

II. Present Situation:

Federal Americans with Disabilities Act

Prior to the enactment of the Americans with Disabilities Act (ADA), society tended to isolate and segregate individuals with disabilities and, unlike individuals who may have experienced other forms of discrimination, individuals experiencing discrimination based on a disability had no legal recourse.¹ In 1990, President George H.W. Bush signed the Americans with Disabilities Act into law,² making it the first comprehensive declaration of equality for people with disabilities. The ADA guarantees equal opportunity for all persons with disabilities in areas such as employment, public services, public transportation, public accommodations, and telecommunications. The ADA gives persons with disabilities the same civil rights protection afforded to individuals based on race, color, sex, national origin, age, and religion.³

Many of the provisions of the ADA are based on section 504 of the Rehabilitation Act of 1973.⁴ For example, the ADA, like section 504, defines a person with a disability as someone with a physical or mental impairment that substantially limits that person in some major life activity, someone with a record of such impairment, or someone who is regarded as having such an impairment.⁵ If an organization or employer violates the ADA, a complaint must be filed with the Equal Employment Opportunity Commission (EEOC or commission) within 180 days from the alleged unlawful practices. The commission will then investigate the complaint. The commission shall dismiss the charge and notify both parties if the investigation does not reveal probable cause of discrimination. If the commission does find probable cause, it must try to eliminate the unlawful discrimination through informal methods.⁶ If the commission cannot reconcile the problem within 30 days after the complaint is the filed, it may file a civil action against the party as long as the party is not a governmental entity. If the party is a governmental entity, the commission shall refer the case to the Attorney General, who may then bring a civil action against the party.⁷ The complaining party may recover compensatory and punitive damages if the employer or organization is found guilty of discrimination, as well as two years of back pay.⁸

In 2008, Congress amended the ADA to revise the definition of “disability” and address several Supreme Court decisions⁹ and portions of the EEOC regulations. The effect of the changes was to make it easier for an individual seeking protection under the ADA to establish that he or she

¹ See 42 U.S.C. s. 12101.

² 42 U.S.C. s. 12101 *et seq.*

³ Disabled World, *American Disability Act*, <http://www.disabled-world.com/disability/ada/> (last visited Mar. 24, 2010).

⁴ Section 504 of the Rehabilitation Act of 1973 is a federal law that protects qualified individuals from discrimination by prohibiting organizations from excluding or denying program benefits or services to an individual with a disability. Office for Civil Rights, U.S. Dep’t of Health and Human Servs., *Your Rights Under Section 504 of the Rehabilitation Act* (2006), available at <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf> (last visited Mar. 24, 2010).

⁵ 42 U.S.C. s. 12102.

⁶ 42 U.S.C. s. 2000e-5.

⁷ *Id.*

⁸ *Id.*; see also s. 42 U.S.C. s. 1981a(a)(2).

⁹ *Sutton v. United Air Lines*, 527 U.S. 471 (1999), *overturned* by Pub. L. 110-325 (2009); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), *overturned* by Pub. L. 110-325 (2009).

has a disability within the meaning of law.¹⁰ The amendments to the ADA went into effect January 1, 2009,¹¹ and a United States Court of Appeals has held that they do not apply retroactively.¹²

Civil Rights Acts

Federal

In 1964, Congress passed the Civil Rights Act (Act), which forbids discrimination on the basis of sex, as well as race, in hiring, promoting, or firing. Specifically, the Act “made it unlawful for an employer to ‘fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual’s race, color, religion, sex, or national origin.’”¹³

Title VII of the Act created the Equal Employment Opportunity Commission (EEOC or commission) to implement the law. Since its creation, Congress has expanded the powers of the EEOC to include investigatory authority, creating conciliation programs, filing lawsuits, and conducting voluntary assistance programs.¹⁴ Today the EEOC enforces a range of federal laws beyond the Civil Rights Act of 1964, including the Age Discrimination Act of 1967, the Equal Pay Act of 1963, the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and Section 501 of the Rehabilitation Act of 1973.¹⁵ In 2009, the EEOC recovered approximately \$294 million in monetary benefits from charges filed under all of the statutes enforced by the EEOC.¹⁶

