IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 99-12142-I

---

MYRTLE DAWKINS,

Plaintiff-Appellant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

---

On Appeal from the United States District Court

For the Middle District of Florida

---

# BRIEF OF THE AMICUS CURIAE FLORIDA

# THE FLORIDA CHAPTER OF THE

# NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

---

T.A. Delegal, III
FL Bar No. 892701
424 East Monroe Street
Jacksonville, FL 32202
Attorney for Amicus Party

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**OTHER AUTHORITY**

## INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) is a nationwide nonprofit, nonpartisan organization whose members regularly litigate employee claims of employment discrimination under state and federal anti-discrimination acts, and whose members regularly seek to expand the interpretation given those acts. Because this case threatens the ability of NELA lawyers to bring claims to remedy employment discrimination under Florida law, and to effectively discharge their duty to their clients, its proper resolution is a matter of substantial concern to NELA and its members.

Counsel for Appellant has consented to the filing of this brief, and counsel for Appellee does not consent to the filing of the brief.

## STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1291 (1999) and 28 U.S.C. §1298 (1999), this Court has jurisdiction to hear arguments on appeal of the District Court's final order.

## STATEMENT OF THE ISSUES

I. Did the trial court err in determining that the right to sue notice issued by the EEOC constituted a "no cause" determination and operated to require Dawkins' to file for an administrative appeal in order to proceed with a claim under the Florida anti-discrimination statutes.

II. Does the fact that a charging party may only contest inadequate EEOC investigations through the filing of a lawsuit after issuance of a right to sue notice prevent the limitation or termination of legal rights based on the EEOC's investigation.

III. Do the separation of powers issues involving the delegation of authority from the Florida Commission on Human Relations to the Equal Employment Opportunity Commission require a remand to the Florida Supreme Court.

## STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae NELA accepts the Statement of The Case submitted by Appellant, Myrtle Dawkins.

## SUMMARY OF THE ARGUMENT

The Appellant, Myrtle Dawkins, contended below that she was denied accommodations, retaliated against for requesting such accommodations and harassed because of her disability. The District Court improperly interpreted the Work Share Agreement to mean that EEOC's finding is automatically adopted by the Florida Commission of Human Relations. This interpretation is contrary to §760 and the authority granted to the Florida Commission on Human Relations by the Florida Legislature. The District Court improperly determined the Equal Employment Opportunity Commission issued a "no cause" finding. Assuming the above rulings are correct, the Work Share Agreement and § 760, Florida Statutes, abridges Dawkins' due process rights guaranteed by the Florida and U.S. Constitution. Dawkins further argues that BellSouth did not timely present the "no cause" argument

which the District Court ultimately used in dismissing Appellant's case in chief.

## STANDARD OF REVIEW

This is a review *de novo* of a motion to dismiss.

## SUMMARY OF ARGUMENT

The district court erred in finding that Dawkins was issued a no cause determination by the EEOC. In April of 1995 the EEOC ceased its previous practice of issuing "no cause" determinations when it could not make a determination as to whether statutory violations took place, and began instead issuing rights to sue without particularized findings. Dawkins was issued a generic right to sue rather than a no cause determination.

The administrative scheme under which the EEOC operates does not contemplate that the EEOC will conduct complete and exhaustive investigations of claims. Rather, the history of the EEOC demonstrates that it fully investigates very few cases, and the remedy for inadequacies in investigation is to file claims in court. By hinging the ability to file a claim under Florida law on the EEOC's determination, the district court's determination is contrary to the applicable administrative scheme.

Dawkins has raised in her brief substantial arguments regarding whether the

Florida Commission's delegation of powers to issue determinations to the EEOC violates Florida's constitutional separation of powers doctrine. This issue should be remanded to the Florida Supreme Court for determination.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN RULING THAT THE RIGHT TO SUE ISSUED TO DAWKINS WAS EQUIVALENT TO A "NO CAUSE DETERMINATION."

The district court erred in considering the right to sue notice in the instant case to constitute a "no cause" determination. The EEOC "Dismissal and Notice of Rights" issued to Dawkins provides:

> The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

No letter of determination was issued, and no finding was made of "no reasonable cause."

