STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARGARET H. WILSON, Petitioner, vs. F. W. BELL, n/k/a BELL TECHNOLOGIES, INC., Respondent.	)	Case No. 97-4841

RECOMMENDED ORDER

An administrative hearing was conducted in this proceeding on February 28, 2000, in Orlando, Florida by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: No Appearance

For Respondent: Janet M. Courtney, Esquire
Lowndes, Drosdick, Doster,
Kantor and Reed, P.A.
215 North Eola Drive
Orlando, Florida 32802

STATEMENT OF THE ISSUE

The ultimate issue for determination is whether Respondent discriminated against Petitioner on the basis of her age by failing to provide equal raises in October 1994 and equal termination benefits in August 1995, in violation of Section 760.10(1), Florida Statutes (1997). (All statutory references are to Florida Statutes (1997) unless otherwise stated).

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the "Commission") on or about August 31, 1995. The Commission did not issue a determination of reasonable cause within 180 days of August 31, 1995, or anytime thereafter. On September 10, 1997, Petitioner filed a Petition for Relief with the Commission requesting an administrative hearing. On October 16, 1997, the Commission referred the matter to DOAH to conduct the administrative hearing.

At DOAH, the case experienced an extensive procedural history. The procedural history is recounted in a discovery order entered on January 28, 2000 (the "Discovery Order").

At the hearing, Petitioner did not appear and did not otherwise present any evidence. Respondent called two witnesses and submitted four exhibits for admission in evidence. The ALJ entered the Discovery Order as an unnumbered exhibit.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the record of the hearing. Neither party requested a Transcript of the hearing. Petitioner did not file a proposed recommended order ("PRO"). Respondent timely filed its PRO on March 9, 2000.

FINDINGS OF FACT

1. Petitioner did not appear at the administrative hearing and did not submit any evidence. Respondent seeks attorney fees and costs incurred as a result of Petitioner's failure to comply with the Discovery Order.

2. It is uncontroverted that Petitioner is a female born on November 17, 1929, and a member of a protected class. Respondent employed Petitioner up to her dismissal on August 1, 1995.

3. Petitioner filed a Charge of Discrimination with the Commission on or about August 31, 1995. The Commission's date stamp on the Charge of Discrimination is legible only for the month and year of filing. August 31, 1995, is the deemed date.

4. Petitioner's Charge of Discrimination contains two allegations of age discrimination. First, Petitioner alleges that Respondent discriminated against Petitioner on August 1, 1995, by terminating Petitioner's employment without the same severance pay that Respondent paid to one of Petitioner's co-workers. Second, Petitioner alleges that in October 1994 Respondent failed to give Petitioner the same raise as Respondent gave Petitioner's co-workers in the same position, i.e., a laboratory technician.

Time Limits

5. The Charge of Discrimination was timely filed in accordance with the requirements of Section 760.11(1). The filing date of August 31, 1995, fell within 365 days of the earliest alleged discrimination on October 1, 1994.

6. Section 760.11(3) authorized the Commission to issue a determination of reasonable cause within 180 days of August 31, 1995, when the Charge of Discrimination was filed. Counting September 1, 1995, as the first day of the 180-day time limit, Section 760.11(3) authorized Commission to determine reasonable cause no later than February 27, 1996.

7. Section 760.11(7) required Petitioner to file a request for hearing within 35 days of February 27, 1996. Counting February 28, 1996, as the first day of the 35-day period and assuming for the benefit of Petitioner that February 1996 had only 28 days, Section 760.11(7) required Petitioner to file a request for hearing no later than April 3, 1996.

8. Petitioner did not timely file her request for administrative hearing. Petitioner first requested an administrative hearing in the Petition for Relief filed on September 10, 1997. Petitioner filed her request for hearing approximately 525 days late and 560 days after the expiration of the 180-day time limit prescribed in Section 760.11(3).

9. Section 760.11(7) statutorily bars Petitioner's claim. Section 760.11(7) expressly provides, in relevant part:

> If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

Fees and Costs

10. The Commission referred the request for hearing in the Petition for Relief to DOAH on October 16, 1997. On November 3, 1997, Respondent filed its Answer and Affirmative Defenses and its Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Alternative Motion for More Definite Statement with Incorporated Memorandum of Law in Support Thereof (respectively, the "Motion to Dismiss" and "Motion for More Definite Statement"). On October 17, 1997, Respondent served Petitioner with copies of the Motion to Dismiss and Motion for More Definite Statement by United States Mail.

11. Petitioner did not file a response to the Motion to Dismiss and Motion for More Definite Statement within 12 days of the date of service, or anytime thereafter. On November 18, 1997, an Order to Show Cause required Petitioner to file no later than December 15, 1997, a written response stating why the relief requested by Respondent should not be granted. A Notice of Hearing issued on the same date scheduled the administrative hearing for February 9, 1998.

12. On December 8, 1997, Petitioner filed her written response to the Order to Show Cause but did not serve a copy on Respondent. On December 30, 1997, a Notice of Ex Parte Communication provided Respondent with a copy of Petitioner's written response and reminded each party to serve the opposing party with copies of any documents filed with DOAH.

13. On January 15, 1998, Respondent filed a renewed Motion to Dismiss and Motion for More Definite Statement and requested a continuance of the administrative hearing on the ground that Respondent had not received a copy of Petitioner's response to the Order to Show Cause until the first week in January. Petitioner did not respond to either of the renewed motions or to the motion for continuance. On February 3, 1998, the ALJ continued the hearing to a date to be agreed upon by the parties during a telephone hearing scheduled for February 9, 1998. The telephone hearing was scheduled to hear oral argument on Respondent's pending motions and as a case management conference.

14. At the outset of the telephone conference conducted on February 9, 1998, Petitioner stated that she did not wish to

proceed without counsel. Petitioner represented that she had been attempting to obtain counsel, without success, and requested additional time in which to obtain counsel.

15. Attorney Robert Hosch, Petitioner's nephew, participated in the motion hearing on February 9, 1998, for the limited purpose of representing that he would assist Petitioner in obtaining counsel. The ALJ granted Petitioner's request for additional time; reserved ruling on Respondent's pending motions for disposition after hearing oral argument during a telephone conference rescheduled for March 2, 1998; instructed Petitioner to have her attorney file a notice of appearance no later than February 19, 1998, and a response to Respondent's renewed Motion to Dismiss and Motion for More Definite Statement no later than March 2, 1998. Pursuant to the agreement of the parties during the telephone conference, the ALJ scheduled the administrative hearing for April 28, 1998. On February 23, 1998, an Order Continuing and Rescheduling Formal Hearing memorialized the foregoing matters.

