

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN INDISH-MILITELLO,                    )  
  )  
          Petitioner,                         )  
  )  
vs.    )     Case No. 01-2512  
  )  
PINELLAS SUNCOAST TRANSIT                )  
AUTHORITY,                                 )  
  )  
          Respondent.                        )  
\_\_\_\_\_                                     )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, held a formal hearing in the above-styled case on September 18, 2002, in Largo, Florida.

APPEARANCES

For Petitioner: Susan Indish-Militello, pro se  
2835 North Seneca Point  
Crystal River, Florida 34429

For Respondent: Alan S. Zimmet, Esquire  
Elita D. Cobbs, Esquire  
Zimmet, Unice, Salzman & Feldman, P.A.  
Two Prestige Place  
2650 McCormick Drive, Suite 100  
Clearwater, Florida 33759

STATEMENT OF THE ISSUES

The issues are: (1) Whether Petitioner's Amended Charge of Discrimination should be dismissed as time barred; and

(2) Whether Petitioner, Susan Indish-Militello (formerly known as Susan Indish and referred to herein as "Petitioner") was discriminated against in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

On or about July 10, 1995, Petitioner filed a Charge of Discrimination against Pinellas Suncoast Transit Authority ("PSTA") for handicap discrimination with the Florida Commission on Human Relations ("Commission") under the Florida Civil Rights Act of 1992 ("FCRA"). On or about July 16, 1999, Petitioner filed an Amended Charge of Discrimination alleging that she was discriminated against because of a handicap in violation of the Americans with Disabilities Act ("ADA") and the FCRA. Petitioner also alleged that her handicap was not reasonably accommodated. The Commission failed to provide a determination as to whether reasonable cause existed to believe that a discriminatory practice had occurred, and Petitioner filed a Request for Formal Administrative Hearing on May 9, 2001. Pursuant to Petitioner's request, on June 27, 2001, the Commission requested the Division of Administrative Hearings to conduct a hearing on Petitioner's Amended Charge of Discrimination.

Petitioner's claims were referred to the Division of Administrative Hearings and were scheduled for a final hearing

to be held on August 15, 2001. On August 8, 2001, PSTA filed a Motion to Dismiss Petitioner's Amended Charge of Discrimination and Request for Formal Administrative Hearing for failure to request an administrative hearing within four years of the date of the last act of alleged discrimination, which Petitioner alleged to be her date of termination, September 8, 1994. A teleconference was conducted on the motion on September 26, 2001.

In response to the Motion to Dismiss, the undersigned issued an Order on January 17, 2002, recommending that the Commission enter a final order dismissing Petitioner's Charge. This recommendation was rejected by the Commission on April 19, 2002, and the case was remanded to the undersigned for further proceedings. The case was reopened by the Division of Administrative Hearings on May 22, 2002, and the final hearing was conducted on September 18, 2002. It was noted at the hearing that the Division of Administrative Hearings does not have jurisdiction over claims made under the ADA.

At the final hearing, Petitioner testified on her own behalf and offered one document as evidence. The Administrative Law Judge reserved ruling on the admissibility of the document due to Petitioner's failure to file an exhibit list or provide copies to opposing counsel pursuant to the Order of Pre-Hearing Instructions dated July 15, 2002, and to consider Respondent's

other objections to the admissibility of this exhibit. Petitioner was directed to send a copy of her document to Division of Administrative Hearings and opposing counsel by September 23, 2002. Petitioner failed to file the document, and thus, the issue of its admissibility need not be reached, and the exhibit is excluded from evidence.

Respondent offered the testimony of Gail Bilbrey, PSTA's benefits specialist; Denise Skinner, PSTA's director of transportation; and Roger Sweeney, PSTA's executive director. Respondent's Exhibits 1 through 12 were admitted into evidence. At the close of the hearing, the parties were ordered to file proposed findings of fact and conclusions of law, within 10 days of the final hearing. Respondent timely filed a proposed recommended order. Petitioner did not file a proposed order. The hearing was recorded but was not transcribed.

#### FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record of the proceeding, the following findings of fact are made:

1. Petitioner, Susan Indish-Militello, is a resident of Marion County, Florida.

2. Respondent, Pinellas Suncoast Transit Authority ("PSTA"), is a transit agency located in Pinellas County, Florida and is an employer under the FCRA.

