IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2598

JENNIFER BACH,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON REVIEW FROM A DECISION OF
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

HOLLAND & KNIGHT LLP
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
Tel.: (305) 374-8500
Fax: (305) 789-7799

Counsel for
United Parcel Service, Inc.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

TABLE OF CITATIONS (continued)

CASES (continued) **Page**

TABLE OF CITATIONS (continued)

CASES (continued) **Page**

TABLE OF CITATIONS (continued)

CASES (continued) **Page**

TABLE OF CITATIONS (continued)

STATUTES **Page**

RULES

INTRODUCTION

This Court should decline to review this case for two reasons. First and foremost, the decision below does not conflict with Joshua, the basis upon which this Court granted review. The two decisions are compatible. Second, the underlying facts of this case are not those on which this Court can construct a reasoned opinion on the issue presented.

But if this Court nonetheless determines that a conflict exists and that the facts are close enough to those needed to support an opinion, it will find that the Fourth District in Bach and the majority in Woodham got it right. The legislature intended a judicial remedy only for claimants whose discrimination charges are meritorious or potentially meritorious. And it intended only an administrative remedy for claimants whose charges, upon investigation, are found to be non-meritorious. The statutory scheme is simple: claimants with a "cause" determination or with no determination after 180 days may file a civil suit. Claimants with a "no-cause" determination – no matter when it issues – must pursue an administrative remedy. The statute affords ***all*** claimants, including Jennifer Bach, due process.

STATEMENT OF THE FACTS AND CASE

Bach Files A Discrimination Charge with the Palm Beach County Office of Economic Opportunity

The petitioner, Jennifer Bach, resigned from her job at United Parcel Service, Inc. ("UPS") in December 1998 (RA.7, 40).[1] In April 1999, she lodged a discrimination complaint against UPS with the Palm Beach County Office of Economic Opportunity ("Palm Beach OEO") (RA.16, 34, 35). The Palm Beach OEO considered her charge filed as of May 13, 1999 (see RA.35).

On May 14, 1999, the Palm Beach OEO sent to UPS a "Notice of Charge of Discrimination" informing UPS of Bach's complaint and indicating that it was the investigative agency (RA.34). The Palm Beach OEO attached to its Notice Bach's discrimination charge and her affidavit describing the nature of her charge (RA.39-42). The Palm Beach OEO also wrote Bach on May 14, 1999 to notify her that a copy of her discrimination charge had been sent to the Florida Commission on Human Relations ("FCHR" or the "Commission") and to the U.S. Equal Employment Opportunity Commission ("EEOC") for "dual filing purposes" (RA.35).[2] In the

[1] Rather than refer to documents found in the record "(R_)," the supplemental record "(SR_)," the petitioner's appendix, and the EEOC's appendix, we have created our own separately-bound appendix, which includes the documents (but not the briefs) we refer to in this brief. We will refer to Respondent's Appendix by page number as "(RA.__)".

[2] There is no evidence in the record that Bach herself filed a discrimination charge with the FCHR in the spring of 1999, that the FCHR assigned this dual-filed complaint a charge number at that time, or that the FCHR undertook investigation or referred

letter, the Palm Beach OEO informed Bach that her charge was being investigated and processed by the Palm Beach OEO (RA.35). The Palm Beach OEO gave Bach's discrimination claim the charge number of 99-05-2212 and the EEOC gave it the charge number of 15M990221 (RA.2, 34, 35, 36).

On April 10, 2000, a year after Bach filed her discrimination complaint, the Palm Beach OEO sent Bach its "Determination of No Reasonable Grounds" in which it informed Bach that it had concluded after investigation that there were "**no reasonable grounds** to believe that there has been a violation of either the ordinance or the federal statute, as alleged" (RA.2-4). In its Determination, the Palm Beach OEO informed Bach that it would submit her file and its Determination to the EEOC for a substantial weight review and then close her case (RA.3).

Two months later, on June 14, 2000, the EEOC sent Bach a "Dismissal and Notice of Rights" informing her that it had "adopted the findings of the state or local fair employment practices agency that investigated this charge" (RA.45-46).

---

investigation to another agency at that time.

Bach Files Suit Under Chapter 760 – Florida's Civil Rights Act

On August 28, 2000, Bach sued UPS in circuit court, alleging counts for "hostile working environment" and "gender discrimination/disparate impact" under chapter 760, Florida Statutes, and "failure to pay wages and time owed" under section 448.08, Florida Statutes (RA.5-17). In Paragraph 34 of the complaint, Bach stated that she had "filed a timely charge of gender discrimination/hostile working environment with the Florida Commission in [*sic*] Human Relations and has met all administrative prerequisites for the bringing of this action" (RA.7). Bach attached to her complaint as evidence of this statement the May 13, 1999 EEOC Charge of Discrimination she filed with the Palm Beach OEO (RA.16).[3] She also attached a March 21, 2000 letter from the FCHR, referencing a charge number of 2000684 (RA.15).[4]

---

[3] It appears from the Palm Beach OEO's charge form that Bach intended that her complaint be "dual filed" with the FCHR (see RA.16, 38).

[4] UPS now believes that this FCHR charge may be unrelated to the discrimination charge at issue in the present case for two reasons: First, the letter indicates that the Commission referred the charge to the Miami Office of the EEOC for investigation – but the charge at issue was investigated and processed by the Palm Beach OEO. (See RA.35). Second, the Palm Beach OEO issued its no cause determination on the May 1999 charge a year later – on April 10, 2000 – less than one month after the FCHR mailed the March 2000 letter acknowledging receipt of the discrimination charge and referring the investigation to the Miami EEOC Office (RA.2-4). Bach, however, apparently believed that this FCHR charge was the basis for her FCRA lawsuit, and thus UPS treated it as such.

