HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 105 Florida Civil Rights Act
SPONSOR(S): Civil Justice Subcommittee; Berman and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 1 N, As CS	Ward	Bond
2) State Affairs Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Civil Rights Act of 1992 was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status…" Similar to federal law, the Florida Civil Rights Act provides a number of actions that, if undertaken by an employer, are unlawful employment practices. For example, it is unlawful to discharge or fail to hire an individual or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on that individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Unlike federal law, the Florida Civil Rights Act has not been amended to specifically include a prohibition against pregnancy discrimination.

The bill brings Florida in line with federal law to prohibit pregnancy-related discrimination in:

- Public lodging or food service accommodations;
- Hiring for employment;
- Compensation for employment;
- Terms, conditions, benefits, or privileges of employment.

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

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title VII Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination on the basis of race, color, religion, national origin, or sex. Title VII covers employers with 15 or more employees and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.

Pregnancy Discrimination Act[2]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[3] that Title VII did not include pregnancy under its prohibition against unlawful employment practices. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII to define the terms "because of sex" or "on the basis of sex," to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[4] Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, and any other term or condition of employment.[5]

Florida Civil Rights Act of 1992

The Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status…"[6] The FCRA provides protection from discrimination in the areas of education, employment, housing, and public accommodations.

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, would be considered unlawful employment practices.[7] For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual's race, color, religion, sex, national origin, age, handicap, or marital status. Unlike Title VII, the FCRA has not been amended to specifically include a prohibition against pregnancy discrimination, although the question of whether the FCRA impliedly covers pregnancy discrimination is currently pending before the Florida Supreme Court.[8]

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[1] 42 U.S.C. § 2000e. et seq.
[2] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978).
[3] 429 U.S. 125, 145 (1976).
[4] The PDA defines the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so infected but has similar ability or inability to work.
[5] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited January 21, 2014).
[6] Section 760.01, F.S.
[7] Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.
[8] *Delva v. The Continental Group, Inc*., Fla.Sup.Ct. Case No. SC12-2315. Oral argument was held Nov. 7, 2013.

Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a component of sex discrimination, the FCRA does not. The fact that the FCRA is patterned after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection on the basis of pregnancy status. Since the Florida Supreme Court has not yet considered the issue, the ability to bring a claim based on pregnancy discrimination varies among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under the FCRA was *O'Laughlin v. Pinchback*.[9] In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeal held that the Florida Human Rights Act was preempted by Title VII, as amended, as it stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."[10] By preempting the Florida statute, the court did not reach the question of whether the Florida law prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.

The court in *Carsillo v. City of Lake Worth*[11] found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination. The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent was to prohibit this type of discrimination it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.

The court in *Delva v. Continental Group, Inc.*[12] held that FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status. The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin.* The court certified the conflict with the *Carsillo* case to the Florida Supreme Court.[13]

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.[14] Like the state courts, the federal courts that have found that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. The courts finding that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status.

Most recently, a Florida federal court concluded that the Florida Legislature intended to include pregnancy in its definition of 'sex,' and therefore discrimination based on pregnancy is an unlawful employment practice under the FCRA.[15]

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[9] 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.
[10] *Id.* at 792.
[11] 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).
[12] 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied*.
[13] The case was filed with the Florida Supreme Court on October 16, 2012, and assigned case number SC12-2315.
[14] Federal courts finding that the FCRA does not include a prohibition against pregnancy discrimination include: *Frazier v. T- Mobile USA, Inc.*, 495 F.Supp.2d 1185, (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011). Federal courts finding that FCRA does provide protection against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), and *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011).
[15] *Glass v. Captain Katanna's, Inc*., --- F.Supp. ---, 2013 WL 3017010 (M.D. Fla. 2013).

Effect of the Bill

The bill provides that pregnancy discrimination in employment and in public lodging and food service establishments is unlawful. This affirmatively brings the Florida provision in line with the federal provision which includes pregnancy in its definition of sex.[16] The bill precludes any discrimination in:

- Public lodging or food service accommodations;
- Hiring for employment;
- Compensation for employment;
- Terms, conditions, benefits, or privileges of employment.

The bill also adds "benefits" to the existing list of employment perquisites that may not be used to discriminate for any of the prohibited reasons. The addition of the term "benefits" (line 102) may have no practical effect since courts routinely use the term "benefits" interchangeably with the existing statutory language "terms, conditions, or privileges of employment."[17] Courts have awarded employment "benefits" as damages without finding the word in the statute.[18] The term "benefits" is not included in the federal equivalent to this statute,[19] but is included in the federal provision which includes pregnancy in the definition of "sex."[20]

B. SECTION DIRECTORY:

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments; rights as private enterprises.

Section 2 amends s. 760.01, F.S., relating to purposes; construction; title.

Section 3 amends s. 760.05, F.S., relating to functions of the commission.

Section 4 amends s. 760.07, F.S., relating to remedies for unlawful discrimination.

Section 5 amends s. 760.08, F.S., relating to discrimination in places of public accommodation.

Section 6 amends s. 760.10, F.S., relating to unlawful employment practices.

Section 7 reenacts s. 760.11, F.S., relating to administrative and civil remedies; construction.

Section 8 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

[16] 42 U.S.C. § 2000e (k) includes the condition of pregnancy in the definition of 'sex,' and uses the term 'benefits' in references to employment privileges that may not be withheld in discrimination.
[17] *See,* eg., *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865 (Fla. 3d DCA 2012) and *Duchateau v. Camp, Dresser & McKee, Inc*., 713 F.3d 1298,1300 (11th Cir. 2013) (". . .a position that did not affect her compensation, benefits, or the terms of her employment.").
[18] *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865 (Fla. 3d DCA 2012).
[19] See 42 U.S.C. § 2000e-2, which provides, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."
[20] 42 U.S.C. § 2000e (k).

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 13, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed the definition of pregnancy. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.