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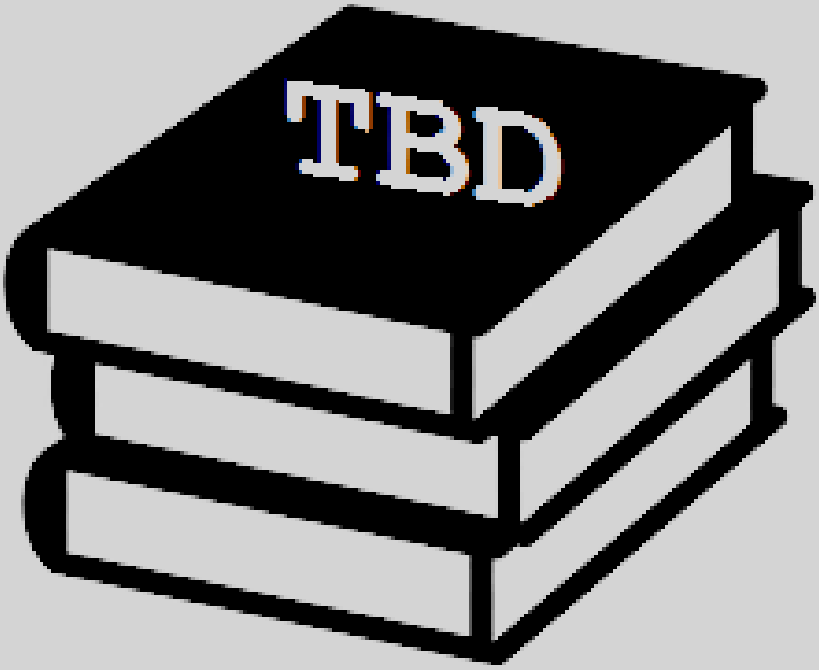

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN W. MAY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-4316
	)	
DISNEY VERO BEACH RESORT,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER OF DISMISSAL

On November 22, 2002, Respondent filed with the Division of Administrative Hearings (Division) a Motion to Dismiss Petition for Relief, in which it stated the following:

> COMES NOW, Respondent Disney Vacation Development Inc., d/b/a Disney's Vero Beach Resort ("Respondent"), by and through its undersigned counsel, and moves the Division to dismiss the Petition for Relief and states:
>
> 1. On June 26, 2000, the Petitioner, John W. May ("Petitioner") filed a Charge of Discrimination with the Florida Commission on Human Relations (hereinafter "Commission") alleging that the Respondent discriminated against him because of his race and color when it discharged him on May 4, 1999. (Exhibit 1).
>
> 2. The Commission concluded its investigation into the matter and issued its Determination of No Cause on September 23, 2002. (Exhibit 2).
>
> 3. A Notice of Determination of No Cause ("Notice") was mailed to the Petitioner on

September 23, 2002. (Exhibit 3). The Notice included the following statement:

"Complainant may request an administrative hearing by filing a PETITION FOR RELIEF within 35 days of the date of this NOTICE OF DETERMINATION: NO CAUSE."

4. The Commission enclosed a Petition for Relief form with the Notice to the Petition. The Notice also included the following statement.

"If the Complainant fails to request an administrative hearing with [sic] 35 days of the date of this notice, the administrative claim under the Florida Civil Rights Act of 1992, Chapter 760, will be dismissed pursuant to section 760.11, Florida Statutes (1992)."

5. Section 760.11(7), Florida Statues, provides that "if the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred."

6. The thirty-fifth day after the date of the Notice would have been October 28, 2002.

7. Petition filed his Petition for Relief ("Petition") on November 4, 2002, 42 days after the date of the Notice. (Exhibit 4).

8. Petitioner did not request an extension of time to file his Petition.

9. Because of the Petitioner's failure to timely file his Petition, his claim is barred and should be dismissed.

WHEREFORE, the Respondent respectfully requests that the Division dismiss this action with prejudice.

Respondent's Motion to Dismiss Petition for Relief was accompanied by a Memorandum of Law in Support of Motion to Dismiss.