UPS moved to dismiss the complaint or, alternatively, for summary judgment (RA.17-20). Because Bach had alleged that she had filed a complaint with the FCHR, UPS asserted in its motion, among other things, that Bach had not exhausted her administrative remedies under Florida's Civil Rights Act of 1992 ("FCRA" or "Chapter 760") (RA.17-18). Before the hearing on its motion, UPS prepared a memorandum of law in support of its motion (RA.21-48). In the memorandum, UPS argued that because Bach had received, on April 10, 2000, a "Determination of No Reasonable Grounds" from the Palm Beach OEO and, on June 14, 2000, a notice from the EEOC adopting the findings of the Palm Beach OEO, she was required, under section 760.11(7), Florida Statutes, to request an administrative hearing within 35 days (RA.24-25). Because Bach had not done so, UPS asserted that her Chapter 760 claims were barred (RA.25). In presenting its argument, UPS relied on Dawkins v. Bellsouth Telecommunications, Inc., 53 F. Supp. 2d 1356, 1361 (M.D. Fla. 1999), aff'd, 247 F.3d 245 (11th Cir. 2001), for the proposition that an EEOC (or local OEO) no cause determination "operates as a [FCHR] no cause determination" (RA.23 n.2).

UPS attached to its memorandum the Notice of Charge of Discrimination the Palm Beach County OEO had sent UPS (RA.34) along with the discrimination charge (RA.38) and Bach's affidavit (RA.39-41); the May 14, 1999 letter from the Palm Beach OEO to Bach (RA.35); and the FCHR's March 21, 2000 letter to Bach (RA.43).

UPS also attached to its memorandum the Palm Beach OEO's "Determination of No Reasonable Grounds" (RA.2-4, 44) and the EEOC's "Dismissal and Notice of Rights" that had been sent to counsel for both parties (RA.45-46).

On the day the trial court heard UPS's motion, November 20, 2000, Bach filed a two-page "Index to Authorities in Opposition to Defendant's Motion to Dismiss" consisting of a list of fourteen case cites (RA.49-50). Bach's Index contained no text, annotations, or other explanation as to the relevance of the listed cases to UPS's motion (RA.49-50). Bach did not file any other response or memorandum presenting any written argument or analysis.

The Trial Court Dismisses Bach's FCRA Claims

The trial court heard argument on UPS's motion. The hearing was not reported. A month later in December 2000, the trial court issued a five-page order on UPS's motion (RA.51-55), including in the order a timeline showing the date Bach filed her discrimination charge with the Palm Beach OEO (4/12/99),[5] the date the 180-day FCRA investigation period ended (10/12/99), the date the Palm Beach OEO issued its determination (4/10/00), the date the "EEOC/FCHR adopted the findings of the OEO" (6/14/00), and the date Bach filed suit (8/28/00) (RA.52). It then construed section

[5] Bach signed and verified her charge on April 12, 1999 (see RA.16, 34) but the Palm Beach OEO did not deem it filed until May 13, 1999 (see RA.35).

760.11, Florida Statutes and determined that Bach's FCRA discrimination claims were barred under section 760.11(7) (RA.55). It further ruled that Bach had "also failed to plead sufficient facts to support her claims" and dismissed the FCRA claims with prejudice (RA.55).[6] The court entered final judgment on January 30, 2001 (RA.57).

Bach Appeals To the Fourth District

Bach appealed the dismissal order and final judgment (RA.56-62). In her initial brief to the Fourth District, Bach presented one issue but made two arguments. She first argued that section 760.11 must be construed to allow a no-cause claimant to file a civil lawsuit, if the "no-cause" determination issues after the 180-day investigation period but before the claimant has opted to file suit as provided by section 760.11(8) and (4)(a). (4th DCA Init. Br. at 9.) Bach acknowledged that section 760.11(7) "appear[ed]" to require dismissal of the discrimination charge upon a no-cause determination regardless of when the FCHR makes that determination, (4th DCA Init. Br. at 9), but nonetheless contended that such a construction would conflict with subsection 760.11(8), which allows a claimant to "proceed under subsection (4), as if the commission determined that there was reasonable cause" once the 180-day investigation period has expired. (4th DCA Init. Br. at 11.) Citing Dawkins, 53 F.

[6] Currently pending in the trial court is Bach's second amended complaint alleging a claim for negligent supervision or retention, based on the same set of facts alleged in her FCRA claims, and the remaining claim for wages owed. (See RA.63-86.)

Supp. 2d 1356, Bach agreed that "[a] no-cause determination by the EEOC operates as a no-cause finding by the FCHR." (4th DCA Init. Br. at 5 n.4.)

Bach also argued that "permitting a no-cause determination made after the 180 day investigatory period to strip [her] of her right to sue destroy[ed] [her] vested right to file a cause of action." (4th DCA Init. Br. at 15.) Although, in a footnote to her initial brief, Bach mentioned that she had not received a letter by registered mail advising her of her appellate options as provided under 760.11(3), she argued – for the ***first*** *time* – in her ***reply*** *brief* that she had been denied due process because "the FCHR, or its deferral agency," had not "complied with the requirement to send the determination via registered mail, and especially failed to notify [her] of her appellate options." (4th DCA Reply Br. at 11-12.)

The Fourth District Affirms

The Fourth District, agreeing with the trial court below and with the majority's opinion in Woodham v. Blue Cross & Blue Shield of Florida, Inc., 793 So. 2d 41 (Fla. 3d DCA 2001), ruled that a Commission finding of no reasonable cause requires the claimant to follow 760.11(7) and to exhaust her administrative remedies before filing suit under Chapter 760, even if the no-cause determination occurs after the 180-day investigation period. Bach v. United Parcel Serv., Inc., 808 So. 2d 230 (Fla. 4th DCA 2001).

Bach moved for rehearing, rehearing *en banc*, and for certification (RA.88-95).

She requested the Fourth District to certify the following question to this Court:

> Whether a claimant under the Florida Civil Rights Act of 1992, may be divested of an already-acquired right to sue if the Florida Commission on Human Relations, or its deferral agency, issues its no-cause determination after the 180 day investigation period?

(RA.93.) The district court denied Bach's motions for rehearing and certification (RA.97).

Bach Seeks Supreme Court Review

Bach then sought to invoke the discretionary jurisdiction of this Court by arguing that the Fourth District's opinion conflicted with this Court's opinion in Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000) (RA.98-100). In her jurisdictional brief, Bach contended that the Third and Fourth Districts' construction of section 760.11 would add a "ghostly judicial amendment" to section 760.11(8), which allows a discrimination claimant to file suit in state court at any time after the 180-day investigation period if the Commission has not, by that time, determined the reasonable cause issue. Bach maintained that these decisions would impliedly "add words to the effect 'unless a "no cause" finding thereafter issues.'" (Pet'r's Juris. Br. at 4.)

