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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

FILED
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DIVISION OF
ADMINISTRATIVE
HEARINGS

FLORIDA DEPARTMENT OF
CORRECTIONS,

Petitioner/Respondent,

vs.

CASE NO.
DOAH NO. 04-3175

RONALD CLARDY,

Respondent/Petitioner.

_____ /

PETITION FOR WRIT OF PROHIBITION

Department of Corrections ("Department") petitions this Court to issue an emergency writ of prohibition preventing Administrative Law Judge ("ALJ") Diane Cleavinger of the Division of Administrative Hearings ("Division" or "DOAH") from exceeding jurisdiction by holding an evidentiary hearing pursuant to an illegal order issued by the Florida Commission on Human Relations ("Commission" or "FCHR") on August 4th, 2004. The Division has no jurisdiction to consider the petition for relief filed in this case. Additionally, the Department seeks a writ of prohibition to prevent the Commission from unlawfully exceeding its subject matter jurisdiction with regards to the conclusions of law of the Administrative Law Judge. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(3) and Article V, § 4(b)(3) of the Florida Constitution. This action is

commenced pursuant to Rule 9.100(e) of the Florida Rules of Appellate Procedure. All documents referenced in this case are listed in numerical order in the accompanying appendix in compliance with Rule 9.220, Florida Appellate Rules of Procedure.

Preliminary Statement of the Case

Petitioner Ronald J. Clardy filed a complaint of discrimination against the Department on March 28, 2002, and a subsequent amended complaint on May 24, 2002 with the Commission pursuant to the Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes (1997), alleging that the Department committed unlawful employment practices on the basis of Petitioner's gender and disability (Document 1). The allegations set forth in the complaint were investigated, and on January 30, 2004, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred (Document 2). Petitioner received a copy of the "No Cause" order and was provided 35 days from the date of the order to file a petition for relief with the Division. Section 760.11(7) states that the petition must be filed in 35 days or "the claim will be barred". On March 8, 2004, Petitioner Clardy attempted to file a petition for relief with the Commission¹. (Document 3). The Commission promptly and properly issued a notice of

¹ note: 38 days after the issuance of the No Cause Determination

dismissal on March 9, 2004 informing Petitioner Clardy that he failed to file a petition for relief, due to “No Jurisdiction or Untimeliness”. (Document 4).

Inexplicably, the Commission issued a Rescission of Notice of Dismissal on March 19, 2004, and transmitted the petition for relief to the Division as timely. (Document 5). The Commission stated that “The Complainant supplied the Commission with the original Postal Receipt as proof that the Petition for Relief was mailed in a timely manner” and cited Rule 60Y-5.008(1), F.A.C. as support. (Document 5). The case was assigned to Administrative Law Judge Diane Cleavinger who issued an Initial Order (Document 6) and Notice of Hearing (Document 8) setting the date for an evidentiary hearing on the matter. The Department, by and through undersigned counsel, filed a Motion to Dismiss the petition on the grounds that it was untimely and that the Commission incorrectly applied the law of the state of Florida to resurrect a claim properly **barred** as untimely. (Document 7). In her Order of Dismissal granting the Department’s Motion to Dismiss, Judge Cleavinger accurately admonished the Commission, ruling “FCHR has no authority to ignore the clear language of the statutes and rules”. (Document 9).

Unfortunately, the Commission’s zeal to revive petitioner Clardy’s dead claim carried them beyond the limits of their jurisdiction. On August 4, 2004, the Commission issued an Order Remanding Petition for Relief From an Unlawful

Employment Practice. (Document 10). In the order, the Commission improperly and illegally overturned the Administrative Law Judge's conclusions of law and applied the common-law principle of equitable tolling to Clardy's untimely claim. (Document 10). The Commission exceeded its subject matter jurisdiction in overturning the conclusions of law of the Administrative Law Judge in areas of law not within the Commissions area of expertise. (Document 10).

Judge Cleavinger, initially thwarted by the unlawful FCHR August 4th order, has issued an Initial Order (Document 11) and Notice of Hearing (Document 13) setting an evidentiary hearing on Clardy's untimely (and thus barred) petition for relief for December 6, 2004. This action is being taken by Judge Cleavinger² in spite of the Department's Renewed Motion to Dismiss, filed on October 6, 2004, which spells out the unlawful nature of the Commission's actions and the necessity of a dismissal of the petition as untimely. (Document 12).

