

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty – This bill provides that, under certain circumstances, a person may have up to four years to file a claim of discrimination.

B. EFFECT OF PROPOSED CHANGES:

Introduction

Chapter 760, F.S., ensures that all individuals in Florida are protected against discrimination in areas of employment, housing and other opportunities based on race, color, religion, sex, national origin, age, handicap, or marital or familial status.

Section 760.03, F.S., creates the Florida Commission on Human Relations (Commission) to carry out the purposes of this chapter. Section 760.04, F.S., assigns the Commission to the Department of Management Services; however, the Commission is not subject to any control of, supervision by, or direction from the department. The Commission is comprised of 12 persons who are appointed by the Governor and confirmed by the Senate. At least one member of the Commission, as required by law, must be 60 years of age or older. The Commission is empowered, pursuant to s. 760.06, F.S., to receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice.

The Florida Civil Rights Act

Part I of Chapter 760 (ss. 760.01-760.11, F.S.) and s. 509.092, F.S., constitute the Florida Civil Rights Act of 1992. The purposes of this Act are to:

- Secure for all individuals in Florida freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status;
- Protect these individuals' interest in personal dignity;
- Make available to the state the full productive capacities of these individuals;
- Secure the state against domestic strife and unrest;
- Preserve the public safety, health, and general welfare; and
- Promote the interests, rights, and privileges of individuals within the state.¹

The Commission, as authorized by the Act, investigates all types of discrimination complaints, including complaints relating to employment discrimination. The Act specifically provides what constitutes unlawful employment discrimination practices. For instance, it is unlawful to discharge or to fail or refuse to hire any individual or 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.²

Section 760.08, F.S., provides that all persons are entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.

¹ Section 760.01(2), F.S.

² Section 760.10(1)(a), F.S.

Section 509.092, F.S., allows operators of public lodging establishments and public food service establishments to refuse accommodations or service to any person who is objectionable or undesirable to the operator. However, such refusal cannot be based upon race, creed, color, sex, physical disability, or national origin. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations that are made available for public use either occasionally or periodically.

Remedies for justified discrimination actions are also provided in chapter 760, F.S. Section 760.07, F.S., provides that anyone discriminated against because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations is entitled to the relief and damages described in this chapter, unless greater damages are expressly provided.

Any individual who believes he or she has been unlawfully discriminated against can file a complaint with the Commission. The filing of this complaint must be within 365 days of the date on which the alleged violation occurred. The Commission then has 180 days from the filing of the complaint to determine whether or not there is reasonable cause to believe that a discriminatory practice occurred. If the Commission determines reasonable cause, the person may either bring a civil action in a court of competent jurisdiction or request an administrative hearing pursuant to the Administrative Procedures Act (chapter 120, F.S.). If the Commission determines that there is no reasonable cause, the complaint is dismissed, at which time the complainant has 35 days from such determination to request an administrative hearing. Upon the issuance of a recommended order by the administrative law judge, the Commission may reject, adopt, or modify the recommended order by issuing its final order.³ In lieu of filing the complaint with the commission, a complaint may be filed with the federal Equal Employment Opportunity Commission or with any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80.

Florida Fair Housing Act

Part II of Chapter 760, F.S. (ss. 760.20-760.37, F.S.) constitutes the Florida Fair Housing Act. It is the state's policy, as provided in s. 760.21, F.S., to provide, within constitutional limitations, for fair housing throughout the state. Part II defines what constitutes unlawful housing discrimination. For instance, it is unlawful to refuse or sell or rent or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion. In addition, protection is afforded an individual who is pregnant or in the process of securing legal custody of a child 18 years of age or younger, or who is disabled or is associated with a disabled person.

Discrimination Based on "Sex" (Inclusion of Pregnancy, Childbirth, and Related Medical Conditions)

The definitions for chapter 760, F.S., are found in s. 760.02, F.S. Although discrimination on the basis of "sex" is grounds for a discrimination claim, the terms "sex", "because of sex", "without regard to sex", and "on the basis of sex" are not defined in current Florida law.

The federal law provides that:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title (section 703(h)) shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered

³ Section 760.11, F.S.

if the fetus were carried to term, or except where medical complications have arise from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.⁴

In 1991, the 1st District Court of Appeals in Florida held that Title VII of the federal law preempted Florida law (see *O'Loughlin v. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991)). Based on this Florida court's interpretation, the Commission, which investigates employment discrimination cases, has thus been construing the term "sex" to include pregnancy, childbirth, and related medical conditions.

