

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: CS/CS/SB 1502

SPONSOR: Governmental Oversight and Productivity Committee, Commerce, Economic Opportunities, and Consumer Services Committee, and Senator Campbell

SUBJECT: Discriminatory Practices

DATE: April 14, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Roberts	JU	Favorable
2.	Gillespie	Maclure	CM	Fav/CS
3.	White	Wilson	GO	Fav/CS
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute for committee substitute for Senate Bill 1502 prohibits public food service establishments from discriminating by restricting admission to a person solely because the person operates a motorcycle or is wearing clothing that displays the name of a motorcyclist organization or association. Public food service establishments that prominently post a written dress code requiring formal wear are exempted from this prohibition.

A person who is discriminated against may file a complaint with the Commission on Human Relations (commission) or the Attorney General’s Office of Civil Rights (AGOCR). The commission or AGOCR may attempt to resolve the claim with informal methods of conference, conciliation, and persuasion. If informal resolution fails or if the commission or AGOCR do not attempt informal resolution, the person who is discriminated against may file a claim for civil injunctive relief against the owners of the public food service establishment.

The bill creates section 760.61 of the Florida Statutes.

II. Present Situation:

Attorney General’s Office of Civil Rights

The Legislature established the Attorney General’s Office of Civil Rights (AGOCR) within the Department of Legal Affairs in 1991.¹ Under current law, the Attorney General has authority to

¹ See ch. 91-74, L.O.F.; s. 16.57, F.S. The Office of Civil Rights was created, in part, based on the recommendations of the Florida Supreme Court’s Racial and Ethnic Bias Commission for the purpose of bringing injunctive and compensatory suits against individuals who engage in harassment or other inappropriate conduct on the basis of race or ethnicity. See Florida

bring a civil or administrative action for damages and for injunctive or other appropriate relief against any person who interferes, or attempts to interfere, by threats, intimidation, or coercion with the rights of another person established under the State Constitution or state law (s. 760.51, F.S.). These civil damages are limited to \$10,000 for each violation, which accrue to the injured person. In addition, if the Attorney General prevails, the Department of Legal Affairs is entitled to reasonable attorney's fees and costs.

Florida Commission on Human Relations

The Florida Commission on Human Relations (commission) is the state agency created by the Legislature to hear complaints under the Florida Civil Rights Act of 1992 (ss. 760.01-760.11 and 509.092, F.S.). The act prohibits employment discrimination based on an individual's race, color, religion, sex, national origin, age, handicap, or marital status (s. 760.10, F.S.).

In addition to complaints involving employment discrimination, the commission hears complaints against public lodging establishments and public food service establishments that refuse accommodations or service based on race, creed, color, sex, physical disability, or national origin (s. 509.092, F.S.).² The commission also hears complaints under the Fair Housing Act (ss. 760.20-760.37, F.S.), which prohibits discrimination in the sale or renting of a dwelling on account of race, color, national origin, sex, handicap, familial status, or religion.

State Resolution for Complaints of Discrimination by Certain Clubs

Pursuant to s. 760.61, F.S., certain clubs are prohibited from discriminating against an individual in evaluating an application for membership because of *race, color, religion, gender, national origin, handicap, age above the age of 21, or marital status*. This provision applies to a club that has more than 400 members, that provides regular meal service, and that regularly receives payments (i.e., payments for dues, fees, use of space, facilities, services, meals, or beverages) from nonmembers for business purposes, but does not apply to fraternal or benevolent organizations, ethnic clubs, or religious organizations where business activity is not prevalent (s. 760.60(1), F.S.).

In addition, current law prohibits this type of club from publishing, circulating, issuing, displaying, posting, or mailing any advertisement, notice, or solicitation containing a statement expressing that the accommodations, advantages, facilities, membership, or privileges of the club are denied to an individual because of *race, color, religion, gender, national origin, handicap, age above the age of 21, or marital status (id.)*.

A person who is discriminated against by a club that violates either of these provisions may file a complaint with the commission or the AGOCR (s. 760.60(2), F.S.). After receiving a complaint, the commission or the AGOCR has discretion whether to resolve the complaint, but must

Supreme Court, Racial & Ethnic Bias Commission, *Where the Injured Fly for Justice, Report & Recommendations 7* (Deborah Hardin Wagner ed., 1991), available at <http://www.flcourts.org/sct/sctdocs/bin/racial.pdf> (last visited Mar. 30, 2003).

² Although s. 509.092, F.S., prohibits an establishment from refusing accommodations or service based on race, creed, color, sex, physical disability, or national origin, an establishment is permitted to refuse accommodations or services on the basis that a person is "objectionable or undesirable to the operator."

investigate the alleged discrimination. The commission or the AGOCR must give notice to the person who filed the complaint if it intends to resolve the complaint. If the commission or the AGOCR fails to give notice within 30 days after the complaint is filed, or fails to resolve the complaint within 30 days after notice is given, the person who filed the complaint is authorized to file a lawsuit seeking injunctive relief against the club to discontinue the discriminatory practice or other appropriate action (s. 760.60(3), F.S.).

