

## SUMMARY OF ARGUMENT

Amicus Curiae, The Association of Florida Management Attorneys (“AFMA”) respectfully appears in this case in support of Respondent, Blue Cross and Blue Shield of Florida, Inc.

In its *per curium* Opinion Denying Rehearing and Granting Certification of Sept. 12, 2001, the Third District Court of Appeal in Woodham v. Blue Cross and Blue Shield of Florida, Inc., 793 So.2d 41 (Fla. 3<sup>rd</sup> DCA 2001) certified conflict with Cisco v. Phoenix Medical Prod., 797 So.2d 11 (Fla. 2d DCA 2001) on one discreet issue, which the court further clarified and certified as a question of great public importance. As the sole issue addressed in the question certified is the subject of direct conflict and indeed, of great public importance, this Court should accept jurisdiction.

Petitioner and Amicus Curiae for Petitioner have raised numerous issues collateral to the issue certified. However, as no issues other than the question certified implicates this Court’s conflict jurisdiction, no other issues raised and addressed by Petitioner and Amicus Curiae for Petitioner should be entertained. The issue before the Court may be fairly characterized as whether the United States Equal Employment Opportunity Commission (“EEOC”) has issued a “no cause” determination on the merits, for purposes of Florida Statutes section 760.11(7), when it issues a Form 161 Dismissal and Notice of Rights letter, which 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.

The Court should answer this question in the affirmative, as 42 U.S.C. 2000e-5(b), 29 C.F.R. sections 1601.18 and 1601.19(a), the EEOC Compliance Manual, and the EEOC itself, all confirm that the EEOC Form 161 Dismissal and Notice of Rights letter constitutes a “no cause” determination on the merits, and that no other basis for dismissal is authorized, consistent with the Third District Court of Appeal’s holding in Woodham.

In answering the certified question in the affirmative, the Court should disapprove of and quash the decision of the Second District Court of Appeal in Cisko, as that court’s conclusion and rationale specifically contravenes the legislative intent of section 760.11(7), the EEOC and Florida Commission on Human Relations (“FCHR”) work sharing agreement, 42 U.S.C. 2000e-5(b), 29 C.F.R. sections 1601.18 and 1601.19(a), the EEOC Compliance Manual, and the EEOC’s own expression of the intended meaning and purpose of the language implemented in the Form 161 Dismissal.

## ARGUMENT

On May 30, 2001, the Third District Court of Appeal, in Woodham v. Blue Cross and Blue Shield of Florida, Inc., 793 So.2d 41 (Fla. 3<sup>rd</sup> DCA 2001), affirmed the trial court's order granting summary judgment in favor of Respondent. In its *per curiam* Opinion Denying Rehearing and Granting Certification of Sept. 12, 2001, the Court certified conflict with Cisko v. Phoenix Medical Prod., 797 So.2d 11 (Fla. 2<sup>d</sup> DCA 2001), and certified the following question as one of great public importance:

WHETHER A CLAIMANT MUST PURSUE THE ADMINISTRATIVE REMEDIES PROVIDED IN SECTION 760.11(7), FLORIDA STATUTES, WHEN THE CLAIMANT HAS FILED A COMPLAINT UNDER THE FLORIDA CIVIL RIGHTS ACT WITH THE FLORIDA COMMISSION ON HUMAN RELATIONS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION JOINTLY, AND HAS RECEIVED AN EEOC "DISMISSAL AND NOTICE OF RIGHTS" STATING: "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."?

Woodham, 793 So.2d at 47.

### 1. Conflict and Certified Question Jurisdiction

The Cisko and Woodham decisions directly conflict on one, discreet issue, as clarified by the Third District Court of Appeal's certified question. Specifically, the Second District Court of Appeal in Cisko held that, "An indication by the EEOC that it was 'unable to conclude' that there was a violation of the Act does not rise to the level of a finding that the EEOC did not have reasonable cause to believe that a violation occurred." Cisko, 797 So.2d at 13. This specific holding is directly in

conflict with the following holding in Woodham: “[A] ‘no cause’ determination issued by the EEOC operates as a ‘no cause’ finding by the FCHR.” Woodham, 793 So.2d at 42 n. 1 (citing Blakely v. United Servs. Auto Ass'n, No. 99-1046-Civ-T-17F, 1999 WL 1053122 (M.D.Fla. Oct.4, 1999)).