After the briefing on jurisdiction, this Court requested Bach to show cause why disposition of her case should not be stayed pending this Court's ruling on the issue the Third District certified in Woodham v. Blue Cross & Blue Shield of Florida, Inc.,

793 So. 2d 41 (Fla. 3d DCA 2001) (RA.101). In her response, Bach argued, correctly, that the issue certified in Woodham was different from the issue that she put before this Court in her jurisdictional brief (RA.104.)[7] She then injected "[a]dditionally, neither Cisko or [*sic*] Woodham address another issue presented in [her] case: whether Bach was denied her due process rights when the FCHR failed to advise her of her rights and remedies once a "no-cause" determination was issued" (RA.104-05). She told this Court that she had "raised this issue with the trial court and the Fourth District Court of Appeal" and then contended that "FCHR's failure to comply with the explicit notice requirements of § 760.11(3) denied [her] her due process and should absolve her of any responsibility she may have had to seek an administrative hearing" (RA.107). The rest of Bach's response to the show cause order was devoted to this "lack of notice" argument (RA.108-10).

[7] The conflict between Woodham and Cisko v. Phoenix Medical Products, Inc., 797 So. 2d 11 (Fla. 2d DCA 2001), is that the Third District ruled in Woodham that an EEOC "unable to conclude" determination was the equivalent of a "no cause" determination, while the Second District held in Cisko that it was not the equivalent.

This Court Accepts Jurisdiction

On June 3, 2002, this Court accepted jurisdiction of the purported conflict between Bach and Joshua. Bach has filed her brief on the merits, as have two amici curiae: the National Employment Lawyers Association, Florida Chapter ("NELA") and the U.S. Equal Employment Opportunity Commission. This is UPS's answer.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretionary jurisdiction in this case. As this Court well knows, unless the district court's decision expressly and directly conflicts with a decision of a sister district court or with a decision of this Court, its discretionary jurisdiction may not be invoked. But, as even amicus curiae, the NELA, recognized: "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."[8] This Court held in Joshua only that, when the FCHR fails to make a cause determination within the 180-day investigation period, the four-year statutory limitations period found in section 95.11(3)(f) applies and not the one-year period found in 760.11 (5) – a ***different*** point of law from the one at issue in this case.

But even if this Court opts to exercise its jurisdiction, it may not address or

---

[8] NELA Init. Br. at 5 (emphasis added).

decide Bach's untimely-raised "notice" issue or the EEOC's irrelevant, worksharing agreement "notice" issue. Bach did not properly raise below her new-found argument that the FCHR failed to provide adequate notice. She cannot show that she raised this "notice" argument in the trial court because she filed no written document presenting this argument, and the trial court hearing was not recorded. Moreover, arguments raised only in footnotes and reply briefs and not addressed by the district court are not preserved for this Court's review. And besides, Bach was not entitled to chapter 760 notice because she did not file her charge with the FCHR as required under the version of Chapter 760 in effect at the time she lodged her discrimination complaint.

The EEOC's point that an EEOC "no cause" does not operate as a FCHR "no cause" because, under the worksharing agreement between the EEOC and the FCHR, each agency must issue its own cause determination is irrelevant here. Bach did not initiate her claim with either the FCHR or the EEOC; neither agency deferred to the other under the FCHR-EEOC Worksharing Agreement. Bach initially filed her discrimination charge with the Palm Beach OEO. But the Palm Beach OEO does not have a worksharing agreement with the FCHR requiring the Palm Beach OEO to notify the FCHR of its determination or requiring the FCHR to issue its own determination based on the OEO's findings.

Finally, if this Court were to exercise its jurisdiction in this case and proceed under the assumption that Bach properly filed her discrimination complaint under

chapter 760 and thus that section 760.11 applies here, it should construe section 760.11 according to its plain and unambiguous language and according to the legislature's obvious intent.

In making their arguments to this Court, Bach and the amicus NELA discount and underemphasize what the legislature well understood: once investigated, some discrimination claims will be found meritorious; others – like Bach's – will be found non-meritorious.

The statute gives the FCHR 180 days to investigate a complaint. If during that time the Commission determines that there is reasonable cause to believe the claimant was discriminated against, the claimant may file a civil suit ***or*** seek an administrative hearing before the Commission. At the time of drafting the Florida Civil Rights Act of 1992, the legislature well understood that the Commission could not investigate every claim lodged with it within the 180 days. And thus it provided claimants receiving ***no determination*** the opportunity to seek either a judicial remedy ***or*** an administrative remedy upon the expiration of the 180-day investigation period. But the statute also plainly and unambiguously provides – without specifying any timeframe – that if the Commission determines that there is ***not reasonable cause*** to believe that the claimant was discriminated against, the Commission is to dismiss the FCHR complaint. Upon a no-cause dismissal, the claimant's statutory remedy is an administrative hearing before an administrative law judge.

Contrary to Bach's assertions, interpreting section 760.11(7) to mean what it says – a no-cause determination may be adjudicated only administratively – does not "divest" a no-cause claimant of a remedy or of due process. The no-cause claimant is entitled to an administrative hearing subject to Commission review and later, if necessary, judicial review. A no-cause claimant who is successful in convincing the Commission or the appellate court that she was discriminated against may sue her employer or accept the affirmative relief offered by the Commission. Thus, under the legislative scheme, ***all*** claimants are afforded an administrative remedy, and claimants with ***meritorious*** claims are ***always*** afforded a ***judicial*** remedy.

Under the common law, there was no right to sue an employer for discrimination. Thus the legislature was not precluded from allowing claimants who receive either "cause" determinations or no determination at all to sue in state court but restricting claimants who receive "no cause" determinations to an administrative hearing. In fact, this scheme evinces its intent to permit only those claimants with meritorious claims to sue in Florida's crowded courts. As the legislature obviously understood, to permit claimants who receive "no-cause" determinations – whenever received – to sue in state court is to waste this state's limited judicial resources on futile – even frivolous – claims.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION OVER THIS CASE BECAUSE THE FOURTH DISTRICT'S DECISION IN BACH DOES NOT "EXPRESSLY AND DIRECTLY" CONFLICT WITH THIS COURT'S DECISION IN JOSHUA

As this Court has so often stated, it

> may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court ***on the same question of law***.

Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980) (emphasis added); Fla. R. App. P. 9.030(a)(2)(A)(iv). "Inherent" or "implied" conflict cannot serve as a basis for this Court's jurisdiction. Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc., 498 So. 2d 888, 889 (Fla. 1986). This Court has observed that decisional conflict occurs most often in two situations:

> (1) the announcement of a *rule of law* which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court.

Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Thus the "primary function" of this Court is to "stabilize the law" by reviewing only those decisions that "form patently irreconcilable precedents." Florida Power & Light Co. v. Bell, 113 So. 2d 697, 699 (Fla. 1959). That is, the "conflict must be such that if the later decision

and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). The question Bach requested the Fourth District to certify was:

> Whether a claimant under the Florida Civil Rights Act of 1992, may be divested of an already-acquired right to sue if the Florida Commission on Human Relations, or its deferral agency, issues its no-cause determination after the 180 day investigation period?

(RA.93.) The question certified by the First District in Joshua v. City of Gainesville, 734 So. 2d 1068 (Fla. 1st DCA 1999), decision quashed, 768 So. 2d 432 (Fla. 2000), was:

> Does the section 760.11(5), . . ., one-year statute of limitations for filing civil actions "after the date of determination of reasonable cause by the Commission" apply also upon the Commission's failure to make any determination as to "reasonable cause" within 180 days as contemplated in section 760.11(8) . . . , so that an action filed beyond the one-year period is time-barred?

734 So. 2d at 1071. These are not the ***same*** questions of law.[9] And the Bach decision would not have the effect of overruling this Court's Joshua decision. The two decisions are compatible: One decision addresses the situation where the claimant receives ***no determination*** whatsoever; the other addresses the situation where the claimant receives a ***no-cause*** determination, but after the expiration of the 180-day

[9] In Joshua, this Court advised that that case revolved around four FCRA subsections: 760.11(3), (4), (5), and (8). Subsection 760.11(7) – the provision at issue here – was not mentioned and was not at issue in Joshua.

period.[10] Under Joshua, if the Commission ***never determines*** the merits of the discrimination charge, the claimant has four years to file suit in state court. Under Bach, if the Commission ***determines*** that the charge has ***no merit***, the claimant has thirty-five days to seek administrative review of that determination. This bifurcated routing based on the claim's merit has been found constitutional. See McElrath v. Burley, 707 So. 2d 836, 840 (Fla. 1st DCA) (holding that alleged disparate treatment of FCRA claimants was rationally related to permissible governmental purpose), review denied, 718 So. 2d 166 (Fla. 1998).

Because Joshua and Bach address and resolve different rules of law, we respectfully suggest that jurisdiction was improvidently granted in this case.

[10] As the majority pointed out in Woodham, "[n]owhere does Joshua ***address*** or grant aggrieved persons the ability to disregard subsection 7 administrative hearing requirement nor does it allow a lawsuit after receipt of a "no cause" determination, albeit beyond the 180-day period." 793 So. 2d at 45 (emphasis added).

II.

THE PETITIONER AND AMICI CURIAE, NELA AND EEOC, RAISE TWO ISSUES THAT THIS COURT MAY NOT ADDRESS

A.

Bach Did Not Properly Or Timely Raise Her "Notice" Issue Below, And The Courts Below Did Not Address It

The issue of whether the Commission gave Bach the notice required under subsection 760.11(3) is not – and cannot be – before this Court.[11] First, there is no record evidence that this issue was raised in the trial court. Bach's new-found notice argument did not appear in any trial court papers, and the trial court did not address it or rule on it in its December 2000 dismissal order.[12] Therefore, even if Bach had properly raised the issue on appeal, the Fourth District could not have addressed it. See Alamagan Corp. v. Daniels Group, Inc., 809 So. 2d 22, 26 (Fla. 3d DCA 2002) (noting that an "appellate court may not decide issues that were not ruled on by a trial court in the first instance"); Wilkerson v. Alachua County, 675 So. 2d 951, 952 (Fla. 1st DCA 1996) (affirming dismissal because argument raised on appeal had never

---

[11] Subsection 760.11(3) provides in pertinent part that "[w]hen 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), Fla. Stat. (2000).

[12] The hearing on UPS's motion to dismiss was not reported.

been presented to the trial court); Nail v. Rinker Materials Corp., 528 So. 2d 450, 453 (Fla. 4th DCA 1988) (ruling that where trial court did not have the issue before it, the issue had not been preserved for appellate review). See also Dober v. Worrell, 401 So. 2d 1322, 1323-24 (Fla. 1981) (citing Lipe v. City of Miami, 141 So. 2d 738, 743 (Fla. 1962) (holding that "[m]atters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by [the supreme court] on appeal")).

Second, Bach's attempts to raise the notice issue in a footnote in her initial brief and later in her reply brief were ineffective. Bach raised only one issue in the Fourth District, and it was not lack of agency notice. It was:

> [w]hether the trial court properly dismissed Appellant's Complaint, finding that a claimant's sole remedy under the Florida Civil Rights Act of 1992, is to request an administrative hearing if the Florida Commission on Human Relations, or its deferral agency, issues its no-cause determination after the 180 day investigation period.

(4th DCA Init. Br. at 1.) In footnote 6 of her initial brief, Bach stated that there was "no evidence that [she] had ever received a registered letter from any agency advising

of her options under the Act."[13] But "[i]t is elementary that arguments which are not made as a point on appeal . . . but are found only in [a] footnote in the appellant's brief, are not properly presented to the appellate court for review." R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996) (citing Fla. Ass'n of Nurse Anesthetists v. Dep't of Prof'l Regulation, 500 So. 2d 324, 327 (Fla. 1st DCA 1986)); see Lipsig v. Ramlawi, 760 So. 2d 170, 192 n.24, 193 (Fla. 3d DCA 2000) (refusing to address issues not raised below and then raised only in footnotes in appellate brief) (quoting R.J. Reynolds), review denied sub nom. Miami Columbus, Inc. v. Ramlawi, 786 So. 2d 579 (Fla. 2001).

