

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1214

SPONSOR: Appropriations Committee and Senators Villalobos and Miller

SUBJECT: Florida Civil Rights Act of 1992

DATE: April 15, 2003

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/2 amendments</u>
2.	_____	_____	<u>ACJ</u>	<u>Withdrawn</u>
3.	<u>Herring</u>	<u>Coburn</u>	<u>AP</u>	<u>Fav/CS</u>
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill amends the Florida Civil Rights Act of 1992. The bill gives the Attorney General the independent authority to initiate upon reasonable cause a civil action for damages, injunctive relief, civil penalties up to \$10,000 per violation, and other appropriate relief against any person or group for: 1) patterns or practices of discrimination; or 2) for discrimination that raises “an issue of general public importance.” If the Attorney General prevails, the Attorney General is entitled to reasonable attorney’s fees and costs.

The Florida Civil Rights Act of 1992 is intended to “. . . secure for all individuals within the state freedom from discrimination . . .” for a variety of reasons, including discrimination due to gender. Chapters 110 and 112, F.S., also prohibit discrimination in state and local employment. The anti-discrimination employment policy of Florida is patterned after Title VII of the federal Civil Rights Act of 1964. Neither the Florida Civil Rights Act nor chapters 110 and 112, F.S., however, expressly include an amendment that was made to the federal act in 1978 that provides that discrimination on the basis of pregnancy is sex discrimination that is violative of Title VII. Although state law has not been amended to expressly reflect the federal change, the Florida Civil Rights Act has been held to be pre-empted by Title VII of the Civil Rights Act of 1984 to the extent that Florida’s law currently offers less protection to its citizens than does the corresponding federal law. The bill amends the Florida Civil Rights Act and chapters 110 and 112, F.S., to expressly include pregnancy, childbirth, or related medical conditions within the class of activities that are subject to the prohibition against discrimination on the basis of sex.

This bill creates s. 760.021, F.S.; amends ss. 110.105, 110.233, 112.042, and 760.11, F.S.; and reenacts ss. 104.31 and 760.10, F.S.

II. Present Situation:

There is currently no formal mechanism or statutory authority within the Florida Commission on Human Relations (FCHR), between the FCHR and the Attorney General's Office, or within the Office of the Attorney General to independently investigate or initiate action under the Florida Civil Rights Act for discrimination that is based on a pattern or practice of discrimination or discrimination that raises an issue of general public importance.

Attorney General's Office of Civil Rights

The Florida Legislature established the Attorney General's Office of Civil Rights within the Department of Legal Affairs in 1991.¹ The Attorney General has limited independent authority to take action under chapter 760, F.S., particularly for violations of civil rights under the Florida Civil Rights Act of 1992, ss. 760.01 through 760.11 and 509.092, F.S. Currently, the Attorney General has independent authority to investigate and take civil action against violations of constitutional and statutory rights. Violations must be made through threat, intimidation, or coercion or attempts thereto.² Additionally upon request by an aggrieved person, the Attorney General can initiate action for discriminatory practices by private clubs if no resolution is reached to eliminate or correct the alleged discrimination by "informal methods of conference, conciliation, and persuasion." Only private clubs that have membership exceeding 400, that provide regular meal service, and that regularly collect dues or other payment are affected.³

Although the Attorney General's Office of Civil Rights has addressed past violations involving disability rights, mortgage lending, other types of economic discrimination, discrimination in places of public accommodations, racial profiling, and elder exploitation, most of the Attorney General's actions have had to be under the Florida Deceptive and Unfair Trade Practices Act (FDUPTA), rather than the Florida Civil Rights Act. The Attorney General based the actions on the underlying theory that the discrimination was unfair and deceptive. According to the Attorney General, only one of the nine cases that in recent years resulted in successful settlements was actually brought under the jurisdiction of the Civil Rights Act, and even that case was supported by a concurrent claim under FDUPTA. In 1999, two causes of action were filed using the Florida Fair Housing Act, after the complainants elected to have the Attorney General represent them as provided in the statute. See s. 760.23, F.S.

Florida Commission on Human Relations

Primary administrative authority and resolution of discrimination matters lies with the Florida Commission on Human Relations (FCHR). The 12-member FCHR was created within the Department of Management Services, where it is administratively housed, one year following the creation of the Office of Civil Rights within the Attorney General's office.⁴ Specifically, the

¹ See ch. 91-74, L.O.F.; s. 16.57, F.S. The creation of the Office of Civil Rights was based in part on a recommendation of the Racial and Ethnic Bias Study Commission of the Supreme Court for the purpose of bringing a state suit against individuals and agencies for harassment and brutality against minorities.