3. Petitioner was employed by Respondent, as a bus operator, beginning in 1989 until September 8, 1994.

4. Petitioner was involved in a work-related bus accident on May 2, 1994, and as a result, she suffered neck and back injuries.

5. Petitioner's injuries were evaluated by Petitioner's treating physician Dr. Jeffrey Tedder on May 4, 1994. On May 19, 1994, Dr. Tedder issued a note releasing Petitioner to return to full work duty on May 29, 1994.

6. Petitioner did not to return to work on May 29, 1994, and utilized vacation and sick leave for approximately the next three weeks. During this time, a second medical evaluation was performed by Dr. Joseph Sena. Dr. Sena issued a report on June 9, 1994, stating that he was unable to substantiate any objective findings which would warrant Petitioner being out from work.

7. Respondent informed Petitioner that she had been released to work by both Dr. Tedder and Dr. Sena. Petitioner returned to work in late June 1994 and worked until July 18, 1994.

8. Petitioner exhausted her sick leave on July 19, 1994.

9. When Petitioner then again failed to return to work, on August 12, 1994, Respondent's General Counsel sent Petitioner a letter by certified mail advising her that all her sick leave

had been exhausted and that in accordance with the Family and Medical Leave Act and PSTA's Labor Agreement with the bus operators' union, Petitioner was required to provide medical certification establishing a qualifying reason for leave within 15 days. The letter also required Petitioner to provide an expected date of return to work. Finally, the letter stated that failure to provide medical certification would subject Petitioner to discipline up to and including termination.

10. The Labor Agreement between the PSTA and its employees is applicable to Petitioner. Petitioner acknowledged that she received a copy of the Labor Agreement. Article 15 of the Labor Agreement, titled "Leave Without Pay" provides in pertinent part the following:

Section 8. Failure to return to work at the expiration of approved leave shall be considered absence without leave and grounds for dismissal.

\* \* \*

Section 13. Leave of Absence - Illness

\* \* \*

B. All leaves of absence without pay for illness shall be supported and confirmed by a medical certificate executed by a doctor.

11. Petitioner forwarded to Respondent a note dated August 17, 1994, from Rev. Dona Knight, a minister, which claimed that Petitioner was "in extreme distress with suicidal

[sic] tendencies and severe [sic] depression." This document, however, did not state an opinion regarding Petitioner's ability to work nor did it provide an expected date of return. In response to the aforementioned note, Respondent's benefits specialist informed Petitioner that the document was inadequate and that she was required to provide proper medical certification. Notwithstanding this request, Petitioner failed to provide any medical documentation indicating a qualifying reason for her unexcused absence from work or an expected date of return.

12. As a result of Petitioner's failing to provide the required documentation, Respondent terminated Petitioner's employment on September 8, 1994, in accordance with the Labor Agreement and PSTA attendance policy.

13. After her termination, Petitioner filed a grievance disputing the termination, and a first-step hearing was held before PSTA's deputy of operations, Ed King. Mr. King denied Petitioner's grievance and upheld the termination.

14. Thereafter, Petitioner filed a second-step grievance, and a hearing was held before PSTA's executive director, Roger Sweeney, on October 17 and October 31, 1994. At the hearing, Petitioner did not provide any medical documentation or request any reasonable accommodation for any alleged handicap or

disability. Therefore, Mr. Sweeny denied the second step grievance, and the termination was again upheld.

15. Following the grievance hearings, Petitioner filed a request for arbitration in accordance with the PSTA's Labor Agreement. An arbitration hearing was held on October 11, 1996, at which Petitioner was represented by counsel. After the hearing, the arbitrator found that Respondent had just cause to terminate Petitioner based on her failure to provide medical documentation for her continued absence from work.

16. After being terminated, Petitioner also filed a claim for unemployment compensation which was denied by a claims examiner on or about October 6, 1994. Petitioner then appealed this decision and a hearing on the appeal was held by an Appeals Referee, where Petitioner was again represented by counsel. Based on the evidence presented at the hearing, the Appeals Referee found that given the length of time Petitioner was absent from work, it was not unreasonable for Respondent to expect her to provide medical certification for her continued absence. The Appeals Referee further found that the statement from Rev. Knight was not a medical document and gave no assessment of Petitioner's ability to resume her duties as a bus driver. The Appeals Referee concluded that Petitioner's failure to provide the requested medical documentation was an intentional violation of her duties and obligations to



Respondent and amounted to misconduct connected with work and, thus, found that Petitioner was properly disqualified from receipt of unemployment compensation benefits.

17. Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations on or about July 11, 1995, alleging that Respondent had discriminated against her based on her handicap. The Charge of Discrimination did not give any "particulars" regarding the alleged discrimination, but indicated that the most recent discrimination took place on September 8, 1994.

18. On or about July 20, 1999, Petitioner filed an Amended Charge of Discrimination, again alleging that Respondent had discriminated against her based on her disability. In the Amended Charge, Petitioner alleged that on September 8, 1994, she was terminated as a bus driver. She further noted that the "most recent or continuing discrimination took place" on September 8, 1994. Under the section of the charging document referred to as "Discrimination Statement," Petitioner stated the following:

I have been discriminated against because of my handicap. I believe my rights have been violated under the American with Disabilities Act and the Florida Civil Rights Act of 1992 as amended.  
1. I was not reasonably accommodated.

19. By August 12, 1994, and prior to her termination, Petitioner had relocated her residence to Marion County, Florida.

20. Petitioner presented no evidence to establish that she suffered from any handicap or disability under the terms of the FCRA, that she required or requested reasonable accommodations to perform her duties, or that her termination by Respondent was based upon or influenced by any alleged disability.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings (Division) has jurisdiction over the parties and Petitioner's claims under the FCRA pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

22. The Division does not have jurisdiction over Petitioner's claims under the ADA; although to the extent the provisions of the ADA are the same as the FCRA, cases arising under the ADA may be instructive. James v. Alachua County Department of Criminal Justice Service, 2001 WL 1107836 (Fla. Div. Admin. Hrg. Sept. 18, 2001).

23. In her Amended Charge of Discrimination, Petitioner contends that she was subject to discrimination, based on an alleged handicap or disability, was unlawfully denied reasonable

accommodation, and was wrongfully terminated from her position as bus operator by Respondent in violation of the ADA and the FCRA.

24. In this case, Respondent raises the threshold issues that Petitioner's claims are time barred, and that Petitioner is collaterally estopped from arguing that Respondent's reason for termination was a pretext for discrimination. These issues must be resolved prior to addressing the merits of Petitioner's case.

25. Respondent's timeliness argument is based on several provisions contained in Chapter 760, Florida Statutes. The relevant provisions of Section 760.11, Florida Statutes, are as follows:

760.11 Administrative and civil remedies; construction.-

(3) Except as provided in subsection (2), the commission shall investigate the allegations in the complaint. Within 180 days of the filing of the complaint, the commission shall determine if there is reasonable cause to believe that discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992. When the commission determines whether or not there is reasonable cause, the commission by registered mail shall promptly notify the aggrieved person and the respondent of the reasonable cause determination, the date of such determination, and the options available under this section.

(4) In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has

occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either:

(a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or

(b) Request an administrative hearing under ss. 120.569 and 120.57.

The election by the aggrieved person of filing a civil action or requesting an administrative hearing under this subsection is the exclusive procedure available to the aggrieved person pursuant to this act.

(5) In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages. The provisions of ss. 768.72 and 768.73 do not apply to this section. The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed \$100,000. In any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action. The right to trial by jury is preserved in any such private right of action in which the aggrieved person is seeking compensatory or punitive damages, and any party may demand a trial by jury. The commission's determination of reasonable cause is not admissible into evidence in any civil proceeding, including any hearing or

trial, except to establish for the court the right to maintain the private right of action. A civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission. The commencement of such action shall divest the commission of jurisdiction of the complaint, except that the commission may intervene in the civil action as a matter of right. Notwithstanding the above, the state and its agencies and subdivisions shall not be liable for punitive damages. The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5).

(6) Any administrative hearing brought pursuant to paragraph (4)(b) shall be conducted under ss. 120.569 and 120.57. The commission may hear the case provided that the final order is issued by members of the commission who did not conduct the hearing or the commission may request that it be heard by an administrative law judge pursuant to s. 120.569(2)(a). If the commission elects to hear the case, it may be heard by a commissioner. If the commissioner, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the commissioner shall issue an appropriate proposed order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay. If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay. Within 90 days of the date the recommended or proposed order is rendered, the commission shall issue a final order by adopting, rejecting, or modifying the

recommended order as provided under ss. 120.569 and 120.57. The 90-day period may be extended with the consent of all the parties. An administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission. In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

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(8) 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 supplied.)

