

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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LUIS F. HERNANDEZ,

EEOC Case No. 15D961043

Petitioner,

FCHR Case No. 96-0033

v.

DOAH Case No. 99-3576

TRANSPO ELECTRONICS, INC.,

FCHR Order No. 04-104

Respondent.

*DSM
Closed*

**ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

This matter is before the Commission for consideration of the "Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand Dated December 4, 2001," issued in the above-styled matter by Administrative Law Judge Daniel Manry.

This is the third time this case is before a panel of Commissioners. In a Recommended Order dated June 6, 2000, the Administrative Law Judge concluded that Petitioner's claim was barred because the Petition for Relief was not timely filed. A Commission panel consisting of Commissioners Paige, Cannon and Elam found this to be error and remanded the case to the Administrative Law Judge in an order filed December 4, 2001. Respondent then filed a motion to dismiss the Petitioner's amended Petition for Relief, alleging that the amended Petition for Relief failed to state a cause of action because the allegations and claims stated therein are outside the scope of the Charge of Discrimination filed with the Commission. The Administrative Law Judge then issued an "Order Closing File," indicating that the cause was before the Administrative Law Judge on Respondent's Motion to Dismiss, and that "being fully advised," the file of the Division of Administrative Hearings was closed. A Commission panel consisting of Commissioners Roberts, Montes and Shutes again remanded the case to the Administrative Law Judge in an order filed September 5, 2002, noting that the Administrative Law Judge's order was not sufficient for the Commission to take final agency action, since it contained no findings of fact and conclusions of law. The Administrative Law Judge then issued an Order, the Order currently before the Commission, which accepted the second remand, refused the first remand, revisited the issue of the timeliness of the Petition for Relief, and concluded, again, that the Petition for Relief was not timely filed.

Pursuant to notice, public deliberations were held on July 22, 2004, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the

Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the above-indicated Order.

Findings of Fact and Conclusions of Law

The Administrative Law Judge maintains in the Order currently before the Commission that the Commission's first remand is refused and the second remand accepted. Yet, it would appear that the first remand was already accepted by the Administrative Law Judge's action in issuing an Order Closing File following Respondent's motion to dismiss after the first remand. It would also appear that the issue of whether the Petition for Relief was timely filed has already been decided by the Commission's remand order to the Administrative Law Judge's first Recommended Order of Dismissal.

In this case, the complaint was timely filed on October 3, 1995. Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand dated December 4, 2001, ¶ 1. The Commission issued a "no cause" determination on July 14, 1999. *Id.*, at ¶ 3. Petitioner filed a Petition for Relief within 35 days of the issuance of that determination, on August 13, 1999. *Id.*, at ¶ 5.

The Administrative Law Judge uses the case of Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So. 2d 891 (Fla. 2002) to create a new legal concept for administrative cases brought under the Florida Civil Rights Act of 1992, the "legislative determination of reasonable cause." *Id.*, at ¶ 4.

Apparently, in the Administrative Law Judge's view, a "legislative determination of reasonable cause" is made when the Commission fails to issue a determination within 180 days of the filing of a complaint, requiring the Petitioner to file a Petition for Relief within 35 days of the 180th day from the filing of the complaint, or the claim will be barred. *Id.*, at ¶ 5.

In Woodham, the Florida Supreme Court concluded that where the Commission issues a "no cause" determination after 180 days from the filing of the complaint, that "no cause" determination will not preclude the Petitioner from filing a case in court.

Based on this, the ALJ concluded, "The 35-day time limit in Section 760.11(7) [requiring a request for administrative hearing within 35 days of the issuance of a "no cause" determination] does not apply in this case because the Commission did not make an agency determination of "no reasonable cause" within the 180-day time limit in Section 760.11(3). Rather, the 35-day time limit in Section 760.11(6) [requiring a request for administrative hearing within 35 days of the issuance of a "cause" determination] applies because a legislative determination of "reasonable cause" occurred pursuant to 760.11(8).....If Petitioner wished to proceed under Subsection 760.11(4)(b), Section 760.11(6) required Petitioner to request an administrative hearing within 35 days of the legislative determination of reasonable cause that occurred on April 1, 1996 [180 days after the filing of the complaint]." *Id.*, at ¶ 19 and ¶ 20.

