SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SJR 1344

SPONSOR: Judiciary Committee and Senator Jones

SUBJECT: Discrimination in Public Employment, Education, and Procurement of Goods and Services

DATE: April 25, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Fav/4 amendments
2.	Matthews	Johnson	JU	Favorable/CS
3.			RC	
4.				
5.				

I. Summary:

The joint resolution creates s. 26 of Article I of the *Florida Constitution* to provide that the state or a municipality, county, district, public college or university, or other political subdivision or government instrumentality of or within the state shall not discriminate in public employment, public education, or public procurement of goods and services against any person on the basis of sex, race, ethnicity, color, or national origin. Furthermore, the joint resolution provides that it is not discrimination for these entities to take affirmative action to promote equal opportunity to the extent permissible under the *United States Constitution*.

II. Present Situation:

A. Constitutional Amendment Process

Article XI of the *Florida Constitution* sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing. If the proposed amendment is approved by a vote of the electors, it becomes effective as an amendment to the *Florida Constitution* on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

B. Equal Protection

Article I, s. 2 of the *Florida Constitution*, which sets forth Florida's constitutional guaranty of equal protection, provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

This constitutional provision was recently amended in 1998. *See* Revision 9,1997-98 Constitution Revision Commission. Revision 9 added the term(s): (a) "female and male alike" to modify the term "natural persons" for the purpose of securing the equality of women; (b) "national origin" to the listing of protected classes so that strict scrutiny of classifications based upon the place of a person's birth, ancestry, or ethnicity would be required; and (c) "physical disability" as a substitute for "physical handicap" due to the recognition that some people regard the term "handicap" as derogatory.

Similarly, section 1 of the 14th Amendment in the *United States Constitution* provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Additionally, the due process clause under the Fifth Amendment of the *United States Constitution* embraces the principle of equal protection of the law. These constitutional guarantees of equal protection of the laws are designed to prevent any person or class of persons from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation. Equal protection requires that once a state grants a right, it must accord that right to all without invidious discrimination.[1]

The guaranty of equal protection, however, does not require that a statute apply equally and uniformly to all persons within the state. It is sufficient if the statute applies uniformly to all persons who are similarly situated.[2] Furthermore, reasonable classifications, meaning a grouping of things because they agree with one another in certain particulars and differ from other things in those particulars, is permissible under the equal protection clause, so long as the classification is not arbitrary and is based on some difference in the classes having a substantial relation to the purpose of the legislation.[3]

C. Race or ethnicity conscious programs

Pursuant to federal law, programs which create a classification based on race and ethnicity are subject to strict scrutiny; i.e., the program must be based upon a compelling governmental interest and must be narrowly tailored to achieve that interest.[4] In order for a race or ethnicity conscious program to be upheld, there must be a "strong basis in the evidence" in support of the program

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[1] *Florida Department of Transportation v. E.T. Legg & Co.,* 472 So.2d 1336 (Fla. 4th DCA 1985).

[2] *State ex rel. Spence v. Bryan*, 87 Fla 56 (1924).

[3] *Greater Miami Financial Corp. v. Dickinson*, 214 So.2d 874 (Fla 1968).

[4] *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

which rests on a particularized showing of the governmental unit's active or passive participation in past or present discrimination.[5]

In recent years, few race-based affirmative action programs have survived the strict scrutiny analysis. In fact since 1995, only one federal court has upheld an affirmative action program challenged on equal protection grounds because in that case discrimination on the part of the government was actually proven.[6]

In Florida, two affirmative action programs based on racial and ethnicity classifications have recently been struck by the federal courts. In *Phillips & Jordan v. Watts,* 13 F.Supp.2d 1308 (N.D. Fla. 1998), a Florida Department of Transportation (DOT) affirmative action contract procurement program was challenged. In this case, a study by MGT of America showed a disparity index[7] of 94.32 for FY 1989-90, and 38.78 for FY 1990-91 in DOT maintenance contracts awarded to black-owned businesses, and a disparity index of 19.33 for FY 1989-90 and 47.25 for FY 1990-91 for Hispanic-owned businesses. In response to this study, the DOT implemented a program which authorized set-aside contracts for competition among only black- and Hispanic-owned businesses.

The program was subsequently challenged on equal protection grounds. The DOT argued the program was constitutional because even though it did not discriminate when contracting, the disparity indices in the MGT report demonstrated that the DOT must have been a passive participant in discrimination, which the DOT speculated emanated from the local construction industry. The Court disagreed, finding that the statistical evidence presented by the DOT merely constituted a generalized assertion of racial discrimination, instead of the required particularized showing that it actively or passively participated in discrimination. The DOT could not simply show that some unknown entity was discriminating because, "[I]t goes without saying that the identity of 'those who discriminate' must be known before a governmental unit may take appropriate measures against 'those who discriminate.'"[8] Thus, the Court held the set aside program unconstitutional. *See also Eng'g Contractors Ass'n of S. Florida, Inc.,* 122 F.3d at 895 (holding Dade County's ordinance which created a minority business certification process and set minority participation goals for county contracts, unconstitutional on equal protection grounds due to a lack of strong or sufficiently probative evidence of discrimination).

D. Gender conscious programs

Pursuant to federal law, programs which create a classification based on gender are subject to intermediate scrutiny; i.e., the program must be substantially related to an important governmental

[5]*Id., Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d 895 (11th Cir. 1997).