Finally, the Department notes that prohibition is the proper form of redress and sole adequate remedy in the instant situation. A writ of prohibition is the proper method of restraining a court of equity about to act in excess of its powers, where no complete and adequate remedy by appeal is shown. Joughin v. Parks, 143 So. 145, 107 Fla. 833 (1935). If the Administrative Law Judge persists in holding an evidentiary hearing in this matter, the Department is not only exposed

² Undersigned gives Judge Cleavinger the benefit of the doubt and assumes her (in)action at this point is based on

to potential liability, but must bear significant costs in preparation for and defense of a claim which is beyond the jurisdiction of the Judge to entertain. Such costs³ are not recoverable by the Department on appeal or by any other legal means. Thus, this admittedly extraordinary and seldom-used writ of prohibition is necessary as the only recourse to prevent significant harm to the Department by the unlawful exercise of quasi-judicial power in excess of the jurisdiction of the Division as stated in Section 760.11(7), Florida Statutes.

Argument

The instant petition for relief was previously dismissed by Administrative Law Judge Cleavinger in an Order of Dismissal dated May 6, 2004 as untimely and thus not within her jurisdiction. The Florida Commission on Human Relations (hereinafter "FCHR") responded by filing an Order Remanding Petition for Relief From An Unlawful Employment Practice on August 4th, 2004. This FCHR order concluded that the Administrative Law Judge had erred in dismissing the petition as untimely, stating (1) that the 35-day filing period is not jurisdictional and thus subject to equitable tolling and (2) the facts of the instant case are sufficient to support a finding that the untimely filing was "a result of equitable circumstances that prevented a timely filing". A prudent examination of the case law cited by the

the feeling that properly dismissing the case again would be an act of futility, inviting another unlawful remand from FCHR.

³ Including, but not limited to, the cost of interviewing and producing numerous out-of-town witnesses, the lost production of those individuals who must leave the job to travel for the hearing, the cost of the attorney in time spent

Commission and other relevant federal and state case law reveals that the 35-day filing period in this case is not subject to equitable tolling, and thus any action by the Division Judge taken in this case (other than a dismissal) is in excess of her jurisdiction. Further, the Commission clearly intends to overturn the Judge's conclusions of law (as they have already once before in the instant case) on matters in excess of their jurisdiction. Thus, a writ of prohibition is necessary to compel both the Division Judge and the Commission to comply with the law of this State.

I. The Administrative Law Judge Has No Jurisdiction in this Matter Because the Filing Period in 760.11(7) is Not Subject To Equitable Tolling

Section 760.11, "Administrative and civil remedies; construction" of Florida Statutes (dubbed in part, the "Florida Civil Rights Act") is the statutory authority controlling the instant Petition for Relief. Subsection (7) of this statute unequivocally states (in pertinent part):

. . . 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. . . . (emphasis added)

The language above is clear and unambiguous. The Florida Supreme Court rules "[w]hen the language of the statute is clear and unambiguous and conveys a clear

and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” Holly v. Auld, 450 So.2d 217 (Fla. 1984).

The most cursory review of Florida case law reveals scores of cases where the term “jurisdictional **bar**” is utilized by the state and federal courts to describe situations where a limitations statute acts as an absolute “jurisdictional **bar**” that cannot be overcome by any considerations, including equitable tolling. E.g. Comercia Bank & Trust, F.S.B. v. SDI Operating Partners, L.P., 673 So.2d 163 (Fla. 4th DCA 1996); Lutheran Brotherhood Legal Reserve Fraternal Benefit Society v. Estate of Petz, 744 So.2d 596 (Fla. 2nd DCA 1999); May v. Illinois Nat. Ins. Co., 771 So.2d 1143 (Fla. 2000); O’Donnell’s Corporation v. Ambroise, 858 So.2d 1138 (Fla. 5th DCA 2003); Town of Oakland v. Mercer, 851 So.2d 266 (Fla. 5th DCA 2003); State v. Goode, 830 So.2d 817 (Fla. 2002); State v. Joubert, 847 So.2d 1023 (Fla. 3rd DCA 2003); State v. T.G., 800 So.2d 204 (Fla. 2001). The above-cited case law and reasoning therein demonstrates beyond question that when the legislature uses the term “bar” or “barred” in reference to an untimely claim, the claim is considered to be jurisdictionally barred, and thus not subject to considerations such as equitable tolling. Despite the unambiguous language of the above statute and corresponding mandate that the statute be interpreted according to its plain meaning and obvious implications (that the limitations period is a

jurisdictional bar and the legislature did not intend equitable tolling to apply), the Division Judge has apparently been persuaded by the Commission's order to exceed her jurisdiction by setting a date for an evidentiary hearing to determine whether or not an unlawful employment practice occurred.

The only "reasoning" cited for the proposition that the time constraints in Section 760.11(7) are not jurisdictional is the following conclusion from a recommended order issued by DOAH Judge T.K. Wetherell, II, in 2002:

31. 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. See *Irwin*, 498 U.S. at 95-96 (filing period in federal law counterpart to Chapter 760 is not jurisdictional)

Ambroise v. O'Donnell's Corporation, FCHR Order #02-100; DOAH Case #02-2762.

