

# 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.)

Prepared By: Community Affairs Committee

BILL: SB 2110

SPONSOR: Senator Rich

SUBJECT: Human & Civil Rights

DATE: April 16, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	<b>Fav/5 amendments</b>
2.	Herrin	Yeatman	CA	<b>Favorable</b>
3.			BI	
4.			JU	
5.			GA	
6.				

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

This bill amends ch. 760, F.S., the Florida Civil Rights Act, to replace the term “handicap” with “disabilities,” and defines the new term, consistent with the Americans with Disabilities Act (ADA). In addition, it clarifies that discrimination based on the term “sex” includes pregnancy, childbirth, and related medical conditions to comport with federal law.

The bill changes notification, response, and investigation deadlines, and related administrative procedures, for complaints filed with the Florida Commission on Human relations. Consistent with a recent Florida Supreme Court ruling, this bill clarifies that a civil action 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.*

In addition, this bill authorizes the commission to impose penalties for failure to register as a “55 and older” community.

This bill amends the following sections of the Florida Statutes: 419.001, 760.01, 760.02, 760.05, 760.07, 760.08, 760.10, 760.11, 760.22, 760.23, 760.24, 760.25, 760.29, 760.31, 760.34, 760.50, 769.60.

The bill re-enacts the following section of the Florida Statutes: 760.11.

## II. Present Situation:

### *Florida Commission on Human Relations*

The Florida Commission on Human Relations (“the commission”) was established as a community relations-based agency in 1969.<sup>1</sup> With the passage of the Florida Human Rights Act of 1977, the commission became an enforcement agency.<sup>2</sup> This act permitted the commission to investigate and resolve employment discrimination complaints through administrative and legal means. Over time, the purview of the commission expanded with the passage of the Florida Fair Housing Act in 1983,<sup>3</sup> the Florida Civil Rights Act in 1992,<sup>4</sup> and the Whistle-Blower’s Act in 1999.<sup>5</sup>

Part I of ch. 760, F.S., outlines the Florida Civil Rights Act, the purpose of which is to protect individuals 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 commission to carry out the purposes of this part. 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. The membership of this commission is broadly representative of various racial, religious, ethnic, social, economic, political, and professional groups in Florida. At least one member of the commission, as required by law, must be 60 years of age or older.

Pursuant to s. 760.06, F.S., the commission can 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 ch. 760 (ss. 760.01-760.11, F.S.) and s. 509.092, F.S., constitute the Florida Civil Rights Act of 1992.

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.

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,

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<sup>1</sup> Section 1, ch. 69-287, L.O.F.

<sup>2</sup> Section 1, ch. 77-341, L.O.F.

<sup>3</sup> Sections 1-19, ch. 83-221, L.O.F. (currently ss. 760.20-760-37, F.S.).

<sup>4</sup> Chapter 92-177, L.O.F. (currently ss. 760.01-760.11, F.S.)

<sup>5</sup> Currently s. 448.102, F.S.; Florida Commission on Human Relations. “About the Commission.” 24 March 2005.

<<http://fchr.state.fl.us/about.htm>>.

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.

### ***Florida Fair Housing Act***

Part II of ch. 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 limits, fair housing throughout the state. This act defines 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. Those who are pregnant or in the process of securing legal custody of a child 18 years of age or younger; and disabled, or associated with a disabled person are also protected.

### ***Whistleblower’s Act***

Pursuant to s. 112.31895, F.S., the commission also has jurisdiction over employment retaliation against state employees. If a state employee or a former state employee initially files a Whistleblower complaint, either with his or her agency or with the Chief Inspector General’s office in the Executive Office of the Governor, and believes that he or she was subsequently retaliated against as a result of filing such complaint (e.g., fired, demoted, transferred etc.), the employee or former employee can file a complaint with the Chief Inspector General or the commission alleging such retaliation.