On November 25, 2002, the undersigned issued an Order Directing Response, which provided as follows:

> No later than 15 days from the date of this Order, Petitioner shall file with the Division a written response to Respondent's motion. In his written response, Petitioner shall identify with specificity those statements made in Respondent's motion with which he disagrees. Any statements not so identified will be considered by the undersigned to be uncontested.
>
> Petitioner's failure to timely file the written response required by this Order will be deemed a concession on Petitioner's part that the relief requested by Respondent in its motion is appropriate, and the undersigned, accordingly, will issue an order closing the file of the Division in this case and returning the matter to the Commission with the recommendation that the Commission issue a final order of dismissal.[1]

On December 6, 2002, Petitioner filed an unopposed motion requesting an extension, until December 11, 2002, to file the response required by the undersigned's November 25, 2002, Order Directing Response. The requested extension was granted by Order issued December 9, 2002.

On December 11, 2002, Petitioner filed a Memorandum of Law in Opposition of Motion to Dismiss, in which he stated the following:

The Petitioner, JOHN MAY, by and through his undersigned attorney moves this Court to Deny Respondent's Motion to Dismiss.

FACTS

The Florida Commission on Human Relations received a complaint filed by John May (Petitioner) dated June 26, 2000 alleging that Respondent, Disney Vero Beach Resort discriminated against him because of his race and color in dismissing him but not a white employee who w[as] accused in the same incident.

On September 23, 2002, the Commission issued a Determination of "No Cause" to the [P]etitioner through his undersigned attorney. The undersigned attorney did engage in a series of telephone calls to attempt to meet with the [P]etitioner to file for an administrative hearing. Unfortunately, Petitioner and Attorney were not able to meet for various personal and professional reasons to discuss Mr. May's wishes.

Mr. May, who works two jobs to support his family and his church, was unable to meet with undersigned counsel who at the time was also working two jobs to support his family.

November 4, 2002 was the first date in which the counsel and [P]etitioner were both available to meet and discuss the issues.

ARGUMENT

The Commission has acted on a good cause basis in granting Petitioner[] an exception to Section 760.11(7) thirty-five day reply rule.

In Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988) the Florida Supreme Court found that the statutory limit of 35 days could be equitably tolled when

someone has been interfered with in asserting his rights.

In the present case, Counsel for Petitioner did not record in his calendar the final date of filing. Counsel did call Petitioner and attempted to set appointments that would work for both schedules, however, delays and attorney cancellations caused Mr. May to file on November 4, 2002.

Mr. May did not personally receive the Notice of Determination of No Cause and could not be presumed to have known that the 35-day limiting period existed.

Mr. May did not intentionally miss filing within 35 days and was in effect lulled into the belief that his rights were not expiring because Counsel did not communicate to Petitioner the urgency of the matter in a clear enough manner. Further, Respondent has not claimed any prejudice by the delay.

WHEREFORE, Petitioner respectfully requests that the Division Deny Respondent's Motion to Dismiss.

A hearing on Respondent's Motion to Dismiss Petition for Relief was held by telephone conference call on December 17, 2002. Following the hearing, on December 19, 2002, Respondent filed a Memorandum of Supplemental Authority in Support of Motion to Dismiss Petition for Relief and Petitioner filed a Supplemental Memorandum of Law in Opposition of Motion to Dismiss Petition for Relief.

Subsection (7) of Section 760.11, Florida Statutes, provides, in pertinent part, as follows:

> If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner. If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

Pursuant to this statutory provision, where the Commission on Human Relations (Commission) issues a Notice of Determination of No Reasonable Cause (Notice) and the complainant desires an administrative hearing on the matter, the complainant must file with (that is, place in the possession of) the Commission Clerk a hearing request within 35 days, not of the date that the complainant received the Notice, but of the date of the Commission's determination (as reflected on the Notice), or else the right to such a hearing and further administrative review is forfeited. See Ambroise v. O'Donnell's Corporation, No. 02-2762, 2002 WL 31003006 (Fla. DOAH 2002)(Recommended Order).

"Despite the language in Section 760.11(7) which states that an untimely claim 'will be barred' if not timely filed, the 35-day filing period is not jurisdictional and is subject to equitable tolling." Id. Mere excusable neglect, however, is an insufficient basis upon which to forgive the filing of a hearing

request beyond this statutorily-mandated 35-day period. Cf. Cann v. Department of Children and Family Services, 813 So. 2d 237, 239 (Fla. 2d DCA 2002)("In Machules, although the supreme court did not adopt an excusable neglect standard, it did hold that the doctrine of equitable tolling could be applied to extend a similar administrative time limit. . . . Further, section 120.569(2)(c), Florida Statutes (2000), provides: 'A petition shall be dismissed if . . . it has been untimely filed.' This language, requiring the dismissal of an untimely request, was added by chapter 98-200, section 4, at 1831, Laws of Florida. We conclude that this amendment overruled Unimed and Rothblatt to the extent those cases held that an untimely administrative appeal could proceed if the delay was a result of excusable neglect."); and Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 223 (2d Cir. 2002), citing Irwin v. Veterans Administration, 111 S. Ct. 453, 458 (1990)("[E]quitable tolling 'do[es] not extend to what is at best a garden variety claim of excusable neglect.'").