Beyond this specific issue, Petitioner and Amicus Curiae for Petitioner raise a number of other issues, which are neither in conflict nor certified to this Court, and are therefore inappropriate for this Court’s determination. For example, the principle issue addressed by the Third District Court of Appeal in Woodham, was: “Whether an aggrieved person may disregard the administrative hearing requirement in section 760.11(7) if the person receives a ‘no cause’ determination after lapse of the section 760.11(3), 180-day period for FCHR action, but before the filing of a lawsuit.” Woodham, 793 So.2d at 43. The Cisko court did not address this issue, and neither the Cisko court nor any other Florida Court conflict with the Woodham court’s holding in this regard.

Neither the “180 day” issue nor any others beyond the scope of the certified issue in conflict are properly before this Court. “If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.” Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). Stated otherwise:

[I]n order to invoke the jurisdiction of this court under Section 4(2), Article V of the Constitution, F.S.A., antagonistic principles of law must have been announced in a case or cases by the lower court based on practically the same facts. The conflict must be obvious and patently reflected in the decisions relied on. The conflict must result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof.

Trustees of Internal Imp. Fund v. Lobeau, 127 So.2d 98, 100-01 (Fla. 1961).

The sole, discreet issue properly implicating this Court's jurisdiction is the conflict arising between the Cisko court's holding that, "the EEOC's finding that 'the EEOC is unable to conclude that the information obtained establishes violations of the statutes' does not amount to a finding that there is not reasonable cause to believe that a violation of the Act has occurred," Cisko, 797 So.2d at 14, and the Woodham court's holding to the contrary.<sup>1</sup>

Consistent with this discreet, jurisdictional issue in conflict, the Third District Court of Appeal clarified and certified it as one of great public importance.

In this regard, it is beyond peradventure that the certified issue before this Court is of tremendous public importance, as it is the subject of dichotomous conflict between the Second District Court and a plethora of state and federal courts, and as the result of the Second District's decision has the resounding impact of conflicting with and

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<sup>1</sup> Consistent with Woodham, even the Cisko court agreed that "Cisko's challenge to the FCHR's authority to delegate without merit," because, "The FCHR delegates its power to make a determination which disposes of rights under the Act pursuant to section 760.11(2), Florida Statutes (1997), and Florida Administrative Code Rule 60Y-5.002." Cisko, 797 So.2d at 12, n. 1.

rendering meaningless the very intent and purpose of the administrative review process underlying and required by Title VII and the Florida Civil Rights Act.

Accordingly, the Court should accept jurisdiction to resolve the certified question, Boulevard Nat. Bank of Miami v. Air Metal Industries, Inc., 176 So.2d 94 (Fla. 1965) (“The issuance of this certificate serves to give this court jurisdiction to review the decision”), and decline to address the collateral issues and arguments raised by Petitioner and Amicus Curiae, NELA. Major League Baseball v. Morsani, 790 So. 2d 1071, 1080, n. 26 (Fla. 2001) (“As a rule, we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in article V, section 3, Florida Constitution.”).

## **2. Resolution of the Certified Question**

Fundamentally, the issue before this Court is whether the EEOC Form 161 Dismissal and Notice of Rights letter is a “no cause” determination on the merits, when it provides as follows:

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.

This issue is not difficult to resolve, and must be answered in the affirmative.

### **a. The EEOC is Neither Empowered Nor Authorized to Make a Determination of “Unable to Conclude One Way or Another”**

Since 1964, Title VII empowered the EEOC to investigate charges of discrimination, and to determine, on the merits, whether or not reasonable cause exists to believe that the charge is true:

If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b). Thus, according to section 2000e-5(b), the EEOC is empowered to make one of two determinations on the merits, “cause” or “no cause,” either independently, or by adopting the findings of an investigating State or local agency. The EEOC has never been empowered nor authorized to make a determination, on the merits, of “unable to determine one way or the other.”

The EEOC’s regulations further explain the procedure governing “no cause” dismissals:

Where the Commission completes its investigation of a charge and finds that there is not reasonable cause to believe that an unlawful employment practice has occurred or is occurring as to all issues addressed in the determination, the Commission shall issue a letter of determination to all

parties to the charge indicating the finding. The Commission's letter of determination shall be the final determination of the Commission.