If the EEOC does not conclude that discrimination has occurred, the applicable regulations provide for issuance of a "no cause" or "no reasonable cause" determination, which constitutes notice to the individual who filed the charge of the right to bring suit on the matters alleged therein. *See* 29 C.F.R. § 1601.19 (1995). On April 19, 1995, however, the Commission voted to eliminate "no cause" determinations in favor of dismissals without particularized findings in cases where the Commission's investigation does not establish reasonable cause to believe discrimination has occurred. Moberly; *Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit*, 24 Pepp. L. Rev. 37, n15 (1996), citing Memorandum from Frances M. Hart, Executive Officer and Executive Secretariat, EEOC, to Gilbert F. Casellas, et al., EEOC Commissioners 3 (Apr. 19, 1995); *see also* Lindemann & Grossman, *Employment Discrimination Law*, ABA Section of Labor and Employment Law, 3rd Edition, 1996, Ch. 29, p. 1240, note 219; *Daily Lab. Rep.* (BNA) at E-5 (Apr. 20, 1995).

The district court therefore erred in concluding that a "no cause" determination was issued to Dawkins.

## II. THE EEOC OFTEN CONDUCTS INADEQUATE INVESTIGATIONS WHICH PLAINTIFFS MAY NOT CONTEST UNTIL CONCLUSION OF THE ADMINISTRATIVE PROCESS, AND THE ABILITY TO FILE A DISCRIMINATION LAWSUIT IS THE ONLY PROPER MECHANISM FOR ADDRESSING INADEQUATE EEOC INVESTIGATIONS.

The EEOC does not have the resources to adequately investigate charges of discrimination. In every year between 1991 and 1996 the EEOC found reasonable cause in less than 3% of charges filed and in 1997 it found reasonable cause in 3.7%. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. Ill. L. Rev. 583 (1999) citing Equal Employment Opportunity Comm'n, *Summary of Enforcement Data and Budget Staffing for the Equal Employment Opportunity Commission FY 1991 Through FY 1997* (Apr. 1998). In 1988 the General Accounting Office determined that inadequate investigations led to the issuance of no cause determinations in 41% to 82% of the files studied in six EEOC district offices. *Id.*

The former Chairman of the EEOC testified: "Budget levels for the

Commission have not kept pace with the increased enforcement and education responsibilities assigned over the past several years. . . . [B]etween 1980 and the present, EEOC has seen a substantial expansion of its workload as a result of an additional statute to enforce, and the number of charges filed w i t h t h e Commission has substantially increased. This situation impedes EEOC's ability to address its workload, implement responsive programs, and provide quality service to [its] constituents-charging parties, employers, and the general public." FY 99 Commerce, Justice, State Approps. Before the Subcomm. on Commerce, Justice, State, the Judiciary and Related Agencies of the Comm. on Appropriations, 105th Cong. 450 (1998) (statement of Paul M. Igasaki, Chairman, EEOC), cited in Larkin *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 Ga. L. Rev. 1181, n. 29 (1999)[1].

---

[1] *See* Moberly; *Admission Possible: Reconsidering the Impact of EEOC Reasonable Cause Determinations in the Ninth Circuit*, 24 Pepp. L. Rev. 37, n. 213-17 (1996). The EEOC is not required or even expected to conduct a full-scale adversarial investigation under the pertinent employment discrimination laws. *EEOC v. American Mach. & Foundry, Inc.,* 13 Fair Empl. Prac. Cas. (BNA) 1634, 1640 (M.D. Pa. 1976). Indeed, the court in *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126, 1134(N.D. Ohio 1976), held that incomplete EEOC investigations

The insufficiency of EEOC investigations caused by inadequate funding has been addressed by other circuits[2]. The DC Circuit has held that the legislative history of the 1972 amendments to Title VII reveals that Congress intended the private right of action provided for in section 706(f)(1) of the Act (42 U.S.C. § 2000e-5(f)(1))--under which an aggrieved employee may bring a Title VII action directly against his or her employer--to serve as the remedy for any improper handling of a discrimination charge by the EEOC *Smith v. Casellas*,119 F.3d 33 (D.C. Cir. 1997.) This court and other circuit courts have uniformly held that no cause of action exists with respect to the EEOC's handling of discrimination claims because Congress has given plaintiffs a right to file a de novo lawsuit against the allegedly discriminating employer. *Id.*; *Baba v. Japan Travel Bureau Int'l, Inc*., 111 F.3d 2, 4 (2d Cir. 1997); *Ward v. EEOC*,

---

are not particularly objectionable precisely because they are merely "directed toward a determination of whether or not there exists reasonable cause to believe that the charging party has suffered discrimination." The nature and extent of the investigation are instead committed to the EEOC's discretion. As a result, EEOC investigations vary greatly in scope and quality. *Johnson v. Yellow Freight Sys., Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984).