² See s. 760.51, F.S. These rights prohibit discrimination based upon race, color, religion, gender, national origin, disability or marital status.

³ See s. 760.60, F.S.

⁴ See s. 760.03, F.S. This commission had existed as the Commission on Human Rights since at least 1977. Most states have a human rights commission that acts as the investigatory agency for complaint intake and investigations. In some cases, these commissions have exclusive enforcement authority of state civil rights laws, however, in most instances the state attorney general is authorized to intervene, file a complaint, or enforce orders of a commission.

Florida Commission on Human Relations is statutorily authorized to receive, initiate, investigate (including issuing subpoenas), seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice under the Florida Civil Rights Act in the areas of education, employment, housing or public accommodations,⁵ and certain private clubs.⁶ Although the law provides that the FCHR can act upon complaints alleging any discriminatory practice under the Florida Civil Rights Act of 1992, the FCHR has construed this authority narrowly to limit its authority to handle discrimination complaints only administratively.

The FCHR can not initiate an investigation or take any independent action until an individual files a complaint with the FCHR. Under current law, the person allegedly injured by the discriminatory practice must initiate steps to address the discrimination for education, employment, housing, public accommodations, and retaliatory discrimination. The person may opt to file a complaint with the FCHR, file a civil action, or notify the Attorney General's Office to take action in some circumstances.

For example, a person may opt to file a complaint for discrimination with the FCHR or alternatively the EEOC within 365 days of the alleged violation. *See* s. 760.11, F.S. Even the Attorney General can file a similar complaint with the FCHR or EEOC. If any other agency has jurisdiction, the FCHR can refer the matter to that agency. The FCHR has 180 days to investigate and determine whether reasonable cause exists. If reasonable cause does exist, the aggrieved person can file a civil action within one year or request an administrative hearing. The person can recover punitive damages capped at \$100,000 in the civil action. Specific relief under the administrative process is set forth in s. 760.11(6), F.S. If the FCHR has reasonable cause to believe that discriminatory practices have occurred, the aggrieved person can request the Attorney General to bring suit which the Attorney General must do on behalf of the aggrieved person. A person can independently or concurrently file a civil action, but it must be filed within one year after the alleged discriminatory practice occurred. The court could opt to stay the court action until the FCHR has completed any pending efforts including the administrative processing of the complaint.

For housing discrimination, complaints are limited to those involving the Florida Fair Housing Act. *See* ss. 760.20-760.37, F.S. Most housing is covered. In some cases, owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker, and housing operated by organizations and private clubs that limit occupancy to members are exempt. If voluntary compliance with the Fair Housing Act does not occur after 180 days after the complaint is filed, or after the matter was referred to the local housing authorities, the person can initiate civil action or petition for an administrative determination by the FCHR. If the FCHR has reasonable cause to believe that discriminatory housing practices have occurred, the Attorney General is required to bring civil action upon that the aggrieved person's behalf. Alternatively or concurrently, a person can bring a civil action no later than two years after the alleged housing discrimination practice.

⁵ See s. 509.092, F.S. Public accommodations includes public lodging and eating establishments only. It does not include lodge halls or other similar facilities or private organizations which are made available for public use occasionally or periodically.

⁶ The FCHR and its federal counterpart, the Equal Employment Opportunity Commission (EEOC), sometimes coordinate to conduct intake and investigate individual complaints of employment discrimination.

State and Local Employment

Chapter 110, F.S., establishes a system of personnel management for state employment. The chapter is intended to provide a means to recruit, select, train, develop, and maintain an effective and responsible workforce. The personnel management system for state employment is intended to include policies and procedures for employee hiring and advancement, training and career development, position classification, salary administration, benefits, discipline, discharge, employee performance evaluations, affirmative action, and other related activities.

Section 110.105(2), F.S., prohibits discrimination, with an exception, as follows:

All appointments, terminations, assignments and maintenance of status, compensation, privileges, and other terms and conditions of employment in state government shall be made without regard to age, sex, race, religion, national origin, political affiliation, marital status, or handicap, except when a specific sex, age, or physical requirement constitutes a bona fide occupational qualification necessary to proper and efficient administration.