16. On March 2, 1998, the parties and Mr. Hosch participated in another telephone conference concerning Respondent's Motion to Dismiss and Motion for More Definite Statement. Mr. Hosch stated that he did not represent Petitioner but was assisting her in obtaining counsel. Petitioner requested additional time in which to obtain counsel. The ALJ required Petitioner to file a more definite statement and a notice of appearance from her attorney, if any, no later than March 12, 1998. The ALJ instructed the parties and Mr. Hosch that failure

to file a more definite statement and any notice of appearance on or before March 12, 1998, would result in dismissal of the proceeding. On March 6, 1998, an Order Granting Motion for More Definite Statement memorialized the rulings and instructions entered during the March 2 telephone conference.

17. On March 13, 1998, Petitioner filed a one-page letter purporting to be a more definite statement. On March 16, 1998, the undersigned entered a Recommended Order of Dismissal.

18. On April 5, 1999, the Commission entered an Order Remanding Case to Administrative Law Judge for Further Proceedings on the Merits (the "Remand"). In relevant part, the Remand concluded that the Recommended Order of Dismissal denied Petitioner her right to represent herself and that it was an abuse of discretion to do so.

19. The Remand stated, in relevant part:

> An examination of the DOAH file discloses that Petitioner attempted to file a more definite statement by letter dated 3/11/98, and received by DOAH 3/13/98. It is not known why the Judge does not refer to this letter in his Order. Perhaps it was ignored because it was received one day late. If so, this only strengthens the Commission's finding that the Petitioner was deprived of an essential due process requirement of Florida law, and the Judge abused his discretion.
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> . . . it is necessary that there be a finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard of the order. Petitioner's argument . . . is probably strong enough by itself to remand the Recommended Order, at least on the issue of willful or deliberate default.

Remand at fourth unnumbered page.

20. On April 19, 1999, an Order Reopening File required the parties to file a status report no later than May 17, 1999. The Order expressly stated that failure to timely file a status report would result in the dismissal of the case. Neither party timely filed a status report.

21. On May 20, 1999, Respondent filed Respondent's Status Report requesting rulings on the original and renewed Motion to Dismiss and Motion for More Definite Statement and requesting the administrative hearing to be scheduled after January 1, 2000. Petitioner never filed a status report and did not respond to Respondent's request for rulings on the pending motions.

22. On June 9, 1999, the ALJ entered an Order Denying Dismissal. The Order denied Respondent's original and renewed Motion to Dismiss and Motion for More Definite Statement. On the same date, a Notice of Hearing scheduled the administrative Hearing for September 28 and 29, 1999, and a Prehearing Order required the parties to comply with several requirements incorporated herein by this reference.

23. On June 25, 1999, Respondent filed Respondent's Motion for Continuance of the hearing scheduled for September 28-29, 1999, on the ground that counsel for Respondent was scheduled for a four-week trial in circuit court beginning September 21, 1999. Petitioner never responded to the Motion for Continuance. An order dated July 13, 1999, rescheduled the administrative hearing for January 20 and 21, 2000.

24. On November 16, 1999, Respondent served Petitioner with Respondent's First Set of Interrogatories and Respondent's First

Request for Production of Documents. Petitioner neither objected to nor answered either discovery request.

25. On November 30, 1999, Respondent served Petitioner with a Notice of Taking Deposition Duces Tecum on December 16, 1999. On December 1, 1999, Petitioner filed a letter requesting a continuance of the administrative hearing and an extension of time to respond to discovery and to attend the deposition. In relevant part, the letter stated that Petitioner continues:

> . . . to have difficulty finding counsel who will assist me on a contingency fee basis . . . . At this time, it would be impossible for me to pay an attorney for his or her time in assisting me. For the same reason, I am requesting that each of the parties' discovery efforts be halted for a short period of time, in order that I might find counsel to help me with my responses and to attend my deposition.
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> I do understand that the Respondent has a right to gather information about my claim and I plan to fully cooperate with those efforts. However, I need the assistance of an attorney in preparing my case and representing me at deposition and at the hearing. I am diligently trying to secure counsel and I only seek a reasonable continuance of the hearing and of pending discovery. . . .
>
> Please allow at least a few extra months before the hearing date and allow me at least an additional month to respond to the Respondent's discovery requests and to attend my deposition, which is currently scheduled for mid-December, 1999. . . .

26. On December 10, 1999, Respondent filed Respondent's Objection to Petitioner's Request for Continuance and Rescheduling of Formal Hearing and Request for Stay of Discovery. On December 14, 1999, Respondent filed Respondent's Limited Withdrawal of Objection to Continuance and Amended Response to

Request for Continuance. Respondent agreed to a continuance of the hearing for one month but objected to any extension of the time for responding to discovery requests or for taking the deposition. An order dated December 17, 1999, rescheduled the administrative hearing for February 28 and 29, 2000, and denied Petitioner's request to stay discovery while she sought counsel.

27. Counsel for Respondent made reasonable efforts to conduct discovery at Petitioner's convenience. Subsequent to November 30, 1999, when Respondent's counsel scheduled Petitioner's deposition for December 16, 1999, Petitioner contacted Respondent's counsel to reschedule the December 16 deposition because Petitioner was recovering from a cold. Respondent's counsel rescheduled the deposition for January 4, 2000, and specifically obtained Petitioner's approval of the January 4th-deposition date.

28. During the week of December 27, 1999, Petitioner contacted Respondent's counsel and represented that Petitioner was scheduled to have surgery to remove cancer from Petitioner's mouth on January 3, 2000. Petitioner stated that she would not be able to talk for several weeks and would not be able to appear at the January 4th deposition.

29. Respondent's counsel agreed to reschedule the deposition if Petitioner would provide written confirmation of the scheduled surgery from Petitioner's physician. Petitioner never provided the written confirmation.

30. Respondent's counsel re-noticed Petitioner's deposition for January 17, 2000. Respondent's counsel obtained Petitioner's

specific approval of the new deposition date before scheduling the deposition. Petitioner failed to appear for her deposition on January 17, 2000, and Respondent's counsel rescheduled the deposition for February 2, 2000.

31. Respondent's counsel made several requests by telephone to obtain Petitioner's answers to interrogatories and Petitioner's response to the request to produce. Both discovery requests had been served on November 16, 1999. Petitioner never objected to or answered Respondent's interrogatories and never objected to or produced the requested documents.

32. On January 10, 2000, Respondent's counsel filed a Motion to Compel and Motion for Sanctions; and Respondent's Motion to Compel Appearance at Deposition and Responses to Discovery and Motion for Sanctions. The Discovery Order (dated January 28, 2000) reserved ruling on the request for sanctions until an evidentiary hearing could be conducted during the administrative hearing scheduled for February 28, 1999. However, the Discovery Order granted the request to compel Petitioner's appearance at the deposition scheduled for February 2, 2000; required Petitioner to bring to the deposition her answers to interrogatories and any documents in response to Respondent's request to produce; and required Petitioner to file her Prehearing Statement in accordance with the requirements of the Prehearing Order entered on June 9, 1999.

