IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-2598
LOWER TRIBUNAL NO.: 4D01-252

JENNIFER BACH,
Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,
Respondent.
_____/

AMENDED REPLY BRIEF FILED ON BEHALF OF PETITIONER

On Appeal from the Fourth District Court of Appeal
L.T. Case No. 4D01-252

Law Offices of STROLLA & STROLLA
Attorneys for Petitioner
The Comeau Building
319 Clematis Street
Suite 801
West Palm Beach, FL 33401
Phone: (561) 802-8987
Fax: (561) 802-8957

_____
STACY STROLLA, ESQUIRE
Florida Bar No.: 0044954

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes:

Cases:

SUMMARY OF ARGUMENT

In a weak attempt to avoid the issues in this case, Respondent tries to take another shot at dismissing this appeal for lack of jurisdiction. Respondent's second attempt, which asserts no new argument, must also fail.

Respondent cannot avoid this Court from considering the issue whether a determination by a separate agency equates to a Florida Commission on Human Relations' ["FCHR"] finding. This is because before this Court can even consider whether an untimely "no cause" finding forecloses on a claimant's right to sue, this Court must first resolve this preliminary issue.

In its Brief, Respondent completely ignores and fails to address the statutory mandate for the FCHR to investigate all charges within 180 days. Respondent's position that an untimely "no cause" determination strips a claimant of her right to sue not only renders this statutory mandate meaningless, but wreaks havoc on the consistency of the statute.

Additionally, Respondent's assertion that a claimant can only initiate court action if her claim is meritorious or "potential meritorious" is not supported by any authority. In fact, the opposite is true. That is because even Respondent admits that if a claim has absolutely no merit, a claimant can still run to court on day 181 if the FCHR failed to issue a determination before suit was filed.

Critically, Respondent refuses to concede that the Act imposes a liberal interpretation requirement, and instead argues a common law doctrine. Respondent's position cannot withstand even cursory scrutiny, because this Court has already held the right to sue is a "constitutionally protected property interest." And, Respondent cannot deny that a claimant is denied due process when she was never alerted of her administrative options.

ARGUMENT AND ANALYSIS

I. THIS COURT HAS ALREADY DETERMINED THAT DISCRETIONARY JURISDICTION IS PROPER.

This Court issued an Order Accepting Jurisdiction on June 3, 2002. Respondent ignores that ruling, arguing that this Court lacks jurisdiction because the Fourth District Court of Appeal's opinion does not conflict with Joshua v. City of Gainesville, 768 So.2d 432 (Fla. 2000).[1] This is the Respondent's second attempt to dismiss this appeal on this ground.[2] This second bite at the apple, which asserts no new argument, must also fail.

Because this Court has already addressed and ruled on this issue in its June 3,2002 Order, Petitioner will not waste the Court's time to revisit and re-argue this issue. Instead, Petitioner stands on the merits of her jurisdictional brief.

---

[1] Respondent's Brief on the Merits at I, pp. 15-17. Respondent's Brief on the Merits will be referenced herein as "Respondent's Brief."

[2] *See* Respondent's Brief on Jurisdiction, pages 3-7.

II PETITIONER RAISED AND PRESERVED HER ARGUMENT THAT THE FCHR FAILED TO COMPLY WITH THE NOTIFICATION REQUIREMENT UNDER FLA. STAT. §760.11(3).

Respondent erroneously and improperly claims that Petitioner failed to raise or preserve her argument that the FCHR failed to comply with the provisions of Fla. Stat. §760.11(3). That argument is not only without merit, it misleads this Court.

Petitioner did not "only raise one issue in the Fourth District." [Respondent Brief at II(A), p 19].[3] And, Petitioner did not merely address the lack of notification in a footnote in her Initial Brief.[4] Instead, she specifically dedicated a point on appeal in her lower court's Initial Brief for the Florida Commission on Human Relations' ["FCHR"] failure to comply with §760.11(3).

Section 760.11(3) requires, in relevant part, that the FCHR "by registered mail **shall** promptly notify the aggrieved person and the respondent of the reasonable cause determination, the date of such determination, and the options available under this section."

---

[3] In arguing that Petitioner limited her appeal to one issue, Respondent fails to properly track the points on appeal raised by Petitioner in her Fourth District Court of Appeal Initial Brief. Instead, Respondent quotes Petitioner's language from her Response to this Court's Order to Show Cause.