Petitioner concedes that he did not file his petition for relief requesting an administrative hearing until November 4, 2002, which was more than 35 days from the Commission's September 23, 2002, no cause determination. He argues, however, that his petition should nonetheless be deemed to have been timely filed based upon equitable principles. According to

Petitioner, he "did not personally receive the Notice of Determination of No Cause" and his attorney, who did, neglected to apprise him "in a clear enough manner" of the filing deadline and the consequences of missing it. Furthermore, Petitioner points out, "Respondent has not claimed any prejudice by the delay" in filing the petition for relief.

The Florida Supreme Court, in the case cited by Petitioner in his Memorandum of Law in Opposition of Motion to Dismiss, Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1998):

> Laid the predicate for applying the tolling doctrine in administrative cases:
>
> "Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."

Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993). Petitioner does not assert that either Respondent or the Commission "misled [him] or lulled him into inaction" or otherwise "prevented him from asserting his rights"; nor does he claim that he "timely asserted his rights mistakenly in the wrong forum." Rather, he contends that his late-filed petition for relief should be considered on the merits and not dismissed as untimely because he was "lulled into the belief his rights

were not expiring" by his own attorney. The argument is unpersuasive.

While Petitioner may not have "personally receive[d] the [Commission's September 23, 2002] Notice of Determination of No Cause," he had constructive knowledge of its contents inasmuch as the notice was served on his attorney. See Rule 28-106.105, Florida Administrative Code ("Service on counsel of record . . . shall be the equivalent of service on the party represented."); Cf. Kelley v. N.L.R.B., 79 F.3d 1238, 1249 (1st Cir. 1996)("Although appellant did not receive actual notice of section 102.14, we find that she did have constructive notice of it and its requirements because she was represented by counsel at the time of the delayed service to DBS. Courts generally impute constructive knowledge of filing and service requirements to plaintiffs who, like appellant, consult with an attorney."); and Community Dental Services v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002), citing Ringgold Corporation v. Worrall, 880 F.2d 1138, 1141-42 (9th Cir. 1989)("Clients are 'considered to have notice of all facts known to their lawyer-agent.'"). Having retained counsel of his own choosing to represent him and serve as his agent in connection with his unfair employment practice claim against Respondent, he cannot avoid the consequences of having missed the deadline for requesting an administrative hearing on his claim by blaming his attorney for the delay in

making his request. See State v. Daniels, 826 So. 2d 1045, 1047 (Fla. 5th DCA 2002), citing State ex rel. Gutierrez v. Baker, 276 So. 2d 470, 471 (Fla. 1973)("[I]n Florida it 'is a general rule that a client is bound by the acts of his attorney within the scope of the latter's authority.'"); and Community Dental Services v. Tani, 282 F.3d at 1168 ("Because the client is presumed to have voluntarily chosen the lawyer as his representative and agent, he ordinarily cannot later avoid accountability for negligent acts or omissions of his counsel."). "[L]ack of due diligence on the part of [Petitioner's] attorney is insufficient to justify application of an equitable toll." South v. Saab Cars USA, Inc., 28 F.3d 9, 12 (2d Cir 1994); see also Cousin v. Lensing, 310 F.3d 843, 848 (5th Cir. 2002("[A]ttorney error does not trigger equitable tolling . . . ."); Deskovic v. Mann, 210 F.3d 354 (2d Cir. 2000)("Attorneys' failure to comply with statutes of limitations due to their own neglect is no basis for equitable tolling."); Gilbert by Gilbert v. Secretary of Health and Human Services, 51 F.3d 254, 257 (D.C. Cir. 1995)("The negligence of Gilbert's attorney does not justify applying equitable tolling."); Fellows v. Earth Construction, Inc., 805 F. Supp. 223, 226 (D. Vt. 1992)("The cases in which the federal courts have equitably tolled statutes of limitations share a common thread. In each case there occurred events beyond plaintiff's control, rendering