33. On January 28, 1999, the administrative assistant for the ALJ telephoned Petitioner and read paragraphs 1-7 of the Discovery Order. On the same date, Respondent's counsel caused a

copy of the Discovery Order to be hand-delivered to Petitioner's residence. Petitioner was not home, and the courier posted the Discovery Order on the front door of Petitioner's residence. On January 29, 2000, Respondent's counsel personally hand-delivered a copy of the Discovery Order to Petitioner at Petitioner's residence and informed Petitioner of the Order's contents.

34. On February 2, 2000, Petitioner failed to appear for her deposition. Petitioner never filed her answers to interrogatories, never filed the documents sought in Respondent's request to produce, and never filed a Prehearing Statement.

35. Respondent's counsel telephoned Petitioner to confirm that Petitioner would be attending a prehearing conference that had been previously scheduled in accordance with the requirements of the Prehearing Order entered on June 9, 1999. Petitioner stated that she would not attend the prehearing conference. When Respondent's counsel asked why Petitioner would not attend the prehearing conference, Petitioner hung up without explanation. When counsel for Respondent made additional attempts to coordinate a prehearing conference, Petitioner refused to speak to counsel for Respondent.

36. Petitioner's refusal to appear at deposition, answer interrogatories, produce documents, and participate in a prehearing conference individually and collectively prejudiced Respondent's ability to prepare a defense. Petitioner's refusal denied Respondent relevant and material information including the identity of Petitioner's witnesses and exhibits as well as Petitioner's current employment and earnings. Petitioner's

refusal deprived Respondent's counsel of the ability to fully perform her duties and responsibilities to her client.

37. Respondent incurred attorney's fees and costs as a result of Petitioner's refusal to appear at deposition, answer interrogatories, and produce documents. Respondent incurred court reporter costs of $169.15 as a result of Petitioner's refusal to appear at any of her depositions. Respondent incurred attorney's fees of $499.75 as a result of Petitioner's refusal to appear at her first deposition. Respondent incurred attorney's fees of $1,870.50 as a result of Petitioner's failure to appear at her second deposition, answer interrogatories, and produce documents; and as a result of various motions filed to obtain Petitioner's attendance at deposition and Petitioner's responses to discovery requests.

38. Petitioner willfully and deliberately disregarded the requirements of the Discovery Order. In relevant part, paragraph 6 in the Discovery Order stated:

> In the absence of competent and substantial evidence of good cause submitted by Petitioner, the failure of Petitioner to timely comply with the requirements of this Order shall be "equivalent to willfulness or deliberate disregard of the order [quoting from the Remand]." Upon Respondent's timely motion and showing of good cause for imposing sanctions, such failure by Petitioner shall subject Petitioner to the imposition of appropriate sanctions including the assessment of fees and costs, the preclusion of evidence, and the dismissal of this proceeding.

39. Petitioner had adequate notice of the terms of the Discovery Order and the opportunity to show good cause for her failure to comply with the Discovery Order. On January 28, 2000,

the administrative assistant for the ALJ read to Petitioner over the telephone the contents of paragraphs 1-7 of the Discovery Order. Petitioner received a copy of the Discovery Order on January 28 and 29, 2000. On January 29, 2000, Respondent's counsel explained the Discovery Order to Petitioner.

40. Petitioner chose not to comply with the Discovery Order. Petitioner neither appeared at the administrative hearing to present evidence to prove the merits of her case nor appeared to present evidence to show why the sanctions requested by Respondent should not be granted.

41. Monetary sanctions are appropriate in this case and commensurate with the offense. Dismissal and the preclusion of evidence are neither appropriate nor adequate sanctions because Petitioner did not appear at the administrative hearing and did not present any evidence. Respondent's counsel was required by law and the rules of ethics to make every reasonable effort to prepare an adequate defense of her client for presentation at the administrative hearing.

42. Dismissal is not appropriate for other reasons. The Commission reversed a previous dismissal in this case and remanded the case in an effort to ensure Petitioner's right to represent herself. After the remand, Petitioner sought additional time to obtain counsel. Relevant orders allowed Petitioner additional time to obtain counsel; afforded Petitioner the right to represent herself during discovery, in accordance with the purpose of the Remand; and attempted to balance the competing interests of the parties.

CONCLUSIONS OF LAW

43. DOAH has jurisdiction over the parties and the subject matter in this proceeding. The parties received adequate notice of the administrative hearing. Section 120.57(1).

Time Limits

44. Section 760.11(3), in relevant part, provides that the Commission "shall determine," within 180 days from the date that an aggrieved party files a Charge of Discrimination, whether there is reasonable cause to believe a discriminatory practice has occurred. If the Commission issues a determination of reasonable cause within the 180-day time limit and the aggrieved party wishes to pursue the claim, Section 760.11(4)(a) and (b), respectively, authorizes the aggrieved party to either bring a civil action in court or request an administrative hearing; but not both. Section 760.11(5) and (7), respectively, requires the civil action or request for administrative hearing to be filed within one year or 35 days of the date the Commission determines reasonable cause.

45. If the Commission does not determine reasonable cause within 180 days, Section 760.11(8) authorizes an aggrieved party to file either a civil action or request for administrative hearing as if the Commission had determined reasonable cause within the 180-day time limit in Section 760.11(3). However, Section 760.11 is silent as to the point at which the one-year and 35-day filing requirements in Section 760.11(5) and (7) begin to run when the Commission fails to act within 180 days.

46. The one-year and 35-day filing requirements in Section 760.11(5) and (7) begin to run at the same point. Both filing requirements were enacted in the same act and relate to the same subject matter, i.e., time limits applicable to the mutually exclusive remedies authorized in Section 760.11(4)(a) or (b). Joshua v. City of Gainesville, 734 So. 2d 1068, 1069-1070 (Fla. 1st DCA 1999). The filing requirements in Section 760.11(5) and (7) are imbued with the same spirit, are actuated by the same policy, and must be considered in pari materia in a manner that harmonizes them and gives effect to legislative intent for the entire act. See, e.g., Major v. State, 180 So. 2d 335, 337 (Fla. 1965); Abood v. City of Jacksonville, 80 So. 2d 443, 444-445 (Fla. 1955); Tyson v. Stoutamire, 140 So 454, 456 (Fla. 1932); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997); Armas v. Ross, 680 So. 2d 1130, 1130 (Fla. 3d DCA 1996); State Farm Mutual Automobile Insurance Company v. Hassen, 650 So. 2d 128, 133 n. 5 (Fla. 2d DCA 1995); Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989); Escambia County Council on Aging v. Goldsmith, 465 So. 2d 655, 656 (Fla. 1st DCA 1985); Jackson v. State, 463 So. 2d 373, 373 (Fla. 5th DCA 1985), reh'g denied.