It is a canon of statutory construction that "statutory interpretations that render statutory provisions superfluous 'are and should be, disfavored'". Johnson v. Feder, 485 So.2d 409 (Fla. 1986); citing Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975). To recount the "reasoning" of the Division (and the Commission), "despite" the plain meaning and obvious implications (recognized by the Administrative Law Judge in Ambroise as evidenced by the above passage) of the statutory language of Section 760.11(7)—that a claim **will be barred** if not filed within 35 days—the statute somehow does

not imply a jurisdictional bar. This interpretation completely eviscerates the meaning of the phrase “will be barred” and renders the language superfluous. Such interpretation is clearly erroneous and cannot be sustained. The nature and meaning of the word “barred” was expounded upon in previous paragraphs. Further evidence that the term “barred” necessarily implies a jurisdictional bar is implicitly stated by the Administrative Law Judge in Ambrose, by the presence of the statements “**Despite the language**. . .’will be barred’. . .the 35-day filing period is not jurisdictional” (emphasis added).

Additionally, it is important to note the case cited by ALJ Wetherell (also cited by FCHR in their August 4th remanding order) as authority for the proposition that Section 760.11(7), Florida Statutes is subject to equitable tolling. In Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1980), the U.S. Supreme Court stated that a statutory provision related to the timely filing of Title VII claims in federal court was not jurisdictional and thus subject to equitable tolling. As a preliminary matter, it is recognized that the Florida Commission on Human Relations and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of the Florida Civil Rights Act. See Brand vs. Florida Power Corp. 633 So. 2d 504,509 (Fla. 1st DCA 1994); Florida Department of Community Affairs vs. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991). However, “guidance” is only necessary when the provisions of the

Civil Rights Act are not clear on their face. As previously established, section 760.11(7) is clear in that any interpretation which foists the doctrine of equitable tolling upon it is contrary to the express language and obvious implications.

In any event, in Irwin, the U.S. Supreme Court stated that a statutory provision related to the timely filing of Title VII claims in federal court was not jurisdictional and thus subject to equitable tolling. The statute in question, stated (in relevant part):

Within thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission. . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title. . .

Even the most superficial examination of the statute at issue in Irwin and Chapter 760.11(7) reveals radically substantive differences in the legislative intent as expressed in the dissimilar statutory language. Indeed, numerous subsequent federal decisions (discussed in the next paragraph) have modified the holding in Irwin to reflect the peculiar facts of Irwin as distinguished from cases where the statutory limitations language is different from the statute in Irwin.

A sampling of subsequent court rulings construing Irwin highlight improper reliance on Irwin as the source of reasoning established by ALJ Wetherell.

“Although intended to create uniformity in this area, Irwin has appeared to sow more confusion and disuniformity than existed earlier.” State of Maryland v.

Sharafeldin, 2004 WL 1660332 (C.A. Md.) (note: not released for publication yet). More importantly, “[t]he Supreme Court noted in Irwin that while the equitable tolling doctrine may apply in certain cases, its application should only be exercised in very limited circumstances.” Wukawitz v. United States, 170 F.Supp.2d 1165 (D. Utah 2001). Two subsequent U.S. Supreme Court cases have narrowed the broader aspirations of Irwin, aggressively espoused by FCHR and DOAH. In U.S. v. Beggerly, 524 U.S. 38 (1998) and U.S. v. Brockamp, 519 U.S. 347 (1997) the High Court rules that equitable tolling is applied based on an examination of the language of the limitations statute in question, and the identification of a legislative intent to equitably toll the limitations period. Wukawitz, 170 F.Supp.2d at 1169, citing Beggerly 524 U.S. at 47-48; Brockamp, 519 U.S. at 350-54. Indeed, in Brockamp, the Court held that equitable tolling was not available in tax refund suits “because the language of the relevant section ‘sets forth its time limitations in unusually emphatic form.’” Wukawitz 170 F.Supp.2d at 1169, citing Brockamp, 519 U.S. at 350. That section 760.11(7) is “unusually emphatic” in its limitation is immediately obvious to anyone familiar with the language of the limitations statutes usually applicable to administrative hearings—namely section 120.569(2)(c), Florida Statutes⁴.

⁴ As opposed to being “barred”, it states that a petition “shall be dismissed...if it has been untimely filed”.