### ***Definition of Disability vs. Handicap***

Currently, the Florida Civil Rights Act does not define “handicap.” However, the Fair Housing Act does define that term to mean:

- (a) A person who 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 who has a developmental disability as defined in s. 383.963.<sup>6</sup>

This definition tracks that of the American with Disabilities Act (ADA), Title III <sup>7</sup> which also defines the term “disability” as “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.” <sup>8</sup> It further defines what constitutes physical or mental impairment. Under the ADA, a physical impairment is:

“Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal,

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<sup>6</sup> Section 760.22(7), F.S.

<sup>7</sup> 28 C.F.R Part 36.

<sup>8</sup> *Id.*

special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.”

The ADA defines a mental or psychological disorder as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

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.

As individuals with disabilities and organizations representing such individuals began to object to the use of such terms as “handicapped person” or “the handicapped”, Congress changed the federal law accordingly. As a result, the use of the terms “disability” (instead of “handicap”) and “individual with a disability” (instead of an “individual with a handicap”) in federal law have all but ceased.

Florida law continues to use the term “handicap” and does not provide that certain conditions are excluded from its definition of handicap. This lack of clarity has led to the filing of several complaints filed with the commission on bases not covered by the Florida Civil Rights Act nor the ADA. However, the commission has routinely dismissed those cases on the basis of federal law, with commission orders stating that the commission had no jurisdiction over such matters.

***Discrimination Based on “Sex” (Inclusion of Pregnancy, Childbirth, and Related Medical Conditions)***

Section 760.02, F.S., provides definitions for purposes of ch. 760, F.S. However, even though “sex” is included as a basis for discrimination, the terms “sex,” “because of sex,” “without regard to sex,” and “on the basis of sex” are not clearly defined in current Florida law.

In 1976, the U.S. Supreme Court ruled that discrimination based upon pregnancy was not sex discrimination under Title VII of the federal Civil Rights Act of 1964.<sup>9</sup> As a result of that court’s decision, Title VII was amended in 1978 to include the Pregnancy Discrimination Act (PDA), thereby providing specific coverage for pregnancy discrimination. The federal law provides:

(k) 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.

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<sup>9</sup> *General Electric v. Gilbert*, 429 U.S. 125 (1976).

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 if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.<sup>10</sup>

In 1991, the First District Court of Appeals in Florida held that Title VII of the federal law preempted Florida law,<sup>11</sup> thereby making discrimination on the basis of pregnancy actionable. Based on this Florida court's interpretation, the commission, which investigates employment discrimination cases, has construed discrimination on the basis of sex to include pregnancy, childbirth, and related medical conditions.

When the Legislature amended the Florida Civil Rights Act in 1992, however, it did not include the PDA language. Current statute should be amended to reflect the federal preemption in this area and current commission practice.

### ***Timeframe for Investigation and Resolution of Complaints***

Any individual who believes he or she has been unlawfully discriminated against may file a complaint with the commission. The complaint must be filed 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 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 ch. 120, F.S.

Initially, when a complaint is filed, the commission must determine if the case meets certain prima facie evidence (e.g., the employer has 15 or more employees, the commission has statutory authority and jurisdiction to investigate the specific type of case; the complaint has been timely filed, etc.). The commission reports that during the course of its investigation, the commission may encounter circumstances beyond its control – circumstances that unfortunately may cause delays in investigating and resolution of the complaints (e.g., noncompliance with discovery requests, failed mediations, etc.).

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,<sup>12</sup> the Auditor General found that 15 of the 20 cases reviewed (75 percent) exceeded the statutory timeframe. In the 2004 report, the Auditor General found some improvement in the

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<sup>10</sup> 42 U.S.C. Section 2000e(k)(1998).

<sup>11</sup> See, *O'Loughlin v. Pinchback*, 579 So.2d 788 (Fla. 1<sup>st</sup> DCA 1991).