Florida

Florida enacted its Civil Rights Act (act) in 1992 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.”¹⁷ Under the act, it is illegal for an employer to fire or fail to hire someone, or limit or deprive an individual of employment opportunities, or adversely affect an individual’s status as an employee, because of that person’s race, color, religion, sex, national origin, age, handicap, or marital status.¹⁸

¹⁰ United States Equal Employment Opportunity Comm’n, *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, http://www.eeoc.gov/laws/statutes/adaaa_notice.cfm (last visited Mar. 24, 2010).

¹¹ Pub. L. 110-325 (2009).

¹² *See Lytes v. DC Water and Sewer Authority*, 572 F.3d 936 (C.A.D.C. 2009).

¹³ The Nat’l Archives, *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, <http://www.archives.gov/education/lessons/civil-rights-act/> (last visited Mar. 24, 2010) (internal citations omitted).

¹⁴ *Id.*; see also United States Equal Employment Opportunity Comm’n, *Laws Enforced by EEOC*, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Mr. 24, 2010).

¹⁵ The Nat’l Archives, *supra* note 13.

¹⁶ United States Equal Employment Opportunity Comm’n, *All Statutes: FY 1997 – FY 2009*, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Mar. 24, 2010).

¹⁷ Section 760.01(2), F.S.

¹⁸ Section 760.10(1), F.S.

The act created the Florida Commission on Human Relations (FCHR) in order to promote and encourage the fair treatment of all persons rather than discriminate based on a person's race, color, religion, sex, national origin, age, handicap, or marital status.¹⁹ An injured party may file a complaint with the FCHR within 365 days of the alleged violation, naming the employer, employment agency, labor organization, or joint labor-management committee. The FCHR must send a copy of the complaint to the alleged violator within five days of the complaint being filed, and that person has 25 days to file an answer. The FCHR then completes an investigation of the complaint, and it has 180 days to determine whether probable cause exists that a discriminatory practice occurred. If probable cause does not exist, the FCHR dismisses the complaint. However, if the FCHR finds probable cause, the injured party may either bring a civil action against the person or request an administrative hearing. If a civil action is instituted, the injured party may receive compensatory damages, including damages for intangible injuries, and punitive damages.²⁰

Florida Bill of Rights of Persons with Developmental Disabilities

The Legislature enacted ch. 393, F.S., to “improve the quality of life of developmentally challenged adults by allowing a family member or other interested party the ability to act on their behalf in making certain decisions such as medical care.”²¹ Chapter 393, F.S., authorizes services to be provided to persons with developmental disabilities, which are administered by the Agency for Persons with Disabilities. Florida Statutes define “developmental disability” as a “disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.”²²

In 1975, the Florida Bill of Rights of Persons with Developmental Disabilities was created to:

- Articulate the legal and human rights of persons with developmental disabilities;
- Provide a mechanism for the identification, evaluation, and treatment of persons with developmental disabilities;
- Divert individuals from institutional commitment to less costly, more effective community environments;
- Fund improvements in the program;
- Ensure that persons with developmental disabilities receive treatment and habilitation;
- Provide programs for the proper habilitation and treatment of persons with developmental disabilities, including comprehensive medical and dental care, education, recreation, therapy, training, social services, transportation, and guardianship;
- Effectuate the principles of self-determination through the establishment of community services; and
- Achieve an ongoing reduction in the use of restraint and seclusion in facilities and programs serving persons with developmental disabilities.²³

¹⁹ Section 760.05, F.S.

²⁰ Section 760.11, F.S.

²¹ Susan Sexton and Lisa Smith, *Guardianship Advocacy: Helping Developmentally Challenged Adults in the Community* (Feb. 21, 2008) (on file with the Senate Committee on Judiciary).