[4] Petitioner's Initial Brief filed with the Fourth District Court of Appeal is attached as Tab 1 to the Supplemental Appendix Filed in Support of Petitioner. Appellant/Petitioner argued that the FCHR's failure to comply with §760.11(3) denied her due process. See Supplemental Appendix Filed in Support of Petitioner at Tab 1, Section II(B).

[Emphasis added].

In her Initial Brief filed with the lower court, Petitioner also quoted this Court's language from Joshua v. City of Gainesville, 768 So.2d 432 (Fla. 2000), requiring the FCHR to provide a claimant notice:[5]

> The Florida Civil Rights Act, sections 760.01-760.11 (1995), was created to protect that property interest. It follows that violations of the Act are themselves deprivations of a property interest. The Act demonstrates the Legislature's intent that one claiming a deprivation under its terms **would have the Commission make a preliminary reasonable cause determination, notify the claimant of its findings, and inform the claimant of the possible next steps that can be taken.** *See* §§ 760.11(3),(4).
>
> Since the Legislature has 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 180 days of filing regarding the status of their claims.**
> Joshua at 439. [Emphasis added].

Certainly, Petitioner's reliance upon subsection (3), in conjunction with the quoted Joshua language requiring notification to claimants, establishes that Petitioner preserved this issue currently on appeal.

III RESPONDENT'S POSITION RENDERS THE STATUTORY MANDATE TO INVESTIGATE CLAIMS AND ISSUE A DETERMINATION WITHIN 180 DAYS MEANINGLESS.

A. The Respondent Completely Ignores and Fails To Address

---

[5] Supplemental Appendix Filed in Support of Petitioner at Tab 1, Section II(B), p 15.

the Statutory Mandate To Investigate And Issue Determinations Of Claims Within 180 Days.

Respondent asserts that the Florida Civil Rights Act's [hereinafter "the Act"] language is clear in requiring a claimant to choose only the administrative option when an agency issues a "no cause" determination after 180 days. [Respondent Brief at III(A) and (B)]. This is not so. What *is* clear is the FCHR "**shall**" determine whether reasonable cause exists **within 180 days.** Fla. Stat. §760.11(3) [emphasis added]. The Respondent completely ignores and fails to address this statutory mandate to issue determinations of claims within 180 days. That authority expires on day 180 by the plain language of the statute, though the FCHR may continue to gather facts and mediate and otherwise seek to resolve claims.

In support of its position, Respondent argues that Section 760.11(7) is consistent with the remainder of the Act. [Respondent Brief at III(A), pp. 27-29]. **But how is requiring an administrative hearing after a no-cause determination is issued <u>after</u> 180 days consistent with the requirement to determine cause <u>within</u> 180 days?** The Respondent's position -- that the FCHR's untimely "no cause" determination bars suit -- renders the 180 day mandate to issue a determination completely meaningless.

Respondent also asserts that if Petitioner's position is correct, then there would be no reason for the FCHR to continue an

investigation or make a timely determination. [Respondent Brief at III(A), p. 28]. This argument is defective. Petitioner is not declaring that the FCHR has no jurisdiction over a claim after 180 days. After 180 days the FCHR still has a valuable role in assembling evidence and settling cases. What Petitioner advances, and what the Act demands, is that once the FCHR fails to comply with the required 180 day screening process, then a claimant has her *choice of remedies*: to either file a civil lawsuit or request an administrative hearing. Fla. Stat. §§760.11(3),(4).

Petitioner's interpretation is consistent with the analysis in Andujar v. National Property and Casualty, 659 So.2d 1214 (Fla. 4th DCA 1995). In Andujar, the Court clearly stated, "When the (FCHR) takes final action **or** after the passage of 180 days, **whichever happens first**, the complainant may file a civil action in the appropriate court." Id. at 1217 [emphasis added].

The Petitioner's statutory analysis does not render any part of the Act meaningless. Respondent's position, however, clearly does. The legislature specifically mandated that the FCHR timely perform its determination process in Section 760.11(3). This Court, in Joshua, understood and specifically recognized that mandate. Ignoring the 180 day deadline for determinations would render the section's language meaningless.

Section 760.11(7) states that a complaint is to be dismissed if the FCHR renders a no-cause finding. Subsections (4) and (8) of

the Act state that complainants have the right to file a civil action after the 180 day period expires. Read harmoniously and in pari materia to make a coherent whole of the statute, these subsections state that the right to sue vests on day 180. It necessarily requires a ghostly judicial amendment to the Act to claim that a later "no cause" finding can eradicate that vested right. Section 760.11(8) states merely that when the Commission fails to act within 180 days, "an aggrieved person may proceed...as if the commission determined that there was reasonable cause."[6] The ghostly judicial amendment would add words to the effect "unless a 'no cause' finding thereafter issues." Such an amendment is not authorized by law and wreaks havoc on the consistency of the statute.

