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 0046-A

SPONSOR: Committee on Judiciary, Senator Villalobos and others

SUBJECT: Florida Civil Rights Act of 1992

DATE: May 15, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Roberts	Roberts	JU	Fav/CS
2.				
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I. Summary:

This committee substitute amends the Florida Civil Rights Act of 1992 and provides that this act may be cited as the "Dr. Marvin Davies Florida Civil Rights Act." The committee substitute 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 great public interest." The committee substitute further provides that a respondent in such a proceeding may request, before any responsive pleading is due, that a hearing be held at which the court shall determine whether the complaint on its face makes a prima facie showing that a pattern or practice of discrimination exists or that, as a result of discrimination, "an issue of great public interest" exists. A prevailing party would be entitled to an award of reasonable attorney's fees and costs and any damages recovered would accrue to the injured party.

The committee substitute also expands the power of the Attorney General's Office of Civil Rights to investigate and initiate actions under the new statutory provisions of this act.

Finally, the committee substitute defines the term "public accommodations" for purposes of the Florida Civil Rights Act (ss. 760.01 – 760.11, F.S.) and s. 509.092, F.S., which deals with public lodging establishments and public food service establishments and their rights as private enterprises.

This bill creates s. 760.021 and 760.08, F.S.; and amends ss. 16.57 and 760.02, F.S.

II. Present Situation:

The Florida Civil Rights Act of 1992
The general purpose of the Florida Civil Rights Act is

> . . . 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 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.

Section 760.02, F.S., contains definitions that are applicable to the chapter, including "discriminatory practice,"[1] and "national origin."[2] The section does not contain a definition for the term "public accommodations."

At least one section of the Florida Civil Right's Act[3] 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.[4]

The remedies for unlawful discrimination under the Act 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 periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

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[1] Section 760.02(4), F.S., defines "discriminatory practice" to mean any violation of the Florida Civil Rights Act of 1992.
[2] Section 760.02(5), F.S., defines "national origin" to include ancestry.
[3] Section 760.10, F.S., designates unlawful employment practices
[4] *O'Laughlin v. Pinchback*, 579 So.2d 788 (Fla. 1st DCA 1991).

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 great public interest.

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.[5] 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.[6] 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.[7]

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, and one year following the creation of the Office of Civil Rights within the Attorney General's office.[8] Specifically, the Florida Commission on Human Relations is statutorily authorized to receive, initiate, investigate (including issuing subpoenas), seek to conciliate, hold hearings on, and act

[5] 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.

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

[7] See s. 760.60, F.S.

[8] 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.

upon complaints alleging any discriminatory practice under the Florida Civil Rights Act in the areas of education, employment, housing or public accommodations,[9] and certain private clubs.[10] 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.

[9] 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.

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

III. Effect of Proposed Changes:

The committee substitute provides that the Florida Civil Rights Act may be cited as the "Dr. Marvin Davies Florida Civil Rights Act." Dr. Marvin Davies was born on February 16, 1934 in rural turpentine quarters at the edge of Hampton, Florida. A longtime civil rights figure and graduate of Florida A&M University, Dr. Davies led the civil rights movement in Florida from 1963 to 1972, serving as the NAACP's Florida Director. After leaving his NAACP post, he served in a variety of roles, including sixteen years as a special assistant to former Governor and current United States Senator, the Honorable Bob Graham. Dr. Davies died on April 25, 2003 at the VA Medical Center at Bay Pines.

Attorney General's Civil Actions for Discrimination
Section 2 of the committee substitute 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 any person or group

- has engaged in a pattern or practice of discrimination as defined by state law; or
- has been discriminated against as defined by state law and such discrimination raises an issue of great public interest,

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 great public interest" are not defined.

Section 2 of the committee substitute also provides that the respondent may request, before any responsive pleading is due, that a hearing be held no earlier than 5 days but no more than 30 days after the filing of the complaint, at which the court shall determine whether the complaint on its face, makes a prima facie showing that a pattern or practice of discrimination exists, or that, as a result of discrimination, an issue of great public interest exists.

