Respondent further states that "even if this Court were to construe § 760.11(7) as requiring a 'no cause' determination, the EEOC's determination "is just that." (Respondent's answer brief pg. 10). The Respondent cites no support for this position and appears to draw its own legal conclusion.

On the contrary, no less than five cases support the common sense understanding that "unable to conclude" hardly provides a definitive determination of a discrimination charge. See Cisko v. Phoenix Medical Products, Inc., 2001 WL 844675 and Jones v. Lakeland Regional Medical Center, 2001 Fla. App. Lexis 15796; Ward v. City of Jacksonville Beach, No. 3000-Civ-510-J-25TJC, Middle District, Florida, 3/26/2001,; Motry v. Devereux Foundation, Inc., No. 99-1457-Civ U.S. District Court, Middle District, Florida, 4/21/2000; and Beckman v. AT&T Universal Card Corp., No. 98-211-Civ-J-10B U.S. District Court, Middle District, June 29, 1999.

Furthermore, the Respondent's conclusion that the EEOC determination was one of "no cause" is without basis because the FCHR

failed to separately adopt and ratify the EEOC "determination". Jones v. Lakeland Regional Medical Center, Case No.: 2D01-290, Fla. App. Lexis 15796, Nov.9, 2001. The pertinent portion of the 1999 Workshare Agreement, paragraph 2 (G), is set forth below:

"The EEOC agrees to provide the FEPA with notice of its final actions on all dual-filed charges. The FEPA agrees to timely issue its final action and Notice of Right to Sue, as appropriate, upon receipt of each of EEOC's acceptable final action notices."

In the case sub judice, the FCHR failed to timely issue its final action upon receipt of the EEOC's notice. Thus, no timely final agency action has occurred in this case.

III. WOODHAM PRESERVED HER ARGUMENT THAT THE EEOC'S DISMISSAL AND NOTICE OF RIGHTS CONTAINING AN "UNABLE TO CONCLUDE" FINDING DID NOT CONSTITUTE A "NO CAUSE" DETERMINATION.

The Respondent argues on page 12 of its Answer Brief that Woodham never contended , until she filed a motion for rehearing with the appellate court, that the "determination that she received from the EEOC relative to her charge of discrimination did not constitute a 'no cause' determination."

Without belaboring this issue, the Petitioner respectfully notes that she disputed that the "unable to conclude" notice remitted to her by the EEOC constituted a "no cause " determination before the trial court and the Third District Court of Appeal. Woodham's argument was preserved in the lower

court and is evidenced in the trial court's Order on Defendant's Motion for Summary Judgment:

"Plaintiff contends that the issuance of the Notice of Right to Sue was not based upon the commission's determination that there existed no reasonable cause to believe that a violation occurred. Specifically, Plaintiff argues that the EEOC checked off the box on the right to sue notice stating inter alia: 'This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issue that might be construed as having been raised by this charge.' Plaintiff contends that the EEOC provides a different form of notice when dismissing a claim for lack of reasonable cause. In sum, Plaintiff argues that the EEOC's Notice of Right to Sue is a neutral statement, claiming that the EEOC is unable to draw conclusions ***as opposed to a dispositive "no cause" finding."*** (emphasis added). Order on Defendant's Motion for Summary Judgment, Woodham v. Blue Cross Blue Shield of Florida, Case No.: 99-2117-CA-(6) [Record pages 172-178; attached to the Petitioner's Amended Brief on The Merits as Exhibit 1].

Furthermore, the Petitioner argued before the Third District Court of Appeal during oral presentation that the "unable to conclude" notice remitted by the EEOC was "nebulous at best" and "confusing".

In a footnote on page 12 of the Respondent's answer brief, the Respondent quotes the Petitioner completely out of context. The Respondent states that the Appellant (Woodham) "does not argue that a "no cause" determination does not trigger the requirement to request an administrative hearing... ." In making this statement, Woodham was not conceding that the instant notice remitted by the EEOC was an effective "no cause". Woodham was merely acknowledging that a true "no cause" decision would implicate § 760.11(7), but that the notice sent in Woodham's case was entirely

inapplicable because it was over 120 days late, and remitted by the EEOC per Woodham's request to close the file, not because the EEOC made any "findings" pursuant to an "investigation". The Respondent confuses that issue.