B. The FCHR Has a Non-Delegable Duty to Issue its Own Determinations.

Respondent wants this Court to ignore the Equal Employment Opportunity Commission's ["EEOC"] amicus brief. It's request to do so is only because the EEOC's position destroys Respondent's case.

As the EEOC correctly explains, in order for this Court to even consider whether an untimely "no cause" finding forecloses on

---

[6] When quoting subsection (8), Respondent places emphasis on the word that a claimant "may" proceed to court if no determination is timely made. [Respondent Brief at III(B), p. 29]. What should be properly emphasized is that in that very same sentence, it explains that if the FCHR fails to determine cause "within 180 days," *then* "an aggrieved person 'may' proceed... as if the commission determined that there was reasonable cause." Fla. Stat. §760.11(8).

a claimant's right to sue, this Court must first resolve whether the Palm Beach County Office of Equal Opportunity ["Local OEO"] determination equates to a FCHR finding.[7]

The Worksharing Agreement between the FCHR and the EEOC declares that although the FCHR may refer a charge to the EEOC for the investigation, the FCHR must issue its own determination and notify the claimant of her rights and options.[8] This requirement is non-delegable and cannot be avoided simply because another agency investigates the charge.[9]

Interestingly, the Respondent argues that this Court should not consider the issue as to whether a finding by the EEOC equates to a FCHR finding, yet it attaches to its own Appendix the EEOC's Dismissal and Notice of Rights letter as well as the Local OEO's determination sent to Petitioner.[10] Respondent's own pleadings support the EEOC's position. **It is undisputed that the EEOC's**

---

[7] Brief of the Equal Employment Opportunity Commission as Amicus Curiae In Support of Petitioner, at p. 15.

[8] See FY Worksharing Agreement, Section II, ¶¶ F and G [EEOC Brief, Appendix at 3a; *See also* Respondent's Appendix at RA 123].

[9] It is not just the Worksharing Agreement that requires the FCHR to issue its own determination. The Act also requires that the FCHR issue its own determination. Fla. Stat. §760.11(3). The FCHR failed to do so.

[10] Respondent's Appendix at RA 44-46. Respondent failed to attach the entire Local OEO determination letter in its Appendix.[RA 44]. The complete Local OEO determination letter is a part of Petitioner's Appendix Filed in Support of Petitioner at Tab 5.

Dismissal letter and the Local OEO's determination fail to mention any State remedies, rights, or options.[11] Consequently, Respondent cannot seek to invalidate the EEOC's position arguing lack of issue preservation, since it took affirmative steps to attach these critical determination letters to its own Brief.

Respondent also seeks to prevent this Court from reviewing this critical, preliminary issue by asserting that Petitioner agreed that an EEOC finding serves as an FCHR finding.[12] [Respondent Brief at II(B), p. 22]. Quite candidly, Petitioner only asserted this position because she, like the cases decided before filing her Complaint, had a "fundamental misunderstanding of the worksharing agreement between the EEOC and the FCHR." [EEOC Brief at p. 19].[13]

---

[11] It is precisely because the EEOC and the Local OEO findings do not serve as an FCHR finding that the determination letters only provide the options available under Federal – and not State – law.

[12] Critically, Petitioner never agreed that the Local OEO finding equated to an FCHR finding. That is because it is undisputed that no Worksharing Agreement exists between the Local OEO and the FCHR. [See Respondent Brief at II(B), FN 14]. Consequently, there exists no authority for the Local OEO determination to serve as the same finding for the FCHR.

[13] Petitioner relied upon Dawkins v. Bellsouth Telecommunications, Inc., 53 F.Supp.2d 1356 (M.D. Fla. 1999)in her lower court Initial Brief when she asserted that the EEOC's finding was the same as the FCHR's. [See Appellant's Initial Brief at FN 4]. In its Amicus Curiae brief, the EEOC explains that the Dawkins court got it wrong, as the specific language of the worksharing agreement requires that each agency must provide notice of its final actions. [EEOC Brief at p. 19, relying upon FY Worksharing Agreement, Section II, ¶¶ F and G, at EEOC Appendix 3a].