The Administrative Law Judge's decision essentially reestablishes the application of the discredited decision in Milano v. Moldmaster, Inc., 703 So. 2d 1093 (Fla. 4th DCA 1998) to the administrative arena (Milano held that if no determination was issued within 180 days of the filing of the complaint, if complainants wanted to pursue their case in state court they had to file in state court within 1 year of the end of that initial 180-day period). In the recent past, prior to being overturned by Joshua v. City of Gainesville, infra, Administrative Law Judges frequently relied on Milano to conclude that if no determination was issued within 180 days of the filing of the complaint, the Petitioner had to file a Petition for Relief within the 35 days of that 180th day or the claim would be barred. The Administrative Law Judge's decision essentially ignores the nearly countless Commission orders remanding those cases back to the Administrative Law Judges, indicating that as long as a Petition for Relief is filed within 35 days of the issuance of a "no cause" determination the filing is timely, and indicating specifically that the Petition for Relief does not have to be filed within 35 days of the conclusion of the 180-day investigative period if a determination has not yet been issued by that time. See, e.g., Wilson v. Scotty's, Inc., FCHR Order No. 98-032 (FCHR 1998); Garrepy v. Department of Environmental Protection, FCHR Order No. 99-022 (FCHR 1999); Finn v. City of Holly Hill, FCHR Order No. 00-012 (FCHR 2000); Major v. Branch Properties, Inc., FCHR Order No. 00-011 (FCHR 2000); Johnson v. Chautauqua Office of Psychotherapy and Evaluation, FCHR Order No. 00-023 (FCHR 2000); and Favors v. Department of Children and Family Services, FCHR Order No. 01-003 (FCHR 2001).

Instructive are recent Commission orders in which Commission panels have dealt with the issue of the timeliness of a Petition for Relief filed more than 4 years after the alleged violation, but within 35 days of the issuance of a determination by the Commission. In one of those cases, Ford v. Mold-Ex Rubber Company, 23 F.A.L.R. 1586, at 1587 (FCHR 2001), the Commission's Order states:

"The Administrative Law Judge.....concluded that since Petitioner's Petition for Relief was filed more than four years after the alleged violation, 'Petitioner's Petition for Relief should be dismissed for lack of jurisdiction under Section 760.11(1), Florida Statutes, and Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000) (where FCHR fails to make a determination of cause within 180 days after the filing of a charge of discrimination, the petitioner has four years from the date of the alleged discriminatory action to file a claim in state court).' Recommended Order, ¶16.

We reject this conclusion of law as incorrect.

We note that the Administrative Law Judge found that the Petition for Relief in this matter was filed within 35 days of the issuance of the no reasonable cause determination. Recommended Order, Preliminary Statement.

A Commission panel has stated, '...a complainant may request an administrative hearing at any time after the conclusion of the initial 180-day period following the filing of the complaint and no later than 35 days after the date of a determination by the

Commission (or simply no later than 35 days after the date of determination, if the Commission's investigation is completed within 180 days of the filing of the complaint).'
Wilson v. Scotty's, Inc., FCHR Order No. 98-032 (FCHR 1998).

Joshua, supra, overturned lower appellate courts that had concluded that if the Commission had not yet issued a 'reasonable cause' determination within 180 days of the filing of the complaint, the complainant had to file its law suit within one year of this initial 180-day period or be barred from doing so later. In so doing, the Court held that in cases in which a 'reasonable cause' determination had not been issued by the Commission the four-year statute of limitation for causes of action based on statutory liability applied, not a limitation of 180 days plus 1-year from complaint-filing.

We note that Joshua dealt with the time frame for filing a civil action in court, as opposed to the time frame to request an administrative hearing, the issue presented in this case, and conclude that nothing in the Joshua decision requires deviation from the Commission's position set out in Wilson, supra.

Based on the foregoing, and since the Petition for Relief in this matter was filed within 35 days of the issuance of the no reasonable cause determination, we conclude that Petitioner's request for administrative hearing is timely and, as indicated, above, that the Administrative Law Judge committed an error of law in concluding that the Petition for Relief is untimely. Accord, Prentice v. North American Realty Corp., d/b/a North American Acquisition Corp., FCHR Order No. 00-021."

Accord, Tutson v. Department of Children and Family Services, FCHR Order No. 02-094 (November 8, 2002). See, also, Indish-Militello v. Pinellas Suncoast Transit Authority, FCHR Order No. 02-016 (April 17, 2002), in which a Petition for Relief was deemed timely filed when it was filed more than four years after the alleged discriminatory act and no determination was issued by the Commission.