The Respondent further argues in footnote 3 on page 12 of its answer brief that "despite the existence of case law, which Woodham relied upon in her Initial Brief to this Court..., Woodham did not cite any of those cases in the briefs that she submitted to the Third District Court of Appeal."

Since the Respondent did not cite any of the cases it referenced, it is difficult to respond to such an argument. However, the Petitioner notes that two of the cases she relied upon were decided after the Third District Court of Appeal issued its opinion in Woodham, to wit: Cisko v. Phoenix Medical Products Inc, 26 Fla. L. Weekly D, 1851 (Fla. 2DCA July 27, 2001) and Jones v. Lakeland Regional Medical Center, Case No.: 2D01-290, Fla. App. Lexis 15796, Nov. 9, 2001. Moreover, the following cases, all holding in harmony that "unable to conclude" does not equal "no cause" were provided to the appellate court in a Notice of Supplemental Authority filed by Woodham: Ward v. City of Jacksonville Beach, No. 3000-Civ-510-J-25TJC, Middle District, Florida, 3/26/2001; Motry v. Devereux Foundation, Inc., No. 99-1457-Civ U.S. District Court, Middle District, Florida, 4/21/2000;

and Beckman v. AT&T Universal Card Corp., No. 98-211-Civ-J-10B U.S. District Court, Middle District, June 29, 1999. [3]

IV. NO CASES RELIED UPON BY THE RESPONDENT APPLY TO THE FACTS OF THE CASE AT BAR.

The Respondent cites Blakely v. United Services Automobile Assoc., 13 Fla. L. Weekly Fed. D 79, (M.D. Fla. 10/4/1999) as authority. (Respondent's answer brief pg 13). However, Blakely did not concern a claimant pursuing a civil remedy upon expiration of the 180 day statutory investigation. In Blakely, the claimant attempted to file a lawsuit "only 142 days after dually filing with the EEOC and the FCHR." Id. at 3. Thus, in Blakely, the claimant file her civil action during the commission's investigation period. In the case at bar, Woodham filed her lawsuit after the 180 day investigation period closed. More importantly Blakely directly conflicts with the mandates of the 1999 workshare agreement which governs the duties of the EEOC and the FCHR in the instant case.

In deciding Blakely, the court relied upon another case cited by the Respondent, Dawkins v. Bellsouth Telecommunications, Inc., 53 F. Supp 2d 1356 (M.D. Fla. 1999) which the court construed to mean that the "EEOC's

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[3] The above-cited cases were all provided to the Third District Court as attachments to Woodham's Notice of filing Supplemental Authority. This authority was accepted by the Third DCA, despite the Respondent's later motion to strike the same.

finding took the place of the FCHR's potential finding." Blakely, 13 Fla. L . Weekly Fed D 79. Thus, the Blakely court concluded that if the EEOC "handed down" a "no cause" finding, a claimant had to seek an administrative hearing within 35 days. As a matter of note, both Blakely and Dawkins were authored by the same judge.

The Court did not engage in any analysis of the language "unable to conclude" employed by the EEOC in either Blakely or Dawkins. The court simply concluded that EEOC forms containing this language constituted "findings" by the FCHR. The court's conclusion is at odds with the 1999 workshare agreement which clearly requires that the EEOC remit its "decision" to the FCHR in a timely manner, and that the FCHR after determining whether the EEOC decision is "acceptable", issue its own final action or Notice of Right to Sue "as appropriate". Jones v. Lakeland Regional Medical Center, Case No.: 2D01-290, Fla. App. Lexis 15796, Nov. 9, 2001; EEOC/FCHR 1999 workshare agreement. Neither Blakely nor Dawkins address the issue relating to the issuance of an untimely notice. Like Blakely, Dawkins concerned a claimant who filed her civil action prior to expiration of the 180 day investigation period. Dawkins filed her civil action on day 176 of the investigation period. Dawkins, 53 F. Supp.2d 1356 (M.D.

Fla. 1999). In this case, Woodham filed after 180 days of filing her charge, based upon her statutory finding of discrimination.§ 760.11(4),(8).

