

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.)

BILL: SB 138

SPONSOR: Senator Wasserman Schultz

SUBJECT: Employment Practices; Discrimination

DATE: March 27, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	CM	_____
4.	_____	_____	BI	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Florida Civil Rights Act of 1992 is intended to “. . . secure for all individuals within the state freedom from discrimination . . .” for a variety of reasons, including discrimination due to gender. Chapters 110 and 112, F.S., also prohibit discrimination in state and local employment. The anti-discrimination employment policy of Florida is patterned after Title VII of the federal Civil Rights Act of 1964. Neither the Florida Civil Rights Act nor chapters 110 and 112, F.S., however, expressly include an amendment that was made to the federal act in 1978 that provides that discrimination on the basis of pregnancy *is* sex discrimination that is violative of Title VII. Although state law has not been amended to expressly reflect the federal change, the Florida Civil Rights Act has been held to be pre-empted by Title VII of the Civil Rights Act of 1984 to the extent that Florida’s law currently offers less protection to its citizens than does the corresponding federal law.

The bill amends the Florida Civil Rights Act and chapters 110 and 112, F.S., to expressly include pregnancy, childbirth, or related medical conditions within the class of activities that are subject to the prohibition against discrimination on the basis of sex. Additionally, the bill provides that these amendments do not obligate employers to pay for health insurance benefits for abortions, except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

This bill amends the following sections of the Florida Statutes: 110.105, 110.233, 112.042, and 760.11, F.S.

This bill reenacts ss. 104.31 and 760.10, F.S., to incorporate the amendments to ss. 11.233 and 760.11, respectively.

II. Present Situation:

A . State and Local Employment

Chapter 110, F.S., establishes a system of personnel management for state employment. The chapter is intended to provide a means to recruit, select, train, develop, and maintain an effective and responsible workforce. The personnel management system for state employment is intended to include policies and procedures for employee hiring and advancement, training and career development, position classification, salary administration, benefits, discipline, discharge, employee performance evaluations, affirmative action, and other related activities.

Section 110.105(2), F.S., prohibits discrimination, with an exception, as follows:

All appointments, terminations, assignments and maintenance of status, compensation, privileges, and other terms and conditions of employment in state government shall be made without regard to age, sex, race, religion, national origin, political affiliation, marital status, or handicap, except when a specific sex, age, or physical requirement constitutes a bona fide occupational qualification necessary to proper and efficient administration.

Section 110.233, F.S., prohibits certain employment acts, including favoritism toward or discrimination against a person in the career service system because of their race, color, national origin, sex, handicap, religious creed, or political opinion or affiliation.

In addition to ch. 110, F.S., ch. 112, F.S., provides general provisions regulating public officers and employees. Section 112.042, F.S., prohibits discrimination in county and municipal employment based solely on race, color, national origin, sex, handicap, or religious creed of any individual.

B. The Florida Civil Rights Act of 1992

The employment policy prohibiting discrimination based upon sex in state and local employment is also reflected in the Florida Civil Rights Act of 1992,¹ which makes it an unlawful employment practice for an employer²

To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status [*emphasis added*].³

The Florida Civil Rights Act's general purposes are

¹ Sections 760.01 – 760.11, F.S.

² Section 760.02(7), F.S., defines “employer” to mean any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

³ Section 760.10(1), F.S.

... to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

Pursuant to s. 760.01(3), F.S., the Florida Civil Right's Act

... shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

The employment policy of Florida that is embodied in the above-cited provisions is patterned after the federal Civil Rights Act of 1964, as amended in 1978.⁴ Neither the Florida Civil Rights Act nor chapters 110 and 112, F.S., reflect an amendment made to the federal act by Congress in 1978 when it enacted the Pregnancy Discrimination Act. The Pregnancy Discrimination Act was enacted in response to a U.S. Supreme Court decision that held that pregnancy discrimination was not sex discrimination protected under Title VII.⁵ The Pregnancy Discrimination Act expressly states that discrimination on the basis of pregnancy *is* sex discrimination and is therefore violative of Title VII. Although the state act has not yet been amended to reflect this change, it is being interpreted like the federal act so that discrimination based on sex encompasses pregnancy, childbirth, or related medical conditions.⁶

Section 760.02, F.S., contains definitions that are applicable to the chapter, including "discriminatory practice,"⁷ and "national origin."⁸ The section does not contain definitions for the phrases "because of sex" or "on the basis of sex." However, s. 760.10, F.S., of the Florida Civil Rights Act, has been held to be pre-empted by Title VII of the Civil Rights Act of 1984 to the extent that Florida's law currently offers less protection to its citizens than does the corresponding federal law.⁹

Section 760.10, F.S., designates unlawful employment practices and the remedies for unlawful discrimination are set forth in s. 760.07, F.S. That section provides:

Any violation of any Florida statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are

⁴ 42 U.S.C. s. 2000e-2, Title VII

⁵ *General Electric Company v. Gilbert*, 429 U.S. 124 (1976).

⁶ *Kidd v. City of Jacksonville*, 97 Fla. 297, 120 So. 556 (1929); *Massie v. University of Florida*, 570 So.2d 963 (Fla. 1st DCA 1990); *Holland v. Courtesy Corporation*, 563 So.2d 787 (Fla. 1st DCA 1990).

⁷ Section 760.02(4), F.S., defines "discriminatory practice" to mean any violation of the Florida Civil Rights Act of 1992.

⁸ Section 760.02(5), F.S., defines "national origin" to include ancestry.