Proponents of this bill state that in order for Florida law to be clear and consistent, the term "sex", as provided in chapter 760, F.S., should be clarified.

Effect of Bill: The bill amends s. 760.10, F.S., to clarify the phrases "because of sex", and on "the basis of sex" to include pregnancy, childbirth, or other related medical conditions. Apparently, the Commission already investigates such complaints pursuant to federal law and therefore, the proposed change would not create a fiscal or workload impact on the Commission's operations or on employers in this state.

Definition of Disability vs. Handicap

Currently, the Florida Civil Rights Act does not define "handicap." However, the Fair Housing Act (Part II of chapter 760, F.S.) defines the term "handicap" in s. 760.22(7), F.S., to mean:

(a) A person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment; or

(b) A person has a developmental disability as defined in s. 383.963.

The Americans with Disabilities Act, Title III (codified at 28 CFR Part 36) defines the term "disability", with respect to an individual, to mean "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." It further defines what constitutes physical or mental impairment. Any person meeting the test of physical or mental impairment, as defined in federal law, is considered to be an individual with a disability for purposes of coverage under the Act.

In addition, paragraph (5) of the federal definition also lists certain conditions that are not included within the definition of "disability." Excluded conditions under the term "disability" in federal law include: transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

Proponents if this bill state that Florida law currently uses what can be viewed as an archaic term ("handicap") to define a mental or physical impairment and the law should be amended to reflect a more up-to-date term as that provided in federal law. In addition, Florida law does not provide that certain conditions are excluded from its definition of handicap. Apparently, the Commission has had several cases from complainants stating that they were discriminated against based on what they alleged was a disability; however, it was reported that the Commission has routinely dismissed them based on federal law, with Commission orders stating that it had no jurisdiction over such matters. Proponents state that clarifying language, as that provided in the federal law, should be included in the Florida Statutes.

⁴ 42 USC 2000e(k) (2000).

Effect of Bill: This bill changes the term “handicap” to “disability,” and makes conforming changes in several sections of chapter 760, F.S., to replace the term “handicap” with “disability”. The bill also clarifies that the term “disability” does not include certain conditions, which is identical to the clarification provided in federal law.

Timeframe for Investigation and Resolution of Complaints

Any individual who believes he or she has been unlawfully discriminated against can file a complaint with the Commission. The filing of this complaint must be within 365 days of the date on which the alleged violation occurred. The Commission then has 180 days from the filing of the complaint to determine whether or not there is reasonable cause to believe that a discriminatory practice has occurred.

Section 760.11(8), F.S., states that in the event the Commission fails to conciliate or determine whether there is reasonable cause on any complaint within 180 days of the filing of the complaint, an aggrieved person may bring a civil action against the person named in the complaint in any court of competent jurisdiction or request an administrative hearing under chapter 120, F.S.

Initially, when a complaint is filed, the Commission must determine if the case meets certain prima facie evidence. As the Commission continues its investigation, it must also ensure that additional information submitted has been completely and accurately provided. Such information may be submitted by either of the parties involved or from other persons (e.g., witnesses to the alleged action, co-workers, etc.) who have knowledge of and information about the case. In some cases, it may be necessary to issue a subpoena in order to obtain this information.

The Auditor General (in Reports No. 2002-102 and 2004-034) cited some concern with the Commission’s ability to timely (within the 180-day timeframe) complete its investigations. In the 2002 report, the Auditor General found that 15 of the 20 cases reviewed (75%) exceeded the statutory timeframe. In the 2004 report, the Auditor General found some improvement in the Commission’s progress in timely investigating and closing its cases, citing that about 60 percent of the selected cases exceeded the 180-day timeframe.

Proponents of the bill state that the Commission needs some flexibility in meeting the statutory timeframe, and that ch. 760, F.S., should be amended to reflect such authority.

Effect of Bill: The bill authorizes the executive director of the Commission to extend the investigation of a complaint for up to an additional 60 days when extenuating circumstances outside the control of the Commission cause delays in investigating and resolving complaints. Such circumstances include the parties have engaged in mediation; a necessary party is unable to be located; one or more of the parties fails to cooperate in the investigation, thereby necessitating the issuance of a subpoena; the respondent has filed bankruptcy; or other circumstances beyond the control of the Commission.

Notification Procedures and Timeframes

Section 760.11, F.S., requires the Commission, within 5 days of receiving a complaint, to send a copy of the complaint to the person who allegedly committed the violation (respondent). Because the law implies that notification is to be within five “calendar” days, the timeframe for when a complaint is received and then reviewed by an investigator may span weekends and/or holidays.