For the same reasons, the cases discussed below and relied upon by the Respondent are in conflict with the EEOC/FCHR 1999 workshare agreement and did not concern notices issued after the 180 statutorily prescribed investigation period under the FCRA. Mulkey v. Equifax Card Servs. Inc., No. 94-1080 Vic.-T-25E (M.D. Fla. Jan 9, 1996) ;Long v. Health Tour Management, Inc., 8:01-Civ-304-T-17-TGW (M.D. Fla 2001) (Long was decided by the same court that authored Blakely); Gorman v. Jim Palmer Trucking, Inc., Case No. 8:01-CV-T-MSS (M.D. Fla. Sept. 20, 2001); Lynch v. Lexford Residential Trust, 6:99-CV-1591-Orl-28KRS. In Hamrick v. Standard Register Co., No. 96-3944-CA (4th Cir., Duval County, 9/2/97 the words, "unable to conclude" were not at issue, and both the JEOC and FCHR made evidentiary findings before issuing a "no cause" decision. Moreover, there was compliance with the 180 day investigation period. Watkins v. Sverdrup Tech., Inc. Case No. 94-30401/RV (N.D. Fla. July 31, 1996) is also inapplicable because under the 1999 workshare agreement, even if the EEOC may resolve a charge, if the charge is dual filed, as in this case, the FCHR does not delegate its authority to make final agency determinations. The delegation of processing does not obviate the need for the EEOC to provide

notice to the FCHR of its action on all dual-filed charges, and for the ***FCHR to timely issues its final action*** based upon its acceptance or not acceptance of the EEOC's action. (emphasis added). Jones v. Lakeland Regional Medical Center, Case No.: 2D01-290, Fla. App. Lexis 15796, Nov. 9, 2001; See also Section 2G 1999 workshare agreement. Lastly, Lowe v. BTI Services, Inc., Case No. 97-4679, 4th Cir. Duval County, 7/20/1998 is abrogated by Joshua v. City of Gainsville, 768 So.2d 432 (Fla. Aug 31,2001).

Contrary to the Respondent's position, the 1999 workshare agreement directly applies to the case sub judice because the EEOC processed the claim for over 300 days, well into the year 1999. Moreover, the Miami EEOC director, Frederico Costales, issued the purported decision to Woodham on July 22, 1999. Thus, the EEOC and FCHR were bound by the 1999 workshare agreement.

Finally, the 1995 Commission Meeting notes provided by the Respondent, further confirms the confusion engendered by the words "unable to conclude". (See pg 28 of Respondent's answer brief, more specifically Commissioner Tucker's response to the proposed "unable to conclude" language) :

"[W]hen 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 [that the] respondent is in compliance, we are saying that is no cause. ***And I can't understand that. It just is not logical."*** (emphasis added).

The paramount issue revealed by the Commission notes is that the EEOC ceased issuing opinions with particularized findings. Equally important, the "reasons" do not provide a claimant with the statutorily required notice of her available rights upon dismissal of her charge. The Respondent's reliance upon the EEOC's commission notes is further weakened in light of the EEOC's stated intent to advise claimants of the reasons for its determination during predetermination interviews. (Respondent's answer brief, pg 29, footnote 8) The record in this case is devoid of any evidence that the EEOC advised Woodham of the "reasons" for its "determination" during a "predetermination interview".

Lastly, this Court's construction of the Florida Civil Rights Act in Joshua v. Gainsville, 768 So.2d 432 (Fla. 2001) is directly applicable to case at bar. The commission failed to notify Woodham with "some type of notice" as to the status of her claim within 180 days of filing, and failed to state the "next available steps" under FCRA in derogation of Joshua. Id. at 438.

In conclusion, § 760.11(7) would not be rendered meaningless should this Court reverse the lower courts, as the notice remitted to Woodham is not a timely, definitive "final decision" as contemplated in the FCRA. On the contrary, § 760.11(8) would be nullified. The Petitioner respectfully prays that this matter be reversed and remanded, and requests attorney fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Amended Reply Brief was served via United States First Class Mail this 8th day of February, 2002 upon:

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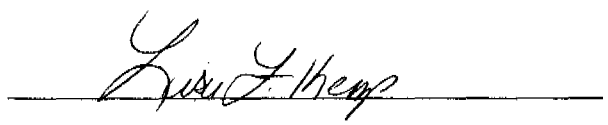
CERTIFICATE OF COMPLIANCE

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.



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