Petitioner cannot waive the issue as to whether the EEOC's determination was the same as the FCHR's simply because she erroneously thought that was so. This Court will apply the law in existence at the time of its decision, not the law that existed at the time of the events. Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467 (Fla. 1978). Though Dawkins at one time may have appeared to be good law, it is no longer even arguably so. See, Jones v. Lakeland Reg'l Med. Ctr., 805 So.2d 940 (Fla. 2d DCA 2001); White v. City of Pompano Beach, 813 So. 2d 1003 (Fla. 4th DCA 2002).

Because it is undisputed that the FCHR failed to comply with its non-delegable duty to issue its own finding, Petitioner's claims must be reinstated.

C. There Exists No Support That a Claimant Can Only Seek Court Action For Meritorious Or "Potentially Meritorious" Claims.

Respondent asserts that a claimant can only initiate court action if her claim is meritorious or "potential meritorious." [14] There exits absolutely no legal support for this position. In fact, the opposite is true.

As this Court recognized in Joshua, when the FCHR fails to comply with its requirement to investigate charges within 180 days,

---

[14] Respondent Brief at III(C), pp 34-35. Respondent apparently coined the phrase "potentially meritorious" claims. No legal authority, statute, worksharing agreement, or legislation classifies charges in this manner.

claimants get a four-year statute of limitations to file a lawsuit. In Joshua, this Court did not make a distinction between meritorious, "potentially meritorious," or non-meritorious claims when providing the four-year limitations period. That is because the statue permits claimants, regardless of the charge's merit, to file suit at any time after the 180 day period expires. *See* Andujar v. National Property and Casualty, 659 So.2d 1214 (Fla. 4th DCA 1995); and McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998).

In fact, if a claimant is concerned about the viability of her claim, she can run to court and file her lawsuit before a determination is ever made.[15] This is so even if the claim is completely baseless.[16] Respondent freely admits this.

Under Respondent's own argument, a claimant -- **regardless of her claim's merit** -- can file a civil action anytime after 180 days but before the agency's determination. [Respondent Brief at III(B)].[17] Respondent's very own admission supports that a

---

[15] Petitioner focused on this "race to the courthouse" result in her Initial Brief at III.

[16] *See* McElrath v. Burley, 707 So.2d 836, 838 (Fla. 1st DCA 1998) ("both claimants who receive a determination by the FCHR of reasonable cause to believe that an unlawful employment practice has occurred and those claimants whose claims are not processed within 180 days, **regardless of merit**, have the right to proceed directly to court without having to go through the administrative process.")(Emphasis added).

[17] Respondent's position is deflated by its own language:

claimant can file suit – and not be required to seek administrative action – regardless of the claim's merit.

In support of its position, Respondent also asserts that Petitioner's charge was "fully investigated." [Respondent Brief at III(C), p 38]. Respondent has no basis on which to make this statement. Because the Local OEO's investigatory file is not a part of this record, there exists no evidence establishing that the Local OEO ever conducted a full investigation. As such, Respondent cannot unilaterally promote its self-serving statement that Petitioner's claim is truly without merit, or that the determination was made after her claim was "fully investigated."

IV. RESPONDENT'S POSITION IGNORES THE ACT'S AND JOSHUA'S MANDATE FOR LIBERAL CONSTRUCTION.

Respondent refuses to concede that the Act imposes a liberal interpretation requirement. Instead, it seeks to argue that because the right to sue an employer was statutorily created, and

---

> [I]f the claimant believes that her claim has merit and has the potential to withstand judicial scrutiny – **or not** – she may sue on day 181 or at any time thereafter until the four-year statute of limitations period expire.
> [Respondent Brief at III(B), p. 29] [emphasis added].

> If the investigation appears to be going well and the claimant is confident of a favorable determination, she may decide to forego filing a civil suit....**But at anytime after day 180 that the investigation appears headed in the opposite direction, the claimant can end it by filing suit.**
> [Respondent Brief at III(B), p. 31][emphasis added].

did not arise from common law, a claimant can be stripped of her right to sue. [Respondent Brief at III(C), p.34]. Respondent fails to provide this Court with any controlling, on-point legal authority to support that position. What *is* controlling, however, is the language of the Act itself.

Section 760.01(3) of the Act states: "The Florida Civil Rights Act of 1992 shall be...**liberally construed** to further the general purposes stated in this section and the special purposes of the particular provision involved." [Emphasis added]. As such, Chapter 760 "is remedial and **requires a liberal construction** to preserve and promote access to the remedy intended by the Legislature." Joshua at 435 [emphasis added].