In the 2002 Auditor General report (No. 2002-102), it was found that notification to the respondent was not mailed within the 5-day timeframe for 16 of the 20 case files reviewed (80%). In a later report (Report No. 2004-034), notification was not mailed within the 5-day timeframe for 18 of the 30 case files reviewed (60%). Some of this delay, as noted by the Auditor General, was attributed to certain operating procedures that required investigators to obtain additional information to clarify the nature and category of the complaint (also known as “perfecting” the case) prior to mailing a copy of the complaint and notifying the respondent of such complaint.

Section 760.11, F.S., also requires the Commission to use registered mail when mailing such notification. In April 2003, as a cost savings measure, the Commission reports that it began using certified mail to notify respondents of complaints. Although certified mail is more expensive than regular mail, it is significantly less expensive than registered mail. The Auditor General recommended, in the same report as that referenced above, that the Commission continue to use certified mail as a cost-savings operational measure and to pursue statutory changes to authorize this procedural and cost-efficient operational change.

Section 760.11(1), F.S.), requires the respondent to respond to a complaint within 25 days. However, this “clock” begins running on the date the complaint is received by the Commission. Given the five-day notification, the respondent actually has only 20 (or less) days in which to respond. Proponents state that allowing the respondent more time to respond to a complaint would enable the respondent to submit more accurate and complete information to the commission and would, ultimately, result in a more expeditious investigation.

Proponents of the bill state that in order to allow the Commission to notify respondents within five full business days, to use certified mail for notification purposes, and to provide a longer timeframe in which a respondent may reply to allegations, ch. 760, F.S., should be amended.

Effect of Bill: The bill clarifies that the Commission has five full business days to notify the respondent that a complaint has been filed. In addition, the bill authorizes the Commission to send such notification by certified mail, return receipt requested. The bill also allows a respondent more time to respond to the complaint and to any Commission request for additional information.

Statute of Limitations for Commencement of Civil Actions

Section 760.11(4), F.S., provides that in the event the Commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved person may either bring a civil action against the person named in the complaint in any court of competent jurisdiction or request an administrative hearing under ss. 120.569 and 120.57, F.S. With regard to civil suits, the Act further provides that a civil action is to commence no later than 1 year after the date of determination of reasonable cause.

Section 760.11(8), F.S., states that in the event that the Commission fails to conciliate or determine whether there is reasonable cause on any complaint within 180 days of the filing of the complaint with the Commission, an aggrieved person may proceed under subsection (4) just as if the Commission had determined that there was reasonable cause. Subsection (4) provides that a complainant may “(a) [b]ring a civil action against the person named in the complaint in any court of competent jurisdiction; or (b) [re]quest an administrative hearing under ss. 120.569 and 120.57. The election by the aggrieved person of filing a civil action or requesting an administrative hearing under this subsection is the exclusive procedure available to the aggrieved person pursuant to this act.”

In a recent court decision (*Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000)), the Florida Supreme Court determined what constitutes the statute of limitation period for bringing a lawsuit under the Florida Civil Rights Act of 1992 when the Commission has not issued an investigative “determination” within 180 days of the receipt of the complaint. Appellate courts in Florida had previously interpreted the statutes to mean that if the Commission had not issued a “reasonable cause” determination within 180 days of the filing of the complaint, the complainant had to file his or her lawsuit within one year of the conclusion of the initial 180-day period or be barred from doing so later. The Florida Supreme Court decision in *Joshua*, however, held that in cases in which a “reasonable cause” determination had not been issued by the Commission, the four-year statute of limitation for causes of action based on statutory liability applied (see s. 95.11(3)(f), F.S.), not a limitation of 180 days plus 1-year from the date the complaint was filed.

While the *Joshua* decision indicates that the four-year statute of limitation for causes of action based on statutory liability applies when the Commission has not issued its determination within the 180-day

period following the filing of the complaint, the Court's decision does not reflect when that four-year time period begins.

Effect of Bill: The bill amends several sections in chapter 760, F.S., to clarify the statute of limitations in which a complainant has to file suit. The bill states that the four-year statute of limitations period applies to certain cases brought pursuant to the Florida Civil Rights Act of 1992, beginning on the date of the alleged discriminatory act. The proposed change conforms ch. 760, F.S., to reflect current court interpretations.