²² Section 393.063(9), F.S.

²³ Section 393.13(2)(d), F.S.

The bill of rights provides that persons with developmental disabilities have the right to:

- Dignity, privacy, and humane care, including the right to be free from sexual abuse in residential facilities;
- Religious freedom and practice;
- Receive services which protect the personal liberty of the individual and which are provided in the least restrictive conditions necessary;
- Participate in an appropriate program of quality education and training services regardless of age or degree of disability;
- Social interaction;
- Physical exercise and recreational opportunities;
- Be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse, or neglect;
- Consent to or refuse treatment;
- Participate in any program or activity that receives public funds; and
- Vote in public elections.²⁴

If a person violates or abuses these rights and privileges, that person is liable for damages as determined by law. However, a person is immune from liability if he or she acts in good faith compliance with the provisions of s. 393.13, F.S. A person is not relieved of liability if the person is found guilty of negligence, misfeasance, nonfeasance, or malfeasance.²⁵

III. Effect of Proposed Changes:

Section 1 amends s. 393.13, F.S., Florida's Bill of Rights of Persons with Developmental Disabilities, to provide that all persons with developmental disabilities have a right to be free from all abuse (not just sexual abuse), neglect, and exploitation, regardless of the setting. This section provides that persons with developmental disabilities also have a right to be free from negligence. Additionally, this section opens up liability to entities, as well as individuals, who violate the rights or privileges of persons with developmental disabilities. The exemption from liability is to expand to entities that act in good faith compliance with the provisions of ch. 393, F.S. However, an individual or entity is not relieved of liability if the individual or entity is liable for or guilty of negligence, misfeasance, nonfeasance, or malfeasance.

The intent is unclear as to why the bill is adding that an individual or entity can be *liable for* negligence. It appears that current law, which provides that an individual or entity is not relieved of liability if the individual or entity *is guilty of* negligence, accomplishes the same thing. It is also unclear how an individual or entity can be "liable for" negligence. Additionally, it is unclear how a person has a right to be free from "negligence."

Section 10 creates s. 760.15, F.S., the Floridians with Disabilities Act, and adopts the federal Americans with Disabilities Act of 1990 (federal act), as amended in 2008, and makes it a part of the Florida Civil Rights Act of 1992. The bill provides legislative findings that barriers remain

²⁴ Section 393.13(3), F.S.

²⁵ Section 393.13(5), F.S.

which prevent persons with disabilities from accessing the full range of public and private programs and services that are available to other citizens of the state. Accordingly, the Legislature intends to promote greater awareness of the obligations under the federal act by enacting it as the law of Florida. The bill also authorizes use of the civil and administrative remedies of the Florida Civil Rights Act to redress violations of the federal act. The bill clarifies that a person may not seek relief under the newly created Floridians with Disabilities Act if that person already has an action pending in state or federal court under the federal act. The bill also clarifies that it does not expand any substantive protections against discrimination based on disability beyond those provided in the federal act or otherwise in Florida law.

Section 4 amends s. 760.02, F.S., to add that, for the purposes of the Floridians with Disabilities Act, the term “public accommodations” includes “a facility or entity included in the definition of the term ‘place of public accommodation’ under Title III of the federal Americans with Disabilities Act, whichever is more inclusive.” According to the Florida Commission on Human Relations (FCHR), essentially three types of public accommodations are covered under current state law: hotels (places of lodging), restaurants, and theaters. However, with the change in this bill to expand the state law definition of “public accommodations” to include the same establishments as the federal law, it will create an increased burden on the FCHR. Under current law, if a person experiences discrimination based on a disability in a public accommodation not covered in Florida’s definition, that person must seek his or her remedy by going to the federal Equal Employment Opportunity Commission, rather than the FCHR. However, with the change in the bill, aggrieved individuals may be more likely to file a complaint with the FCHR.²⁶

Finally, Section 9 amends s. 760.11, F.S., to allow a person aggrieved by a violation of ss. 413.08 and 553.501-553.513, F.S.,²⁷ to file a complaint with the Florida Commission on Human Relations (FCHR) in order to seek administrative and civil remedies. The bill adds that a person may file a complaint with the FCHR alleging that a public accommodation (in addition to an employer, employment agency, labor organization, or joint labor-management committee) violated the Florida Civil Rights Act. The bill also specifies that the FCHR must send a copy of a filed complaint to the person who allegedly committed the violation by registered mail.