47. The one-year filing requirement in Section 760.11(5) begins to run on the first day after the 180-day time limit in Section 760.11(3). If the Commission issues a determination of reasonable cause after 180 days or never issues a determination of reasonable cause, a civil action filed more than one year after the 180-day time limit is statutorily barred by Section

760.11(5). Joshua, 734 So. 2d at 1070-1071 (question certified to the Florida Supreme Court) rev. granted 735 So. 2d 1285 (Fla. 1999); Adams v. Wellington Regional Medical Center, Inc., 727 So. 2d 1139 (Fla. 4th DCA 1999) (question certified to the Florida Supreme Court); Daugherty v. City of Kissimmee, 722 So. 2d 288 (Fla. 5th DCA 1998); Crumbie v. Leon County School Board, 721 So. 2d 1211 (Fla. 1st DCA 1998); Kalkai v. Emergency One, 717 So. 2d 626 (Fla. 5th DCA 1998); Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1998). See also Sasser M. and Stafford S., "Defining the Hourglass: When Is a Claim Under the Florida Civil Rights Act Time Barred?", 73 Fla. B.J. 68 (Dec. 1999).

48. The 35-day filing requirement in Section 760.11(7) also begins to run on the first day after the 180-day time limit in Section 760.11(3). If the Commission issues a determination of reasonable cause after 180 days or never issues a determination of reasonable cause, a request for an administrative hearing filed more than 35 days after the 180-day time limit is statutorily barred by Section 760.11(7). See, e.g., Joshua, 734 So. 2d at 1070-1071; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626; Milano, 703 So. 2d at 1094-1095. See also Hall v. Boeing Aerospace Operation, 20 FALR 2596 (1998); Gessler v. Department of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993), reh. denied, dismissed, 634 So. 2d 624 (Fla. 1994)(agency is bound by its administrative orders pursuant to the doctrine of stare decisis). Compare Nordheim v. Department

of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998) (agency refusal to consider its prior decision is abuse of discretion) with Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996) (Section 120.53 requirement for subject matter index does not begin until effective date of 1992 amendment).

49. In this case, Petitioner is deemed to have filed her Charge of Discrimination on August 31, 1995. Counting September 1, 1995, as the first day of the 180-day period, Section 760.11(3) authorized the Commission to issue a determination of reasonable cause no later than February 27, 1996.

50. The 35-day filing requirement in Section 760.11(7) began to run in this case on February 28, 1996. Section 760.11(7) required Petitioner to file her request for hearing in the Petition for Relief no later than April 3, 1996.

51. Petitioner did not file a request for hearing until September 10, 1997. Petitioner filed the request for hearing 525 days late and 560 days after the 180-day time limit in Section 760.11(3).

Statutory Authority

52. Section 760.11(3) provides that the Commission "shall determine" reasonable cause within 180 days of the date Petitioner filed her Charge of Discrimination on August 31, 1995. The statute does not state that the Commission shall determine reasonable cause within 180 days or anytime thereafter. After February 27, 1996, the Commission had no statutory authority to

act. Neither the Commission nor DOAH can adopt an interpretation of Section 760.11(3) that enlarges, modifies, or contravenes the 180-day time limit prescribed by the legislature. Sections 120.52(8)(c) and 120.58(7)(3)4. See also DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla. 4th DCA 1994), rev. denied, 659 So. 2d 1086 (Fla. 1995) (agency lacks authority to impose time requirement not found in statute); Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 362 (Fla. 1st DCA 1984) (agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious).

53. Florida Administrative Code Rule 60Y-5.008(1) requires an aggrieved party to file a Petition for Relief requesting an administrative hearing within 30 days of service of a Notice of Determination of No Reasonable Cause. (Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.) Rule 60Y-5.008(2) provides that the Commission may grant an extension of time to file a request for hearing upon a showing of good cause if the aggrieved party files a motion for extension of time within the 30-day period prescribed in Rule 60Y-5.008(1).

54. Rule 60Y-5.008 expressly limits its scope to cases in which the Commission issues a determination of reasonable cause. The express terms of the rule do not reach situations where the Commission fails to issue a determination of reasonable cause. Neither the Commission nor DOAH can deviate from Rule 60Y-5.008. Section 120.68(7)(e)2. An agency's deviation from a valid

existing rule is invalid and unenforceable. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

55. Even if Rule 60Y-5.008 applied to situations in which the Commission fails to issue a notice of determination in 180 days, the rule's authority to extend the 30-day filing requirement cannot be construed in a manner that effectively extends the 180-day time limit in Section 760.11(3). The 30-day filing requirement in Rule 60Y-5.008 begins to run on the first day after the 180-day period in Section 760.11(3). Cf. Joshua, 734 So. 2d at 1070-1071; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626; Milano, 703 So. 2d at 1094-1095. Petitioner did not file a motion to extend the 30-day filing requirement within 30 days after the 180-day period.

56. Neither the Commission nor DOAH can construe Rule 60Y-5.008 to enlarge, modify, or contravene the 180-day time limit the legislature prescribed in Section 760.11(3). A rule cannot impose a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. See, e.g., DeMario, 648 So. 2d at 213-214 (agency lacked authority to impose time requirement not found in statute); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988) (agency cannot

vary impact of statute by creating waivers or exemptions) reh. denied. Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. Department of Highway Safety & Motore Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997), reh'g denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), reh'g denied; Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) reh. denied. See also Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117.

57. The record does not disclose why the Commission failed to issue a determination of reasonable cause within the 180-day time limit in Section 760.11(3). The reason may be attributable to administrative convenience or expediency related to a heavy caseload that prevents the agency from completing its investigation within 180 days. However, administrative convenience or expediency cannot dictate the terms of the time limits prescribed by the legislature in Section 760.11(3). Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1241 (Fla. 1st DCA 1996) reh. denied; Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995) reh. denied; Flamingo Lake RV Resort, Inc. v. Department of Transportation, 599 So. 2d 732, 732 (Fla. 1st DCA 1992).

58. If administrative convenience were allowed to extend the 180-day time limit prescribed in Section 760.11(3), the result would subject the statutory time limit to a "manipulable open-ended time extension. . . ." Cf. Lewis v. Conners Steel Company, 673 F.2d 1240, 1242 (11th Cir. 1982) (barring Title VII lawsuit filed outside the 90-day period). Such a result ". . . could render the statutory limitation meaningless." Id.

Jurisdiction

59. Petitioner's claim is statutorily barred by Section 760.11(7). In relevant part, Section 760.11(7) requires that Petitioner's request for hearing in her Petition for Relief:

> . . . must be made within 35 days of the date of determination of reasonable cause [by the Commission]. . . . If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred. (emphasis supplied)

60. The statutory bar to a claim filed more than 35 days after the expiration of the 180-day time limit in Section 760.11(3) is not a jurisdictional bar to Petitioner's claim. Rather, failure to comply with the 35-day filing requirement in Section 760.11(7) admits a defense analogous to a statute of limitations. Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1997) reh. en banc clarification and certification. Accord Joshua, 734 So. 2d at 1068; Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai, 717 So. 2d at 626.