[6]*McNamara v. City of Chicago,* 138 F.3d 1219 (7th Cir. 1998); *Recent Judicial Opinions Regarding the Permissibility of Race-Based Personnel Decisions in the Public Schools*, 141 Ed. Law Rep. 1 (March, 2000).

[7]A disparity index is the ratio of the percentage of utilization to the percentage of availability times 100 for each group and year. The court explained that an index of 100 is parity, an index under 100 represents under-utilization, and an index below 80 is generally accepted as evidence of adverse impact. *Id.* at 1311.

[8]*Id.* at 1313-1314.

interest.[9] In order for a gender conscious program to be upheld, there must be "sufficient probative evidence" in support of the government's rationale for enacting a gender preference.[10] Unlike the strict scrutiny test, the government need only show some past societal discrimination based on gender, rather than discrimination by the government, in support of the program.[11]

Based on recent United States Supreme Court case law, it appears the Court is beginning to move toward what some legal commentators have termed "heightened intermediate scrutiny" of classifications based on gender.[12] For example in *United States v. Virginia*, the United States argued that the Virginia Military Institute's (VMI's) male only admissions policy violated equal protection.[13] Moreover, the United States argued that the Court should adopt a strict scrutiny standard for gender classifications.[14] The Court chose not to apply strict scrutiny in its analysis; however, in discussing the intermediate scrutiny standard, the Court added that the proffered justification for a classification based on gender must be "exceedingly persuasive," and that it is a difficult standard for the government to meet.[15] Ultimately, the Court ruled that VMI's male-only admissions policy violated equal protection finding that both of the following justifications proffered by VMI were insufficient: (1) that single-sex education yields important educational benefits and that providing such an option fosters diversity; and (2) that VMI's adverse method of training provides educational benefits that cannot be made available unless modified to women, and that such modifications would destroy VMI's program.

III. Effect of Proposed Changes:

Section 1. The resolution creates s. 26 of Article I of the *Florida Constitution*. It provides that the state or a municipality, county, district, public college or university, or other political subdivision[16] or government instrumentality of or within the state (hereinafter collectively referred to as "the state"), shall not discriminate in public employment, public education, or public procurement of goods and services against any person on the basis of sex, race, ethnicity, color, or national origin.

The effect of this provision will be to add sex to the list of protected classes, i.e., race, religion, national origin, and physical disability, contained in the *Florida Constitution*. As a result, it could be argued that the class of sex within the context of public employment, education, and

[9] *Engineering Contractors Association of South Florida, Inc.* at 909.

[10] *Id.*

[11] *Id.*

[12] *Do We Still Need a Federal Equal Rights Amendment?*, 44-Feb B. BJ 10, 27 (2000).

[13] *United States v. Virginia*, 518 U.S. 515 (1996).

[14] *Id.*

[15] *Id*. at 146-147.

[16] "Political subdivision" is statutorily defined as counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state. Section 1.01(8), F.S.

procurement of goods and services is now subject to strict scrutiny review in Florida, like race and ethnicity, rather than current law's provision of intermediate scrutiny.

The provision also adds the classes of color and ethnicity to the *Florida Constitution*. The addition of ethnicity does not appear to change current law as the constitution currently makes national origin a protected class which the 1997-98 Constitution Revision Commission comments state embrace ethnicity.

Furthermore, the resolution provides that it is not discrimination for the state to take affirmative action to promote equal opportunity to the extent permissible under the *United States Constitution*.

This provision of the resolution reiterates the existing fact that Florida's affirmative action programs are subject to the constitutional limitations set forth in federal case law which, as discussed in the "Present Situation" section of this analysis, subject affirmative action programs based on race and ethnicity to strict scrutiny, and programs based on gender to intermediate scrutiny. Furthermore, while the provision does not require affirmative action programs to be provided, it will serve to prohibit the outlawing of affirmative action programs in Florida.

Finally, the resolution states that the new constitutional provision does not invalidate any court order or consent decree that is in force as of the effective date of this section, nor does it prohibit action taken to establish or maintain eligibility for any federal program.

This resolution provides no effective date for the constitutional amendment. In accordance with section 5 of Article XI of the *Florida Constitution*, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by the electorate.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Municipalities and counties will be affected by the joint resolution in the same manner the state will. *See* VII, "Related Issues", *infra*.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Potentially, legal challenges will be generated if the constitutional amendment proposed by the joint resolution is passed by the citizens of this state. Consequently, there may be an indeterminate fiscal impact on the state court system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under current federal and Florida constitutional law, the government is prohibited from discriminating based upon the classes of race, religion, national origin, and physical disability. This resolution would add the classes of sex and color to this list. As a result of these additions, it can now be argued that a discrimination claim based upon sex within the context of public employment, education, or procurement of goods and services is subject to strict scrutiny review by the court, rather than current law's provision of intermediate scrutiny. Application of strict scrutiny would increase the government's burden in proving a justification for the discrimination. Moreover, the addition of the class of color may allow a new, but likely very narrow group of discrimination claims to be filed.

Although this joint resolution does not require the government to provide affirmative action programs, it can not prohibit or otherwise outlaw affirmative action programs.

VIII. Amendments:

None.