In her reply brief, Bach tacked this lack of notice issue onto the body of her due process argument. (4th DCA Init. Br. at 11-12.) But it is also elementary that an argument made for the first time in the reply brief is not properly raised and presented to the appellate court for review. See J.A.B. Enters. v. Gibbons, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) (reasoning that "an issue not raised in an initial brief is

---

[13] Bach reasoned that "it is logical to conclude that no such letter was sent because the agency recognize[d] that once the 180 days passe[d] without determination, [she was] free to file her lawsuit." (4th DCA Init. Br. at 10 n.6.) We, on the other hand, think it "logical to conclude" that the FCHR did not send her notice because she did not file her complaint with the FCHR; because no worksharing agreement with the Palm Beach OEO required the OEO to inform the FCHR of its determination or the FCHR to make and issue its own determination based on the OEO's investigation, (see EEOC Br. at 5 n.2); and because there is no evidence that the Palm Beach OEO, in fact, notified the FCHR of its determination.

deemed abandoned" and ruling that the appellants could not argue that they did not receive a compensation order where their initial brief did not raise the issue); see also RIS Inv. Group, Inc. v. Dep't of Bus. & Prof'l Regulation, 695 So. 2d 357, 359 (Fla. 4th DCA 1997) (declining to address constitutionality arguments "as they were raised for the first time in the reply brief"); Gen. Mortgage Assocs., Inc. v. Campolo Realty & Mortgage Corp., 678 So. 2d 431, 431 (Fla. 3d DCA 1996) (ruling that it could not consider issue raised for the first time in the reply brief); Carrasquillo v. Holiday Carpet Serv., Inc., 615 So. 2d 862, 863 (Fla. 3d DCA 1993) (same); Snyder v. Volkswagen of Am., Inc., 574 So. 2d 1161, 1161 (Fla. 4th DCA 1991) (same).

And last, it is elementary that this Court may not consider issues not properly raised and ruled on below. See Cargle v. State, 770 So. 2d 1151, 1155 n.3 (Fla. 2000) (declining to address claim that "was not the basis for [the Court's] conflict jurisdiction in this case and was not addressed by the district court below"); Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 499 n.7 (Fla. 1999) (declining to address an issue that was "neither raised in the trial court nor addressed by the [district court]" and thus was not preserved for appellate review); Oyster Pointe Resort Condo. Assoc., Inc. v. Nolte, 524 So. 2d 415, 419 (Fla. 1988) (declining to address evidentiary issue where record revealed no evidence that issue was raised in the trial court or on appeal to the district court); Simmons v. State, 305 So. 2d 178, 180 (Fla. 1974) (holding that where issue was not passed upon below, it could not be cited for conflict or considered

by the Court on the merits). Because Bach did not timely and properly raise her notice argument below, this Court may not consider it. And for the same reason, this Court may not consider the EEOC's notice argument.

B.

The EEOC's "Lack of FCHR Notice" Argument Is Irrelevant Here; Bach Conceded Below That the EEOC Notice Operated as a FCHR Notice and Never Claimed Otherwise

The issue the EEOC raises in its amicus brief – whether an EEOC no-cause notice operates as an FCHR no-cause notice – is not before this Court. I its brief, the EEOC reasoned that "[a]lthough the court below did not explain why it treated the EEOC's determination as a determination of the Florida Commission, it appears likely that this assumption was based on the worksharing agreement between the EEOC and the FCHR." (EEOC Br. at 2.) The EEOC then "offer[ed] its views" on this issue to "assist this Court in reaching a proper resolution of the issue before it." (EEOC Br. at 2.)

To answer the EEOC's question, the Fourth District treated the EEOC no-cause determination as an FCHR no-cause determination because that is the position the parties took, and Bach never questioned that position in either court below. In fact, Bach stated in her initial brief to the Fourth District that a "no-cause determination by the EEOC operates as a no-cause finding by the FCHR." (4th DCA Init. Br. at 5 n.4.) She did not ask the district court (or this Court) to rule otherwise. Therefore, the issue

was not properly raised or preserved for review here.[14] See Simmons, 305 So. 2d at 180 (holding that where issue was not passed upon below, it could not be cited for conflict or considered by the Court on the merits). See also Cargle, 770 So. 2d at 1155 n.3; Metro. Dade County, 737 So. 2d at 499; Oyster Pointe Resort Condo. Assoc., 524 So. 2d at 419.

The EEOC's amicus brief does not "assist" here because the issue it raises is not germane to the issue that ***is*** before this Court: whether a "no-cause" determination issuing after the 180-day investigation period but before the claimant has filed a civil suit, as provided in subsections 760.11(8) and (4)(a), requires the claimant

---

[14] Moreover, the worksharing agreement between the EEOC and the FCHR is irrelevant. Bach did not file her discrimination charge with the EEOC or with the FCHR. She filed her complaint with the Palm Beach OEO. The OEO sent her complaint to the FCHR. The Palm Beach OEO does not have a worksharing agreement with the FCHR. (See EEOC Br. at 5 n.2.) The Palm Beach OEO's sending of Bach's complaint to the FCHR for "dual filing purposes" was ineffective to bring her state claims under the Florida Civil Rights Act or to invoke the provisions of the FCHR-EEOC Worksharing Agreement the EEOC bases its arguments on. See Senate Staff Analysis and Economic Impact Statement, Commerce and Economic Opportunities Committee, Bill No. SB354 (Mar. 15, 2001) ("Staff Analysis") (RA.113-20).

And further, while the 1999 and 2000 Worksharing Agreements between the FCHR and the EEOC provided that each agency was to issue its own final action notice upon receipt of the other agency's final action notice (Sec. II, ¶¶ F & G; RA.123), the EEOC fails to mention that these provisions have since been deleted, and the 2002 Worksharing Agreement does not include them. (See RA.132.)

to pursue administrative review as provided in subsections 760.11(7) and (13) .

III.