61. Florida courts holding that noncompliance with statutory filing requirements is a jurisdictional bar generally do so on the basis of specific statutory language. Relying on

language in Section 194.171(6), for example, the Florida Supreme Court has held that the 60-day filing requirement in Section 194.171(2) is a "jurisdictional statute of nonclaim." Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 815 (Fla. 1988). Accord Wal-Mart Stores, Inc. v. Day, 742 So. 2d 408, 409 (Fla. 5th DCA 1999); Palmer Trinity Private School, Inc. v. Robbins, 681 So. 2d 809 (Fla. 3d DCA 1996); Hall v. Leesburg Regional Medical Center, 651 So. 2d 231 (Fla. 5th DCA 1995); Walker v. Garrison, 610 So. 2d 716 (Fla. 4th DCA 1992); Markham v. Moriarty, 575 So. 2d 1307 (Fla. 4th DCA 1991), cert. denied, 502 U.S. 968, 112 S. Ct. 440 (1991); Gulfside Interval Vacations, Inc. v. Schultz, 479 So. 2d 776 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 830 (Fla. 1986). See also Davis v. Macedonia Housing Authority, 641 So. 2d 131, 132 (Fla. 1st DCA 1994) (the 60-day filing requirement in Section 194.171(2) is a jurisdictional bar to an action to contest loss of tax exemption for 1990). Cf. Pogge v. Department of Revenue, 703 So. 2d 523, 525-526 (Fla. 1st DCA 1997) (the 60-day filing requirement in Section 72.011(2) is a jurisdictional bar to an action contesting the assessment of taxes but was not a jurisdictional bar to an action for a refund of taxes prior to 1991 when the legislature amended former Section 72.011(6) to delete express language that Section 72.011 was inapplicable to refunds); Mikos v. Parker, 571 So. 2d 8, 9 (Fla. 2d DCA 1990) (the 60-day filing requirement in Section 194.171 was not a jurisdictional bar to a claim for refund of taxes assessed in 1989). Compare City of Fernandina Beach v. Page, 682 So. 2d 573 (Fla. 1st DCA 1996); Joyner v. Roberts, 642

So. 2d 826 (Fla. 1st DCA 1994); and Chihocky v. Crapo, 632 So. 2d 230 (Fla. 1st DCA 1994) (the failure to strictly comply with statutory notice procedures may toll the running of the 60-day filing requirement in Section 194.171(2)).

62. Federal courts generally view filing requirements in discrimination cases as statutes of limitation rather than as jurisdictional prerequisites to filing suit. For example, 42 U.S.C. Section 2000e-5(f)(1) requires an aggrieved party to file suit within 90 days after receipt of a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). In Espinoza v. Missouri Pacific Railroad Co., 754 F.2d 1247, 1250 (5th Cir. 1985), the court held that the 90-day filing requirement in 42 U.S.C. Section 2000e-5(f)(1) is not a jurisdictional prerequisite to suit but is a statute of limitations subject to the doctrine of equitable tolling.

63. The Supreme Court has adopted a similar construction of the requirement in 42 U.S.C. Section 2000e-16(c) for an aggrieved party to file suit within 30 days after receipt of a right to sue letter from the EEOC. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92, 111 S. Ct. 453, 455 (1990), the Court resolved a conflict between federal appellate courts over whether a late-filed claim deprived federal courts of jurisdiction. In Irwin, the Fifth Circuit Court of Appeals had held that federal courts lacked jurisdiction over claims filed more than 30 days after receipt of a right to sue letter. Irwin v. Department of Veterans Affairs, 874 F.2d 1092 (5th Cir 1989). The holding by the Fifth Circuit was in direct conflict with decisions in four

other courts of appeals. Boddy v. Dean, 821 F.2d 346, 350 (6th Cir. 1987); Martinez v. Orr, 738 F.2d 1107, 1109 (10th Cir. 1984); Milam v. United States Postal Service, 674 F.2d 860, 862 (11th Cir. 1982); Saltz v. Lehman, 672 F.2d 207, 209 (D.C. Cir. 1982). The Supreme Court held that the 30-day filing requirement is not jurisdictional but creates a "rebuttable presumption of equitable tolling." Irwin, 498 U.S. at 95-96, 111 S. Ct. at 457.

Equitable Tolling

64. Florida courts have applied the doctrine of equitable tolling to excuse an otherwise untimely initiation of an administrative proceeding when four requirements are satisfied. First, the filing requirement is not jurisdictional. Cf. Environmental Resource Associates of Florida, Inc. v. State, Department of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993) (Judge Zehmer dissenting, in relevant part, because the 21-day time limit in that case was "not jurisdictional"); Castillo v. Department of Administration, Division of Retirement, 593 So. 2d 1116 (Fla. 2d DCA 1992) (remanding the case for equitable considerations related to the "not jurisdictional" 21-day period for challenging agency action). Second, the delay is a minor infraction of the filing requirement. Stewart v. Department of Corrections, 561 So. 2d 15 (Fla. 4th DCA 1990)(applying the doctrine to excuse a request for hearing that was one day late); Environmental Resource, 624 So. at 332-333 (Judge Zehmer's dissenting opinion found that the delay was a minor infraction). Third, the delay does not result in prejudice to the other party. Stewart, 561 So. 2d at 16. Fourth, the delay is caused by the

affected party's being misled or lulled into inaction, being prevented in some extraordinary way from asserting his or her rights, or having timely asserted his or her rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d 1132, 1133-1134 (Fla. 1988). See Burnaman, R., "Equitable Tolling in Florida Administrative Proceedings," 74 Fla. B.J. 60 (February 2000).

65. The first requirement for equitable tolling is the only requirement that is satisfied in this case. The 35-day filing requirement in Section 760.11(7) is not a jurisdictional prerequisite to Petitioner's claim. Irwin, 498 U.S. at 92, 111 S. Ct. at 455; Milano, 703 So. 2d at 1094-1095.

66. The second requirement for equitable tolling is not satisfied in this case. The delay caused by the failure to timely file a request for hearing was not a minor infraction but was significant and lasted 525 days. Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306, 307 (Fla. 1st DCA 1997) (refusing to allow filing of letters of intent one day late in certificate of need process); Environmental Resource, 624 So. 2d at 331 (court refused to reverse a final order denying a hearing where the request for hearing was four days late).

67. The third requirement of the doctrine of equitable tolling is not satisfied in this case. The delay sought by Petitioner would prejudice Respondent by adding 525 days to the 580-day time limit prescribed by the legislature in Section

760.11(1)(365 days), Section 760.11(3)(180 days), and Section 760.11(7)(35 days).

68. Petitioner submitted no evidence that the fourth requirement of the doctrine of equitable tolling was satisfied in this case. Petitioner failed to show that the delay in filing her request for hearing was the result of being misled or lulled into inaction, of being prevented in some extraordinary way from asserting her rights, or of having timely asserted her rights mistakenly in the wrong forum. See, e.g., Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16, 1999) (refusing to remand a denial of a request for hearing where the recommended order contained findings of fact and conclusions of law supporting the denial of an untimely request for hearing).

69. Even if the evidence showed that Petitioner had been lulled into inaction, Petitioner failed to show that she was lulled into inaction by Respondent. It is mere supposition to conclude that Petitioner was lulled into inaction by the failure of the Commission to issue a notice of determination within the 180-day time limit prescribed in Section 760.11(3). Even if the evidence supported such a finding, the Commission is not a named party to this proceeding.

