HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 625 Florida Civil Rights Act
SPONSOR(S): Cortes and Berman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 982

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 1 N	Robinson	Bond
2) State Affairs Committee	16 Y, 0 N	Moore	Camechis
3) Judiciary Committee			

SUMMARY ANALYSIS

Title II of the federal Civil Rights Act of 1964 (Title II) prohibits discrimination on the basis of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the federal Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Title VII was amended in 1978 to specifically include discrimination based on pregnancy, childbirth, and related medical conditions as prohibited forms of sex discrimination in employment.

Patterned after Title II and Title VII, but providing even broader protections, 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…" in places of public accommodation and employment. However, although Title VII expressly includes pregnancy status as a component of sex discrimination in employment, the FCRA does not. The fact that the FCRA is patterned after Title VII but does not expressly prohibit discrimination based on pregnancy status has caused division among both federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status in employment. In 2014, the Florida Supreme Court concluded that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in employment practices, consistent with the express provisions of Title VII. The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

The bill codifies the Florida Supreme Court decision by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FRCA to prohibit discrimination on the basis of pregnancy in places of public accommodation.

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

The effective date of the bill is July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title II and VII of the Civil Rights Act of 1964[1]

Title II of the federal Civil Rights Act of 1964 (Title II) prohibits discrimination on the basis of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees[2] 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.[3]

Pregnancy Discrimination Act[4]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[5] that Title VII did not include pregnancy discrimination as a form of sex discrimination under its prohibition against unlawful employment practices. In response to the decision, Congress passed the Pregnancy Discrimination Act (PDA) in 1978. The PDA amended Title VII to expressly define the terms "because of sex" and "on the basis of sex," to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[6] 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, or any other term or condition of employment.[7]

Florida Civil Rights Act of 1992

Patterned after Title II and Title VII, but providing broader protections, 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…"[8] in employment and public accommodations.[9] Similar to Title VII, the FCRA provides a number of actions that, if undertaken because of or on the basis of an individual's race, color, religion, sex, national origin, age, handicap, or marital status, are considered unlawful employment practices, including:[10]

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[1] 42 U.S.C. § 2000a *et seq.;* 42 U.S.C. § 2000e *et seq*.
[2] 42 U.S.C. § 2000e(b)
[3] 42 U.S.C. § 2000e-2(a).
[4] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978), codified as 42 U.S.C. § 2000e(k).
[5] 429 U.S. 125, 145 (1976).
[6] 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 affected but has similar ability or inability to work.
[7] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited February 24, 2015).
[8] Section 760.01, F.S.
[9] "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. Section 760.02(11), F.S.
[10] 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.

- Failing to hire an individual, or otherwise discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment;
- Limiting, segregating, or classifying employees or applicants for employment in ways that would deprive such individuals of employment opportunities or adversely affect an individual's status as an employee;
- Failing or refusing to refer an individual for employment;
- Excluding or expelling an individual from membership in a labor organization or limiting, segregating, or classifying the membership of a labor organization;
- Discriminating in admission to, or employment in, any program established to provide apprenticeship or other training for a profession, occupation, or trade;
- Discriminating in licensing, certification, credentials, examinations, or an organizational membership required to engage in a profession, occupation, or trade; and
- Printing or publishing ads related to membership in certain labor organizations or employment that indicate a preference, limitation, specification, or discrimination.

Unlike Title VII, the FCRA has not been amended to specifically include discrimination based on the pregnancy status of an individual as an unlawful employment practice. The FCRA also does not prohibit pregnancy discrimination in places of public accommodation.

Pregnancy Discrimination in Florida

The fact that the FCRA is patterned after Title VII but has not been amended to expressly include pregnancy status as a component of sex discrimination in employment has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection from discrimination on the basis of pregnancy under state law. Thus, the ability to bring a claim based on pregnancy discrimination varied among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under Florida law was *O'Laughlin v. Pinchback*.[11] 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[12] (predecessor to the FCRA) 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."[13] The court held that both federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII, as amended, preempted Florida law "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."[14] By finding the Florida Human Rights Act to be preempted by federal law, the court did not reach the question of whether the Florida law on its own prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.[15]

The Fourth District Court of Appeal in *Carsillo v. City of Lake Worth*[16] found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination.[17] The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent, as expressed by the PDA, 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.[18]

[11] 579 So.2d 788 (Fla. 1st DCA 1991).
[12] This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, Chs. 69-287, 72-48, and 77-341, L.O.F., and which was also patterned after Title VII.
[13] *O'Laughlin,* at 792.
[14] *Id.*
[15] *Id.* at 791.
[16] 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).
[17] *Id.* at 1119.
[18] *Id.* at 1120.