29 C.F.R. § 1601.19(a).

The only other types of dismissals authorized are for the following procedural deficiencies, which are not based upon the merits:

(a) Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII or the ADA, the Commission shall dismiss the charge. A charge which raises a claim exclusively under section 717 of title VII or the Rehabilitation Act shall not be taken and persons seeking to raise such claims shall be referred to the appropriate Federal agency.

(b) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to § 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.

(c) Where the person claiming to be aggrieved cannot be located, the Commission may dismiss the charge: Provided, That reasonable efforts have been made to locate the charging party and the charging party has not responded within 30 days to a notice sent by the Commission to the person's last known address.

(d) Where a respondent has made a settlement offer described in § 1601.20 which is in writing and specific in its terms, the Commission may dismiss the charge if the person claiming to be aggrieved refuses to accept the offer: Provided, That the offer would afford full relief for the harm alleged by the person claiming to be aggrieved and the person

claiming to be aggrieved fails to accept such an offer within 30 days after actual notice of the offer.

29 C.F.R. § 1601.18(a)-(d). The EEOC has never been empowered nor authorized to dismiss a charge, even on procedural grounds, based upon a finding of “unable to determine one way or the other.”

The EEOC Compliance Manual further clarifies and confirms that there are only three types of dismissals that the EEOC is empowered and authorized to make:

*Types of Dismissals* – There are three types of dismissals. The first type, covered in § 4.3, involves jurisdictional or coverage considerations, such as timeliness, standing, or whether the respondent is subject to the statutes. The second type, covered in § 4.4, relates to the actions or status of the charging party / complainant. The third type occurs upon issuance of a no cause finding (see § 4.5).

EEOC Compliance Manual § 4.1(b) (11/96) (Exhibit “B” to Brief of Amicus Curiae HRPBC).

The Form 161 Dismissal and Notice of Rights implemented by the EEOC in this case (R. 30), facially reflects the foregoing authorized bases for dismissal: The options next to the first seven (7) boxes list each of the multiple forms of the procedural bases for dismissal outlined in the EEOC Compliance Manual, and in 29 C.F.R. § 1601.18(a)-(d) (facts alleged fail to state a claim, identify a disability, or identify an employer within the purview of the statutes, failure to timely file, failure to provide requested information, inability to locate charging party, and failure to accept a restorative settlement offer). The eighth (8<sup>th</sup>) and last box applicable,<sup>2</sup> provides the only other authorized basis for dismissal: a determination on the merits, “that there is

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<sup>2</sup> Box nine (9), allowing the EEOC to adopt the findings of a state or local investigating agency is authorized by 42 U.S.C. § 2000e-5(b) (“In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities....”), and any such findings would likewise correspond to the EEOC’s statutory bases for dismissal: dismissal for procedural deficiencies, or dismissal based upon a finding of “no cause.”

not reasonable cause to believe that the charge is true,” 42 U.S.C. 2000e-5(b); 29 C.F.R. § 1601.19(a), otherwise known as “a no cause finding,” according to the EEOC Compliance Manual. The EEOC has no power to issue an “unable to determine, one way or the other” dismissal.

**b. Implementation of the Form 161 “No Cause” Dismissal**

It is true that in 1995, the EEOC ceased its practice of implementing detailed Letters of Determination (“LOD”) upon issuance of “no cause” dismissals, which included specific conclusions and findings of fact. Instead, the EEOC adopted the present Form 161 “no cause” determination, which does not contain a recitation of particularized findings of fact. The intent of this change was simply to preclude administrative findings from being implemented as evidence in subsequent litigation. (April 19, 1995 Minutes of an EEOC Special Commission Meeting to Consider the Recommendations of the Charge Processing Task Force, p. 29 lines 8-22, p. 30, lines 1- 8, Document No. 11 in Respondent’s Appendix).

Petitioner, and particularly Amicus Curiae, NELA, argue that the foregoing procedural change and adoption of the Form 161 uniform language “at most constitutes an indication by the EEOC that the EEOC simply could not determine one way or the other whether the law was violated, i.e., it could neither find cause nor determine that there was no cause.” NELA Brief at p. 11. However, in addition to the EEOC not being authorized to make a “could not determine one way or the other” dismissal, the subsequently issued EEOC Priority Charge Handling Procedures and subsequent EEOC discussions on the topic confirmed that the Form 161 Dismissal was and remains a “no cause” finding, on the merits.