26. Subsection 760.11(3), Florida Statutes, requires the Commission to make a reasonable cause determination within 180 days of the filing of a claim. Subsection 760.11(4), Florida Statutes, explains the steps that claimants may take if the Commission has determined there is reasonable cause to believe that the discriminatory action occurred: the claimant may either bring a civil action or request an administrative hearing. Subsections 760.11(5) and (6), Florida Statutes, set forth the time frames for filing a civil action or requesting an

administrative hearing. According to Subsection 760.11(5), Florida Statutes, any civil action brought under subsection (4) must be filed no later than one year after the date of the reasonable cause determination. Subsection 760.11(6), Florida Statutes, provides that any administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the Commission.

27. Subsection 760.11(8), Florida Statutes, describes how claimants who do not receive a reasonable cause determination within 180 days may proceed. It provides that in such instances, the claimant or aggrieved person "may proceed under subsection (4), as if the Commission determined that there was reasonable cause."

28. It is clear from the plain reading of the language of Subsections 760.11(5) and (6), Florida Statutes, that a complainant who received a favorable reasonable cause determination within 180 days has one year from the date of the determination to bring a civil action or 35 days to request an administrative hearing. However, Subsection 768.11(8), Florida Statutes, is silent as to the statute of limitations for bringing a civil action or requesting an administrative hearing when, as here, the Commission fails to make any determination within the allotted 180 days.

29. The Florida Supreme Court has partially addressed this issue in Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000). In that case, an employee filed a complaint with the Commission alleging racial discrimination in January 1995, and a second complaint alleging retaliation in July 1995. After the Commission failed to make a reasonable cause determination, the employee filed a civil action in the circuit court on January 20, 1998. In a motion to dismiss, the employer alleged that the employee's action was time barred by the one-year statute of limitation provided in Subsection 760.11(5), Florida Statutes, following the 180-day time period. The Court rejected this argument, however, and instead adopted the employee's reliance on Subsection 95.11(3)(f), Florida Statutes, which provides a four-year statute of limitations for actions based on statutory liability. Joshua, 768 So. 2d at 437. See also Seale v. EMSA Correctional Care, Inc., 767 So. 2d 1188 (Fla. 2000) (general four-year statute of limitations for statutory causes of action embodied in Subsection 95.11(3)(f), Florida Statutes, applies when the Commission failed to make a cause determination).

30. Joshua address only the time frame for filing a civil action in court and not the time frame to request an administrative hearing. However, the principle behind the holding in Joshua appears to be based on the general rule that



the general statutes of limitations in Chapter 95, Florida Statutes, are applied in cases where a specific statute of limitations is absent, including in administrative proceedings. See Associated Cocoa Cola v. Special Disability Trust Fund, 508 So. 2d 1305, 1306 (Fla. 1st DCA 1987) (the general rule is that "a general statute of limitations may be applied to administrative proceedings in the absence of a specially applicable statute of limitations"). This principle is consistent with the long-held doctrine of statutes of limitations which is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582 (1944).

31. In this case, Petitioner filed the subject Amended Charge of Discrimination almost five years after what Petitioner alleged to be the last act of alleged discrimination, her termination date, to request an administrative hearing. Although the imposition of a time limit on requesting an administrative hearing in this case extinguishes Petitioner's claims, a four-year statute of limitation balances Petitioner's right to fair notice, an opportunity to be heard, and her duty to ensure the expeditious resolution of her claims, with

Respondent's right to assert an adequate defense and to an end to potential litigation.

32. Applying the principles enunciated in paragraphs 29 and 30 to this case, Petitioner's Amended Charge of Discrimination is time-barred.

33. The second threshold issue raised by Respondent is that Petitioner is collaterally estopped from claiming that her termination was in violation of the Florida Civil Rights Act or that Respondent's termination was pretextual for discrimination. In support of this position, Respondent relies on the findings and decision made in two proceedings involving Petitioner's termination as a bus driver with the PSTA, an arbitration proceeding and an unemployment compensation proceeding.

