

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ADA PELT-WASHINGTON, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-1136  
 )  
 BMA STARKE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

This cause came on for resolution upon Respondent's "Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment," and Petitioner's Response thereto. Oral argument was heard by telephonic conference call on June 23 and 25, 2004.

APPEARANCES

For Petitioner: Samuel A. Mutch, Esquire  
Mutch & Levine, P.A.  
2114 Northwest 40th Terrace, Suite A-1  
Gainesville, Florida 32605-3592

For Respondent: Carlos J. Burruezo, Esquire  
Fisher & Phillips, LLP  
1250 Lincoln Plaza  
300 South Orange Avenue  
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether this case is properly before the Division of Administrative Hearings.

PRELIMINARY STATEMENT

On June 15, 2004, Respondent filed its "Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment." In a telephonic conference on June 23, 2004, the undersigned offered Petitioner a continuance of the final hearing scheduled for June 30 through July 1, 2004, in order to allow time for Petitioner to file a written response to the pending Motion. Instead, Petitioner elected to file a Response immediately, and did so on June 24, 2004. Oral argument by telephonic conference was held on the Motion and Response on June 25, 2004.

The Motion has been treated as a motion for a recommended order of dismissal.

The material facts as found herein are not in dispute.

FINDINGS OF FACT

1. On or about April 2, 2004, the Florida Commission on Human Relations (Commission) forwarded a packet of papers, as more fully described below, to the Division of Administrative Hearings (Division). At the request of the parties, a disputed-fact hearing was scheduled for June 30, 2004 through July 1, 2004.

2. The Charge of Discrimination in this cause bears a signature date of April 23, 2002. It states that the most recent alleged discrimination occurred in December 2001, and

alleges race, color, and religious discrimination and retaliation.

3. The copy of the Charge sent to the Division in the Commission's referral packet bears a Commission date-stamp of December 2, 2002. However, Respondent has provided a copy of the Charge, showing that it was first filed with the Commission on November 19, 2002, and the parties are in agreement that November 19, 2002, was the date of actual filing of the Charge with the Commission. The Charge filed with the Commission was accompanied by a cover letter dated November 14, 2002, and a "confidential" affidavit also dated November 14, 2002.

4. On December 6, 2002, Respondent received the Commission's Notice of Petitioner's Charge of Discrimination. Thereafter, Respondent submitted its position statement with attachments to the Commission.

5. The parties subsequently engaged in settlement discussions but were unable to come to terms.<sup>1/</sup> On November 20, 2003, the law office representing Petitioner notified the Commission that settlement was not possible and that Petitioner's attorney wanted to be advised of the Equal Employment Opportunity Commission (EEOC) case number assigned to the same allegations of discrimination by the EEOC, pursuant to the Commission's work-sharing agreement with that Federal agency.

6. On January 21, 2004, Petitioner's attorney's law office again wrote to the Commission requesting the EEOC case number and stating, "[W]e may take our client's issues up in the judicial arena."<sup>2/</sup>

7. Petitioner filed with the Commission on February 10, 2004, an Election of Rights signed by her attorney on February 9, 2004, on which the following option had been checked:

More than 180 days have elapsed since I filed my charge of discrimination. I wish to withdraw my charge and file a Petition for Relief to proceed with an administrative hearing as provided for under Florida Statutes Section 760.11(4)(b) and (8).

8. On February 16, 2004, the Commission sent a letter to Petitioner's attorney confirming its receipt of the Election of Rights on February 10, 2004, and reciting the foregoing reason stated therein. The Commission attached to its letter a blank petition for relief with instructions that the petition should be completed and returned to the Commission within 20 days. Twenty days from the Commission's February 16, 2004, letter would have been March 8, 2004.

9. By a letter dated March 16, 2004, Petitioner's attorney wrote the Commission advising that for purposes of the EEOC claim, "March 23, 2002," should be used as the last date of discrimination. March 23, 2002, is a date four months after the

date alleged in the Charge of Discrimination which had been filed with the Commission. (See Finding of Fact No. 3.)

10. Apparently, the Commission filed the EEOC complaint with that federal agency on March 18, 2004.

11. By a March 18, 2004, form letter, the Commission advised Petitioner, via her attorney, that the EEOC claim had been filed and given a number. The Commission's form advises that Petitioner need do nothing with the EEOC until the Commission has made its final findings in the case before the Commission.