The Administrative Law Judge's refusal to hear this case on the merits is puzzling in light of the history of the Indish-Militello case cited above. In that case, the Commission's order, described above, was appealed and the First District Court of Appeal dismissed the appeal indicating that the Petitioner was unable to show that "review of the final agency decision would not provide an adequate remedy," the showing necessary to obtain review of an interlocutory administrative order. See Pinellas Suncoast Transit Authority v. Indish-Militello, 819 So. 2d 1011 (Fla. 1st DCA 2002).

In other words, the Commission's determination of the timeliness of the Petition for Relief is likely not appealable until the Commission issues a final order, unless it can be shown that review of the final order would not provide an adequate remedy, and in the Indish-Militello case that could not be shown.

With regard to the Administrative Law Judge's apparent refusal to abide by the Commission's earlier determination that the Petition for Relief was timely filed and hear the case on the merits, we note that, in some instances, the Commission can utilize a Commissioner to serve as an Administrative Law Judge. This can be done in situations

in which the Commission's investigation has yielded a determination that there is reasonable cause to believe that an unlawful employment practice has occurred. See Section 760.11(6), Florida Statutes (2003). In the instant, case, however, the option of having a Commissioner serve as an Administrative Law Judge is not available because the Commission's investigation led to a determination that there was no reasonable cause to believe that an unlawful employment practice occurred. See Section 760.11(7), Florida Statutes (2003). Consequently, the Commission needs to have a Division of Administrative Hearings Administrative Law Judge hear this case.

The Administrative Law Judge seems to suggest that the Commission either issue a final order adopting his order or pursue a mandamus action against the Administrative Law Judge to get the Administrative Law Judge to comply with the first remand. Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand Dated December 4, 2001, ¶ 64. The suggestion that the Commission would have to mandamus the Administrative Law Judge to proceed further on the Petition for Relief, placing one state agency in the position of having to sue another state agency, is a waste of the resources of the people of the State of Florida, in our view. It also appears to attempt to create an appealable issue out of the Commission's ruling on the timeliness of the Petition for Relief, when the First District Court of Appeal has indicated in an earlier case that the timeliness issue was not appealable prior to a final order on the merits, stating that there was no showing that "review of the final agency decision would not provide an adequate remedy." See Pinellas Suncoast Transit Authority v. Indish-Militello, supra.

Ultimately, however, what is most troublesome, in our view, is there is no way Petitioners reading the statute could know that if the Commission has not issued a determination within 180 days of the filing of the complaint, they must file a Petition for Relief within 35 days of the 180th day from the filing of the complaint or their claim will be barred. Section 760.11(8), Florida Statutes (2003), states, "In the event 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." The statute section reads that a person *may* proceed as if a "cause" determination is made, but not that a person *must* proceed as if a "cause" determination has been made.

Based on the foregoing, we conclude that the Administrative Law Judge committed an error of law in concluding that the Petition for Relief in this matter was not timely filed and we decline to adopt the Administrative Law Judge's "Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand Dated December 4, 2001." In correcting the conclusions of law of the Administrative Law Judge as explained, supra, we find: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law determining the timeliness of a Petition for Relief filed under the Florida Civil Rights Act of 1992; (2) that the reason the modifications are being made by the Commission is that the conclusions of law as stated run contrary to previous Commission decisions on

the issue; and (3) that in making these corrections the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(1), Florida Statutes (2003).

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's "Order Accepting Second Remand Dated September 5, 2002, and Refusing First Remand Dated December 4, 2001," in a document entitled, "Exception." Petitioner attached numerous exhibits to this document.

We accept Petitioner's exceptions to the limited extent they except to the Administrative Law Judge's conclusion that the Petition for Relief was not timely filed.

Remand

Noting that, because a "no cause" determination has been issued in this case, a Commissioner of the Florida Commission on Human Relations cannot serve as an Administrative Law Judge in this matter and, consequently, a Division of Administrative Hearings Administrative Law Judge is needed to conduct further proceedings on the Petition for Relief, this matter is hereby REMANDED to the Division of Administrative Hearings for assignment to an Administrative Law Judge willing to conduct further proceedings on the Petition for Relief in accordance with this Order.

DONE AND ORDERED this 16th day of August, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Gayle Cannon,
Panel Chairperson;
Commissioner John Corbett; and
Commissioner Keith Roberts

Filed this 16th day of August, 2004,
in Tallahassee, Florida.

Violet Crawford

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Daniel Manry, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 16th day of August, 2004.

By: *Violet Crawford*
Clerk of the Commission
Florida Commission on Human Relations