34. The essential elements of collateral estoppel are that the parties and the issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction. Mobil Oil Corporation v. Robert L. Shevin, 354 So. 2d 372, 374 (Fla. 1977)

35. The parties to the arbitration hearing, the unemployment compensation hearing, and this proceeding are identical. However, the issues in those proceedings, while related to the Petitioner's termination, were not identical to the issues in this proceeding. In the arbitration hearing, the

issue was whether Petitioner was discharged for just cause; in the unemployment compensation hearing, the issue was whether Petitioner was discharged for misconduct connected with work. Here, the issue is whether Respondent violated the FCRA by terminating Petitioner because of her alleged handicap or disability.

36. In view of the fact that the issues in the aforementioned proceedings are not identical to the issue in this proceeding, the doctrine of collateral estoppel can not be applied in this case. To establish a case for collateral estoppel, each of the four elements listed in paragraph 34 must be established. Having failed to establish the second element, there is no need to address the remaining elements. Nonetheless, the findings and conclusions reached in the arbitration hearing and the unemployment compensation hearing can be used to bolster or support the position taken by Respondent in this proceeding.

37. Even if Petitioner's claims are not time-barred, Petitioner has failed to establish a prima facie case of discrimination under the FCRA.

38. Section 760.10, Florida Statutes, provides in relevant part the following:

- (1) It is an unlawful employment practice for an employer

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual, with respect to compensation, terms, conditions, or privileges, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

39. To present a prima facie case of employment discrimination based on a disability or handicap under the FCRA, Petitioner must show (1) that she is a person with a handicap or disability; (2) that she is qualified for the position apart from her handicap or disability; and (3) that she was terminated from her position solely based on her handicap or disability. Smith v. Avatar Properties, Inc. 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998). Petitioner must establish all elements to meet her burden. See Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1350 (S.D. Fla. 2000).

40. The FCRA does not define the term handicap, but the American Disabilities Act of 1990, 42 U.S.C. Section 12101, et seq., provides guidance. Smith, 714 So. 2d at 1106. Pursuant to the ADA, "disability" is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment. 42 U.S.C. Section 12102(2). The regulations which implement the ADA define a mental impairment to include any mental disorder, such as emotional or mental illness. 29 C.F.R. Section 1630.2(h)(2).

The term "major life activities" are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. Section 1630.2(i). An impairment is "substantially limiting" when the individual is unable to perform a major life activity that the average person in the general population can perform or is significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity. 29 C.F.R. 1630.2(j).

41. In the Amended Charge of Discrimination, Petitioner failed to allege that she had any impairment that would substantially limit any of her major life activities.

42. Petitioner presented a note from a minister dated August 17, 1994, which stated that she had been counseling with Petitioner since March 1994 and that Petitioner was in extreme distress with suicidal tendencies and severe depression due to her automobile accident. This document lacks credibility in that it is not from a qualified professional capable of rendering such a diagnosis. Moreover, there is no indication that the conditions described in the note substantially limited Petitioner's ability to perform major life activities or to work.

43. The evidence established that Petitioner, at one point, suffered neck and back injuries in a work-related bus

accident, but those injuries are not at issue here. Moreover, the evidence established that with respect to those injuries, two physicians documented, in May 1994, that Petitioner was fit to work and there was no reason for her absence from work.

44. Petitioner failed to establish that she had a handicap or disability under FCRA. Having failed to allege or establish that she had a handicap, no further analysis is required.

45. Respondent established, and it is undisputed, that Petitioner was terminated from her position as a bus driver because of her failure to appear for work at the expiration of approved leave and for her failure to provide medical documentation to support her continued absence from work.

46. Even if it is assumed that Petitioner met her initial burden in this case, which she failed to do, Respondent has demonstrated that it had legitimate, non-discriminatory reasons for terminating Petitioner's employment.

#### RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that Petitioner's Amended Charge of Discrimination be dismissed with prejudice.

DONE AND ENTERED this 25th day of October, 2002, in  
Tallahassee, Leon County, Florida.

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CAROLYN S. HOLIFIELD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of October, 2002.

COPIES FURNISHED:

Denise Crawford, Agency Clerk  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

Susan Indish-Militello  
2835 North Seneca Point  
Crystal River, Florida 34429

Alan S. Zimmet, Esquire  
Elita D. Cobbs, Esquire  
Zimmet, Unice, Salzman & Feldman, P.A.  
Two Prestige Place  
2650 McCormick Drive, Suite 100  
Clearwater, Florida 33759

Cecil Howard, General Counsel  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

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.