THE FOURTH DISTRICT CORRECTLY CONSTRUED SECTION 760.11 TO CARRY OUT THE LEGISLATURE'S OBVIOUS INTENT TO PROVIDE A JUDICIAL REMEDY FOR MERITORIOUS DISCRIMINATION CLAIMS AND TO PROVIDE ONLY ADMINISTRATIVE REVIEW FOR NON-MERITORIOUS CLAIMS – SUCH AS BACH'S

To reach the issue Bach raises, this Court must assume what Bach alleged and conceded: that she filed her charge with the FCHR (RA.7); that an FCHR deferral agency investigated her claim (4th DCA Init. Br. at 5 n.4); and that she received an FCHR no-cause determination at the end of the investigation (4th DCA Init. Br. at 5 n.4). See Dep't of Ins. v. First Floridian Auto. & Home Ins. Co., 803 So. 2d 771, 773 (Fla. 1st DCA 2001) (reasoning that reviewing courts must "assume the truth of a complaint's well-pleaded factual allegations when deciding whether dismissal of the complaint was proper").

A.

Under The Statutory Scheme of the Florida Civil Rights Act, Meritorious or Potentially Meritorious Claims May Be Filed In the State's Courts; Non-Meritorious Claims May Be Adjudicated Only Administratively

Bach urges this Court to construe section 760.11 to provide that, when the Commission does not make a reasonable cause determination within 180 days as provided in subsection 760.11(3), a claimant obtains the right to sue under subsection 760.11(8) and, under Joshua, retains that right for four years – even if the claimant

does not sue after 180 days but instead allows the Commission to retain its jurisdiction and continue its investigation, and the Commission, based on this continued investigation, finds the discrimination charge to be meritless or even frivolous. That the legislature did not intend this result is evident from the no-cause provision, subsection 760.11(7).

The Administrative Review Process

According to section 760.01, the FCRA is to be liberally construed to further "the special purposes of the particular provision involved." § 760.01(3), Fla. Stat. (2000). The unmistakable purpose of the provision involved here, section 760.11 "Administrative and civil remedies," is to provide an administrative screening process for determining whether a discrimination charge has any merit or any chance of being resolved before suit is brought in state court. See McElrath v. Burley, 707 So. 2d at 840 (noting that section 760.11, among other things, "imposes a preliminary screening procedure to weed out unmeritorious claims"); Joshua, 768 So. 2d at 437 ("the Legislature's desire that aggrieved persons avail themselves of the remedies provided by the Commission prior to seeking court action is made clear in section 760.07"); § 760.07, Fla. Stat. (2000).

The special purpose of subsection 760.11(7) is to provide the claimant with administrative review of the Commission's determination that "there is not reasonable cause to believe" that the employer discriminated. § 760.11(7), Fla. Stat. (2000).

Subsection (7) provides that the no-cause claimant may request an administrative hearing before an administrative law judge. Id. If on review of the administrative law judge's findings the Commission determines that the employer has indeed discriminated, the claimant, who is then no longer a no-cause claimant, may bring "a civil action under subsection (5) as if there has been a reasonable cause determination or accept the affirmative relief offered by the commission, but not both." Id. If, on the other hand, the administrative law judge upholds the Commission's original no-cause determination and the Commission dismisses the discrimination charge, the no-cause claimant may appeal the dismissal. § 760.11(13), Fla. Stat. (2000) (stating that "[f]inal orders of the commission are subject to judicial review"); see, e.g., Brand v. Fla. Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994) (on review of an FCHR final order dismissing a discrimination charge with prejudice).

On appeal, if the appellate court determines that the employer discriminated, the court must remand the matter to the Commission "for appropriate relief." § 760.11(13), Fla. Stat. (2000). The claimant then becomes a cause claimant and has the "option to accept the relief offered by the commission" or to bring "a civil action under subsection (5) as if there has been a reasonable cause determination." Id.

Under this comprehensive statutory scheme, at any point in the process that a no-cause claimant obtains a cause determination, she becomes a cause claimant entitled to bring a civil suit.

Bach hopes to obtain a ruling from this Court that would allow her to circumvent the administrative processes provided in subsections (7) and (13) and to bring her non-meritorious claims in the state court. But such a ruling would thwart the legislature's well-thought-out scheme.

Subsection (8) Does Not Nullify Subsection (7) After 180 Days

Citing to Allstate Ins. Co. v. Rush, 777 So. 2d 1027 (Fla. 4th DCA 2000), Bach argues that, because subsection (8), which permits a ***no-determination*** claimant to bring a civil suit after 180 days, follows subsection (7), which provides a ***no-cause*** claimant administrative review, subsection (8) is the statute's "last expression." She then asserts that the "logical interpretation" of this sequence is that the legislature intended subsection (7) to apply only to no-cause determinations made within the 180 days. (Pet'r's Init. Br. at 11-12.) But Bach overlooks the exception to the "last expression rule": if the last expression found in one section is plainly inconsistent with the preceding section which conforms to the legislature's obvious policy and intent, the later section must be construed to give it effect consistent with the preceding section and with the policy the earlier section promotes. 777 So. 2d at 1032.

This exception applies here. The obvious intention of subsection (7) is to give claimants who have had their claims investigated and who have failed to prove the merits of their claims to the investigative agency an opportunity to obtain review of the agency's unfavorable determination and the opportunity to prove once again –

administratively – the merits of their discrimination charges. Subsection (8) should not be construed to permit these claimants to take their non-meritorious claims to court just because the agency's investigation and determination took longer than 180 days.[15]

Under Bach's desired construction of section 760.11, there would be no reason for the FCHR to continue an investigation or make ***any*** determination after day 180. If, as Bach contends, the right to bring a civil suit vests indelibly on day 181, no Commission determination after that point would make any difference. If the Commission were to conclude its investigation after day 180 and find that the employer had discriminated, the claimant could sue her employer. If the Commission were to conclude after day 180 that the employer did not discriminate, the claimant could still sue her employer. The legislature could not have intended this result. If it had, it simply could have terminated the Commission's jurisdiction on day 181. It did not do so. In fact, under the statute, the Commission retains jurisdiction to resolve the charge – unless and until ***the claimant*** terminates its jurisdiction by filing suit.[16] See § 760.11(5), Fla. Stat. (2000).

B.

The Statute Gives Control And Choice Of Remedy To The Discrimination Claimant When the Florida Commission on Human Rights Does Not Issue Its Determination Within 180 Days

The legislature gave to the claimant the decision of whether and when to pursue a judicial or administrative remedy when there is ***no determination*** by day 180.

---

[15] The Staff Analysis shows that the legislature is quite aware that the Commission must struggle to investigate and make determinations within 180 days. (See RA.119.)