it patently unfair to oblige the litigants to the strict time requirements set forth in the respective statutes. No similar event or intervening circumstance is present in the instant case. While the circumstances underlying the events in August of 1990 are unfortunate for plaintiff and her counsel, they do not comprise a situation warranting the exercise of the court's equitable powers. This case, unlike the cases cited above, is a matter of simple attorney neglect."); and Environmental Resource Associates of Florida, Inc. v. Department of General Services, 624 So. 2d at 330-31 ("Appellant contends that its preparation and mailing of a petition for hearing within the 21-day period evidences its intent not to waive its right to hearing, and that equitable tolling should delay the filing period so that its petition would be considered timely filed. We disagree that principles of equity should enlarge the time for filing in this case and affirm. . . . There is nothing extraordinary in the failure to timely file in this case. Quite to the contrary, the problem in this case is the too ordinary occurrence of a party's attorney failing to meet a filing deadline.").

That Respondent may not have suffered any prejudice as a result of Petitioner's failure to have timely filed his petition for relief does not, in and of itself, provide a basis upon which to excuse the late filing of the petition. See Baldwin County Welcome Center v. Brown, 104 S. Ct. 1723, 1726

(1984)("Brown also contends that the doctrine of equitable tolling should apply because the Welcome Center has not demonstrated that it was prejudiced by her failure to comply with the Rules. This argument is unavailing. Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.").

Because it is undisputed that Petitioner did not file his petition for relief requesting an administrative hearing within 35 days of the Commission's September 23, 2002, no cause determination, and since Petitioner has not alleged facts supporting his position that equitable considerations require that the petition be treated as having been timely filed[2], the file of the Division of Administrative Hearings in this case is hereby closed, the final hearing scheduled for January 15, 2003, is hereby cancelled, and the matter is hereby returned to the Commission with the recommendation that the Commission enter a final order dismissing Petitioner's petition, as requested by Respondent, on the ground that Petitioner's claim is "barred" pursuant to Subsection (7) of Section 760.11, Florida Statutes.

DONE AND ENTERED this 23rd day of December, 2002, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of December, 2002.

ENDNOTES

1/ The undersigned has only recommended order, not final order, authority in the instant case. Accordingly, he has treated Respondent's motion as a motion requesting the entry of a recommended order of dismissal.

2/ "A [complainant] who asserts the applicability of equitable tolling bears the burden of proving that it is appropriate." Carter v. West Publishing Co., 225 F.3d 1258, 1265 (11th Cir. 2000).

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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 of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the final order in this case.

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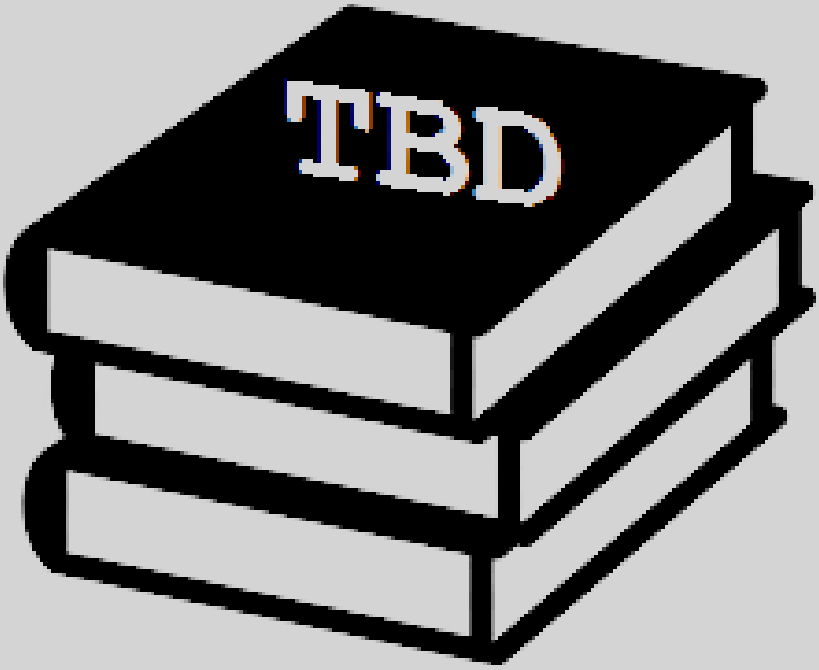

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