<sup>12</sup> Auditor General, *Florida Commission on Human Relations Operational Audit*, Report No. 02-102 (November 2001).

commission's progress in timely investigating and closing its cases, citing that about 60 percent of the selected cases exceeded the 180-day timeframe.<sup>13</sup>

### *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).

In 2002, the Auditor General found notices to respondents were not mailed within the 5-day timeframe for 16 of the 20 case files reviewed (80 percent). 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 percent).<sup>14</sup> The Auditor General attributed some of the delay 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.

The commission reports that compliance with and adherence to the limited 5-calendar day timeframe in which to notice respondents is difficult. Moreover, the commission reports that requiring an investigator to expedite the review and perfect the complaint merely to meet a limited notification requirement jeopardizes the quality of the preliminary review process. Having time to accurately perfect the case ensures time will not be wasted in further litigating the claim.

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 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. In its 2002 report, the Auditor General recommended the commission continue to use certified mail as a cost-savings operational measure and to pursue statutory changes to authorize such an operational change.

Current law requires the respondent to respond to a complaint within 25 days.<sup>15</sup> However, this "clock" begins running on the date the complaint is received by the commission. Given the 5-day notification (and longer if the commission encounters unexpected delays outside its control), the respondent actually has only 20 (or less) days in which to respond. Allowing the respondent more time to respond to a complaint may enable the respondent to submit more accurate and complete information to the commission and would, ultimately, result in a more expeditious investigation.

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<sup>13</sup> Recent data collected by the commission (as of December 30, 2004) revealed that approximately 34 percent of the cases in the commission's current inventory (not including housing or whistleblower complaints, which are subject to different timeframes) has exceeded the 180-day timeframe.

<sup>14</sup> Recent data collected by the commission (as of December 30, 2004) revealed that the commission is now averaging six days to notify respondents; approximately 90 percent of the 665 cases docketed had actually received notification within five days.

<sup>15</sup> Section 760.11(1), F.S.

### ***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 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 file a civil action under subsection (4) as if the commission had determined there was reasonable cause.

In *Joshua v. City of Gainesville*,<sup>16</sup> the Florida Supreme Court ruled on the statute of limitation period for lawsuits brought under the Florida Civil Rights Act of 1992 where the commission had not issued an investigative “determination” within the required 180 days. The court held, in cases where such a determination has not been made, the four-year statute of limitation for causes of action based on statutory liability applies.<sup>17</sup>

In a 2004 report,<sup>18</sup> the Auditor General again cited concern that it was unclear exactly when the four-year statute of limitations actually commences and further recommended that the commission pursue legislative changes to redress this issue.

### ***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 percent 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 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 in the statutes to assess any kind of fine for failure to register with the Commission and, therefore, has no means of enforcing registration compliance.<sup>19</sup>

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<sup>16</sup> 768 So. 2d 432 (Fla. 2000).

<sup>17</sup> Section 95.11(3)(f), F.S.

<sup>18</sup> Auditor General, *Commission on Human Relations*, Report No. 2004-034 (Aug. 2003).

<sup>19</sup> Only those facilities or communities against which a complaint has been filed and which, upon further investigation by the commission, had not previously registered as a 55+ facility would potentially be subjected to an administrative fine for

### III. Effect of Proposed Changes:

**Section 1** amends s. 760.01, F.S., relating to the purposes of the Florida Civil Rights Act by changing the word “handicap” to “disability” to reflect changes in federal law. This change also occurs in all other sections of the bill except sections 2 and 7.

**Section 2** amends s. 760.02, F.S., the definitions portion of the act, to include a definition of disability **identical to** the definition in the ADA.

**Section 3** amends s. 760.05, F.S., to change the word “handicap” to “disability.”

**Section 4** amends s. 760.07, F.S., to change the word “handicap” to “disability.” This section also replaces “gender” with “sex” to be consistent with other references in the chapter.

**Section 5** amends s. 760.08, F.S., to change the term “handicap” to “disability,” adds “age” as a basis of discrimination to make the list of discriminatory bases consistent with the purposes statement in s. 760.01, F.S., which lists the types of discrimination the act addresses; and rearranges the list of discriminatory bases to maintain consistency in the act.