12. The March 18, 2004, EEOC complaint is virtually identical in all respects to the Charge filed by Petitioner with the Commission on November 19, 2002, except for the date of alleged discrimination. (See Finding of Fact No. 9.)

13. On March 29, 2004, Petitioner's attorney signed a second Election of Rights, checking the same reasons as were given in the February 10, 2004, Election of Rights. (See Finding of Fact No. 7.) The second Election of Rights was filed with the Commission on March 31, 2004.

14. On April 1, 2004, the Commission sent a second letter to Petitioner via her attorney, confirming receipt of Petitioner's second Election of Rights dated March 29, 2004, and stating that it had been filed on March 30,[sic] 2004. This

Commission letter again reiterated the option requested by the Petitioner. (See Finding of Fact Nos. 7 and 13.)

15. The April 1, 2004, letter from the Commission attached a second blank petition for relief for Petitioner to complete, and further advised:

The initial letter dated February 16, 2004 included the Petition for Relief to be filed with the Commission within 20 days of the dated letter. We have not received the Petition for Relief to date; therefore I am enclosing another Petition for Relief to be completed. Forward the original Petition for Relief to the Division of Administrative Hearings and mail a copy to the Division. The Election of Rights Form will be forwarded to the Division of Administrative Hearings for case assignment as requested.

16. On April 1, 2004, the Commission filled out a Transmittal of Petition form, which it forwarded to the Division, attaching only the Commission's April 1, 2004, letter to Petitioner's attorney, a copy of the original Charge of Discrimination incorrectly date-stamped as filed with the Commission on December 2, 2003 (see Finding of Fact No. 3), and a copy of Petitioner's Election of Rights, dated March 29, 2004, which had been signed by her attorney. (See Finding of Fact No. 13.)

17. Petitioner admits that at no time within 20 days of either the Commission's February 16, 2004, letter or the

Commission's April 1, 2004 letter, did Petitioner file a Petition for Relief either with the Commission or the Division.

18. Not until after Respondent had moved to dismiss before the Division on June 15, 2004, did Petitioner file a Petition for Relief. On June 24, 2004, that Petition for Relief was filed with the Division, without prior leave of an Administrative Law Judge of the Division. The Petition was not on a Commission form. As of June 25, 2004, the date of oral argument on the Motion to Dismiss and Response thereto, the free-form Petition for Relief had only been filed with the Division and had never been filed with the Commission. On the basis of the record before the Division, it appears that Petitioner has never filed with the Commission a Petition for Relief, also known as a request for administrative hearing.

19. It is undisputed that no Petition for Relief or request for administrative hearing was filed by Petitioner with the Commission within 215 days of filing the Charge of Discrimination with the Commission, which would have been 180 days plus 35 days; nor within 35 days of February 16, 2004, the date of the Commission's first letter advising Petitioner to timely file a Petition for Relief with the Commission; or within 35 days of April 1, 2004, the date of the Commission's second letter advising Petitioner to timely file a Petition for Relief with the Commission.

CONCLUSIONS OF LAW

20. For the reasons set out hereafter, the Division of Administrative Hearings does not have jurisdiction of this cause, pursuant to Sections 120.569 and 120.57(1) and Chapter 760, Florida Statutes.

21. The following statutes are important in reaching the foregoing conclusion. Only the pertinent parts have been quoted.

760.11 Administrative and civil remedies; construction--

\* \* \*

(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. 120.56 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.

\* \* \*

(6) . . . 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. . . .

\* \* \*

(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.

22. Petitioner filed a Charge of Discrimination with the Commission on November 19, 2002.

23. One hundred and eighty days passed without the Commission reaching a determination of reasonable cause or no reasonable cause.

24. Section 760.11(8), Florida Statutes, provided Petitioner with two options at the end of 180 days: (1) to bring a civil action pursuant to Subsection (4)(a), or (2) to request an administrative hearing, pursuant to Subsection (4)(b), Florida Statutes.

25. An administrative hearing pursuant to Subsection (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the Commission.

See § 760.11(6), Fla. Stat.