The bill also changes the term “handicap” to “disability” in appropriate sections of law and makes technical and conforming changes.

The effective date of the bill is July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

²⁶ E-mail from Hunter Barnett, Florida Comm’n on Human Relations (Mar. 25, 2010) (on file with the Senate Committee on Judiciary).

²⁷ Section 413.08, F.S., relates to the rights of an individual with a disability, use of a service animal, and discrimination in public employment or housing accommodations. Sections 553.501-553.513, F.S., relate to accessibility by handicapped persons in building construction.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill expands the definition of “public accommodations” to include all facilities and entities included in the definition in the federal Americans with Disabilities Act. Accordingly, the bill may have a fiscal impact on businesses that are now included within the definition of “public accommodations” and are sued for discriminatory practices.

C. Government Sector Impact:

The bill establishes a cause of action under state law for disability-based discrimination and expands the legal remedies available to persons whose rights have been violated. According to the Office of the State Courts Administrator:

By expanding the remedies and financial compensation options that are available, the bill encourages individuals with disabilities to elect to file suit under the state law, rather than the federal Americans with Disabilities Act. This shift in workload from the federal courts to the state courts comes at a time when state court funding is scarce and claims of discrimination, especially with regard to employment, are rising.

The number of workers claiming job discrimination based on disability, religion, or national origin surged to a new high in 2009, as job bias complaints overall stayed at near-record levels. The EEOC [Equal Employment Opportunity Commission] reported that charges of disability discrimination rose by about 10% to 21,451 claims, the largest increase of any category.

One should also consider that the ADA Amendments Act, which became effective January 1, 2009, changed the

definition of “disability” under the ADA for the express purpose of covering more people. There is considerable speculation that more lawsuits will be filed alleging violations of the ADA, due to the change in the definition.²⁸

Additionally, the bill expands the definition of “public accommodation” and adds sections of law that may be violated and provides that an aggrieved person may file a complaint with the Florida Commission on Human Relations (FCHR) for those violations. Accordingly, the bill may create additional workload for the FCHR. According to the FCHR:

Conservatively, FCHR estimates that the provisions of SB 2396 could potentially generate between 900 and 1,000 additional cases each year – cases that would involve some assertion of disability, whether due to age, retaliation, etc. in employment, housing, and public accommodations. Given this additional workload, the FCHR anticipates that it will need:

- 6 FTE Investigator IIs
- 2 FTE Senior Attorneys
- 3 FTE Administrative Assistants
- TOTAL: 11 FTEs; \$728,755 (includes salary and benefits, expenses, and human resources services – support from DMS)²⁹

FCHR also anticipates needing additional resources to provide administrative support for the increased workload (*e.g.*, intake, mail, and information technology staff; supplies; and operating expenses). The exact fiscal impact of the additional administrative support is unknown at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²⁸ Office of the State Courts Administrator, *Judicial Impact Statement SB 2396* (March 24, 2010) (on file with the Senate Committee on Judiciary).

²⁹ Florida Comm’n on Human Relations, *Additional Comments on SB 2396 from the Florida Commission on Human Relations* (Mar. 26, 2010) (on file with the Senate Committee on Judiciary).

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 6, 2010”

The bill makes two technical changes, by restoring an erroneously deleted cross-reference to s. 509.092, F.S., and correcting a cross-reference to s. 760.15, F.S.

- B. **Amendments:**

None.