The section also amends s. 760.08, F.S., relating to discrimination in places of public accommodation, to specifically list several categories of facilities governed by this statute. These categories include, but are not limited to, hotels, restaurants, movie theatres, auditoriums, bakeries, laundromats, terminals of public transportation, museums, parks, day care centers, and gymnasiums.<sup>20</sup>

**Section 6** amends s. 760.10, F.S., to change the term “handicap” to “disability” and to delete an obsolete directive.

This section also creates a new subsection (10) 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. In addition, this section includes a provision that is identical to the federal Pregnancy Discrimination Act (PDA) regarding health insurance benefits for abortion. Specifically, subsection (10) does not require an employer to pay for health insurance benefits for abortion except where the life of the mother is in danger by carrying the fetus to full term. As in the federal law, this provision does not preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

**Section 7** amends s. 760.11, F.S., in several respects. It changes the timeframe in which the commission must notify the respondent against whom a complaint has been filed, from 5 days to 5-business days. In addition, it provides that notice may be sent by certified mail, return receipt requested, rather than registered mail.

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failing to register. The amount of such fine will not exceed \$500, which is the amount of the fine provided in current law for submitting false information to the commission. The levying of any fine is optional and purely at the discretion of the commission.

<sup>20</sup> Section 760.02(11), F.S. defines “public accommodation” in general terms. This list is inclusive of these general terms, and provides more specificity.



This section changes the complaint response deadline from 25 days to 21 days. However, the section also changes the start date from which the respondent must respond, from the date the complaint is filed to the date of the notice of filing the complaint and request for information. This change extends the time for respondents to file a response.

This section also provides for exceptions to the 180-day timeframe in which the commission must make a reasonable cause determination. The section authorizes the executive director of the commission to extend, up to an additional 60 days, the investigation of a complaint under certain circumstances. These circumstances include when:

- 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
- there are other circumstances beyond the control of the commission.

Moreover, this section is amended to require that a civil action 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*. This is consistent with the court ruling in *Joshua v. City of Gainesville*, 768 So.2d 432 (Fla. 2000).<sup>21</sup>

**Section 8** amends s. 760.22, F.S., to change the definition of “handicap” as currently provided in that statute to “disability.” This section also explicitly excludes certain conditions from the definition of “disability” as delineated in section 2 of the bill.

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

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

**Section 11** amends s. 760.25, F.S., to change the term “handicap” to “disability,” and rearrange 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. This section also changes the term “handicap” to “disability.”

**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 “handicap” to “disability.”

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

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<sup>21</sup> In this case, the Florida Supreme Court determined the statute of limitations for discrimination actions where the commission has not yet ruled in the prescribed timeframe.

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

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

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

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:

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.

C. Government Sector Impact:

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.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

## VIII. Summary of Amendments:

### **Barcode 680424 by Commerce and Consumer Services:**

This amendment removes the word “age” from the public accommodations part of the bill, to recognize the necessity to discriminate on the basis of age at some public facilities (e.g. bars).

### **Barcode 194636 by Commerce and Consumer Services:**

This amendment deletes a proposed list of specific categories of facilities that may not discriminate against protected classes of persons. The general “place of public accommodation” is retained.

### **Barcode 051482 by Commerce and Consumer Services:**

This amendment deletes a proposed provision stating that the subsection does “not require an employer to pay for health insurance benefits for abortion, except when the life of the mother would be endangered if the fetus were carried to term, or except when medical complications have arisen from an abortion.”

### **Barcode 644030 by Commerce and Consumer Services:**

This amendment includes “homosexuality and bisexuality” in the list of conditions that are not included in the term “disability.”

### **Barcode 532404 by Commerce and Consumer Services:**

This amendment replaces the terms “physically disabled or handicapped,” and “developmentally disabled,” with the term “an individual with a disability.”