26. The same 35-day filing requirement exists for the filing of a Petition for Relief with the Commission after a determination of no reasonable cause. See §§ 760.11 (7),

Fla. Stat. Any filing after the 35 days has run has been consistently barred by the statute and case law. See Clardy v. Department of Corrections, DOAH Case No. 04-1020 (RO: May 6, 2004); Wayne v. Pagliara v. Marion County Fire-Rescue Department, DOAH Case No. 04-0096 (RO: February 5, 2004; FO: June 30, 2004); Garland v. Dept. of State, DOAH Case No. 00-1797 (RO: July 24, 2000; FO: February 8, 2001); McGill v. U.S. Marine /Bayliner Marine Corp., DOAH Case No. 95-6018 (RO: March 18, 1996); FO approved); Hall v. Boeing Aerospace Operation, DOAH Case No. 94-6976 (RO: March 29, 1995; FO approved); Wright v. HCA Central Florida Regional Hospital, Inc., DOAH Case No. 94-0070 (RO: July 27, 1995; FO: January 26, 1995); Pusey v. Knapp, DOAH Case No. 96-3321 (RO: November 25, 1996; FO: October 16, 1997).

27. For a very long time, the case law uniformly held that someone in Petitioner's situation has 35 days, from the one hundred and eightieth day, in which to file a Petition for Relief with the Commission. Under this line of cases, Petitioner herein would have had until May 19, 2003, plus 35 days, in which to file her Petition for Relief with the Commission. Clearly, Petitioner did not file a Petition for Relief by that date. This flaw was long considered jurisdictional and fatal. The Legislature has clearly directed that an aggrieved person has 35 days within which to file a

request for administrative hearing, and an appellate court has clearly directed that the filing period begins to run immediately upon the expiration of the 180-day period, if the Commission has taken no action. See Milano v. Moldmaster, Inc. 703 So. 2d 1093 (Fla. 4th DCA 1997), which decision was departed from, in part, in Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000).

28. Petitioner's reliance on Joshua v. City of Gainesville, supra is misplaced. That case involved a four-year statute of limitations being extended to a civil action brought in circuit court by a petitioner where there had been at least a modicum of misleading information provided by the Commission.

29. The decision in Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So. 2d 891 (Fla. 2002), leads to the conclusion that the Florida Supreme Court now recognizes that when the Commission fails to make an agency determination within the 180-day time limit in Section 760.11(3), Florida Statutes, the parties are to rely on the legislative determination of reasonable cause which occurs by operation of Section 760.11(8), Florida Statutes, and the legislative determination of reasonable cause enables Petitioner to request an administrative hearing pursuant to Sections 760.11(4)(b), 120.569, and 120.57(1), Florida Statutes.

30. The undersigned is not unmindful of the Commission's

decisions in Miller v. Leesburg Medical Center, FCHR Remand Order 99-1480, entered January 2, 2003, and Saunders v. Hangar Prosthetics and Orthotics, Inc., FCHR Final Order 01-0872, entered March 20, 2002, wherein the Commission as much as said that when it fails to make a determination of reasonable or no reasonable cause within the 180 days mandated by the statute, the complainant automatically receives an unlimited period of time from the date of the last alleged discriminatory offense (not just the four years provided for a circuit court action, which was the holding in Joshua) in which to file his or her Petition for Relief with the Commission. The Commission's Order in Saunders adopts Prentice v. North American Realty Corp. d/b/a North American Acquisition Corp., FCHR Order 00-021 (FCHR January 9, 2001) and Wilson v. Scotty's, Inc., FCHR Order No. 98-032 (FCHR 1998). The Commission's Order in Prentice purports to overrule the Article V appellate court in Milano v. Moldmaster, 703 So. 2d 1093 (Fla. 4th DCA 1997), for Section 760.11(4)(b) purposes, as Joshua did for Section 760.11(4)(a) purposes.

31. However, the case at bar differs from Miller and Saunders. At least in each of those cases, the Petitioner had filed a Petition for Relief with the Commission. Herein, the record only reflects that the Petition was filed with the Division. Also herein, the Petitioner did not timely comply

with the two letters of instruction issued by the Commission, each of which equates procedurally with a "right to sue" letter.

32. In the instant case, there has been no materially misleading or absent information attributable to the Commission which would have affected the timely filing of a Petition for Relief. Rather, herein, the Commission twice advised Petitioner to file a Petition for Relief, and twice Petitioner did not do so within 35 days of either letter of instruction.