Section 110.233, F.S., prohibits certain employment acts, including favoritism toward, or discrimination against, a person in the career service system based on race, color, national origin, sex, handicap, religious creed, or political opinion or affiliation.

In addition, ch. 112, F.S., provides general provisions regulating public officers and employees. Section 112.042, F.S., prohibits discrimination in county and municipal employment based solely on race, color, national origin, sex, handicap, or religious creed of any individual.

The Florida Civil Rights Act of 1992

The employment policy prohibiting discrimination based upon sex in state and local employment is also reflected in the Florida Civil Rights Act of 1992,⁷ which makes it an unlawful employment practice for an employer⁸

To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.⁹

The Florida Civil Rights Act's general purposes are

. . . to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public

⁷ Sections 760.01 – 760.11, F.S.

⁸ Section 760.02(7), F.S., defines “employer” to mean any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

⁹ Section 760.10(1), F.S.

safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

Pursuant to s. 760.01(3), F.S., the Florida Civil Right's Act

. . . shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

The employment policy of Florida embodied in these provisions is patterned after the federal Civil Rights Act of 1964, as amended in 1978.¹⁰ Neither the Florida Civil Rights Act nor chapters 110 and 112, F.S., reflect an amendment made to the federal act by Congress in 1978 when it enacted the Pregnancy Discrimination Act. The Pregnancy Discrimination Act was enacted in response to a U.S. Supreme Court decision that held that pregnancy discrimination was not sex discrimination protected under Title VII.¹¹ The Pregnancy Discrimination Act expressly states that discrimination on the basis of pregnancy is sex discrimination and is therefore violative of Title VII. Although the state law has not yet been amended to reflect this change, it is being interpreted like the federal act so that discrimination based on sex encompasses pregnancy, childbirth, or related medical conditions.¹²

Section 760.02, F.S., contains definitions that are applicable to the chapter, including "discriminatory practice,"¹³ and "national origin."¹⁴ The section does not contain definitions for the phrases "because of sex" or "on the basis of sex." However, s. 760.10, F.S., of the Florida Civil Rights Act, has been held to be pre-empted by Title VII of the Civil Rights Act of 1984 to the extent that Florida's law currently offers less protection to its citizens than does the corresponding federal law.¹⁵

Section 760.10, F.S., designates unlawful employment practices, and the remedies for unlawful discrimination are set forth in s. 760.07, F.S. That section provides:

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. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or

¹⁰ 42 U.S.C. s. 2000e-2, Title VII

¹¹ *General Electric Company v. Gilbert*, 429 U.S. 124 (1976).

¹² *Kidd v. City of Jacksonville*, 97 Fla. 297, 120 So. 556 (1929); *Massie v. University of Florida*, 570 So.2d 963 (Fla. 1st DCA 1990); *Holland v. Courtesy Corporation*, 563 So.2d 787 (Fla. 1st DCA 1990).

¹³ Section 760.02(4), F.S., defines "discriminatory practice" to mean any violation of the Florida Civil Rights Act of 1992.

¹⁴ Section 760.02(5), F.S., defines "national origin" to include ancestry.

¹⁵ *O'Laughlin v. Pinchback*, 579 So.2d 788 (Fla. 1st DCA 1991).

periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

III. Effect of Proposed Changes:

Attorney General's Civil Actions for Discrimination

Section amends the Florida Civil Rights Act of 1992 to give the Attorney General independent authority to take civil action against civil rights discrimination arising in the areas of education, employment, housing, and public accommodations; as well as employment retaliation based on race, color, religion, gender, national origin, age, disability, or marital status. If the Attorney General has reasonable cause to believe that a “pattern or practice of discrimination” or an issue of discrimination that is of “general public importance” exists, the Attorney General can take civil action against those persons or groups who have engaged in discriminatory practices. The phrases “pattern or practice of discrimination” or “an issue of general public importance” are not defined.

In addition to seeking damages and injunctive and other appropriate relief, the Attorney General may also recover civil penalties up to \$10,000 per violation as well as attorney’s fees and costs. This authority to recover is similar to authority found in s. 760.51, F.S. Civil penalties collected under this section will be deposited in the General Revenue Fund.

Section 2 expands the power of the Attorney General's Office of Civil Rights to investigate and initiate actions under the new statutory provision in section 1.

