

STORAGE NAME: h1457.jo.doc
DATE: February 18, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1457
RELATING TO: Civil Rights Violation/Civil Action
SPONSOR(S): Representatives Gottlieb and Sobel
TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
 - (2) FISCAL POLICY & RESOURCES
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Current law allows the Florida Attorney General to bring a civil suit to enforce the state's civil rights laws only in cases where a defendant has interfered, or attempted to interfere, by threats, intimidation, or coercion, with someone's enjoyment of his or her rights. In such suits, the Attorney General may seek civil penalties of up to \$10,000 per violation, in addition to injunctive relief, court costs, and reasonable attorney's fees.

This bill authorizes the Florida Attorney General to bring a broader variety of civil suits to enforce the state's civil rights laws. Under this bill, the Attorney General may bring suit against a person or group engaged in a pattern or practice of discrimination. Additionally, the Attorney General may bring suit to enforce the state's civil rights laws where there is no pattern or practice of discrimination, if the Attorney General finds that a person or group has been discriminated against and that discrimination raises an issue of general public importance. The Attorney General may seek civil penalties of up to \$10,000 per violation in suits brought under this bill, in addition to injunctive relief, court costs, and reasonable attorney's fees.

There are constitutional and other concerns regarding this bill. See Section V. Comments herein.

This bill appears to have an indeterminate fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|-----------------------------------------|----------------------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: This bill creates new causes of action.

B. PRESENT SITUATION:

Section 760.07, F.S., provides, in pertinent part:

Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are expressly provided for. If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy.

Section 760.11(5), F.S., further provides:

In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages. ... The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed \$100,000. In any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

The Attorney General may bring a civil or administrative action against any person who "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any other person of rights secured by the State Constitution or laws of this state[.]"¹ Such an action is brought in the name of the state, but may be brought on behalf of the injured person.² Any damages recovered in such an action accrue to the injured person, but the Attorney General may seek reasonable attorney's fees and costs,³ as well as civil penalties of up to \$10,000 per violation.⁴

¹ Section 760.51(1), F.S.

² See *id.*

³ See *id.*

⁴ See s. 760.51(2), F.S.

Federal law provides the Attorney General of the United States with the authority to institute a civil action to restrain a "pattern or practice" of violating the comparable federal civil rights statutes, without bringing such a suit on behalf of a specific injured party.⁵ However, he is not authorized to pursue civil monetary penalties for such violations.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a new s. 760.021, F.S. This new section authorizes the Attorney General to bring a civil suit "for damages, injunctive relief, costs, attorney's fees, civil penalties not to exceed \$10,000 per violation, and such other relief as may be appropriate under the circumstances." To bring such a suit, the Attorney General must have reasonable cause to believe that either "[a] person or group of persons is engaged in a pattern or practice of discrimination; or ... [a] person or group of persons has been discriminated against and such discrimination raises an issue of general public importance[.]"

D. SECTION-BY-SECTION ANALYSIS:

None.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The extent of revenues this bill would bring to the state is dependent on how often the Attorney General chooses to bring suit under this bill's new causes of action.

2. Expenditures:

The amount of state expenditures this bill would require is dependent on how often the Attorney General chooses to bring suit under this bill's new causes of action. Although this bill provides for the Attorney General to recover costs and reasonable attorney's fees if the state prevails, presumably there will be some proceedings where the state does not prevail or where the defendant is uncollectible.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

⁵ See 42 U.S.C. § 1971(c)(voting rights); 42 U.S.C. § 2000a-5(a)(public accommodations); 42 U.S.C. § 2000e-6(a)(employment); 42 U.S.C. § 3614 (housing).

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Delegation of Legislative Power

Article II, s. 3, Fla. Const., provides that “[n]o person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided [in the state constitution].” This bill may raise concerns with respect to this provision.

The Supreme Court of Florida has ruled that this separation-of-powers provision prevents the Legislature from delegating legislative power.⁶ The power to legislate is defined as “involv[ing] the exercise of discretion as to the content of the law, its policy, or what it shall be[.]”⁷ “The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the [entity to which power is delegated] and the courts to determine whether the [entity] is carrying out the legislature’s intent.”⁸ Those standards or guidelines must appear in the text of a statute or be within the realm of reasonable inference from it.⁹ As the Court explained in *Conner v. Joe Hatton, Inc.*,¹⁰

[w]hen [a] statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the [entity that authority has been delegated to] the power to say what the law shall be.