In contrast, the Third District Court of Appeal in *Delva v. Continental Group, Inc.* (*Delva I*)[19] held that the 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.[20] 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[21] with the *Carsillo* case to the Florida Supreme Court.[22]

In 2014, the Florida Supreme Court reviewed the *Delva I* decision in *Delva v. Continental Group, Inc.* (*Delva II*)[23] and quashed the decision, holding that:

> The statutory phrase making it an "unlawful employment practice for an employer… to discriminate…because of…sex," as used in the FCRA, includes discrimination based on pregnancy, which is a natural condition and primary characteristic unique to the female sex."[24]

The court reasoned that such a construction of the FCRA was consistent with legislative intent, as expressed in the FCRA itself, that the FCRA be liberally construed to further its purpose to secure for all individuals within the state freedom from discrimination because of sex.[25] Indeed, the court found that to conclude that the FCRA does not protect women from discrimination based on pregnancy—a primary characteristic of the female sex—would undermine the very protection provided in the FCRA to prevent an employer from discriminating against women because of their sex.[26] The court ascribed no legal significance to the Legislature's failure to amend the FCRA to include pregnancy discrimination after the *Gilbert* decision and rejected the argument that the failure to do so was an indication of the Legislature's intent not to include pregnancy within the meaning of sex discrimination.[27]

The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

Claims and Remedies under Title VII and the FCRA

A Florida employee may now file a charge of an unlawful employment practice based upon pregnancy discrimination with either the federal Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

A person who wishes to file a complaint with the EEOC must do so within 300 days of a violation in a jurisdiction with a fair employment practices agency (such as Florida, which has the FCHR).[28] The EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.[29] If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the EEOC must engage in informal conferencing, conciliation, and

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[19] 96 So.3d 956 (Fla. 3d DCA 2012).
[20] *Id.* at 958.
[21] *Id.*
[22] Federal courts interpreting the FCRA similarly wrestled with whether pregnancy status is covered by its provisions. Like the state courts, the federal courts that 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. *See 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), *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011), and *Glass v. Captain Katanna's, Inc*., 950 F.Supp.2d 1235 (M.D. Fla. 2013). The courts that found that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status. *See 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).
[23] 137 So. 3d 371 (Fla. 2014)
[24] *Id.* at *372.*
[25] *Id*.
[26] *Id.* at 375.
[27] *Id.*
[28] 42 U.S.C. § 2000e-5(e)(1). The enforcement procedures referenced in this paper do not apply to individuals affected by federal agencies, who have a separate process. 29 C.F.R. part 1614.
[29] 42 U.S.C. §. 2000e-5(b).

persuasion to remedy the unlawful employment practice.[30] After the EEOC concludes its investigation and issues a "right-to-sue" letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.[31]

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation.[32] The FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.[33] If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.[34] A plaintiff is required to file a state claim in civil court under the FCRA within one year of the determination of reasonable cause by the FCHR.[35]

Remedies available to persons who bring claims based upon pregnancy discrimination differ depending on whether the claim is brought under Title VII or under the FCRA. If a plaintiff prevails under Title VII or the FCRA, the plaintiff might be entitled to an order prohibiting the discriminatory practice, as well as reinstatement or hiring, with or without back pay.[36] Depending upon the number of persons employed by the defendant employer, a Title VII claimant may also recover from $50,000 to $300,000 in aggregated compensatory and punitive damages.[37] In contrast, there is no limit on compensatory damages under the FCRA, which include "damages for mental anguish, loss of dignity, and any other intangible injuries."[38] Punitive damages under the FCRA may not exceed $100,000.[39] However, the total recovery, including back pay, for a claimant who brings a discrimination claim against the state or its subdivisions is limited under the FCRA to $300,000.[40]

Effect of the Bill

The bill codifies the Florida Supreme Court decision in *Delva II* by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FCRA to prohibit discrimination on the basis of pregnancy in places of public accommodation. Accordingly, pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:

- By places of public accommodation; or
- With respect to employment, provided that the discriminatory act constitutes an unlawful employment practice.

Persons injured by a violation of the FCRA due to pregnancy discrimination are entitled to all rights and remedies under the FCRA.

B. SECTION DIRECTORY:

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments.

Section 2 amends s. 760.01, F.S., relating to the purpose and construction of the FCRA.

Section 3 amends s. 760.05, F.S., relating to functions of the Florida Commission on Human Relations.

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[30] *Id*.
[31] 42 U.S.C. § 2000e-5(f)(1).
[32] Section 760.11(1), F.S.
[33] Section 760.11(3), F.S.
[34] Section 760.11(4), F.S.
[35] Section 760.11(5), F.S.
[36] Section 760.11(5), F.S.; 42 U.S.C. § 2000e-5(g).
[37] 42 U.S.C. §1981a(b)(3)
[38] Section 760.11(5), F.S.
[39] Section 760.11(5), F.S.
[40] Section 760.11(5), F.S., referring to the limited waiver of sovereign immunity in section 768.28, F.S. Unlike the FCRA, there apparently is no limitation on total recovery, including back pay, for a claimant who brings suit against the state or its subdivisions under Title VII, though the caps on compensatory and punitive damages would apply.

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(1), F.S., to incorporate pregnancy discrimination into provisions relating to administrative and civil remedies for violations of the FCRA.

Section 8 provides an effective date of July 1, 2015.

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:

   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

None.