70. The doctrine of equitable tolling generally has been limited to cases in which one party has been lulled into inaction or prevented from asserting his or her rights by the acts or omissions of the party's adversary. In Irwin, for example, the Court held that the doctrine of equitable tolling applied to an action brought by a discharged government employee against the

government. The Court noted that the doctrine of equitable tolling generally was limited to situations where a complainant was induced or tricked by an adversary's misconduct into allowing a filing deadline to pass. Irwin, 498 U.S. at 96, 111 S. Ct. at 455.

71. The Florida Supreme Court has not limited the doctrine of equitable tolling to cases in which a party is tricked or induced by the misconduct of an adversary into allowing a filing deadline to pass. The Florida Supreme Court has expanded the doctrine to reach cases where a party allows a filing deadline to pass through the party's own inadvertence or mistake of law. In Machules, 523 So. 2d at 1132, the court held that a discharged agency employee who chose to pursue a claim through union grievance, and thereby allowed the time limits for requesting a hearing to lapse, did not waive the right to a hearing.

72. In Machules, the court's expansion of equitable tolling to inadvertence and mistake of law involved a state agency that was both a named party and an adversary to the discharged agency employee. The decision in Machules did not involve a state agency that was a non-party in a case such as this in which two or more named parties are adversaries and who are the real parties in interest. Machules, 523 So. 2d at 1132.

73. Florida appellate courts have not expanded the doctrine of equitable tolling beyond the facts in Machules. Florida appellate courts have applied the doctrine of equitable tolling in administrative cases involving state agencies that are adversaries to substantially affected parties. See, e.g., Mathis

v. Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999), the court applied (state agency was adversary in claim for back pay by agency's employee); Avante, Inc. v. Agency for Health Care Administration, 722 So. 2d 965 (Fla. 1st DCA 1998) (state agency was adversary in action to recover Medicaid payments); Unimed Laboratory, Inc. v. Agency for Health Care Administration, 715 So. 2d 1036 (Fla. 3d DCA 1998)(state agency was adversary in action to recover Medicaid payments); Haynes v. Public Employees Relations Commission, 694 So. 2d 821 (Fla. 4th DCA 1997) (state agency was adversary in employee dismissal action); Phillip v. University of Florida, 680 So. 2d 508 (Fla. 1st DCA 1996)(state agency was adversary in employee dismissal action); Abusalameh v. Department of Business Regulation, 627 So. 2d 560 (Fla. 4th DCA 1993)(state agency was adversary in license revocation proceeding); Environmental Resource, 624 So. 2d at 331 (state agency that was adversary in contract termination case did nothing to cause four-day delay in filing request for hearing); Castillo, 593 So. 2d at 1117 (state agency was adversary in beneficiary's claim for retirement benefits); Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988(Fla. 1st DCA 1991) (state agency was adversary in action seeking reimbursement of cleanup costs); Stewart, 561 So. 2d 15 (state agency was adversary in employee dismissal action).

74. Florida courts have been reluctant to extend the doctrine of equitable tolling to administrative cases in which a state agency is only a nominal party rather than an adversary to the affected party. In Vantage Healthcare, 687 So. 2d at 307, a

state agency awarded a certificate of need to an applicant after allowing the applicant to file its letter of intent one day late. The agency applied the doctrine of equitable tolling to extend the filing deadline by one day. The court held that the doctrine of equitable tolling does not apply to the certificate of need application process because the application process:

> . . . is not comparable to . . . judicial or quasi-judicial proceedings. We have found no authority extending the doctrine of equitable tolling to facts such as in the present case.

Cf. Perdue, 1999 WL 393464 (Fla. 4th DCA 1999) (refusing to apply the doctrine of equitable tolling to extend the deadline for challenging a notice of intent to issue a conceptual permit approving overall master project design).

75. Unlike the state agency in Vantage Healthcare, the Commission is not a party to this proceeding. Assuming arguendo the evidence showed that the Commission's failure to issue a written notice within the 180-day time limit in Section 760.11(3) lulled Petitioner into inaction, application of the doctrine of equitable tolling to the facts in this case would extend the doctrine to administrative proceedings in which a party is lulled into inaction by the inaction of a non-party.

Clear Point of Entry

76. The clear point of entry doctrine is a judicial doctrine that requires state agencies to provide parties who are substantially affected by proposed agency action with a clear point of entry to formal or informal proceedings authorized in Chapter 120. The clear point of entry doctrine was first enunciated in Capeletti Brothers, Inc. v. State, Department of

Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979). Since 1979, the doctrine has been followed by Florida courts. See, e.g., Environmental Resource, 624 So. 2d at 331-332 (concurring opinion of Judge Ervin); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). See also Southeast Grove Management, Inc. v. McKinness, 578 So. 2d 883 (Fla. 1st DCA 1991); Capital Copy, Inc. v. University of Florida, 526 So. 2d 988 (Fla. 1st DCA 1988); Lamar Advertising Company v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); City of St. Cloud v. Department of Environmental Regulation, 490 So. 2d 1356 (Fla. 5th DCA 1986); Henry v. Department of Administration, Division of Retirement, 431 So. 2d 677 (Fla. 1st DCA 1983). See also Shirley S., "In Search of a Clear Point of Entry," 68 Fla. B.J. 61 (May 1994).

77. An agency provides a clear point of entry to an affected party by satisfying several fundamental requirements. First, the agency must notify the affected party of the proposed agency action. In addition, the notice must inform the affected party of the right to request an administrative hearing pursuant to Section 120.57 and inform the affected party of the time limits within which the party must file a request for hearing. If the affected party fails to file a request for hearing within the time prescribed in the clear point of entry, the affected party waives the right to request a hearing. See, e.g., Environmental Resource, 624 So. 2d at 331-332 (citing Capeletti Brothers, 368 So. 2d at 348).

78. There is no evidence in this case that the Commission satisfied the requirements of the clear point of entry doctrine. Rather, the evidence shows that the Commission did not issue a determination of reasonable cause, or otherwise issue a notice of rights, within the 180-day time limit prescribed in Section 760.11(3) or anytime thereafter.

79. The failure of the Commission to act within the time prescribed in Section 760.11(3) raises at least four issues. The first issue is whether Sections 760.11(3), (7) and (8) provide an aggrieved party with a clear point of entry in the absence of agency action. If so, the second issue is whether uncertainty, if any, created by agency inaction can operate to negate the clear point of entry provided by statute. The third issue is whether the clear point of entry doctrine operates any differently in cases in which the state agency is neither an adversary of the affected party nor a nominal party. If the doctrine does apply with equal force to such cases, the fourth issue is whether the inaction of a non-party can effectively enlarge statutes of limitation intended, in part, to protect the affected party's adversary.

