

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 405 Employment Liability for Persons with Disabilities

**SPONSOR(S):** Civil Justice Subcommittee; Baxley and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 926

| REFERENCE                                         | ACTION           | ANALYST  | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|---------------------------------------------------|------------------|----------|------------------------------------------|
| 1) Civil Justice Subcommittee                     | 14 Y, 0 N, As CS | Woodburn | Bond                                     |
| 2) Health & Human Services Access<br>Subcommittee |                  |          |                                          |
| 3) Judiciary Committee                            |                  |          |                                          |

### SUMMARY ANALYSIS

Supported employment services are offered to help an individual with a developmental disability gain or maintain employment. The bill provides that an employer who employs a person with a developmental disability who received supported employment services is not liable for a negligent or intentional act or omission of the employee provided that the employer did not have actual notice of an act or omission creating an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment service that has provided employment services to a person with a developmental disability is not liable for the actions or conduct of that person as an employee.

This bill does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Developmental Disability

"Developmental Disability" is a term that is defined in s. 393.063, F.S., as:

A disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

The Agency for Persons with Disabilities (APD)<sup>1</sup> has been specifically tasked with serving the needs of Floridians with developmental disabilities. The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities.

#### Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain employment. Generally, services involve job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines "supported employment services" as on-going support services provided by the designated state unit to achieve job stabilization.<sup>2</sup>

The Division of Vocational Rehabilitation (DVR) specifically defines "supported employment services" as "ongoing support services and other appropriate services needed to support and maintain a person who has a severe disability in supported employment."<sup>3</sup> The service provided is based upon the needs of the eligible individual as specified in the person's individualized written rehabilitation program. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.<sup>4</sup>

Both DVR and APD provide supported employment services. They also connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to such services. However, these entities do not share information about their customers with the employers that employ their customers as supported employment. This is due to various reasons, including confidentiality concerns and contract agreements between the employer and the organization.

#### Employer Liability, In General

Under common law principles, an employer is liable for an act of its employee that causes injury to another person if the wrongful act was done while the employee was acting within the apparent scope

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<sup>1</sup> For more information see <http://apd.myflorida.com/> (last visited March 3, 2011).

<sup>2</sup> 34 C.F.R. s. 363.6(c)(2)(iii). "What is the State Supported Employment Services Program? Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment. (Authority: 29 U.S.C. 795j)." 34 C.F.R. s. 363.1. See also, Supported Employment State Grants, at <http://www.ed.gov/programs/rsasupemp/index.html> (last visited 3/11/2009).

<sup>3</sup> For DVR: "Supported employment" means competitive work in integrated working settings for persons who have severe disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of a severe disability. Persons who have severe disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work. Section 413.20(22), F.S. For APD: "Supported employment" means employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance. Section 393.063(37), F.S.

<sup>4</sup> Section 413.20(27), F.S.

of employment and serving the interests of his or her employer. An employee is not acting within the scope of his or her employment, and thereby the employer is not liable, if the employee is acting to accomplish his or her own purposes and not to serve the interests of the employer.<sup>5</sup> The test for determining if the conduct complained of occurred within the scope of employment is:

- Whether the employee was performing the kind of conduct he was employed to perform;
- The conduct occurred within the time and space limits of the employment; and
- The conduct was activated at least in part by a purpose to serve the employer.<sup>6</sup>

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.<sup>7</sup> An employer may be held liable for a negligent act of an employee committed within the scope of his or her employment even if the employer is without fault.<sup>8</sup> An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label 'employer' to impose strict liability under a theory of respondent superior<sup>9</sup> but instead look to the employer's control or right of control over the employee at the time of the negligent act."<sup>10</sup> Employer fault is not an element of vicarious liability claims.<sup>11</sup>

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as "an employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person would be harmed."<sup>12</sup> An action for negligent hiring is based on the direct negligence of the employer. However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury. "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."<sup>13</sup> In *Williams v. Feather Sound, Inc.*, the Florida 2nd District Court of Appeal, in a case regarding negligent hiring, discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's

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<sup>5</sup> *Gowan v. Bay Count*, 744 So.2d 1136, 1138 (Fla. 1st DCA 1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Garcy v. Broward Process Servers, Inc.* 583 So.2d 714, 716 (Fla. 4th DCA 1991). The term "intentional" means done with the aim of carrying out the act. Black's Law Dictionary (9th ed. 2010), intentional.

<sup>8</sup> "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer." *Makris v. Williams*. 426 So.2d 1186, 1189 (Fla. 4th DCA 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. Black's Law Dictionary (9th ed. 2010), negligent. A negligent act is one that creates an unreasonable risk of harm to another. Black's Law Dictionary (9th ed. 2010), act.

<sup>9</sup> Respondent superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. Black's Law Dictionary (9th ed. 2010), respondent superior.

<sup>10</sup> *Vasquez v. United Enterprises of Southwest Florida, Inc.* 811 So.2d 759, 761 (Fla. 3rd DCA 2002).

<sup>11</sup> *Makris v. Williams*. 426 So.2d 1186, 1189 (Fla. 4th DCA 1983).

<sup>12</sup> Black's Law Dictionary (9th ed. 2010), negligent hiring.

<sup>13</sup> *Anderson Trucking Service, Inc. v. Gibson*. 884 So.2d 1046, 1052 (Fla. 5th DCA 2004).

propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.<sup>14</sup>

Section 768.096, F.S., provides an employer presumption against negligent hiring, "if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."<sup>15</sup>

### Effect of the Bill

The bill creates s. 768.0965, F.S., entitled "Employees with Disabilities Opportunity Act," to provide that an employer is not liable, under certain conditions, for negligent or intentional acts or omissions by an employee with a developmental disability, as defined in s. 393.063, F.S. The employer is not liable if:

- The employee has received supported employment services through a public or private not-for-profit provider; and
- The employer does not have actual notice of an action or omission of the employee which creates an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment services provider who provides supported employment services to an individual with a developmental disability is not liable for the actions or conduct of that individual that occurs within the scope of such individual's employment.

The bill provides an effective date of July 1, 2011. The act applies only to causes of action that occur on or after the effective date.

#### B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 creates s. 768.0965, F.S., regarding employer and not-for-profit supported employment service provider liability.

Section 3 provides an effective date of July 1, 2011.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

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<sup>14</sup> *Williams v. Feather Sound, Inc.*, 386 So.2d 1238, 1239 - 1240 (Fla. 2nd DCA 1980).

<sup>15</sup> Section 768.096, F.S., defines what a background investigation must include, like contacting references, interviewing the employee, and obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 14, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment amends the effective date to provide that the act applies to causes of action that occur on or after the effective date. The bill was then reported favorably.