Housing for Older Persons

Section 760.29 (4)(a), F.S., provides that the housing discrimination law does not apply to housing for older persons. Housing for older persons is defined to mean "any state or federal program that the commission determines is specifically designed and operated to assist elderly persons; is intended for, and solely occupied by, persons 62 years of age or older; or intended and operated for occupancy by at least 80% of which are 55 years of age or older and the housing facility or community publishes and adheres to policies and procedures demonstrating such intent."

Any facility claiming this exemption must register with the Commission, which registration must be renewed biennially from the date of original date of filing. The Commission is authorized to establish a reasonable registration fee not to exceed \$20, which is collected biennially. The Commission is statutorily authorized to impose an administrative fine (not to exceed \$500) on a facility or community that knowingly submits false information. However, the Commission is not currently authorized by law to assess a fine for failure to register with the Commission and, therefore, has no means of enforcing registration compliance.

Effect of Bill: The bill authorizes the Commission to impose an administrative fine of up to \$500 on certain facilities or communities that claim to provide housing for older persons but have not registered with the Commission.

C. SECTION DIRECTORY:

Section 1. Amends s. 760.01(2), F.S., to change the term "handicap" to "disability" (conforming language as per the definition change in section 2.)

Section 2. Creates s. 760.02(12), F.S., to provide a definition for "disability" in Part I of chapter 760; also clarifies that this definition does not include certain conditions. Makes consistent with and mirrors the language found in federal law

Section 3. Amends s. 760.05, F.S., to change the term "handicap" to "disability."

Section 4. Amends s. 760.07, F.S., to change the term "handicap" to "disability," and changes the term "gender" to "sex" to be consistent with other references to such term in this chapter.

Section 5. Amends s. 760.08, F.S., to change the term "handicap" to "disability," and rearranges the list of discriminatory bases.

Section 6. Amends s. 760.10, F.S., to change the term "handicap" to "disability," amends s. 760.10(8)(b), F.S., to delete an obsolete date, creates s. 760.10(10), F.S., to clarify that discrimination "because of sex" or "on the basis of sex" includes pregnancy, childbirth, and other related medical conditions to be consistent with federal law

Section 7. Amends s. 760.11, F.S., to allow for notification of a party by the Commission within 5 full business days, authorizes the use of certified mail for notification, with return receipt requested, and requires a respondent to respond to the Commission's request for information within 21 days of the date of the Notice of Filing Complaint and Request for Information. This section also provides for exceptions to the 180-day timeframe by authorizing the executive director of the Commission to extend,

up to an additional 60 days, the investigation of a complaint when extenuating circumstances outside the control of the Commission arise. Exceptions include: parties are engaged in mediation; a necessary party cannot be located; one or more of the parties fails to cooperate in the investigation, thereby necessitating the issuance of a subpoena; the respondent has filed bankruptcy; or other circumstances beyond the control of the Commission. Additionally, this section provides that a civil action must be commenced either no later than 1 year after the date of determination or no later than 4 years from the date the discriminatory action took place, whichever occurs first.

Section 8. Amends s. 760.22(7), F.S., to change the definition of “handicap” to “disability” and clarifies that “disability” does not include certain conditions.

Section 9. Amends s. 760.23, F.S., to change the term “handicap” to “disability” and rearranges the list of discriminatory bases.

Section 10. Amends s. 760.24, F.S., to change the term “handicap” to “disability” and rearranges the list of discriminatory bases.

Section 11. Amends s. 760.25, F.S., to change the term “handicap” to “disability” and rearranges the list of discriminatory bases.

Section 12. Amends s. 760.29, F.S., to authorize the Commission to impose an administrative fine on any 55 and older community or facility that fails to register with the Commission; changes the term “handicap” to “disability” and rearranges the list of discriminatory bases.

Section 13. Amends s. 760.31, F.S., to change the term “handicap” to “disability” .

Section 14. Amends s. 760.34, F.S., to change the term “answer” to “response.”

Section 15. Amends s. 760.50, F.S., to change the term “handicapped” to “disabled.”

Section 16. Amends s. 760.60, F.S., to change the term “handicap” to “disability” and rearranges the list of discriminatory bases..

Section 17. Amends s. 419.001(1)(d), F.S., to delete unnecessary language from the definition of “resident” pursuant to the definition change in section 8.

Section 18. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Commission states that any revenue generated from the authority granted under the bill to impose an administrative fine of up to \$500 for failure of 55 and older facilities to register is indeterminate and will likely be minimal.

2. Expenditures:

The Commission states that the bill will not create any new duties nor require it to expend additional funds to implement the bill’s provisions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent 55 and older facilities do not register with the Commission, those facilities may face administrative fines of up to \$500 for failure to register.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

N/A.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A.