

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 374

INTRODUCER: Senator Rouson

SUBJECT: Housing Discrimination

DATE: December 6, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 374 amends ss. 760.34, F.S., and 760.35, F.S., to allow a person alleging housing discrimination under the Florida Fair Housing Act (FFHA) to file a civil action regardless of whether the aggrieved person has exhausted his or her administrative remedies. Accordingly, the aggrieved person may file a civil action regardless of whether:

- He or she has filed a complaint with the Florida Commission on Human Relations (Commission);
- The Commission has resolved a complaint (if the aggrieved person chose to file one); or
- Any particular amount of time has passed since the aggrieved person filed a complaint with the Commission.

The bill prohibits an aggrieved person from filing a civil action under the FFHA in two instances: (i) if the claimant has consented to a conciliation agreement obtained by the Commission, other than to enforce the terms of the conciliation agreement; or (i) if an administrative law judge has commenced a hearing.

The bill, in making the FFHA substantially equivalent to the federal Fair Housing Act, enhances the opportunity for the Commission to continue to receive its federal funding of approximately of approximately \$597,189 (based on a six-year average of funding).

The bill takes effect upon becoming law.

II. Present Situation:

The Florida Commission on Human Relations

The Commission was established by the Legislature in 1969 and is charged with enforcing the state's civil rights laws. The Commission investigates complaints of discrimination under the

Florida Fair Housing Act of 1983, the Florida Civil Rights Act of 1992, and the Whistle-Blower's Act of 1999. The Commission is certified as a "substantially equivalent" agency by the United States Department of Housing and Urban Development (HUD) and, through annual work share agreements, receives and investigates housing discrimination complaints referred by HUD. HUD provides funding to the Commission through the Fair Housing Assistance Program (FHAP) for processing complaints, training, technical assistance, and creating and maintaining data information systems.

The Florida Fair Housing Act

The FFHA is modeled after the federal Fair Housing Act.¹ The FFHA prohibits a person from refusing to sell or rent, or otherwise make unavailable, a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.² In addition, the FFHA affords protection to persons who are pregnant or in the process of becoming legal custodians of children of 18 years of age or younger, or persons who are themselves handicapped or associated with a handicapped person.³

A person alleging discrimination under the FFHA has one year after the discriminatory housing practice to file a complaint with the Commission.⁴ The Commission has 100 days after receiving the complaint to complete its investigation and issue a determination.⁵ The Commission may also decide to resolve the complaint and eliminate or correct the discriminatory housing practice through conciliation.⁶ If the Commission is unable to obtain voluntary compliance within 180 days after a complaint is filed, the aggrieved person may initiate a civil action or file a petition for an administrative determination.⁷ If the Commission finds reasonable cause to believe that housing discrimination has occurred, the aggrieved person may request that the Attorney General bring an action against the respondent.⁸ A civil action must be commenced within two years after the alleged discriminatory act occurred.⁹ The court may "continue" (this means the case is held in abeyance pending the settlement) a civil case if conciliation efforts by the Commission or by the local housing agency are likely to result in a satisfactory settlement.¹⁰ If the court finds that a discriminatory housing practice has occurred, the court must issue an order prohibiting the practice and providing affirmative relief.¹¹

¹ Chapter 760, part II, F.S., is the Florida Fair Housing Act. Florida Fair Housing Commission, Housing Act, <https://fchr.myflorida.com/history-of-the-florida-commission-on-human-relations> (last visited Dec. 4, 2019),

² Section 760.23(1), F.S.

³ Sections 760.23(6)-(9), F.S.

⁴ Section 760.34(1) and (2), F.S.

⁵ Section 760.34(1), F.S.

⁶ *Id.*

⁷ Section 760.34(4), F.S.

⁸ *Id.*

⁹ Section 760.35(1), F.S.

¹⁰ *Id.*

¹¹ Section 760.35(2), F.S.