The EEOC Priority Charge Handling Procedures (revised 6/20/95), provide as follows:

**F. DETERMINATIONS**

**I. Elimination Of Substantive “No Cause” LODs**

Substantive “no cause” determinations will no longer be used. Instead, the parties will be informed in a short-form determination that the investigation failed to disclose a violation. These determinations will not include particularized factual findings, but rather will use the following uniform language which is included in the dismissal form approved on May 1, 1995 [the Form 161], and a copy of which is attached as Attachment B:

Based upon the Commission’s investigation, the Commission 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.

(EEOC Priority Charge Handling Procedures (revised 6/20/95), p. 11 (Exhibit “D” to Brief of Amicus Curiae HRPBC)).

Moreover, subsequent EEOC discussions on the topic specifically confirmed that the Form 161 Dismissal was and remains a “no cause” finding, on the merits:

COMMISSIONER TUCKER: When we say that we are unable to conclude, but respondent, well we are not certifying that respondent is in compliance. We are saying that is a no cause determination? That’s a no cause?

CHAIRMAN CASELLAS: Yes, we have concluded that that language constitutes a finding of no cause and that there is no statutory requirement that we use any special language to so accomplish that.

(February 8, 1996 Minutes of EEOC Commissioners Meeting, p. 19, lines 6-12, Document No. 12 in Respondent’s Appendix). According to this Court, “an agency’s interpretation of its own regulations has traditionally been accorded considerable respect.” Beach v. Great Western Bank, 692 So.2d 146, 149 (Fla. 1997); see also,

Humana v. Department of Health and Rehabilitation Services, 492 So.2d 388, 392 (Fla. 4<sup>th</sup> DCA 1986) (“the agency’s interpretation of its own rule is entitled to great weight and persuasive force in the appellate court”).

Certainly, in addition to providing that, “Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes,” the EEOC Form 161 Dismissal also provides that, “This does not certify that the respondent is in compliance with the statutes,” and that “No finding is made as to any other issues that might be construed as having been raised by this charge.” The provision, “unable to conclude that the information obtained establishes violations of the statutes,” is the functional equivalent of, “no reasonable cause to believe that the charge is true.” The additional provisions are consistent with the EEOC’s authorized role in making “no cause” determinations. Neither Title VII nor the EEOC’s regulations allow the EEOC to “certify that the respondent is in compliance with the statutes,” or to make any findings other than as to those issues actually “addressed in the determination.” See 29 C.F.R. § 1601.19(a).

For the foregoing reasons, the vast majority of courts have not labored over the issue of whether the EEOC Form 161 “unable to conclude” determination and dismissal constituted a “no cause” determination, because it *could not be otherwise*. See, e.g., Woodham, 793 So.2d at 42 n. 1, Blakely, 1999 WL 1053122 (M.D.Fla. Oct.4, 1999); Dawkins v. Bellsouth Telecommunications, Inc., 53 F. Supp. 2d 1356

(M.D. Fla. 1999), aff'd, 247 F. 3d 245 (11th Cir. 2001); Watkins v. Sverdrup Technology, Inc., Case No. 94-30401/RV (N.D. Fla. July 31, 1996), aff'd on other grounds, 153 F.3d 1308 (11th Cir. 1998); Mulkey v. Equifax Card Servs. Inc., Case No. 94-1080-Vic.-T-25E (M.D. Fla., January 9, 1996) (Respondent's A. 8); Long v. Health Tour Management, Inc., Case No. 8:01-CV-304-T-17-TGW (M.D. Fla. May 31, 2001)(Respondent's A. 5); Gorman v. Jim Palmer Trucking, Inc., Case No. 8:01-CV-170-T-MSS (M.D. Fla. Sept. 20, 2001)(Respondent's A. 3); Lynch v. Lexford Residential Trust, 6:99-CV-1591-Orl-28KRS (M.D. Fla. Nov. 26, 2001)(Respondent's A. 7); Hamrick v. Standard Register Co., No. 96-3944-CA (Cir. Ct., 4th Cir., Duval County, September 2, 1997) (Respondent's A. 4); Lowe v. BTI Services, Inc., Case No. 97-4679 (Cir. Ct., 4th Cir., Duval County, July 20, 1998) (Respondent's A. 6).