This new legislation tracks language found under the Federal Fair Housing Act which gives the U.S. Attorney of the Department of Justice the independent authority to investigate and take action against discrimination in fair housing issues. *See* 42 U.S.C §3614. However, for civil enforcement of discrimination in other areas, the U.S. Attorney General has varying degrees of authority that are more constrained. For example, for violations for discrimination under Title II (public accommodations) of the Federal Civil Rights Acts of 1964 and 1991, the U.S. Attorney General has independent authority to take civil action if he or she has reasonable cause to believe that the persons or group of persons are engaged in a “pattern or practice of resistance” that denies full enjoyment of a right and the practice is intended to deny the right fully. *See* 42 U.S.C. §2000a-5. If the U.S. Attorney General wants to expedite the matter, he or she may certify the case to the court that the matter is of “general public importance.” For violations for discrimination in education under Title IV (public education) of the Federal Civil Rights Acts of 1964 and 1991, the U.S. Attorney General can only take action upon receipt of a signed complaint that discrimination has occurred from a parent of the aggrieved child or from the aggrieved child. *See* 42 U.S.C. §2000a-5. If the U.S. Attorney General believes the complaint is meritorious and certifies that the aggrieved person is unable to initiate action, he or she can initiate civil action after providing the school board or college authority notice and after certifying that reasonable time was given to the school board or college authority to address the matter. For discrimination matters involving Title VII (employment) of the Federal Civil Rights Acts of 1964 and 1991, the authority to investigate and take action for patterns or practices of discrimination is bifurcated between the EEOC and the U.S. Attorney General. The U.S.

Attorney General only has authority to investigate and pursue patterns or practices of discrimination in public employment claims.¹⁶ See 42 U.S.C. §2000e-6.

Florida would join the ranks of eight other states that have some variation of this proposed language already in their civil rights act (California, Missouri, and Wisconsin) or limited to their fair housing acts (Arkansas, Delaware, Georgia, Nebraska, and Ohio).

Sections 1 and 2 take effect on becoming law.

Discrimination on the Basis of Sex

Sections 3 through 6 amend the following four sections of law to provide the definition for the phrase “without regard to sex,” “because of sex,” or “on the basis of sex” to also include without regard to pregnancy, childbirth, or related medical conditions, for purposes of the prohibition against sex-based discrimination:

- Section 110.105, F.S., relating to state employment policies.
- Section 110.233, F.S., relating to career service appointments.
- Section 112.042, F.S., relating to county and municipal employment policies.
- Section 760.10, F.S., relating to unlawful employment practices.

As a result, women affected by pregnancy, childbirth, or related medical conditions would be required to be treated in the same way as all other persons not so affected but similar in their ability or inability to work for all employment-related purposes. This requirement would extend to receipt of health insurance or fringe benefits.

Sections 7 and 8 readopt s. 104.31, F.S., relating to a state, county or municipal employee or officers' political activities, and s. 760.11, F.S., relating to administrative and civil remedies under the Florida Civil Rights Act, to incorporate amendments to s. 110.233, F.S., and s. 760.10, F.S., respectively, through cross-references thereto.

Sections 3 through 8 take effect July 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁶ In 1978, the Department of Justice underwent a federal reorganization which amended Title VII of the federal Civil Rights Act. The reorganization plan transferred limited power from the EEOC back to the Attorney General in cases involving discrimination suits against public employers. The approval of this agency plan occurred without formal action by Congress as provided by federal law. See DOJ Reorg. Plan No. 1 of 1978, Sec. 5, 43 F.R. 19807, 92 Stat. 3781. An executive order was subsequently issued to clarify that the transfer was valid and intended. See Executive Order No. 12068. At least two federal suits unsuccessfully challenged the validity of the transfer to the Attorney General. See *U.S. v. Fresno United School Dist.*, 592 F.2d 1088 (9th Cir. 1979); *U.S. v. City of Yonkers*, 592 F. Supp. 570 (S.D. New York 1984)

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is unclear whether the discrimination based on a woman's pregnancy, childbirth or related medical condition is appropriately cognizable and distinctive as sex discrimination or gender discrimination. The phrase "sex discrimination" and "gender discrimination" appear to be used interchangeably in court cases when determining whether the discrimination "based on sex" or "because of sex" deprives, tends to deprive or otherwise adversely affects an individual's employment opportunities or access to benefits. The clear exception appears to be in cases of discrimination arising from sexual harassment which is clearly to be classified as sex discrimination. Any equal protection challenge for gender or sex discrimination likely would not be subject to strict scrutiny because the female gender is not recognized as a special protected class (race, religion, national origin, or physical disability under s. 2, Art. I of the Florida Constitution). Therefore, the test of any state law would be based on whether the state can show a rational relationship where the classification resulting in discrimination advances important governmental objectives and the discriminatory means are substantially related to those objectives.¹⁷

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Persons aggrieved by discriminatory practices or policies that may become the basis of a civil action for damages and other relief may benefit from injunctive relief and damages awarded, provided the aggrieved persons are either specifically named in the suit or are part of the class affected by a class action filed by the Attorney General. Persons subject to potential or actual discriminatory conduct may benefit from the potentially expedited resolution brought by the Attorney General's involvement and additional resources to remedy, stop, or prevent patterns or practices of discrimination or discrimination that are of general public importance.

