IN THE SUPREME COURT OF FLORIDA

JENNIFER BACH

Petitioner,

v.

Case No. SC01-2598
L. T. No.: 4D01-252

UNITED PARCEL SERVICE,
INC.

Respondent.
________________________________/

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

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BRIEF IN SUPPORT OF PETITIONER
ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

____

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SUMMARY OF ARGUMENT

For many years prior to the decision below (and one other case also under review by this Court) it was understood that the Florida Civil Rights Act (FCRA) allowed any charging party the right to file a lawsuit 180 days (or more) after filing a charge with the Florida Commission on Human Relations (FCHR) or its federal or local counterparts. In the event of a "no cause" determination in less than 180 days, the claimant is diverted to an administrative hearing instead of court. The hearing must be requested within 35 days of the "no cause" finding or all rights are forfeited. The court below held that a "no cause" finding has that same preclusive effect even if it comes after 180 days. After the 180 days has run, the claimant has four years to file suit. But under the decision below, the right to sue can be cut off by a surprise "no cause" document issued at any time within those four years.

Florida courts decided many relevant cases between the decision in this case and the instant appeal. Those decisions have significantly eroded the foundations of the decision below. Prior precedent, in this Court and others, also militates against affirmance. These decisions undermine the holding sub judice in two distinct ways. First, these cases establish that the right to sue that accrues on day 180 is constitutional in nature and can not be nullified by a later administrative decree of "no

cause." Second, even if such a divestiture could be constitutional, it would require at a minimum, the notice mandated by the statute itself: a registered letter setting forth the options available to the charging party. Petitioner received no notice of any sort coincident with the "no cause" finding issued in her case after 180 days. Such notice, to conform to the statute, would need to tell her, at least, that she must request an administrative hearing within 35 days or forfeit all rights.

Petitioner's "no cause" finding issued from a local agency and was adopted by a federal agency. Neither of these events was a determination by the Florida Commission on Human Relations which must act independently for the determination to have legal force under the Florida Civil Rights Act.

A different panel of the court below issued an opinion in apparent contradiction to the opinion in this case. That panel went so far as to certify conflict with a decision that the opinion ad litem had adopted. A third panel of that court sought unconvincingly to harmonize the two prior decisions of the court below.

The Legislature and this Court have established that the FCRA must be liberally construed to effectuate its general purpose and that each section of it must be liberally construed to effectuate its special purpose. This means that whenever a court confronts two possible interpretations of the statute, it must opt for the one that allows access to the remedy if such a construction is at all reasonable. Many courts have

cited and applied this rule in correctly interpreting FCRA.

In the case at hand, it is not even necessary to apply the liberal construction doctrine because the ruling below is so plainly wrong. The decision does violence to the simple language of the statute by amending into it language allowing a "no cause" finding falling after 180 days to revoke the vested right to sue. This conflicts with several passages of the statute itself and disrupts the system created by the statute.

FCHR and its counterpart agencies continue to conciliate and mediate cases after 180 days have passed. Many cases settle this way. This Court has held that the Legislature favored letting this administrative process run its course even while giving claimants the right to abort the process by filing suit any time after 180 days. The court below has upset that applecart. Claimants now must hurry to court for fear that late-breaking "no cause" findings will void their right to sue if they permit the Commission to complete its process. Persons previously secure in their right to sue are now prematurely forced into court for fear of an unhappy conclusion at FCHR retroactively revoking their litigation rights.

This Court has twice established that the principles furthered by FCRA are of the highest importance and that they will trump countervailing interests and legal doctrines. Some lower courts have again lost sight of their duty of liberal construction and have succumbed to the temptation of unburdening crowded dockets and avoiding

the complexities of difficult and unfamiliar doctrines by accepting unworthy theories under which FCRA claims may be dismissed without reaching the merits. Defendants have been emboldened to advance arguments bordering on the frivolous. Poorly reasoned opinions spread among many trial courts before they can be corrected on appeal. By then may worthy claims are irretrievably lost and many wrongs are never righted. This Court should firmly remind the lower courts of their duty to reject spurious constructions of civil rights statutes.