Remedies available under the FFHA include fines and actual punitive damages.¹² The court may also award reasonable attorney fees and costs to the Commission.¹³

If the Commission is unable to obtain voluntary compliance or has reasonable cause to believe that a discriminatory act has occurred, the Commission may institute an administrative proceeding. Alternatively, the aggrieved person may request administrative relief under ch. 120, F.S., within 30 days after receiving notice that the Commission has concluded its investigation.¹⁴

The Commission, or any local agency certified as substantially equivalent, may institute a civil action in an appropriate court if it is unable to obtain voluntary compliance with the local fair housing law.¹⁵ The local agency does not have to petition for an administrative hearing or exhaust its administrative remedies prior to bringing civil action.¹⁶

The Federal Fair Housing Act

Substantially Equivalent Agencies

HUD administers and enforces the federal Fair Housing Act (FHA).¹⁷ The FHA recognizes that a state or local government may also enact laws or ordinances prohibiting unlawful housing discrimination.¹⁸ HUD may certify a state or local government agency as “substantially equivalent” if HUD determines that the state or local law and the FHA are substantially equivalent with respect to:

- The substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;
- The procedures followed by such agency;
- The remedies available to such agency; and
- The availability of judicial review of such agency’s action.¹⁹

HUD had developed a two-step process of substantial equivalency certification. The first step considers the adequacy of the law, meaning that the law which the agency administers facially provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the FHA.²⁰ A determination of the adequacy of a state or local fair housing law “on its face” is intended to focus on the meaning and intent of the text of the law, as distinguished from the effectiveness of its administration. Accordingly, this determination is not limited to an analysis of the literal text of the law. Regulations, directives,

¹² Fines are capped in a tiered system based on the number of prior violations of the Fair Housing Act: up to \$10,000 if the respondent has no prior findings of guilt under the Fair Housing Act; up to \$25,000 if the respondent has had one prior violation of the Fair Housing Act; and up to \$50,000, if the respondent has had two or more violations of the Fair Housing Act. Section 760.34(7)(b), F.S.

¹³ Section 760.34(7)(c), F.S.

¹⁴ Section 760.35(3), F.S.

¹⁵ Sections 760.22(9) and 760.34(8), F.S.

¹⁶ Section 760.34(8), F.S.

¹⁷ 42 U.S.C. § 3601, et seq.

¹⁸ 42 U.S.C. § 3610.

¹⁹ *Id.*

²⁰ 24 C.F.R. § 115.201.

rules of procedure, judicial decisions, or interpretations of the law by competent authorities will be considered in making the determination.²¹ The second step considers the adequacy of performance of the law, meaning that in operation the fair housing law provides rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the FHA.²²

If a housing discrimination complaint is filed with HUD under the FHA and the complaint falls within the jurisdiction of a substantially equivalent agency, HUD must refer the complaint to the local or state agency and may take no further action, except under limited circumstances.²³

The Commission serves as the certified substantially equivalent HUD agency in Florida.²⁴ Through annual work-share agreements with HUD, the Commission accepts and investigates housing discrimination cases from HUD. According to the Commission's Fiscal Year 2010-11 through Fiscal Year 2017-18 Annual Reports, housing complaints were, on average, 15 percent of all complaints received by the Commission.²⁵

The Fair Housing Assistance Program

A substantially equivalent agency is eligible for federal funding through the Fair Housing Assistance Program (FHAP).²⁶ FHAP permits HUD to reimburse state and local agencies for services that further the purposes of the FHA. Financial assistance provides support for:

- The processing of dual-filed complaints;
- Training under the FHA and the agencies' fair housing law;
- The provision of technical assistance;
- The creation and maintenance of data and information systems;
- The development and enhancement of education and outreach projects, special enforcement efforts, partnership initiatives, and other fair housing projects.²⁷

The Commission is reimbursed by HUD for closing housing cases, through deposit from HUD into the Human Relations Commission Operating Trust Fund within the Commission. In Fiscal Year 2018-2019, these payments totaled \$507,061 for the 2018 grant period. This amount was 45.99 percent of the Commission's Operating Trust Fund for that year.²⁸ In Fiscal Year 2017-18,

²¹ 24 C.F.R. § 115.204.