¹⁷ *Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001).

C. Government Sector Impact:

The Office of the Attorney General does not anticipate a significant fiscal impact as the Attorney General's authority to take action under this bill is discretionary. The Attorney General reports that in the past two years the Office of Civil Rights has negotiated over \$25 million in restitution, fees and costs, including the \$1 million settlement in *State of Florida v. Adam's Mark Hotel*,¹⁸ the \$23.8 million in consumer restitution and the \$250,000 for attorney's fees and costs in the case against *Household Finance, Inc.*

The Florida Commission on Human Relations reports no fiscal impact from this bill. The FCHR reports that the authority granted to the Attorney General under this bill would not conflict with its jurisdictional authority at this time. Under current practice, the FCHR and the Attorney General's office work cooperatively on matters of discrimination. The FCHR's authority to conduct intake and investigate individual complaints of discrimination remains unaffected by the bill.

According to the Florida Commission on Human Relations,¹⁹ no increase in cases would be expected if this bill were enacted into law because the term "sex" is already construed by the courts to include pregnancy, childbirth, and related medical conditions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Unlike existing provisions in s. 760.51, F.S., relating to the Attorney General's authority to enforce civil rights violations, this bill does not state whether the action may also be brought in the name of injured person, particularly if the Attorney General seeks to recover damages.

The bill does not address the jurisdictional overlap and interplay between the authority of the Florida Commission on Human Relations and the authority of the Attorney General's Office as provided under this bill and how it may affect an individual's potential or pending FCHR claim or civil action and recovery or other relief.

¹⁸ In 1999, the Attorney General joined a class action lawsuit filed by the United States Justice Department in federal court against Adam's Mark Hotel for discriminatory practices against registered guests attending a black college reunion. Although agreements settling the state, federal and private complaints were reached in March 2000, the court rejected the private class-action and state agreements and ruled that the matter needed to be heard in state court. The state Attorney General charged the Adam's Mark hotel with violating the state's Deceptive and Unfair Trade Practices based on the hotel's disparate treatment of registered guests attending an annual black college reunion. Among other things, the Attorney General charged that black guests were denied the opportunity to rent higher quality rooms, were denied the same access to parking facilities and services as white guests, were charged additional, undisclosed deposits for telephones and movies that were not charged at white events and had to wear color-coded wristbands on the resort premises. Under the agreement, the Adam's Mark Daytona Beach Resort agreed to pay a total of \$1 million to former guests and Florida's historically black colleges. The money is administered by the attorney general's office through a designated claims administrator and can compensate each eligible individual up to \$1,000 per claim.

¹⁹ The Commission is the administrative body created by the Legislature to administer the Florida Civil Rights Act. Part of its duties include holding hearings and rendering decisions on claims alleging discrimination.

Further, neither the bill nor current law address the extent to which documents and other evidence are or would be shared between the FCHR and the Attorney General, and continued protection of such documents as confidential or exempt from inspection as arising from matters for which the FCHR and the Attorney General may be sharing concurrent investigatory jurisdiction. Presumably, the FCHR and the Attorney General would continue to work cooperatively, with the FCHR focused on its duties to conduct intake and investigation of individual complaints and with the Attorney General focused on civil actions against specific matters of discrimination as prescribed by this bill.

During the 2002 legislative session, the CS for SB 410 by the Committee on Judiciary and Senator Wasserman Schultz, passed the Committees on Governmental Oversight and Productivity and Judiciary. Like SB 138, the CS for SB 410 would have amended the Florida Civil Rights Act and chs. 110 and 112, F.S., to expressly include pregnancy, childbirth, or related medical conditions within the class of activities that are subject to the prohibition against discrimination on the basis of sex. The CS/SB 410 was placed on the Calendar for second reading, but it was not taken up prior to the end of session.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