⁹ *O'Laughlin v. Pinchback*, 579 So.2d 788 (Fla. 1st DCA 1991).

expressly provided for. If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

III. Effect of Proposed Changes:

The bill amends the following four sections of law to provide the definition for the phrase "without regard to sex," "because of sex," or "on the basis of sex" to also include without regard to pregnancy, childbirth, or related medical conditions, for purposes of the prohibition against sex-based discrimination:

- Section 110.105, F.S., relating to state employment policies.
- Section 110.233, F.S., relating to career service appointments.
- Section 112.042, F.S., relating to county and municipal employment policies.
- Section 760.10, F.S., relating to unlawful employment practices.

As a result, women affected by pregnancy, childbirth, or related medical conditions would be required to be treated the same as all other persons not so affected but similar in their ability or inability to work for all employment-related purposes. This requirement would extend to receipt of health insurance or fringe benefits. However, these provisions do not obligate an employer to pay for health insurance benefits for abortion except under two conditions:

- < 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.¹⁰

Nonetheless, an employer is not precluded from providing abortion benefits nor does it affect bargaining agreements in regard to abortion.

Two sections of law, s. 104.31, F.S., relating to a state, county or municipal employee or officer's political activities, and s. 760.11, F.S., relating to administrative and civil remedies under the Florida Civil Rights Act, are re-published to incorporate amendments to s. 110.233, F.S., and s. 760.10, F.S., respectively, through cross-references thereto.

The act takes effect July 1, 2002.

¹⁰ The Florida Supreme Court has recently held that although the right of privacy under the *Florida Constitution* guarantees a woman the right to choose abortion, it does not create an entitlement to financial resources to avail herself of that choice. *See Renee B. v. Florida Agency for Health Care Administration*, 790 So.2d 1035 (Fla. 2001). The Court did not preclude the possibility that a future challenge could be made on the grounds that the applicable Medicaid provisions restricting benefits for medically necessary abortions only in cases of endangerment to the mother's life or in cases of rape or incest constitute gender discrimination violative of the equal protection clause under s. 2, Art. I of the *Florida Constitution*. Section 2, Art. I of the *Florida Constitution* was amended in 1992 by the adoption of a constitution revision ballot initiative, to include further clarification that all females and males alike are equal before the law. Although the equal protection claim was made in *Renee B.*, the Court did not rule on the merit of the claim citing the inadequate court record and the lower court's failure to rule on the claim.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is unclear whether the discrimination based on a woman's pregnancy, childbirth or related medical condition is appropriately cognizable and distinctive as sex discrimination or gender discrimination. The phrase "sex discrimination" and "gender discrimination" appear to be used interchangeably in court cases when determining whether the discrimination "based on sex" or "because of sex" deprives, tends to deprive or otherwise adversely affects an individual's employment opportunities or access to benefits. The clear exception appears to be in cases of discrimination arising from sexual harassment which is clearly to be classified as sex discrimination. At any rate, any equal protection challenge for gender or sex discrimination would not likely be subject to strict scrutiny because the female gender is not recognized as a special protected class such as those who are protected because of race, religion, national origin, or physical disability under s. 2, Art. I of the *Florida Constitution*. Therefore, the test of any state law would be based on whether there was a rational relationship in which the state would have to show that the classification resulting in discrimination advances important governmental objectives and the discriminatory means are substantially related to those objectives.¹¹

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

¹¹ *Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001).

C. Government Sector Impact:

According to the Florida Commission on Human Relations,¹² no increase in cases would be expected if this bill were enacted into law because the term “sex” is already construed by the courts to include pregnancy, childbirth, and related medical conditions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides that its provisions against employment discrimination based on sex do not obligate state employers to pay for health insurance benefits for abortion except under two conditions: (1) where the life of the mother would be endangered if the fetus were carried to term; or (2) where medical complications have arisen from an abortion. This language mirrors a provision in the federal labor relations law.¹³

In contrast, however, it should be noted that federal law governing Medicaid and other federal health insurance benefits and state law on Medicaid exclude coverage for abortion except if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest.¹⁴ To the extent that current law on Medicaid and other health insurance policies provide coverage for abortions based on different or additional conditions, it is uncertain whether the inconsistency in this bill could be construed to deny or conflict with coverage provided by other law or rule.¹⁵ At any rate, it is an inconsistency in existing federal and state law.

During the 2002 legislative session, the CS for SB 410 by the Committee on Judiciary and Senator Wasserman Schultz, passed the Committees on Governmental Oversight and Productivity and Judiciary. Like SB 138, the CS for SB 410 would have amended the Florida Civil Rights Act and chs. 110 and 112, F.S., to expressly include pregnancy, childbirth, or related medical conditions within the class of activities that are subject to the prohibition against discrimination on the basis of sex. The CS/SB 410 was placed on the Calendar for second reading, but it was not taken up prior to the end of session.

VIII. Amendments:

None.

¹² The Commission is the administrative body created by the Legislature to administer the Florida Civil Rights Act. Part of its duties include holding hearings and rendering decisions on claims alleging discrimination.

¹³ See 42 U.S.C. s. 20003(k).

¹⁴ See, e.g., 42 U.S.C. s. 139733 (c) (no health insurance funds are available to perform abortions except when the mother’s life would be endangered by carrying the pregnancy to term, or in case of rape or incest); 42 U.S.C. s. 1093 (no funds available to the Department of Defense can be used to perform abortions except when the mother’s life would be endangered by carrying the pregnancy to term, no medical treatment facility or other department facility may be used to perform an abortion except when the mother’s life would be endangered by carrying the pregnancy to term, or in case of rape or incest); s. 409.815(2)(t), F.S. (no Medicaid funds available for abortion other than in case of mother’s life threatened by term pregnancy.)

¹⁵ R-59 G-4230, F.A.C.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