The Fourth District Court of Appeal opinion in this case does not comport with the Joshua language, nor the direct language of the Act itself, requiring that the Act be liberally construed. Indeed, the appellate court's opinion, in adopting Woodham v. Blue Cross and Blue Shield of Florida, Inc.,793 So.2d 41 (Fla. 3d DCA 2001, takes the opposite approach of struggling to construe the statute to deny access to the remedy. The lower court's interpretation requires addition of the ghostly amendment noted above. Neither the statute itself nor the Joshua mandate permits such a reading.

//

V RESPONDENT CANNOT REFUTE THAT THE ACT DENIES A CLAIMANT DUE PROCESS BY FAILING TO AFFORD A CLAIMANT THE RIGHT TO APPEAL TO A JUDICIAL TRIBUNAL AFTER AN ADMINISTRATIVE HEARING.

Respondent relies upon McElrath and Scholastic Systems v. LeLoup, 307 So.2d 841 (Fla. 1974), in support of its argument that Petitioner was not denied due process. [Respondent Brief at III(C)]. Respondent's argument is in two parts; first employment law claims did not exist at common law and so are not afforded constitutional protection from revocation of vested rights; second, the appeal to a district court of appeal satisfies any due process concerns arising from retroactive nullification of the right to sue that vests on day 180.

The first point is plainly wrong because this Court has already held the right to sue that vests on day 180 to be a "constitutionally protected property interest." Joshua, 768 So. 2d at 438-439. In any case, it is too narrow a distinction to allege that employment actions did not exist at common law. What matters is that actions for unliquidated damages did exist at common law and that is exactly what modern discrimination statutes amount to. La Rosa v. Broward County, 505 So. 2d 422 (Fla. 1987)

The second point is irrelevant to these facts. While it has been held that an administrative proceeding reviewable by an appellate court may satisfy due process, that is not the issue here. The issue here is that the Petitioner at one time had a right to go to court instead of an administrative proceeding. She

was stripped of not only her right to go to court but also her right to go to the administrative tribunal because she did not exercise that administrative option within 35 days of a finding that did not alert her of what options she had. The Legislature did not have to pass a civil rights act. Some states do not have one. But once the Legislature creates a right to sue under a civil rights act, it may not capriciously revoke that right without giving Petitioner notice and an opportunity to preserve the right. Here the Legislature showed utmost respect for those rights. It is the court below that has done violence to plain statutory language.

CONCLUSION

The issues on appeal are ripe for determination. Respondent cannot avoid the EEOC's position since it took affirmative steps to attach these critical determination letters to its own Brief. And, as Respondent cannot dispute that the FCHR is statutorily mandated to issue a determination within 180 days, the Petitioner had the right to chose the option of filing a civil action. Respondent can also not refute that because the FCHR failed to timely issue a no-cause finding, and advise her of her options, the Petitioner was denied her due process.

A review of the statutory mandates in the Florida Civil Rights Act, in conjunction with the legislative intent behind the Act's enactment, requires that the lower court's opinion be reversed with instructions to reinstate Petitioner's state civil rights claims.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been furnished by U.S. Mail this ___ day of September 2002 to **Lucinda Hofmann, Esq.**, Holland & Knight, 701 Brickell Ave., Suite 3000, Miami, Florida 33131, **Richard Johnson, Esq.**, counsel for NELA, Florida Chapter, 314 W. Jefferson Street, Tallahassee, Florida 32301, **Susan R. Oxford, Esq.**, counsel for the EEOC, 1801 L Street, N.W. Washington, D.C., 20507; **Michael J. Farrell, Esq.**, counsel for the EEOC Miami District Office, One Biscayne Tower, Suite 2700, 2 Biscayne Blvd., Miami, Florida 33131.

Law Offices of STROLLA & STROLLA
The Comeau Building
319 Clematis Street
Suite 801
West Palm Beach, FL 33401
Attorneys for Petitioner
Phone:(561) 802-8987
Fax: (561) 802-8957

By:_____
STACY STROLLA
Florida Bar No. 0044954

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED that Petitioner's Reply Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(2) as it has been prepared in Courier New 12-point font.

Law Offices of STROLLA & STROLLA
The Comeau Building
319 Clematis Street
Suite 801
West Palm Beach, FL 33401
Attorneys for Petitioner
Phone:(561) 802-8987
Fax: (561) 802-8957

By:_____
STACY STROLLA
Florida Bar No. 0044954