[2]This Court has recognized "the vagaries of EEOC determinations" *Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995).

719 F.2d 311, 312-14 (9th Cir. 1983); *Stewart v. EEOC*, 611 F.2d 679, 683-84 (7th Cir. 1979)(Hoffman, J., sitting by designation); *Francis-Sobel v. University of Maine*, 597 F.2d 15, 17-18 (1st Cir. 1979); *Gibson v. Missouri Pac. R.R. Co.,* 579 F.2d 890, 891 (5th Cir. 1978); *Feldstein v. EEOC*, 547 F. Supp. 97, 100 (D. Mass. 1982); *Hall v. EEOC*, 456 F. Supp. 695, 701 (N.D. Cal. 1978).

The reasoning employed by these circuit opinions is undermined by the ruling of the district court in the instant case. If insufficient resources and inadequate investigation can be cured by providing a litigant access to the courts for a federal claim, the same reasoning should also apply for a state cause of action. Preventing the individual from suing the EEOC for mishandling or neglecting its investigatory duties only makes sense when the individual can proceed with a cause of action after the EEOC concludes its investigation. While the Florida statutory scheme does allow for an administrative proceeding to review a no reasonable cause determination by the Florida Commission on Human Relations pursuant to §760.11(3), Florida Statutes (1998) , requiring that such hearings be held in the approximately 97% of cases in which the EEOC does not find reasonable cause would significantly burden that administrative process. Further, it is notable that a complainant may request a right-to-sue letter, at which time the EEOC, except under certain circumstances, drops its investigation. 29 C.F.R. §1601.28(a)(3). In such circumstances, as well when the

EEOC issues a right to sue merely because it was unable to investigate the claim, it is difficult to imagine what the complainant would contest in a state administrative hearing.

## III. THE COURT SHOULD REMAND THE CASE TO THE FLORIDA SUPREME COURT TO ADDRESS WHETHER THE FCHR'S DELEGATION OF POWERS TO EEOC VIOLATES THE FLORIDA CONSTITUTION.

Dawkins has raised in her initial brief the issue of whether the Florida Commission on Human Relations' delegation to the EEOC the authority to issue cause determinations constitutes a violation of the Florida Constitution. The correct interpretation of this provision of the Florida Constitution is a question of Florida law. "[F]ederal courts are required to construe the [Florida Constitution] . . . as would the Supreme Court of Florida." *Royal Health Care Servs., Inc. v. Jefferson-Pilot Life Ins. Co.*, 924 F.2d 215, 216 (11th Cir. 1991). Where the Supreme Court of Florida has not addressed a particular issue, federal courts are then bound by the decisions of the Florida district courts of appeal that address the disputed issue, unless there is an indication that the supreme court would not adhere to the district court's decision.

*Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1257 n. 14 (11th Cir. 1988); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1235 n. 7 (5th Cir. Unit B 1982)[3]. In this case, however, no Florida courts have addressed this specific delegation of powers issue. When the outcome of an appeal turns on an interpretation of Florida law, it is appropriate to certify a question to the Florida Supreme Court. *Cesary v. Second National Bank of North Miami*, 567 F.2d 283 (5th Cir. 1978). Therefore, this issue should be remanded to the Florida Supreme Court.

[3] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the Court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit.

## CONCLUSION

The District Court erred in granting BellSouth's Motion to Dismiss. The District Court was incorrect in ruling that the EEOC issued a no cause finding. The administrative scheme under which the EEOC operates requires that a party be able to file an action in court to address the sufficiency of the investigation conducted by the EEOC, and the district court's ruling prevents the appropriate resolution of inadequate EEOC investigations. The separation of powers arguments relating to the FCRA's delegation to the EEOC should be resolved by the Florida Supreme Court.

Respectfully submitted this the _____ day of July, 2000.

_____

T.A. Delegal, III

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular course of U.S. Mail to Ruth Fife, Esquire, BellSouth Legal Dept., Suite 4300, 675 West Peachtree Street N.E., Atlanta, Georgia 30375, and Cathy Goodwin, Esquire, Suite 1015, 201 South Orange Avenue, Orlando, Florida 32801, and Merette L. Oweis, Esquire, DiCesare, Davidson & Barker, P.A., P.O. Box 7160, Lakeland, Florida 33807 this__ day of July, 2000.

_____

T.A. Delegal, III

FL Bar No. 0892701

424 East Monroe Street

Jacksonville, FL 32202

Phone (904) 633-5000

Fax (904) 358-2850

Attorney for Amicus NELA