⁶ See *Board of Architecture v. Wasserman*, 377 So.2d 653 (1979).

⁷ *State ex rel. Taylor v. City of Tallahassee*, 177 So. 719, 720-21 (Fla. 1937). See also *B. H. v. State*, 645 So.2d 987 (Fla. 1994); *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260 (Fla. 1991).

⁸ 10 FLA. JUR. 2D CONSTITUTIONAL LAW § 190. See also authorities cited therein.

⁹ See *High Ridge Mgmt. Corp. v. State*, 354 So.2d 377 (Fla. 1977); *Smith v. Portante*, 212 So.2d 298 (Fla. 1968).

¹⁰ 216 So.2d 209 (Fla. 1968).

In short, "if a named authority is authorized to decide what should and should not be deemed an infringement of the law, [a statute] must be held unconstitutional as an attempt to make an improper delegation of legislative power."¹¹

It is possible a court could find that, because this bill authorizes the Attorney General to bring suit upon a finding that past discrimination "raises an issue of general public importance," it contains a standard so vague as not to provide an adequate basis upon which to determine whether the Attorney General is acting in accord with the intent of the Legislature, and is thus an impermissible delegation of legislative power to the Attorney General. Should a court so find, it is possible that the remedy would be to strike down the entire statute.

Double Jeopardy

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb[.]" This prohibition against double jeopardy is binding on the states through the Due Process Clause of the Fourteenth Amendment.¹²

In *United States v. Ward*,¹³ the Supreme Court of the United States ruled that some civil penalties may be "so punitive either in purpose or effect" as to be criminal in nature despite being labeled "civil."¹⁴ To seek such penalties exposes a defendant to criminal jeopardy and thus invokes the Double Jeopardy Clause.¹⁵ Because this bill's civil penalties do not purport to compensate a party for losses, a court could find that they are actually criminal in nature; that court might then rule that pursuing civil penalties under this bill prevents a defendant from being prosecuted criminally on a related charge. Conversely and for the same reasons, a court could also hold that someone already convicted or acquitted of a crime arising out of the same facts could not be sued for the civil penalties this bill provides.

Excessive Fines

The Eighth Amendment to the United States Constitution prohibits "excessive fines." This prohibition is binding on the states through the Due Process Clause of the Fourteenth Amendment.¹⁶ Since "[c]ivil penalties are fines payable to the government to punish and deter bad conduct, not payments of the costs of an injury or harm[.]"¹⁷ an award of civil penalties under this bill may be subject to reversal and mandatory reduction "if it is grossly disproportional to the gravity of a defendant's offense."¹⁸

B. RULE-MAKING AUTHORITY:

None.

¹¹ 10 FLA. JUR. 2D CONSTITUTIONAL LAW § 190.

¹² See *Benton v. Maryland*, 395 U.S. 784 (1969).

¹³ 448 U.S. 242 (1980).

¹⁴ *Id.* at 249. See also *Hudson v. United States*, 522 U.S. 93 (1997); *Breed v. Jones*, 421 U.S. 519 (1975); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938).

¹⁵ See *Hudson*, 522 U.S. at 104.

¹⁶ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷ *Ellett Bros., Inc. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 391 (4th Cir. 2001) (Michael, J., concurring in part and concurring in the judgment).

¹⁸ *United States v. Bajakajian*, 524 U.S. 321, 335 (1998). See also *Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993); *United States v. 817 N.E. 29th Drive, Wilton Manors, Florida*, 175 F.3d 1304 (11th Cir. 1999); *Department of Environmental Protection v. Zabelinski*, 785 So.2d 517 (Fla. 3d DCA 2000).

STORAGE NAME: h1457.jo.doc

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PAGE: 6

C. OTHER COMMENTS:

It is not clear what the limits are to this bill's second cause of action. The bill does not provide any criteria for the Attorney General to rely upon in finding that "such discrimination raises an issue of general public importance."

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

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