Instead, most courts have addressed the issue as being simply whether the EEOC “no cause” determination also constituted an FCHR “no cause” determination for purposes of Florida Statutes section 760.11(7).<sup>3</sup> See, e.g., Woodham, 793 So.2d at 42 n. 1 (“a ‘no cause’ determination issued by the EEOC operates as a ‘no cause’ finding by the FCHR”); Bach v. United Parcel Services, 2001 WL 984715 (Fla. 4th DCA Aug. 29, 2001). The rationale, as articulated by United States District Court for the Middle District of Florida in Blakely, is straight forward:

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<sup>3</sup> See foot note 1. Even the Cisko court agreed that “Cisko's challenge to the FCHR's authority to delegate without merit,” because, “The FCHR delegates its power to make a determination which disposes of rights under the Act pursuant to section 760.11(2), Florida Statutes (1997), and Florida Administrative Code Rule 60Y-5.002.” Cisko, 797 So.2d at 12, n. 1.

Under the worksharing agreement between the EEOC and the FCHR, filing with one agency constituted filing with the other. As such, when the EEOC handed down a no-cause finding, the need to file for an administrative hearing within 35 days under the FCRA was triggered.

Blakely, 1999 WL 1053122 at \*4. See Dawkins v. Bellsouth Telecommunications, Inc., 53 F. Supp. 2d 1356 (M.D. Fla. 1999), aff'd, 247 F. 3d 245 (11th Cir. 2001); Watkins v. Sverdrup Technology, Inc., Case No. 94-30401/RV (N.D. Fla. July 31, 1996), aff'd on other grounds, 153 F.3d 1308 (11th Cir. 1998).

**c. The Cisko Decision**

There is neither precedent nor rational basis for the Second District Court of Appeal's decision in Cisko v. Phoenix Medical Prod., 797 So.2d 11 (Fla. 2d DCA 2001). The Cisko court opined:

A "liberal construction" of section 760.11(7) requires a specific finding of lack of reasonable cause before an individual is stripped of her right of access to the courts for redress against discrimination. An indication by the EEOC that it was "unable to conclude" that there was a violation of the Act does not rise to the level of a finding that the EEOC did not have reasonable cause to believe that a violation occurred. This finding could reasonably be interpreted as indicating that the EEOC did not have sufficient information from which to make a determination.

Cisko, 797 So.2d at 13.

However, the Cisko court neither *liberally construes* section 760.11(7), nor does it *reasonably interpret* the EEOC's dismissal. To the contrary, the Cisko court *strictly construes* section 760.11(7) to require that a "no cause" determination – presumably by any administrative agency - use the *magic language* that there is "not

reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred.” Furthermore, the Cisko Court’s conclusion that, “An indication by the EEOC that it was ‘unable to conclude’ that there was a violation of the Act does not rise to the level of a finding that the EEOC did not have reasonable cause to believe that a violation occurred,” is purely *hypothetical*, contrary to the EEOC’s statutory and regulatory authorization and directives, and contrary to EEOC’s own expressed intent. See (February 8, 1996 Minutes of EEOC Commissioners Meeting, p. 19, lines 6-12, Document No. 12 in Respondent’s Appendix) (“we have concluded that that language constitutes a finding of no cause and that there is no statutory requirement that we use any special language to so accomplish that.”).

The Cisko court implemented its own “rules of construction” to specifically *defeat* the legislative intent of section 760.11(7), the EEOC and FCHR work sharing agreement, 42 U.S.C. 2000e-5(b), 29 C.F.R. sections 1601.18 and 1601.19(a), the EEOC Compliance Manual, and the EEOC’s own expression of the intended meaning and purpose of the language utilized in the Form 161 Dismissal. According to this Court, principles of construction should not be implemented to “lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity.” Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000) (citations omitted).

**3. Conclusion**

For the foregoing reasons, Amicus Curiae, the Association of Florida Management Attorneys, respectfully requests this Court accept jurisdiction, to answer the certified question in the affirmative, and to approve of the Third District Court’s decision in Woodham, and to disapprove of the Second District Court’s decision in Cisko.

Respectfully submitted this **17th** day of December, 2001.

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief, prepared using Times New Roman 14-point font, proportionately spaced, complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been served by United States mail to the following counsel of record this 17<sup>th</sup> day of December, 2001.:

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