[16] As we discuss at greater length below, this continuing jurisdiction is one factor that distinguishes the Illinois Fair Employment Practices Act construed in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), from Florida's Civil Rights Act.

See § 760.11(8), Fla. Stat. (2000) ("In the event 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). Thus, if 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 limitations period expires. § 760.11(8) & (4)(a), Fla. Stat. (2000); Joshua. Alternatively, she may seek an administrative hearing before the Commission, retaining the right to appeal an adverse decision. § 760.11(8), (4)(b), (6), (13) Fla. Stat. (2000); see Green v. Am. Home Companions, Inc., 23 FALR 3706 (FCHR Aug. 21, 2001) (ruling that, after Joshua, "where the Commission never issues a finding of reasonable cause or no reasonable cause, a request for an administrative hearing [under subsection 760.11(4)(b)] can be made at any time").[17]

Thus, Bach's assertion that "the FCHR affords no due process of any sort from the time the right [to sue] vests on day 180 and the time the vested right is revoked by issuance of a 'no cause' determination" is baseless. (Pet'r's Init. Br. at 17.) Bach could

[17] This is clearly the pre-determination, or as Bach puts it, the "pre-deprivation" due process contemplated under the statute. (See Pet'r's Init. Br. at 17.) That Bach failed to take advantage of subsections 760.11(8) and (4)(a) during the "no determination" period does not mean that she was denied due process during this period, and her argument to that effect is disingenuous.

have sued UPS at any time after day 180, or she could have sought Commission review of the merits of her discrimination charge. § 760.11(8) & (4), Fla. Stat. (2000). Either avenue would have provided Bach all the due process she was due. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("the Due Process Clause grants the aggrieved party the opportunity to present [her] case and have its merits fairly judged"); Strohm v. Hertz Corp/Hertz Claim Mgmt., 685 So. 2d 37, 39 (Fla. 1st DCA 1996) (holding that there can be no due process violation where there has been no denial of a meaningful opportunity to be heard).

Under the statutory scheme, if the claimant brings a civil suit, the Commission loses jurisdiction to continue its investigation and to reach a merits determination. § 760.11(5), Fla. Stat. (2000); Sweeney v. Fla. Power & Light Co., 725 So. 2d 380, 381 (Fla. 3d DCA 1998). But if the claimant does not file suit, the Commission retains jurisdiction, the investigation continues, and the Commission is free to make a determination that is either favorable or unfavorable to the claimant.

Thus, if the investigation appears to be going well and the claimant is confident of a favorable determination, she may decide to forgo filing a civil suit and terminating the Commission's jurisdiction because the anticipated "cause" determination may assist her in negotiations or in other ways. But at anytime after day 180 that the investigation appears to be headed in the opposite direction, the claimant can end it by filing a civil suit. The control and choice remain hers – until the Commission

determines that her claims have no merit.

As Bach discovered in this case, the decision to allow the Commission to continue its investigation carries with it the risk that the Commission's determination will be unfavorable. But an unfavorable determination – even if it issues after the 180-day investigation period – does not deprive the no-cause claimant of a statutory remedy or of due process, as Bach mistakenly argues.

C.

The Florida Civil Rights Act Provides Due Process for All Claimants, Even Those the Commission Determines Have Non-Meritorious Claims

Subsection 760.11(7) Afforded Bach Due Process

Bach contends that permitting a Commission no-cause determination issuing after day 180 to "strip [her] of her right to sue" would destroy her "vested right to file a cause of action once the 180 day period passes" thus depriving her of due process

and a property interest. (Pet'r's Init. Br. at 15.) But Bach's "vested right to sue"[18] argument appears to be more in the nature of an "access to the courts" argument, as it is manifest that the statute provides due process to all no-cause claimants: "[t]hose whose claims are found to lack merit in the initial screening are protected from having their claims extinguished by having the opportunity to get that ruling reversed in the administrative process." McElrath, 707 So. 2d at 840.

As we discussed in Point III A, the statute affords no-cause claimants due process – an administrative hearing before an administrative law judge, Commission review of the ALJ's findings, and judicial review of the Commission's final order. It is well established that such an administrative remedy provides full due process. See, e.g., Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166, 169 (Fla. 1974) (noting that "[d]ue process requires that no one shall be personally bound until [s]he has had [her] 'day in court'" and holding that a "party is afforded [her] 'day in court' with respect

---

[18] Although Bach claims that she has a "vested right to sue," she cites no binding precedent to support this claim. (Pet'r's Init. Br. at 7, 15, 17.) Our research reveals that courts have, indeed, held that certain plaintiffs have had a vested right to sue. These cases, however, are distinguishable from this case because they involve facts and issues not present here – retroactive application of revised or amended statutes. See e.g., Kaisner v. Kolb, 543 So. 2d 732, 738 (Fla. 1989) (ruling that amended statute, which repealed a section of the original statute providing that sovereign immunity was waived up to limits of the municipality's insurance policy, could not be applied retroactively to impair plaintiff's rights, which vested at the time of injury); City of Winter Haven v. Allen, 541 So. 2d 128, 135 (Fla. 2d DCA 1989) (holding that the retroactive application of the statute would adversely affect the plaintiff's right to recover the policy limits of the city's insurance).

to administrative decisions when [she] has a right to a hearing and has the right of appeal to a judicial tribunal of the action of an administrative body") (citing Permenter v. Younan, 31 So. 2d 387 (Fla. 1947)). When Bach received her no-cause determination, subsections 760.11(7) & (13) afforded her her "day in court": she had the right to a hearing before an administrative law judge and the right to appeal to the district court a subsequent unfavorable determination.

Because, At Common Law, Employees Had No Right To Sue Their Employers For Discrimination, The Legislature Was Free To Retract The Right to Sue, Found In Subsection 780.11(8), Upon A No-Cause Determination

Because Florida's Civil Rights Act affords all discrimination claimants due process – in the courts if their claims are meritorious or potentially meritorious,[19] administratively if their claims are non-meritorious – Bach must be arguing that, although she had the right to sue but didn't because of her own inaction, she nonetheless retained that right to access the state's courts even after receiving the no-cause determination. But it is well established that "to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common law right previously enjoyed by the people of this state."

