

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 215 w/CS Civil Rights Violation/Damages  
**SPONSOR(S):** Kottkamp, and others  
**TIED BILLS:** none **IDEN./SIM. BILLS:** SB 1214

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	18 Y, 0 N w/CS	Jaroslav	Havlicak
2) State Administration	6 Y, 0 N w/CS	Bond	Everhart
3) Public Safety Appropriations		Davis	DeBeaugrine
4) Appropriations			
5)			

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### SUMMARY ANALYSIS

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. Such suits are brought in the name of the state, but may be brought on behalf of specific injured parties.

This bill expands the authority of the Florida Attorney General to initiate a civil lawsuit against any person violating the state's civil rights laws, and to seek injunctive relief and damages on behalf of any injured person.

The Florida Civil Rights Act of 1992 currently applies to any employer of 15 or more employees; this bill reduces the threshold to 10 or more employees.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0215d.ap.doc  
**DATE:** April 9, 2003

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |  |   |
|--------------------------------------|---|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | 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 broader authority for the Attorney General to initiate civil actions, and expands the number of Florida businesses subject to the Florida Civil Rights Act of 1992.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

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.

In addition to these fairly broad provisions for private enforcement of the state's civil rights laws, 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[.]"<sup>1</sup> Such an action is brought in the name of the state, but may be brought on behalf of the injured person.<sup>2</sup> Any damages recovered in such an action accrue to the injured person, but the Attorney General may seek reasonable attorney's fees and costs,<sup>3</sup> as well as civil penalties of up to \$10,000 per violation.<sup>4</sup>

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<sup>1</sup> Section 760.51(1), F.S.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See s. 760.51(2), F.S.

By comparison, federal law provides the Attorney General of the United States with the authority to enjoin a "pattern or practice" of violating the comparable federal civil rights statutes, without bringing such a suit on behalf of a specific injured party.<sup>5</sup> However, the U.S. Attorney General may not, in such a suit, pursue civil monetary penalties on behalf of an injured person.

Section 760.02, F.S., provides definitions applicable to the Florida Civil Rights Act of 1992 (Part I of ch. 760, F.S.)(the "Act"). Subsection (7) defines an "employer" subject to the Act as one 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 a person.

### **Effect of Bill - Civil Actions**

This bill creates a new s. 760.021, which section authorizes the Florida Attorney General to bring a civil suit "for damages, injunctive relief, 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[.]" If the Attorney General prevails, monetary damages recovered are paid to injured party, not the state; and the Attorney General may additionally seek reasonable attorney's fees and costs.

### **Effect of Bill - Civil Rights Actions**

The Office of Civil Rights (which is under the authority of the Attorney General) currently may investigate and initiate actions under s. 760.51, F.S. (interference by threats, intimidation, or coercion of an individual's state or federal constitutional rights). This bill also expands the authority of the Office of Civil Rights to investigate and initiate actions for violations of any statutory rights in ch. 760. F.S., which include:

- Sections 760.01-.11, F.S., relating to the Commission on Human Relations and laws making it unlawful for a private employer to discriminate against any person because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
- Sections 760.20-.37, F.S., relating to the Florida Fair Housing Act.
- Section 760.40, F.S., relating to genetic testing; informed consent; confidentiality; penalties; and notice of use of results.
- Section 760.50, F.S., relating to discrimination on the basis of AIDS, AIDS-related complex, and HIV.
- Section 760.60, F.S., relating to discriminatory practices of certain clubs.
- Section 760.80, F.S., relating to minority representation on boards, commissions, councils, and committees.
- Section 760.854, F.S., relating to the Center for Environmental Equity and Justice.

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<sup>5</sup> 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).

## **Effect of Bill - Civil Rights Act of 1992**

This bill amends the definition of an “employer” subject to the Florida Civil Rights Act of 1992 from 15 to 10 or more employees.

### **C. SECTION DIRECTORY:**

Section 1 creates s. 760.021, F.S., authorizing the Attorney General to commence a civil action against any person or group of persons engaged in a pattern or practice of discrimination in violation of state law.

Section 2 amends s. 16.57, F.S., to provide that the Office of Civil Rights may enforce any of the provisions of ch. 760, F.S.

Section 3 amends s. 760.02, F.S., to amend the definition of “employer” under the Florida Civil Rights Act of 1992.

Section 4 provides an effective date of “upon becoming law.”

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **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 attorneys’ fees if the state prevails, presumably there will be some proceedings where the state does not prevail or where the defendant is insolvent, cannot be found, or for whatever other reason cannot be collected against.