²² 24 C.F.R. § 115.201.

²³ 42 U.S.C. 3610.

²⁴ HUD additionally certified as substantially equivalent the Broward County Office of Equal Opportunity, Jacksonville Human Rights Commission, Office of Community Affairs – Human Relations Department (Orlando), Palm Beach County Office of Equal Opportunity, Pinellas County Office of Human Rights, and City of Tampa Office of Community Relations. United States Department of Housing and Urban Development, Fair Housing Assistance Program (FHAP) Agencies, https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP/agencies#FL (last visited Dec. 4, 2019).

²⁵ Florida Commission on Human Relations, Annual Reports, available at <https://fchr.myflorida.com/annual-reports/> (last visited Dec. 4, 2019)

²⁶ United States Department of Housing and Urban Development, Fair Housing Assistance Program (FHAP), https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Dec. 4, 2019).

²⁷ 24 C.F.R. § 115.300.

²⁸ Email from Christopher Turner, Deputy Director of External and Legislative Affairs, Florida Commission on Human Relations (Oct. 31, 2019) (on file with the Senate Committee on Judiciary).

these payments totaled \$611,721, which was 49.89 percent of the Commission's Operating Trust Fund.²⁹ The six-year average of trust fund revenue received from HUD is \$597,189.

Exhaustion of Administrative Remedies

A series of recent judicial decisions regarding the applicability of administrative remedies under the FFHA have threatened the Commission's status as a substantially equivalent HUD agency.

In 2004, the Fourth District Court of Appeal held in *Belletete v. Halford* that an aggrieved person must first exhaust administrative remedies under the FFHA before commencing a civil action in state court, citing the doctrine of exhaustion of administrative remedies.³⁰ The Court's holding was not based upon an analysis of the FFHA, which does not explicitly require exhaustion of administrative remedies. Rather, the court provided a brief analysis of what it considered to be an analogous provision of the Florida Civil Rights Act. The *Belletete* holding has been criticized by the Florida Attorney General, and has been rejected by the U.S. District Court for the Southern District of Florida.³¹ Nevertheless, Florida state courts, both in and outside of the Fourth District Court of Appeal, have adopted the *Belletete* holding, and dismiss claims brought under the FFHA where the plaintiff has not exhausted the administrative process.³²

In ongoing discussions since 2008, HUD has informed the Commission that the judicial interpretation of the FFHA in *Belletete* requiring the exhaustion of administrative remedies renders the Florida law fundamentally inconsistent with federal law. The FHA explicitly allows an aggrieved person to commence a civil action whether or not a complaint has been filed with HUD and without regard to the status of any such complaint.³³ Efforts to amend the FFHA during the 2014,³⁴ 2016,³⁵ 2018,³⁶ and 2019³⁷ legislative sessions were unsuccessful and courts continue to apply the *Belletete* rule in FFHA civil actions.

On July 2, 2015, HUD notified the Commission that it would suspend the Commission's participation in FHAP if the FFHA was not amended by January 25, 2016, to overcome the judicially-created requirement that a plaintiff exhaust their administrative remedies as a

²⁹ Email from Christopher Turner, Deputy Director of External and Legislative Affairs, Florida Commission on Human Relations (April 5, 2019) (on file with the Senate Committee on Judiciary).

³⁰ *Belletete v. Halford*, 886 So. 2d 308, 310 (Fla. 4th DCA 2004); *See also Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co. of Boston*, 285 So. 2d 386, 389-90 (Fla. 1973). The doctrine of the exhaustion of administrative remedies is the principle that if an administrative remedy is provided by statute, a claimant must first seek relief from the administrative body before judicial relief is available. Black's Law Dictionary (10th ed. 2014), exhaustion of remedies.