Not only is Irwin inapplicable to the case at hand for the previously cited reasons, but as precedent goes, it isn't a bedrock of clear jurisprudence that warrants such blind reliance (if it did indeed stand for the proposition advanced in this case, which of course it does not). As the Federal Circuit of the U.S. Court of Appeals laments, "The Supreme Court's decisions do not speak with great clarity on the subject of equitable tolling against the government". Stone Container Corporation v. United States, 229 F.3rd 1345, 1352 (Fed. Cir. 2000). Indeed, the 11th Circuit has held subsequent to Irwin, that equitable tolling is inapplicable to a case where timely filing of a claim is considered a "jurisdictional prerequisite to a suit". Oropallo v. United States, 994 F.2d 25, 29 (1st Cir. 1993); citing Vintilla v. U.S., 931 F.2d 1444, 1447 (11th Cir. 1991).

Finally, although it is not addressed by the Division Judge or the Commission, there is a Florida Supreme Court case dealing with equitable tolling as applied to a filing deadline in a request for an administrative hearing. See Machules v. Department of Administration, 523 So.2d 1132 (Fla. 1988). In Machules, the Florida Supreme Court applied equitable tolling to an old 20-day filing deadline in the subsequently revised Florida Administrative Code. Thus, Machules stands for the limited proposition that equitable tolling should be applied to the rule at issue in Machules, and possibly (by logical extrapolation) to rules or

statutes with similar language⁵. Since the language of the statute in this case is not even remotely similar, Machules is not controlling in this case. Further, all cases subsequent to Machules have dealt with Section 120.569, Florida Statutes. This section has substantially different (and less emphatic) language regarding the dismissal of untimely claims for administrative hearings than does Section 760.11⁶.

II. FCHR Has No Jurisdiction To Overturn the ALJ's Conclusions of Law on This Issue

The Administrative Law Judge has no jurisdiction over Clardy's petition for relief. Judge Cleavinger previously (and correctly) ordered this, but was illegally rebuffed by the Commission's remanding order. In overturning the ALJ's conclusions of law, the Commission exceeded its jurisdiction. The decision about whether or not equitable tolling applies to the facts of the instant case is a mixed determination of fact and law which is the province of the Administrative Law Judge—not the Commission. Section 120.57(l), Florida Statutes states that the Commission can reject or modify the ALJ's conclusions of law “over which it has substantive jurisdiction”. An Agency can only reverse an ALJ's legal conclusions on those matters which are within the Agency's field of expertise. G.E.L. Corp. v. Department of Environmental Protection, 2004 WL 1224331 (5th DCA 2004). Just

⁵ It is noted that some courts have erroneously stated in dicta that Machules stands for the sweeping proposition that any untimely request for an administrative hearing is not a jurisdictional defect and thus subject to equitable tolling. See Appel v. Florida Department of State, Division of Licensing, 734 So.2d 1180 (Fla. 2nd DCA 1999); cf Cann v. Department of Children and Family Services, 813 So.2d 237 (Fla. 2nd DCA 2002).

as the Department of Environmental Protection's "expertise" is confined to matters related to environmental issues, FCHR's "expertise" is on legal matters pertaining to "human relations" or civil rights law. Id. Whether or not "equitable tolling" applies to the facts of this case is a matter within the province of the Administrative Law Judge, as it does not relate in any way to FCHR's area of legal "expertise". In this case, the Commission has exceeded its statutory authority by finding that equitable tolling should operate to preserve the timeliness of Clardy's appeal. Thus, a writ of prohibition is necessary to prevent the inevitable repeat of this extra-jurisdictional activity.

WHEREFORE, Petitioner requests that this Court issue a writ of prohibition preventing Judge Diane Cleavinger of the Division of Administrative Hearings from exceeding jurisdiction by holding an evidentiary hearing pursuant to the illegal order, and additionally issue a writ of prohibition preventing the Florida Commission on Human Relations from exceeding its jurisdiction with regards to the Administrative Law Judge's conclusions of law.

Respectfully submitted,

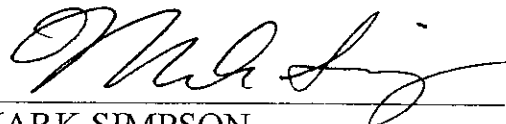
MARK SIMPSON
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⁶ As opposed to being "barred", it states that a petition "shall be dismissed...if it has been untimely filed".

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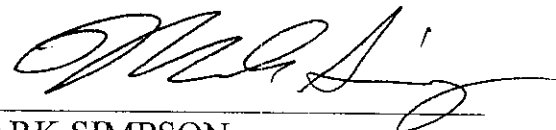
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Writ Of Prohibition was served by U.S. mail to Diane Cleavinger, DOAH, The Desoto Building , 1230 Apalachee Parkway, Tallahassee, Florida 32399, Denise Crawford, Agency Clerk , FCHR, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida 32301 and Ronald J. Clardy , Post Office Box 20951, Tallahassee, Florida 32316 .on this 5th day of November , 2004.


MARK SIMPSON

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).


MARK SIMPSON

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