80. Sections 760.11(3), (7), and (8) provide a clear point of entry by notifying an aggrieved party that a request for an administrative hearing must be filed within 35-days of the earlier of: the determination of reasonable cause; or the 180-day time limit prescribed in Section 760.11(3). If the Commission fails to act within 180 days, the 35-day filing requirement in Section 760.11(7) begins to run immediately after the 180-day

time limit in Section 760.11(3). Cf. Joshua, 734 So. 2d at 1068); Adams, 727 So. 2d at 1139; Daugherty, 722 So. 2d at 288; Crumbie, 721 So. 2d at 1211; Kalkai 717 So. 2d at 626. Any other construction is unreasonable. Milano, 703 So. 2d at 1093.

81. Agency action taken after the 180-day time limit in Section 760.11(3) is neither statutorily authorized nor statutorily required as a prerequisite of the 35-day filing requirement in Section 760.11(7). In the absence of agency action by the Commission, Section 760.11(8) authorizes an aggrieved party to proceed under Section 760.11(4) as if the Commission had issued a notice of determination within the 180-day time limit in Section 760.11(3).

82. The inaction of the Commission cannot enlarge, modify, or contravene the terms of a statute. An agency cannot impose by inaction or other practice a requirement not found in a statute or otherwise enlarge, modify, or contravene the terms of a statute. See, e.g., DeMario, 648 So. 2d at 213-214 (agency lacked authority to impose time requirement not found in statute); Booker Creek, 534 So. 2d at 423. If an agency rule or practice conflicts with a statute, the statute prevails. Hughes, 710 So. 2d at 685; Johnson 709 So. 2d at 624; A Duda & Sons, 608 So. 2d at 884; Wingfield Development, 581 So. 2d at 197.

83. If the Commission is concerned that its rules or practices may cloud the clear point of entry provided in Sections 760.11(3), (7), and (8), the Commission has no authority to enlarge the 180-day time limit in Section 760.11(3). However, the Commission does have authority to issue a written notice of

rights to the parties within the time authorized in Section 760.11(3).

84. Assuming arguendo that the requirements of the clear point of entry doctrine are not satisfied in the statutory notice provided in Sections 760.11(3), (7), and (8), the issue is whether the clear point of entry doctrine operates any differently in cases such as this one in which the state agency is neither an adversary to the aggrieved party nor a nominal party. Courts have most frequently applied the clear point of entry doctrine in cases involving a state agency that is an adversary to the affected party. See, e.g., Florida League of Cities v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991); Capital Copy, Inc. v. University of Florida, 526 So. 2d 989 (Fla. 1st DCA 1988); Lamar Advertising Company v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); City of St. Cloud v. Department of Environmental Regulation, 490 So. 2d 1356, 1358 (Fla. 1st DCA 1986); Henry v. State, Department of Administration, 431 So. 2d 677, 680 (Fla. 1st DCA 1983); Manasota 88, Inc. v. Department of Environmental Regulation, 417 So. 2d 846 (Fla. 1st DCA 1982); Sterman v. Florida State University Board of Regents, 414 So. 2d 1102 (Fla. 1st DCA 1982).

85. Less frequently, courts have applied the clear point of entry doctrine in cases involving a state agency that is a nominal party but not an adversary to the affected party. In a certificate of need case, for example, the court held that failure of the state agency to notify competing hospitals that the hospital-applicant had submitted a revised application

denied competing hospitals of a clear point of entry. NME Hospitals, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 379, 384-385 (Fla. 1st DCA 1986) (opinion on Motion for rehearing), reh. denied. In another certificate of need case, the court refused to extend the time limits in a clear point of entry for an applicant to file its letter of intent. Vantage Healthcare, 687 So. 2d at 308 (refusing to apply equitable tolling to the certificate of need process).

86. At least one court has applied the clear point of entry doctrine in a case in which the state agency was neither an adversary to the affected party nor a nominal party. In a proceeding between a fruit dealer and the grower, the court held that the failure of the dealer to request a hearing within the time limit prescribed in a statutorily required agency notice waived the dealer's right to a de novo hearing. Southeast Grove Management, Inc. v. McKiness, 578 So. 2d 883, 886 (Fla. 1st DCA 1991).

87. Unlike the statutory requirement for agency notice in Southeast, nothing in Section 760.11 requires agency action after 180 days as a prerequisite to the 35-day filing requirement in Section 760.11(7). If the Commission fails to complete its investigation and issue a notice of rights within 180 days, Section 760.11(8) authorizes an aggrieved party to proceed under Section 760.11(4) as if the Commission had issued a notice of rights within the 180-day time limit.

88. The Commission can accelerate the point at which the 35-day filing requirement begins to run by issuing a notice of

determination in less than 180 days. However, the Commission has no statutory authority to delay the point at which the 35-day requirement begins to run by acting beyond the 180-day time limit in Section 760.11(3) or by failing to act altogether.

Equitable Estoppel

89. The doctrine of equitable estoppel is distinguishable from the doctrine of equitable tolling. The latter doctrine is concerned with the point at which a limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. Morsani v. Major League Baseball, 739 So. 2d 610, 614-615 (Fla. 2d DCA 1999). Equitable estoppel comes into play only after the limitations period has run and addresses the circumstances in which a party is estopped from asserting the statute of limitations as a defense to an admittedly untimely action. Id. See also Ovadia v. Bloom, 2000 WL 227961 (Fla. 3d DCA March 1, 2000).

90. Like equitable tolling, equitable estoppel can be applied to a state agency where the state agency is a named party and an adversary to the affected party. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215 (Fla. 1st DCA 1986). A party must specifically plead equitable estoppel in administrative cases. University Community Hospital v. Department of Health and Rehabilitative Services, 610 So. 2d 1342, 1346 (Fla. 1st DCA 1992). Equitable estoppel does not apply in cases where the delay is caused by a mistake of law. Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994); Dolphin Outdoor Advertising v.

Department of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991); Tri-State, 500 So. 2d 216. Equitable tolling may apply in cases where the delay is caused by mistake of law or inadvertence. See, e.g., Machules, 523 So. 2d at 1134 (pursuing claim through union grievance procedure instead of requesting hearing tolls the clear point of entry).

Discrimination

91. If the doctrines of equitable tolling, estoppel, or clear point of entry were applied to this case to enlarge the 35-filing requirement in Section 760.11(7) by 525 days, the doctrines would not change the outcome of this case. Petitioner failed to satisfy her burden of proof.

92. Section 760.10(1), in relevant part, makes it an unlawful employment practice for Respondent to discriminate against Petitioner because of Petitioner's age. Chapter 760, entitled the Florida Human Relations Act (the "Act"), adopts the legal principles and judicial precedent set forth under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e et seq. (the "ADA").

93. The initial burden of proof is on Petitioner. Florida Department of Transportation vs. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino vs. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner must satisfy her burden of proof by a preponderance of the evidence. Section 120.57(1)(g).