³¹ In *Milsap v. Cornerstone Residential Management, Inc.*, 2008 WL 1994840 (S.D. Fla. 2008), the United States District Court for the Southern District of Florida, relying on *Belletete* as the only state court case on the issue, dismissed a familial status claim brought under the FFHA for failure to exhaust administrative remedies. On reconsideration, in which the Florida Attorney General intervened and argued *Belletete* was wrongly decided, the court reversed itself and reinstated the FFHA claims. *See*, 2010 WL 427436 (S. D. Fla. 2010).

³² *Sun Harbor Homeowners Ass'n v. Bonura*, 95 So. 3d 262, 267 (Fla. 4th DCA 2012); *State v. Leisure Village, Inc.*, 40 Fla. L. Weekly D934 (Fla. 4th DCA 2015); *HOPE v. SPV Realty, L.C.*, Case No. 14-32184-CA-01 (Fla. 11th Cir. Ct. April 30, 2015).

³³ 42 U.S.C. § 3613.

³⁴ SB 410 (Senator Braynon) and HB 453 (Representative Watson).

³⁵ SB 7008 (Senate Governmental Oversight and Accountability) and HB 339 (Representative Rouson).

³⁶ SB 306 (Senator Rouson) and HB 853 (Representative Davis).

³⁷ 32 SB 958 (Senator Rouson) and HB 565 (Representatives Williams and Davis).

condition precedent to filing a housing discrimination claim under the FFHA.³⁸ In light of the legislative calendar, HUD agreed to extend the deadline to amend the FFHA until March 12, 2016.³⁹

On March 16, 2016, HUD recognized pending litigation in the Third District Court of Appeal⁴⁰ and vowed to refrain from making any decision regarding suspension of the Commission's participation in FHAP during the pendency of the judicial proceedings.⁴¹ In December 2016, the Third District Court of Appeal applied the *Belletete* rule and held that a plaintiff must exhaust all administrative remedies before commencing an action in civil court, determining that "[w]hether the [Florida Fair Housing Act] should be amended to conform precisely to the federal [Fair Housing Act] is a matter for the Legislature."⁴²

On August 8, 2019, HUD notified the Commission that the FFHA, as interpreted by the courts, is not substantially equivalent to the federal Fair Housing Act.⁴³ The Commission continues to risk suspension in FHAP if the legislature does not amend the FFHA.

Effect of Proposed Changes:

The bill amends ss. 760.34, F.S., and 760.35, F.S., to provide that an aggrieved person is not required to exhaust his or her administrative remedies before commencing a civil action under the FFHA. Accordingly, the person may file a civil action regardless of whether:

- He or she has filed a complaint with the Commission;
- The Commission has resolved a complaint (if the aggrieved person chose to file one); or
- Any particular amount of time has passed since the aggrieved person filed a complaint with the Commission.

The bill prohibits an aggrieved person from filing a civil action under the FFHA in two instances: (i) if the claimant has consented to a conciliation agreement obtained by the Commission, other than to enforce the terms of the conciliation agreement; or (i) if an administrative law judge has commenced a hearing. These provisions are consistent with the federal Fair Housing Act.

The bill makes conforming changes to 760.07, F.S.

The act takes effect upon becoming law.

³⁸ Letter from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, to Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 2, 2015) (on file with the Senate Committee on Judiciary).

³⁹ Letter from Lynn Grosso, Acting Deputy Assistant Secretary for Enforcement and Programs, to Michelle Wilson, Executive Director, Florida Commission on Human Relations (Mar. 16, 2016)(on file with the Senate Committee on Judiciary).

⁴⁰ *Housing Opportunities Project v. SPV*, 212 So. 3d 419 (Fla. 3rd DCA 2016).

⁴¹ Letter from Sara K. Pratt, *supra*, note 46.

