

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 774

INTRODUCER: Commerce and Tourism Committee, Senator Thompson, and others

SUBJECT: Florida Civil Rights Act of 1992

DATE: March 19, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	Fav/CS
2.			GO	
3.			JU	
4.			RC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 774 amends ch. 760, F.S., also known as the Florida Civil Rights Act (FCRA). The bill creates a definition for “sex” to include a male, a female, or a female who is pregnant or is affected by any medical condition related to pregnancy. It further provides that a female who is pregnant or affected by a medical condition related to pregnancy is to be afforded the same treatment as any other employee with similar ability to work. This language is patterned after the federal Pregnancy Discrimination Act. Currently, state and federal courts are split on whether the Legislature intended to prohibit discrimination based on pregnancy.

The bill extends the number of days from 180 to 240 for the Florida Commission on Human Relations to investigate the allegations of a complaint and make a determination of whether reasonable cause exists to believe a violation of the FCRA has occurred.

This bill substantially amends ss. 760.02 and 760.11, F.S.

II. Present Situation:

Title VII Civil Rights Act of 1964¹

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination on the basis of race, color, religion, national origin, or sex. Title VII covers employers with 15 or more employees and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for employers to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.

Pregnancy Discrimination Act²

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*³ that Title VII did not include pregnancy under its prohibition against unlawful employment practices. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII to define the terms “because of sex” or “on the basis of sex,” to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.⁴ Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, and any other term or condition of employment.⁵

Florida Civil Rights Act of 1992

The Florida Civil Rights Act of 1992 (FCRA) was enacted to “secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status...”⁶ FCRA provides protection from discrimination in the areas of education, employment, housing, and public accommodations.

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, would be considered unlawful employment practices.⁷ For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual’s race, color, religion, sex, national origin, age, handicap, or marital status. Unlike Title VII, the FCRA has not been amended to specifically include a prohibition against pregnancy discrimination.

¹ 42 U.S.C. 2000e. et. seq.

² Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978).

³ 429 U.S. 125, 145 (1976).

⁴ The PDA defines the terms “because of sex” or “on the basis of sex” to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so infected but has similar ability or inability to work.

⁵ For more information, see U.S. Equal Employment Opportunity Commission, *Facts about Pregnancy Discrimination*, <http://www.eeoc.gov/facts/fs-preg.html> (last visited March 13, 2013).

⁶ Section 760.01, F.S.

⁷ Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.

Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a component of sex discrimination, the FCRA does not. The fact that the FCRA is patterned after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection on the basis of pregnancy status. Since the Supreme Court has not yet considered the issue, the ability to bring a claim based on pregnancy discrimination varies among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under the FCRA was *O'Laughlin v. Pinchback*.⁸ In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeals held that the Florida Human Rights Act was preempted by Title VII, as amended, as it stood as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination.”⁹ By preempting the Florida statute, the court did not reach the question of whether the Florida law prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.

The court in *Carsillo v. City of Lake Worth*¹⁰ found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination. The court recognized that the Florida statute had never been amended, but concluded that since Congress’ original intent was to prohibit this type of discrimination, it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.

The court in *Delva v. Continental Group, Inc.*¹¹ held that FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court’s analysis that the FCRA had not been amended to include pregnancy status. The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin*. The court certified the conflict with the *Carsillo* case to the Florida Supreme Court.¹²

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.¹³ Like the state courts, the federal courts finding that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is

⁸ 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.

⁹ *Id.* at 792.

¹⁰ 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).

¹¹ 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied*.

¹² The case was filed with the Florida Supreme Court on October 16, 2012 and assigned case number SC12-2315.

¹³ Federal courts finding that the FCRA does not include a prohibition against pregnancy discrimination include: *Frazier v. T-Mobile USA, Inc.*, 495 F.Supp.2d 1185, (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011). Federal courts finding that FCRA does provide protection against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), and *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011).

patterned after Title VII, which bars pregnancy discrimination. The courts finding that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status.

Florida Commission on Human Relations

The Florida Commission on Human Relations (commission) is an administrative body that is charged with carrying out the purposes of the FCRA. The commission is comprised of 12 members who are appointed by the Governor, subject to Senate confirmation.¹⁴ The commission is administratively housed within the Department of Management Services (department); however, the commission is not subject to the control, supervision, or direction of the department.¹⁵ The commission is statutorily authorized to receive, initiate, investigate, hold hearings on, and act upon complaints alleging any discriminatory practice under the FCRA.¹⁶

Employment Complaint Process

Any person who feels that they have been unlawfully discriminated against, in violation of the FCRA, may file a verified complaint with the commission within 365 day of the alleged violation.¹⁷ The commission will, by registered mail, send a copy of the complaint to the person alleged to have committed the discriminatory practice, within 5 days of the complaint being filed. The person alleged to have committed the discriminatory practice may file a verified answer to the complaint within 25 days of the date the complaint was filed with the commission. If there is another state agency or other unit of government that has subject matter jurisdiction and has legal authority to investigate the complaint, the commission may refer the complaint to such agency for an investigation.¹⁸