ARGUMENT

I. LATER JURISPRUDENCE HAS ERODED THE FOUNDATIONS OF THE DECISION BELOW

The operative holding of the court below is that a "no cause" finding by the Equal Employment Opportunity Commission ("EEOC") or the Florida Commission on Human Relations ("FCHR") requires a charging party to prevail in an administrative hearing before filing a suit in court under the Florida Civil Rights Act, §§ 760.01-11, Florida Statutes (2001), regardless of whether the "no cause" finding comes before or after the administrative charge has been pending for 180 days. Bach v. United Parcel Service, Inc., 808 So. 2d 230 (Fla. 4th DCA 2001). The hearing must be requested within 35 days of the "no cause" finding. Id. , citing § 760.11(7), Florida Statutes. In reaching this conclusion, the court below dispensed with independent analysis,

opting instead to adopt as its own the holding and reasoning of the then-newly decided case in a sister court, Woodham v. Blue Cross & Blue Shield of Florida, Inc., 793 So. 2d 41 (Fla. 3d DCA 2001). Petitioner had maintained that for a "no cause" finding to divert her to an administrative hearing and strip her of her right to go to court, the finding must come within 180 days of the filing of her charge with an appropriate agency.[1] She noted that the failure of the agency to make a determination within 180 days conferred upon her the right to go to court at any time within four years as established by this Court in Joshua v. City of Gainesville, 768 So. 2d 432, 439 (Fla. 2000). However, this Court in Joshua did not expressly address whether the right to sue that vests on day 180 may be revoked by a "no cause" finding coming after 180 days but still within the four-year limitations period. Accordingly the Woodham court, and the court below, concluded, in effect, that one who obtained a vested right to sue by agency inaction for 180 days had better hurry on to court before a later agency action erased that vested right. Thus a "no cause" finding or its equivalent could void

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[1] Under § 760.11(1), a charging party may satisfy the pre-suit requirements of the Florida Civil Rights Act by filing a charge with either FCHR, EEOC, or an authorized local fair employment practices agency ("FEPA"). In this case, Petitioner dual-filed with EEOC and Palm Beach County Office of Equal Opportunity. The local agency issued it's "no cause" equivalent, "no reasonable grounds" and EEOC adopted that finding without comment. It has no bearing on the issues in this case whether the findings at issue were made by EEOC, FCHR, a FEPA or some combination of these agencies, as will be shown below.

the vested right to sue, even after 180 days had passed.

The Woodham court also decided a separate issue -- that an "unable to conclude" finding from EEOC is the equivalent of a "no cause" from FCHR. That issue is not directly implicated in this case, but it set in motion a chain of court rulings that have significantly spilled over onto the central controversy at bar here. Among these is Cisko v. Phoenix Medical Products, Inc., 797 So. 2d 11 (Fla.2d DCA 2001), which reached the opposite conclusion from Woodham by holding that the EEOC's "unable to conclude" was not the same as FCHR's "no cause." The Woodham court, on rehearing, certified conflict with Cisko. That case is now before this Court.

The Cisko court specifically declined to address the main issue in this case, whether a determination after 180 days may consign a charging party to an administrative hearing which must be sought within 35 days as opposed to a lawsuit which must be filed within four years. Cisko, 797 So. 2d at 13 n.2. But the Cisko court did reach two other issues that have loomed large in the subsequent debate: first, that the Legislature meant what it said in § 760.01(3) about the statute being liberally construed to further the purpose of eradicating discrimination, and, second, that an agency finding will not pass muster if it "does not inform a claimant of what rights she possesses upon dismissal of her complaint." Id. at 13-14. This Court had made

exactly those same points about the Florida Civil Rights Act in Joshua, 768 So. 2d at 435, 439.

Jones v. Lakeland Regional Medical Center, 805 So.2d 940 (Fla. 2d DCA 2002), followed Cisko but added another item to the toolbox of those analyzing the issue in this case. That is that the worksharing agreement between EEOC and FCHR requires that FCHR will make a separate finding from EEOC. Thus an EEOC finding alone can not consign a charging party to an administrative hearing. Id. at 941. This affords Petitioner an alternative basis for relief -- that FCHR never issued her a "no cause" so her right to sue was never actually revoked, even if the law allowed such a revocation.

Considerable confusion arose when the Fourth District, having adopted Woodham in the instant case, certified conflict with Woodham without so much as a mention of the instant case. White v. City of Pompano Beach, 813 So. 2d 1003 (Fla. 4th DCA 2002). The White court sided with Cisko in taking the Legislative mandate of liberal construction to mean that a court facing two legally plausible outcomes must opt for the one that allows access to the remedy. Id. at 1006. Secondly, the court adverted to a blindingly obvious provision of the Florida Civil Rights Act that definitively settles this case as well as Woodham:

> When the commission determines whether or not there is reasonable cause, the commission **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.**

§ 760.11(3), Florida Statutes (emphasis added).

Registered mail. Options available. Failing that, there has simply not been a determination of the sort that could even theoretically divert a charging party from court to an administrative hearing.