94. Petitioner must establish a prima facie case of discrimination. Rosenbaum v. Souhtern Manatee Fire and Rescue

District, 980 F.Supp 1469 (M.D. Fla. 1997); Andrade v. Morse Operations, Inc., 946 F.Supp 979, 984 (M.D. 1996). Petitioner must show by a preponderance of evidence that: she is a member of a protected class; she suffered an adverse employment action; she received disparate treatment from other similarly situated individuals in a non-protected class; and that there is sufficient evidence of bias to infer a causal connection between her age and the disparate treatment. Id. Failure to establish the last prong of the conjunctive test is fatal to a claim of discrimination. Mayfield v. Patterson Pump Company, 101 F.3d 1371 (11th Cir. 1996); Earley v. Champion International Corp., 907 F.2d 1077 (11th Cir. 1990).

95. It is uncontroverted that Respondent engaged in an adverse employment action when Respondent terminated Petitioner's employment. It is also uncontroverted that Petitioner is a member of a protected class.

96. Petitioner submitted no direct evidence of the alleged discrimination. In the absence of such evidence, Petitioner must provide sufficient inferential evidence of the alleged discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

97. Petitioner submitted no evidence. Petitioner failed to make a prima facie showing that she received dissimilar treatment from individuals in a non-protected class; that there was any bias against Petitioner; or that, even if evidence of bias did

exist, it was sufficient to infer a causal connection between Petitioner's age and the alleged disparate treatment.

Fees and Costs

98. Respondent seeks attorney's fees and costs incurred by Respondent as a result of Petitioner's failure to comply with the Discovery Order. Florida Rules of Civil Procedure ("FRCP") Rule 1.370(b)(2) authorizes the undersigned to require the failing party to pay reasonable expenses caused by the offending party's failure to comply with a discovery order, or to impose other sanctions including an order striking pleadings, precluding evidence, or dismissing the claim.

99. Before imposing any sanction authorized in FRCP Rule 1.370(b)(2), Petitioner must have an opportunity to be heard on the question of whether her failure to comply with the Discovery Order was willful or in bad faith. Sizemore v. Ray Gunter Trucking, Inc., 524 So. 2d 717 (Fla. 1st DCA 1988); Austin v. Papol, 464 So. 2d 1339 (Fla. 2d DCA 1985). Petitioner had adequate notice of her opportunity to show that her failure to comply with the Discovery Order was not willful or in bad faith.

100. The Discovery Order expressly stated that the administrative hearing scheduled for February 28, 2000, would include time for Petitioner to show why her failure to comply with the Discovery Order was not willful or in bad faith. The Discovery Order also placed Petitioner on notice of the consequences of her failure to appear at the administrative hearing and show by competent and substantial evidence why her

failure to comply with the Discovery Order was not willful or in bad faith. Paragraph 6 of the Discovery Order stated:

> In the absence of competent and substantial evidence of good cause submitted by Petitioner, the failure of Petitioner to timely comply with the requirements of this Order shall be "equivalent to willfulness or deliberate disregard of the order [quoting from the Remand]." Upon Respondent's timely motion and showing of good cause for imposing sanctions, such failure by Petitioner shall subject Petitioner to . . . appropriate sanctions including the assessment of fees and costs. . . .

101. The Clerk of DOAH mailed a copy of the Discovery Order to Petitioner on January 28, 2000. On the same date, the administrative assistant for the ALJ telephoned Petitioner and read the contents of paragraphs 1-7 of the Discovery Order. In addition, Respondent's counsel caused a copy of the Discovery Order to be posted on the front door of Petitioner's residence on January 28, 2000. On January 29, 2000, Respondent's counsel hand-delivered a copy of the Discovery Order to Petitioner and informed Petitioner of the requirements of the Order.

102. Petitioner failed to appear at the administrative hearing. Petitioner failed to show by competent and substantial evidence why she failed to appear for her deposition on February 2, 2000, why she never filed her answers to interrogatories, why she never filed the documents sought in Respondent's request to produce, and why she never filed a Prehearing Statement.

103. Petitioner's failure to comply with the Discovery Order was willful and in bad faith, equivalent to willfulness and deliberate disregard of discovery orders, more than neglectful

and inadvertent, and prejudicial to the other party. Cf. Commonwealth Federal Savings and Loan Association v. Tubero, 569 So. 2d 1271, 1273 (Fla. 1990); Regante v. Belsky, 600 So. 2d 13 (Fla. 2d DCA 1992); In Re: Forfeiture of $20,900.00, 539 So. 2d 14 (Fla. 1st DCA 1989) (reversing orders striking pleadings and dismissing cases without a finding that noncompliance was willful and in bad faith). The prejudice to Respondent included depriving Respondent of information needed to adequately prepare for the administrative hearing and depriving Respondent's counsel of the ability to perform the duties and responsibilities owed to her client.

104. As a result of Petitioner's willful failure to comply with the Discovery Order, Respondent incurred attorney's fees and costs in the aggregate amount of $2,539.40. Monetary sanctions are reasonable and appropriate in this case and commensurate with the offense. Dismissal and the preclusion of evidence are neither appropriate, adequate, nor commensurate with the offense. Petitioner did not appear and did not present any evidence in this case. Respondent's counsel was required by applicable law and the rules of ethics to make every reasonable effort to prepare an adequate defense for her client and to present that defense at the administrative hearing.

105. The Commission remanded this case on April 5, 1999, to give Petitioner an opportunity to represent herself. Petitioner sought additional time to obtain counsel. Relevant orders allowed Petitioner additional time to obtain counsel, effectuated the intent of the Remand by affording Petitioner an opportunity

to represent herself during discovery, and attempted to balance the competing interests of the parties.

106. Petitioner is not subject to a lesser standard of conduct, as distinguished from legal competence, than a licensed attorney. A contrary rule would insulate a party from the consequences of appropriate sanctions whenever a party chose lay representation. Burke v. Harbor Estate Associates, Inc., 591 So. 2d 1034, 1037-1038 (Fla. 1st DCA 1991). Accord Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324 (Fla. 3d DCA 1992).

107. Petitioner's noncompliance with the Discovery Order is part of a consistent pattern and practice of noncompliance with valid orders and with Respondent's good faith attempts to effectuate discovery at the convenience of Petitioner. Petitioner's history of noncompliance, delay, and refusal to pursue her claim evinces a pattern of conduct that is more than mere neglect or inadvertence. From 1997 to the present, Petitioner has consistently failed to comply with orders in this case including the Discovery Order; has failed to make a good faith effort to comply with other orders including the order to file a more definite statement; and has consistently frustrated Respondent's good faith attempts to effectuate discovery at Petitioner's convenience. See, e.g., Bailey v. Woodlands Company, Inc., 696 So. 2d 459 (Fla. 1st DCA 1997) (repeated noncompliance with orders is willful noncompliance and warrants dismissal).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Commission enter a final order dismissing this proceeding as untimely filed; finding that Respondent did not discriminate against Petitioner; denying Petitioner's Charge of Discrimination and Petition for Relief; and imposing monetary sanctions against Petitioner in the aggregate amount of $2,539.40.

DONE AND ENTERED this 6th day of April, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.