Federal Relief for Discrimination by Places of Public Accommodation

Under Title II of the Civil Rights Act of 1964, all persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination on the ground of *race, color, religion, or national origin* (42 U.S.C. s. 2000a). The act defines a “place of public accommodation” to include:

- Any inn, hotel, motel, or other establishment that provides lodging to transient guests, other than an establishment located within a building that contains not more than 5 rooms for rent or hire and that is actually occupied by the proprietor of the establishment as his or her residence;
- Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any facility located on the premises of any retail establishment, or any gasoline station; and
- Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment (*id.*).

A person aggrieved by an act or practice of discrimination may bring a civil action in federal court seeking preventative relief, including permanent or temporary injunctions, or restraining orders (42 U.S.C. 2000a-3). In addition, the Attorney General of the United States may also seeking preventative relief if he or she has reasonable cause to believe that any person or group is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted under the act, and the pattern or practice is of a nature and is intended to deny the full exercise of those rights (42 U.S.C. s. 2000a-5). The Attorney General may also intervene in actions brought by individuals aggrieved by discriminatory acts or practices if the case is of “general public importance” (42 U.S.C. s. 2000a-3).

III. Effect of Proposed Changes:

Discrimination by Public Food Service Establishments

The bill creates s. 760.61, F.S., to prohibit public food service establishments, as defined in s. 509.013(5), F.S., from discriminating by restricting admission to a person solely because the person operates a motorcycle or is wearing clothing that displays the name of a motorcyclist organization or association. Public food service establishments that prominently post at the entrance of the establishment a written formal dress code, which requires the public to wear a suit, dress, jacket or tie for admission, are exempted from this prohibition.

Section 509.013(5)(a), F.S., states that a, “Public food service establishment’ means any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.” Section 509.13(5)(b), F.S., states that the following entities are excluded from the definition of “public food service establishment”:

- Place maintained and operated by a public or private school, college, or university for the use of students and faculty or temporarily to serve events such as fairs, carnivals, and athletic contests.
- Eating place maintained and operated by a church or a religious, nonprofit fraternal, or nonprofit civic organization for the use of members and associates or temporarily to serve events such as fairs, carnivals, or athletic contests.
- Eating place located on an airplane, train, bus, or watercraft, which is a common carrier.
- Eating place maintained by a hospital, nursing home, sanitarium, assisted living facility, adult day care center, or other similar place that is regulated under s. 381.0072, F.S.
- Place of business issued a permit or inspected by the Department of Agriculture and Consumer Services under s. 500.12, F.S.; e.g., food manufacturing factories and retail food stores.
- Place of business where the food available for consumption is limited to ice, beverages with or without garnishment, popcorn, or prepackaged items sold without additions or preparation.
- Theater, if the primary use is as a theater and if patron service is limited to food items customarily served to the admittees of theaters.
- Vending machines.
- Research and development test kitchen limited to the use of employees and which is not open to the general public.

The bill further states that the section does not prohibit the restriction of admission to a person because the person’s conduct poses a risk to the health, safety, or property of another.

Enforcement

The bill allows a person who is discriminated against by a public food service establishment to file a written complaint with the commission or the AGOCR. After receiving a complaint, the commission or the AGOCR is required to investigate the alleged discrimination, but may ultimately decide in its discretion to not attempt to informally resolve the complaint. If the commission or AGOCR chooses to resolve the complaint, it may attempt to eliminate or correct the discrimination by informal methods of conference, conciliation, and persuasion.

The commission or the AGOCR must give written notice to the person who filed the complaint if it intends to resolve the complaint within 30 days after receiving the complaint. If the commission or the AGOCR fails to give notice within this 30 day period or if it fails to resolve the complaint within 30 days after such notice is given, the person who filed the complaint, or the Attorney General on behalf of the person, is authorized to file a lawsuit seeking injunctive

relief against the owners of the public food service establishment to discontinue the discriminatory practice or other appropriate action.

Effective Date

The bill takes effect upon becoming a law.

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:

Freedom of Association

The First Amendment of the United States Constitution includes the freedom of association. Public accommodation laws, like this bill, that proscribe discrimination by proprietors based on enumerated grounds implicate this freedom.

For example in *Roberts v. United States Jaycees*,³ the United States Supreme Court considered whether application of the Minnesota Human Rights Act, which proscribes discrimination because of sex, to the Jaycees violated the Jaycees' freedom to associate only with men. The court found that the organization's right to freedom of expressive association was implicated by the act; however, the court stated that this right is not absolute.⁴ Infringements on this right may be justified by regulations adopted to serve compelling state interests, which cannot be achieved through less restrictive means.⁵ Applying this test, the court held that Minnesota's compelling interest in eliminating gender discrimination justified any infringement on the Jaycees' freedom of expressive association.⁶

More recently in *Boy Scouts of America v. Dale*,⁷ the United States Supreme Court considered whether application of New Jersey's public accommodations law, which proscribes discrimination by a public accommodation because of sexual orientation, to

³ 468 U.S. 609 (1984).