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. The prevailing party would be entitled to an award of reasonable attorney's fees and costs. Any damages recovered shall accrue to the injured party.

Section 3 of the committee substitute expands the power of the Attorney General's Office of Civil Rights to investigate and initiate actions under the new statutory provision in section 2.

This new legislation tracks in part similar 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.[11] *See* 42 U.S.C. §2000e-6.

Sections 4 and 5 of the committee substitute prohibit discrimination in places of public accommodation. Specifically, section 5 which creates s. 760.08, F.S., provides that:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.

Section 4 adds a definition for the term "public accommodations" for purposes of its application under the Florida Civil Rights Act and s. 509.092, F.S., pertaining to public lodging establishments and public food service establishments and their rights as private enterprises.[12] The term "public accommodations" means "places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments."

[11] 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)

[12] Section 509.092, F.S., states that "[p]ublic lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, physical disability, or national origin. A person aggrieved by a violation of a rule adopted under this section has a right of action pursuant to s. 760.11."

Each of the following establishments which serve the public would be considered a place of public accommodation under this bill:

- Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of the establishment as his or her residence.
- Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.
- Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.
- Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

The prohibition against persons in places of public accommodations is intended to track in part similar language found under the federal Civil Rights Act which prohibits discrimination in places of public accommodation and allows the United States Attorney General to enforce against such discrimination.[13] There are, however, several differences between the proposed language and the federal law. Federal law defines public accommodations to include at a minimum prohibits inns or other lodgings with more than 5 rooms for rent. This proposed legislation prohibits discrimination in inns or lodgings with more than 4 rooms. Federal law prohibits the discrimination in places of public accommodations on the grounds of race, color, religion, or national origin. This proposed legislation prohibits discrimination in such places on the grounds of race, color, religion, national origin, sex, handicap or familial status. Florida Civil Rights Act already provides some form of civil relief after administrative remedies are exhausted, for persons from discrimination on the grounds of gender, handicap, marital status and age depending on whether the claim is based on education, housing, employment or public accommodations.[14] The proposed legislative language would have the effect of providing administrative and civil relief to aggrieved persons of discrimination on these grounds and of authorizing the Florida's Attorney General to proceed directly against such discrimination based on the provisions of this bill in cases involving patterns or practices of discrimination or involving issues of great public interest.

With the passage of this bill, Florida would join the ranks of eight other states that have some variation of the 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).

[13] See 42 U.S.C. 2000a; 42 U.S.C. 2000a-5

[14] See s. 760.07, F.S. Notably public accommodations under this section is expressly stated not to include "lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically." It is indeterminate whether this definition and the newly created definition would be construed to be in conflict.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is unclear whether the discrimination based on sex is appropriately cognizable or distinct from discrimination based on gender. The phrase "sex discrimination" and "gender discrimination" appear to be used interchangeably in court cases when determining whether there is discrimination "based on sex" or "because of sex." The clear exception appears to be in cases of discrimination arising from sexual harassment which is clearly to be classified as sex discrimination. At any rate, any equal protection challenge for gender or sex discrimination would not likely be subject to strict scrutiny because the female gender is not recognized as a special protected class such as those who are protected because of 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 there was a rational relationship in which the state would have to show that the classification resulting in discrimination advances important governmental objectives and the discriminatory means are substantially related to the those objectives. *See Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001).

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.

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*,[15] 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.

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 committee substitute 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, although the bill does provide for recovered damages to accrue to the "injured party". The committee substitute also provides that the "prevailing party" shall be entitled to an award of reasonable attorney's fees and costs. If the Attorney General prevails in such a proceeding, it is unclear whether the award of attorney's fees and costs is intended to go to the injured party or the Attorney General. As the committee substitute is written, it could be argued that the intent would be that the award of attorneys fees and costs would go to the Attorney General if successful, not the injured party.

[15] 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.

The committee substitute 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.

Further, neither the committee substitute 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.

VIII. Amendments:

None.