But what of Jennifer Bach? Granted she got an actual "no cause" rather than an "unable to conclude" but she got it after 180 days and she got no list at all of the options available to her, let alone by registered mail. The Fourth District rather unconvincingly sought to harmonize Bach with White in a later opinion. Hagan v. Seacrest Services, Inc., __ So. 2d __, 27 Fla. L. Weekly D1091, 2002 WL 893302 (Fla. 4th DCA May 8, 2002). The court struggled to resolve the apparent conflict by limiting Bach's endorsement of Woodham to the issue of an agency's authority to revoke the automatic right to sue that vests on day 180 -- that an administrative decree is enough to divert a plaintiff into an administrative hearing even after she is already within her four-year limitations period for filing suit. Thus Bach adopts the half of Woodham that says that vested rights are written in disappearing ink, while White rejects the half of Woodham that says "unable to conclude" is the same as "no cause."

But this effort at harmonization necessarily fails. White makes clear that a "no

cause" determination is not legally cognizable unless it comes by registered mail with a list of the options available to the charging party. So Bach never got a legitimate "no cause" at all, let alone one that could retroactively cut off her access to court. Moreover, White, like Joshua before it -- and like the statute it construes -- insists that where there are two plausible ways to read this particular statute, the court must always opt for the one that allows access to the remedy. This being so, a retroactive revocation of a vested right to sue can not withstand even rudimentary scrutiny.

II. THE STATUTE REQUIRES LIBERAL CONSTRUCTION

The Florida Legislature modeled the Florida Civil Rights Act on Title VII of the Civil Rights Act of 1964. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). Despite being in derogation of the common-law doctrine of employment at will, Title VII has been accorded the broadest possible sweep of liberal construction to eradicate the evils of employment discrimination. The U.S. Supreme Court has repeatedly declared that Title VII is no ordinary remedial statute, but the effectuation of a national policy of the "highest priority." Franks v. Bowman Transportation Co., 424 U.S. 747, 763-4 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-22 (1975).

This Court long ago endorsed that spirit of liberal construction of employment discrimination laws in noting the "overwhelming public policy" that mandates legal

interpretations that permit access to the remedies embodied in such laws in preference to alternative statutory constructions that would deny such access. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989). More recently, this Court has returned to that theme with even more specific reference to the legislative mandate articulated in § 760.01(3), Florida Statutes, that the act as a whole be "liberally construed" to further its general purposes as well as the special purposes of each section. Resolving a technical procedural ambiguity in favor of an employer that is seeking to prevent a court from reaching the merits of a case is never among the general or special purposes of the Act. Such ambiguities must be resolved in favor of the employee.

> Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.

Joshua, 768 So. 2d at 435.

So at a minimum, liberal construction means, in the familiar sports metaphor, that a "tie goes to the runner." It means that, unless the plaintiff's position is completely unreasonable, a court must resolve any doubts about the meaning of the Florida Civil Rights Act in favor of the person seeking access to the remedy. Reaching the merits is favored; denying access to court on complex technicalities is disfavored. Some courts have immediately grasped this point and applied it faithfully,

as shown in the discussions of Cisko, Jones, and White, supra. See also, Dixon v. Sprint, 787 So. 2d 968 (Fla. 5th DCA 2001); Segura v. Hunter Douglas Fabrication Co., 84 F. Supp.2d 1227 (M.D. Fla. 2002); Moore v. City of Tampa, 2001 WL 1763974 (M.D. Fla. Nov. 14, 2001).

The statute provides a right to sue on day 180 if no determination is yet made. § 760.11(8). Nothing in the statute provides for EEOC or FCHR to nullify that right by a retroactive "no cause" determination. That agency power must be imported into the statute through judicial legislation. Thus with the right to sue, on or after day 180, being explicit in the statute and the power of some agency to void that right ex post facto being artificially read into the statute, the conflict is easy to resolve without even resorting to liberal construction doctrines. A cogent federal opinion analyzed the statute and concluded that a "no cause" determination occurring 180 or more days after the charge-filing date comes to late to divert the claimant from court to an administrative hearing. Motry v. The Devereux Foundation, Inc., Case No. 99-1457-CIV-ORL-19B (M.D. Fla. April 21, 2000). Appendix hereto.

McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998), assessed the constitutionality of the provision of § 760.11(7) that permits FCHR to divert a claimant to an administrative hearing instead of court. It was integral to the court's finding the provision constitutional that FCHR was powerless to impair the claimant's access to

court after 180 days had run because:

> The provision permitting those who have had no action within the 180-day period to proceed directly to circuit court protects such charging parties from any preclusive effect of dilatory review.

Id. at 840. The court thus distinguished the pertinent provision from similar statutory provisions that had been found unconstitutional. The court did not face and did not decide the exact question of whether the law would still be constitutional if it permitted FCHR to impair a claimant's access to court after 180 days had run. But there is the strongest implication that this would be enough to render the provision unconstitutional. Id. at 839-40.