For complaints that are not referred to another agency, as provided above, the commission has 180 days from the date the complaint was filed to complete an investigation to determine whether reasonable cause exists to believe that a discriminatory practice has occurred in violation of the FCRA.¹⁹ If the commission determines that reasonable cause exists, the complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S.²⁰

A civil action must be filed no later than 1 year after the commission issues the reasonable cause determination.²¹ Available remedies include an order prohibiting the discriminatory practice and affirmative relief, such as back pay. A judge may also award compensatory damages for the aggrieved person's mental anguish, loss of dignity, and any other intangible injury, as well as punitive damages. Punitive damages are capped at \$100,000. The court may award reasonable attorney's fees to the prevailing party.

¹⁴ Section 760.03, F.S.

¹⁵ Section 760.04, F.S.

¹⁶ Section 760.06, F.S.

¹⁷ Section 760.11(1), F.S. In lieu of filing a complaint with the commission, a complainant may file a complaint with the Equal Employment Opportunity Commission.

¹⁸ Section 760.11(2), F.S.

¹⁹ Section 760.11(3), F.S.

²⁰ Section 760.11(4), F.S.

²¹ Section 760.11(5), F.S.

An administrative hearing under ch. 120, F.S., must be requested within 35 days after the commission issues its reasonable cause determination.²² A commissioner may hear the case or the commission can request the case be heard by an administrative law judge (ALJ). If the commissioner finds that a violation of the FCRA has occurred, he or she will issue a proposed order prohibiting the practice and providing affirmative relief, such as back pay. The prevailing party may also be entitled to reasonable attorney's fees. If an ALJ finds that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended or proposed order.

If during its initial investigation, the commission determines that no reasonable cause exists to believe that a violation of the FCRA has occurred, the commission will dismiss the complaint.²³ The complainant has 35 days in which to request an administrative hearing before an ALJ. If the ALJ finds that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The ALJ may also award attorney's fees to the prevailing party. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended order. If the final order issued by the commission determines that a violation of the FCRA occurred, a party has 1 year from the date of the final order to initiate a civil action or accept the relief offered by the commission. However, an aggrieved person cannot file both a private action and accept the relief offered by the commission.

If the commission fails to make a determination as to whether reasonable cause exists within 180 days of the date the complaint was filed, a complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S.²⁴

According to the commission, budget and staff reductions, along with an increase in the number of cases filed, have made it difficult for investigators to complete cases within the 180 days allotted by statute.²⁵ The commission is projected to receive more than 1,700 cases in the current fiscal year up from the 1,221 cases filed in FY 2010. The average caseload of investigators is expected to increase proportionally from 71.5 in FY 2010 to a projected average of 85 in FY 2012.

III. Effect of Proposed Changes:

Section 1 provides that the act may be cited as the "Protect Our Women Act."

Section 2 amends s. 760.02, F.S., to create a definition of "sex," which means the biological state of being male, female, or a female who is pregnant or affected by a medical condition related to pregnancy or childbirth. For all employment-related purposes, a pregnant female or

²² Section 760.11(6), F.S.

²³ Section 760.11(7), F.S.

²⁴ Section 760.11(8), F.S.

²⁵ Florida Commission on Human Relations, *Senate Bill 774 Staff Analysis* (Feb. 21, 2013) (on file with the Senate Commerce and Tourism Committee).

female affected by a pregnancy-related medical condition must be treated the same as an individual not so affected who has similar ability or inability to work. This will clarify legislative intent on whether pregnancy discrimination is prohibited under the FCRA.

Section 3 amends s. 760.11, F.S., to provide that the commission shall have 240 days after the filing of a complaint to complete an investigation into whether there exists reasonable cause to believe that a discriminatory practice has occurred. If the commission fails to conciliate or determine whether there is reasonable cause on any complaint within the 240 days, a complainant may proceed with either a civil action or request an administrative hearing.

Section 4 provides an effective date of July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 774 will clear up court conflicts and reduce the need to litigate whether pregnancy status is protected under the FCRA.

Individuals bringing cases before the commission or an ALJ alleging discriminatory conduct may be awarded compensatory and punitive damages. Previously, these cases could only be brought in a civil court.

C. Government Sector Impact:

According to the commission, this bill will not impact their workload and would not create any administrative costs.²⁶

²⁶ Commission, *SB 774 Staff Analysis*.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Individuals may be bring claims for pregnancy discrimination under Title VII in federal courts.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

CS by Commerce and Tourism on March 18, 2013:

The CS removes provisions that allow the commission or an administrative law judge to include an award for punitive and compensatory damages in its recommended order.

B. Amendments:

None.