The Office of the Attorney General reports that this bill will have no additional cost to the state.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

#### D. FISCAL COMMENTS:

Monetary damages recovered under the authority granted by this bill are to be distributed to the individual harmed, not the state. The recovery of fees and costs of investigation and prosecution will reimburse specific costs incurred, such as expert witnesses, court reporters, etc. It is unclear, however, who would have preference if the available recovery is insufficient to pay the damages due to the individual and the costs recoverable by the Attorney General.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

Staff of the Judiciary Committee writes:

##### 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 Florida Supreme Court has ruled that this separation-of-powers provision prevents the Legislature from delegating legislative power.<sup>6</sup> 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[.]”<sup>7</sup> “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.”<sup>8</sup> Those standards or guidelines must appear in the text of a statute or be within the realm of reasonable inference from it.<sup>9</sup> As the court explained in *Conner v. Joe Hatton, Inc.*,<sup>10</sup>

[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.

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.”<sup>11</sup>

<sup>6</sup> See *Avatar Development Corp. v. State*, 723 So.2d 199 (Fla. 1998); *Board of Architecture v. Wasserman*, 377 So.2d 653 (1979).

<sup>7</sup> *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).

<sup>8</sup> 10 FLA. JUR. 2D CONSTITUTIONAL LAW § 190.

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

<sup>10</sup> 216 So.2d 209, 211 (Fla. 1968).

<sup>11</sup> 10 FLA. JUR. 2D CONSTITUTIONAL LAW § 190.

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.<sup>12</sup> Should a court so find, it is possible that the remedy would be to strike down the entire statute.

However, in other contexts, the Florida Supreme Court has treated quite broad language as sufficiently clear not to be an unconstitutional delegation of legislative power, especially where a statute seeks to conform to analogous provisions of federal law,<sup>13</sup> as this bill attempts to do.<sup>14</sup>

### 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.<sup>15</sup>

In *United States v. Ward*,<sup>16</sup> 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.”<sup>17</sup> To seek such penalties exposes a defendant to criminal jeopardy and thus invokes the Double Jeopardy Clause.<sup>18</sup> Because, unlike the damages it also provides for, 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, except simultaneously. 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 later be sued for the civil penalties this bill provides.

To date, however, Florida courts have ruled that similar civil penalties are not so disproportionate as to be “punitive” and thereby invoke the Double Jeopardy Clause.<sup>19</sup>

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

It is possible for the Attorney General to file suit under the provisions of this bill even if the actual victim has settled his or her claims against the wrongdoer; this could undermine the finality of such

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<sup>12</sup> Similar language has been upheld as a valid delegation by Congress to the Attorney General of the United States. See, e.g., *United States v. Northside Realty Associates, Inc.*, 518 F.2d 884 (5th Cir. 1975). However, the Florida Supreme Court has held that the state constitution’s explicit separation of powers provision imposes a stronger non-delegation doctrine on the Legislature than the federal constitution does on Congress. See *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

<sup>13</sup> See, e.g., *Department of Legal Affairs v. Rogers*, 329 So.2d 257 (Fla. 1976) (holding that the terms “unfair methods of competition” and “unfair or deceptive” in Florida’s “Little FTC Act,” ss. 501.204-501.205, F.S., are not so vague as to be unconstitutional delegations of legislative power).

<sup>14</sup> Conversation with Monesia Brown, Legislative Director, Office of the Attorney General, March 7, 2003.

<sup>15</sup> See *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>16</sup> 448 U.S. 242 (1980).

<sup>17</sup> *Id.* at 249. See also *Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ursery*, 518 U.S. 267 (1996); *United States v. Halper*, 490 U.S. 435 (1989); *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).

<sup>18</sup> See *Hudson*, 522 U.S. at 104.

<sup>19</sup> See *State v. Sobieck*, 701 So.2d 96 (Fla. 5th DCA 1997).

settlements and frustrate the intent of both parties. Moreover, this may compel defendants sued by private parties for civil rights violations to implead the state as a co-plaintiff rather than risk multiple suits, thus consuming resources the Attorney General might rather expend elsewhere.

This bill specifically authorizes the Attorney General to pursue the remedies it authorizes “in any appropriate court.” Hence, claims under this bill could be brought in federal court if there was a basis for federal jurisdiction.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On March 12, 2003, the House Committee on Judiciary adopted one amendment to this bill. This amendment broadens the pre-suit investigative authority of the Office of Civil Rights (“Office”) within the Department of Legal Affairs by allowing the Office to investigate and initiate suits, and authorizing the Attorney General to “administer oaths and affirmations, subpoena witnesses or matter, and collect evidence[,]” with respect to any violation of ch. 760, F.S., rather than only s. 760.51, F.S. The bill was then reported favorably with a committee substitute.

On March 24, 2003, the Committee on State Administration adopted one amendment changing the definition of “employer” under the Florida Civil Rights Act of 1992. The bill was then reported favorably with a committee substitute.