Joshua, 768 So. 2d at 438-439, recognized the vested right to sue as a "constitutionally protected property interest." Joshua further required **pre-deprivation** due process before the state may void this vested right. As shown above, the statute itself requires at least the minimal due process of a list of available options by registered mail. Joshua, in grounding the right in the Constitution, requires an even fuller panoply of pre-deprivation rights. Id. In no case can it pass muster that an agency clerk's issuance of a "no cause" form letter is sufficient to nullify a vested constitutional right.

In the overall context of the statute, the opinion below violates basic statutory policies by forcing cases into court that might be resolved at the Commission level.

The threat of a "no cause" after 180 days hangs over the head of a plaintiff like a sword of Damocles. It creates a powerful incentive for claimants to bring suit immediately upon the passage of day 180 to avoid divestiture of the right to sue by an untimely "no cause" finding. In a closely related context, this Court has specifically disapproved of reading this statute in a fashion that creates such incentives. Noting the Legislature's desire that aggrieved persons "avail themselves of the remedies provided by the Commission prior to seeking court action," this Court concluded:

> Thus, despite the language of section 760.11(8), which allows a complainant to proceed to circuit court without a reasonable cause determination, the entire statutory scheme seems to favor exhaustion of administrative remedies prior to court action.

Joshua, 768 So. 2d at 437.

Thus the Legislature and this Court have expressed a strong policy in favor of letting the administrative process run its course, even while affording the claimant a right to abort that process after 180 days have passed. Such a policy arises from the understanding that, even after 180 days, the Commission might still successfully resolve the claim through mediation or conciliation, thereby obviating the need for a lawsuit. Some defendants have argued that there is no point in allowing the administrative process to continue beyond 180 days if a "no cause" finding will no longer keep a claimant out of court. The answer is that informal resolutions and

settlements of all sorts are common when the agency and the parties continue working together. But no reasonable claimant will let the process run its course if, after day 180, doing so involves the risk of losing an already-acquired right to sue. In this way, the panel's opinion sets up a race to the courthouse wherein the complainant rushes to divest the Commission of jurisdiction to avoid being stripped of the right to sue by an untimely "no cause" determination.

Thus on several bases, the decision below breaks faith with the statute itself and the mandates of this Court in Joshua.

III. A NEED FOR REAFFIRMATION

The Florida Civil Rights Act was hailed at its passage as affording even greater protection and better remedies than its federal counterparts. Many litigants saw the opportunity to seek remedies in state court that had previously been available only to federal litigants. That path has, for many, become a minefield of malpractice risks for attorneys and worthy claims lost for plaintiffs.

A decade after the 1992 Amendments converted the old Florida Human Relations Act to the Florida Civil Rights Act, adding damages and jury trials to the equitable remedies previously available, some of our courts, burdened with crowded dockets and resentful of the increased workload and unfamiliar doctrines of this new category of cases, have become increasingly receptive to defense arguments of a

character and quality that would not have been accepted nor perhaps even tolerated in virtually any other area of law.

As a consequence, some of the defense bar has become emboldened and increasingly creative in developing procedural nitpicks that might result in early dismissals of FCRA claims with no consideration of the merits. Defense theories that border on the frivolous prevail in a single trial court and spread like wildfire. The first poorly reasoned opinion is attached to a motion to dismiss, then the second, and so on until an impression is created that a worthy new defense theory has been articulated. By the time appellate correction of unworthy theories can be accomplished, many excellent cases are irretrievably sacrificed and many egregious wrongs set in concrete for earlier litigants. See, e.g., Klonis v. Department of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000); Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1996), abrogated by, Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000).

This Court signaled, first in Byrd and again in Joshua, that the Florida Civil Rights Act furthers a public policy of the highest order and that it must be read in a fashion that favors access to the remedy where there is a reasonable way to do so. This must be reaffirmed in a more inescapably explicit fashion so that each new cute and creative procedural evasion of the Act is greeted by the lower courts with the disfavor that the statute and controlling precedent mandate.

CONCLUSION

The decision of the court below should be reversed. This Court should provide clearer guidance to lower courts that they must indulge every reasonable presumption to interpret the Florida Civil Rights Act in a way that permits access to the remedies and that disfavors novel procedural bars to reaching the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this 11th day of July, 2002, to Lucinda Hoffman, Esq., HOLLAND & KNIGHT, 701 Brickell Ave., Suite 3000, Miami, Florida 33131; and to Stacy Strolla, Esq., STROLLA & STROLLA, 319 Clematis St., Suite 801, West Palm Beach, Florida 33401.

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Richard E. Johnson

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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Richard E. Johnson