⁴ *Roberts*, 468 U.S. at 623.

⁵ *Id.*

⁶ *Id.* at 623-627.

⁷ 530 U.S. 640 (2000).

the Boy Scouts of America violated the group's freedom to associate only with heterosexuals. The Court noted that the forced inclusion of an unwanted person in a group infringes on a group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.⁸ Further, the Court stated that, "Freedom of association plainly presupposes a freedom not to associate."⁹ Ultimately, the Court held that the Boy Scouts were not required to admit homosexuals, as New Jersey's interests in its public accommodation law did not justify an infringement on the Boy Scouts' right to advocate its viewpoint that homosexuality is not a legitimate form of behavior.¹⁰

This bill may be subject to constitutional challenges arguing that its proscriptions against discrimination based on clothing and transportation unconstitutionally impinge on a proprietor's freedom of association. Whether such arguments would be successful appears to be an issue of first impression as no case law appears to address the precise issue of whether the state has a sufficiently compelling interest in eliminating discrimination based on clothing and transportation that would justify any impingement on the freedom to associate by the bill.

Equal Protection:

Article I, s. 2 of the State Constitution, which sets forth Florida's constitutional guaranty of equal protection, provides:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Similarly, the United States Constitution provides in s. 1 of Amendment 14 that no state shall deny to any person within its jurisdiction the equal protection of the laws. Additionally, the due process clause of the Federal Constitution embraces the principle of equal protection of the law.

These constitutional guarantees of equal protection of the laws are designed to prevent any person or class of persons from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation. Equal protection requires that once a state grants a right, it must accord that right to all without invidious discrimination.

The guaranty of equal protection, however, does not require that a statute apply equally and uniformly to all persons within the state. It is sufficient if the statute applies

⁸ *Boy Scouts of America*, 530 U.S. at 648.

⁹ *Id.*

¹⁰ *Id.* at 650-661.

uniformly to all persons who are similarly situated.¹¹ Furthermore, reasonable classifications, meaning a grouping of things because they agree with one another in certain particulars and differ from other things in those particulars, is permissible under the equal protection clause, so long as the classification is not arbitrary and is based on some difference in the classes having a substantial relation to the purpose of the legislation.¹²

This bill may be challenged on equal protection grounds asserting that it does not apply uniformly to all persons who are similarly situated, e.g., the bill applies to “public food service establishments,” but does not apply to other classes of businesses open to the public. Businesses, however, are not suspect classes; thus, the statute created by the bill would be evaluated by the rational basis test. The test requires that a statutory classification bear some reasonable relationship to the achievement of a legitimate state purpose.¹³ Here it may be argued that the statute is reasonably related to achievement of the state’s purpose to eliminate discrimination against motorcyclists by restaurants, which reportedly are the businesses most often engaged in such activity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill authorizes an aggrieved person, who is discriminated against by a public food service establishment, to seek informal resolution of his or her complaint through the commission or the AGOCR. If the complaint is not resolved, the bill authorizes the aggrieved person to bring a civil action for injunctive relief to discontinue the discriminatory practice.

C. Government Sector Impact:

The bill may cause a workload increase for the commission and for the AGOCR, due to a potentially increased number of complaints. The bill, however, provides the commission and AGOCR with discretion regarding whether to resolve each complaint. The bill does not provide an appropriation.

VI. Technical Deficiencies:

None.

¹¹ *State ex rel. Spence v. Bryan*, 87 Fla. 56 (1924).

¹² *Greater Miami Financial Corp. v. Dickinson*, 214 So.2d 874 (Fla. 1968).

¹³ See *Florida League of Cities, Inc. v. Dep't of Environmental Regulation*, 603 So.2d 1363 (Fla. 1st DCA 1992).

VII. Related Issues:

An example of legislation that creates a protected class of persons based on attire and transportation is Minnesota statute s. 604.12. This statute prohibits a “place of public accommodation” from restricting access, admission, or usage to a person solely because the person operates a motorcycle or is wearing clothing that displays the name of an organization or association. This law was enacted in 1998 and effectively proscribes any establishment from having a dress code, e.g., a restaurant that has jacket and/or tie policy, to the extent that such dress code denies access to persons operating motorcycles or wearing specified attire.

The web site for the American Bikers Awareness, Training, and Education Association (ABATE) of Minnesota provides information on this law and recommends that motorcyclists, who are denied access to a place of public accommodation, provide the establishment with a copy of the law and notify ABATE. A certified letter and a copy of the law are sent by ABATE to the establishment. ABATE then visits the establishment several weeks later, and if services are again denied, a lawsuit for damages is filed.¹⁴

To date, there is no case law construing the Minnesota law. Thus, it is unknown whether any constitutional challenges to the law would be successful.

VIII. Amendments:

None.

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

¹⁴ http://abatemn.org/equal_access.htm