33. A generous reading of the combined statutory schemes established by Chapters 120 and 760, Florida Statutes, would be that the blank Petition for Relief form sent by the Commission to Petitioner is not a mandatory document. Therefore, if Petitioner had not utilized the Commission's form, but had filed a request for hearing which was adequate under Chapter 120, Florida Statutes, and Chapter 28-106, Florida Administrative Code (The Model Rules), and that free-form request had been appropriately and timely filed with the Commission, within 35 days of the Commission's first acknowledgment that Petitioner wished to file for an administrative hearing (the first Commission letter instructing when to file the Petition with the Commission), and finally, after the Commission's review, that free-form request for hearing had been transmitted by the Commission to the Division, then jurisdiction would lie in the Division. In other words, if some appropriate request for an

administrative hearing had been filed with the Commission within 35 days of the Commission's February 16, 2004, acknowledgment that Petitioner wished to file for an administrative hearing, jurisdiction would rest in the Division, once the Commission had assessed the free-form request<sup>3/</sup> for sufficiency under the statutes and Model Rules and had then transmitted the request to the Division. However, that scenario did not occur. Petitioner did not file within 35 days of either the Commission's February 16, or April 1, 2004, acknowledgment/instructional letter.

34. Petitioner did not comply with the statutory time frame for filing and did not comply with the statutory requirement of filing a petition/request for hearing with the referring agency, in this case, the Commission. The latter flaw also puts this case outside the prerequisites of Sections 120.569 and 120.57(1), Florida Statutes, which statutory requirements are incorporated into Chapter 760, Florida Statutes, by Sections 760.11 (6) and (7), Florida Statutes, and by the Commission's own rules.

35. The Commission's 180 days to take action on Petitioner's initial complaint/Charge of Discrimination ran out on May 19, 2003. The thirty-fifth day following May 19, 2003, was June 23, 2003. Petitioner did not timely file a Petition for Relief but eventually elected an administrative hearing on

February 9, 2004, more than 266 days after the expiration of the 180-day time period. Petitioner attempted to cure this fatal flaw by filing a second Election of Rights with the Commission, apparently in reliance on the date the EEOC claim was filed with that other agency. There is no precedent for counting days in the State forum based on the Federal forum. The second Election of Rights was more than 314 days after the expiration of the State's 180-day time limit.

36. As discussed previously, the Election of Rights documents herein cannot be considered as petitions or requests for hearing under Sections 120.569 and 120.57(1), and Chapter 760, Florida Statutes.<sup>4/</sup>

37. On February 16, 2004, Petitioner was notified by the Commission that she must file a Petition for Relief within 20 days. Petitioner did not meet that filing date or file within 35 days of February 16, 2004, either. On April 1, 2004, Petitioner was notified by the Commission to file a Petition for Relief. While the April 1, 2004, letter erroneously told Petitioner she could file simultaneously with the Commission and the Division, Petitioner was not materially misled, because her Petition was already jurisdictionally time-barred. Assuming arguendo, but not ruling, that the Commission's April 1, 2004 notification could have reactivated Petitioner's 35-day filing period, she still did not file within 35 days of April 1, 2004,

either, and she never filed with the Commission at all.

38. An interpretation of Section 760.11(8), Florida Statutes, that allows Petitioner to request an administrative hearing after the expiration of the 35-day time limit would reduce to a nullity the time limits imposed by the Legislature. This case should be dismissed as jurisdictionally time-barred.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations dismiss this case, which exists only by the Charge of Discrimination, and a late-filed petition before the Division of Administrative Hearings.

DONE AND ENTERED this 29th day of July, 2004, in Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
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 29th day of July, 2004.



ENDNOTES

<sup>1/</sup> On March 25, 2003, the attorney for Petitioner wrote to Respondent's attorney stating that there would be further advices about a settlement. On September 3, 2003, Respondent notified the Commission that no settlement was possible.

<sup>2/</sup> Note that this language (notice of a planned civil action in a court of competent jurisdiction) may have been sufficient to permit a dismissal by the Commission, pursuant to Florida Administrative Code Rule 60Y-5.006(5).

<sup>3/</sup> This Recommended Order of Dismissal makes no assessment of the sufficiency, vel non, of the Petition for Relief filed with the Division.

<sup>4/</sup> The statutory scheme here differs from that in many Chapter 120, Florida Statutes, cases where an agency prosecutes, and a citizen need only elect to contest the allegations of the agency. Here, the agency (the Commission) is not technically a "party."

COPIES FURNISHED:

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

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

Samuel A. Mutch, Esquire  
Mutch & Levine, P.A.  
2114 Northwest 40th Terrace, Suite A-1  
Gainesville, Florida 32605-3592

Carlos J. Burruezo, Esquire  
Fisher & Phillips, LLP  
1250 Lincoln Plaza  
300 South Orange Avenue  
Orlando, Florida 32801

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.