⁴² *Housing Opportunities Project v. SPV*, 212 So. 3d 419 at 424

⁴³ Letter from Carlos Osegueda, Office of Fair Housing and Equal Opportunity Region IV Director, Subject: Post-Suspension Performance Assessment Report, (Aug. 8, 2019) (on file with the Senate Committee on Governmental Oversight and Accountability).

III. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

IV. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The passage of the bill appears necessary to allow the Commission to continue to receive federal reimbursement for the Commission's resolution of housing discrimination cases. Without the bill, the Commission may be disqualified from receiving this federal funding.

V. Technical Deficiencies:

None.

VI. Related Issues:

On April 5, 2019, HUD notified the Commission that it was suspended from participating in the FHAP for a period of 90 days, effective April 11, 2019, and ending on July 11, 2019.⁴⁴ The suspension was a direct result of the agency's failure to adequately address four identified deficiencies: (i) staffing and workload management; (ii) quality management and case processing; (iii) conciliation and public interest requirements; and (iv) budget and finance requirements.⁴⁵

During the suspension period, HUD did not refer complaints to the Commission and did not accept cases for dual-filing from the Commission. HUD did pay the Commission for cases dual-filed and those completed during the suspension period which met quality and timeliness standards.

Between June 28, 2019, and July 16, 2019, pursuant to federal regulations, HUD conducted a remote performance assessment to determine whether the deficiencies resulting in suspension had been remedied and/or eliminated.⁴⁶ On August 8, 2019, HUD issued its Post-Suspension Performance Assessment Report (Post-Suspension Report) advising the Commission of its conclusion that the critical performance standards and benchmarks were not met, and that it would recommend withdrawal of the Commission's certification to the Assistant Secretary.⁴⁷ Within the Post-Suspension Report, HUD made note of the continuing substantial equivalency issues that remain because the Florida fair housing law has not been amended to cure the judicially created exhaustion requirement.⁴⁸ HUD acknowledged the Commission's efforts to file legislation to clarify the discrepancy and that substantial equivalency issue was not specifically a part of the Performance Improvement Plan or suspension.⁴⁹

On September 25, 2019, Anna Maria Farias, the Assistant Secretary for Fair Housing and Equal Opportunity, notified the Commission of her decision to place the Commission on a one year probationary status instead of withdrawing the Commission's certification.⁵⁰ Within 30 days of the end of the one-year probationary period, HUD will re-assess the Commission's performance and make a decision regarding the Commission's continued participation in FHAP.

Currently, there are two separate issues affecting the Commission's certification in the FHAP. The bill addresses and cures one of these – the substantial equivalence issue. The second issue relates to the Commission's prior suspension and current probationary status. In this regard, the Commission advises that it is in frequent communication with HUD and continues to make

⁴⁴ Letter from Carlos Osegueda, Office of Fair Housing and Equal Opportunity Region IV Director, Subject: Suspension from the Fair Housing Assistance Program (April 5, 2019)(on file with the Senate Committee on Governmental Oversight and Accountability).

⁴⁵ *Id.*

⁴⁶ Letter from Carlos Osegueda, Office of Fair Housing and Equal Opportunity Region IV Director, Subject: Post-Suspension Performance Assessment Report, (Aug. 8, 2019) (on file with the Senate Committee on Governmental Oversight and Accountability).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Letter from Anna Maria Farias, Assistant Secretary for Fair Housing and Equal Opportunity (Sept. 25, 2019) (on file with the Senate Committee on Governmental Oversight and Accountability).

strides in remedying the deficiencies and demonstrating its ability to serve the citizens of Florida. Additionally, for fiscal year 2019-2020, the Legislature authorized 8 additional full time equivalent positions and appropriated associated funding to the Commission to address the staffing and workload issues which were identified deficiencies related to the suspension. The Commission instructions that all of these positions have been filled.

VII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 760.07, 760.34, and 760.35.

VIII. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.