[19] On day 180, if the Commission has not completed its investigation or made a decision on the merits of the discrimination charge, the charge remains *potentially* meritorious.

Yachting Promotions, Inc. v. Broward Yachts, Inc., 792 So. 2d 660, 663 (Fla. 4th DCA 2001), review denied, 819 So. 2d 133 (Fla. 2002). Bach cannot show this.

Under the common law of this state, employees had no right to sue their employers for discrimination. See McElrath, 707 So. 2d at 839 (explaining that, in Florida, protection from employment discrimination is a statutory right legislatively created in 1977 "in derogation of the common law rule that Florida employees may be hired or fired at will"). Therefore, that the legislature gave discrimination claimants the right to sue after 180 days where there has been ***no determination***, does not mean that this Court must construe the statute to allow discrimination claimants with a ***no-cause determination*** the same right. Because employees did not have this right under the common law, the legislature was free to treat different claimants differently and to condition the new statutory right to sue upon the receipt of a "cause" determination.

But even if section 760.11(7) is construed to apply to no-cause determinations issued after 180 days and thus as "depriving" a claimant of her unexercised right to sue, the "constitutional guaranty of a 'redress of any injury'" bars a "statutory abolition of an existing remedy" only if no "alternative protection" is afforded. See Faulkner v. Allstate Ins. Co., 367 So. 2d 214, 216 (Fla. 1979). Thus, Bach's "deprivation of her vested right to sue" argument fails because subsection 760.11(7) afforded her "alternative protection" – a hearing before an administrative law judge.

The obvious intent of the legislature was to provide the right to sue to claimants

with meritorious or potentially meritorious claims, not to claimants with baseless claims. See McElrath, 707 So. 2d at 840. As this Court reasoned in Joshua, "the legislative intent is to uproot discrimination." 768 So. 2d at 439. Where there has been a determination of ***no discrimination***, there is nothing for a court or jury to "uproot," and therefore there is no purpose to be served by allowing a no-cause claimant to sue in state court.

The Commission's Late Determination Did Not Affect Bach's Due Process or Property Interest

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), upon which Bach bases her argument that the Commission's failure to make a reasonable cause determination within 180 days "deprive[d] her due process and property interest," is factually inapposite and fails to support her contention. (Pet'r's Init. Br. at 15.) The statute at issue in Logan was the Illinois Fair Practices Act, chapter 48, ¶ 851 *et seq*. of the Illinois Revised Statutes (the "Illinois Act"). Under the Illinois Act, the Illinois Commission had 120 days to convene a fact-finding conference, and the claimant was entitled to review of any Commission order based on this fact-finding.

In Logan, because the Commission failed to hold the conference within 120 days, the employer moved to dismiss Logan's charge. Because the Commission refused to dismiss, the employer sought review in the Supreme Court of Illinois, where Logan argued that the Commission's failure to convene a timely conference violated

his due process and equal protection rights because it extinguished his discrimination charge. The Illinois Supreme Court rejected Logan's argument and ruled that, under the Illinois Act, the Commission's failure to hold a fact finding conference within 120 days "deprived the Commission of jurisdiction to consider Logan's charge." Id. at 427. In other words, because of the Commission's inaction, the claimant lost – completely – his ability to bring a discrimination charge against his employer.

Logan sought review in the United States Supreme Court, challenging not the Commission's failure to convene, but "the 'established state procedure' that destroy[d] his entitlement without according him proper procedural safeguards." Id. at 436. The Supreme Court reversed and remanded, concluding that Logan was "entitled to have the Commission consider the merits of his charge . . . before deciding whether to terminate his claim." Id. at 434.

Logan obviously does not apply here. Florida's Act has never been construed to allow dismissal of a claimant's discrimination charge merely because the Commission has not conducted an investigation or issued a determination by day 180. To the contrary, the statute specifically preserves the discrimination charge after day 180 by permitting the claimant to file suit or request an administrative hearing before the Commission. See McElrath, 707 So. 2d at 840 (noting that section 760.11(8), "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"). The Commission's failure to complete its investigation or issue a determination by day 180 does not destroy the claimant's entitlement to have the merits of her charge decided, and it does not destroy the Commission's jurisdiction to continue its fact-finding.

Unlike Logan's discrimination charge, which was terminated before it was investigated, Bach's charge was fully investigated and found to be without merit. Unlike Logan, Bach was entitled to sue or seek administrative review at the end of the 180-day investigation period irrespective of whether the Commission had investigated her claims.

In summary, Bach has not shown how she was deprived of due process or how her discrimination charge property interest was not duly protected. At any time after day 180, Bach could have pursued her discrimination claims in state court. But she slept on this right, and thus her discrimination charge was fully investigated and found to be without merit. Subsection 760.11(7) provided her with the procedural safeguards of an administrative hearing and of later judicial review. At any point in this administrative process that Bach had succeeded in proving her claims to be meritorious, her right to sue would have been revived.

CONCLUSION

For the reasons discussed and under the authorities cited, this Court should dismiss this case for lack of conflict jurisdiction. Alternatively, this Court should affirm the Fourth District's decision.

Respectfully submitted,

HOLLAND & KNIGHT LLP
Counsel for United Parcel Service, Inc.
701 Brickell Avenue, Suite 3000
Miami, Florida 33131
Tel. 305-374-8500
Fax 305-789-7799

By: _____
Lucinda A. Hofmann
Fla. Bar No. 882879

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 19, 2002 the foregoing respondent's brief on the merits and the accompanying separately-bound, one-volume appendix were been mailed to: Stacy Strolla, Esq., Law Offices of Strolla & Strolla, attorneys for the petitioner, 319 Clematis Street, Suite 801, West Palm Beach, Florida 33401; Richard E. Johnson, Esq., counsel for amicus National Employment Lawyers Association, Florida Chapter, 314 West Jefferson St., Tallahassee, Florida 32301; Susan R. Oxford, Esq., counsel for amicus EEOC, 1801 L Street, N.W., Washington, D.C. 20507; Michael J. Farrell, Esq., counsel for amicus EEOC, EEOC Miami District Office, One Biscayne Tower, Suite 2700, 2 South Biscayne Blvd., Miami, Florida 33131.

Lucinda A. Hofmann

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure as it has been prepared in Times New Roman 14-point font.

Lucinda A. Hofmann