

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 Commerce Committee

BILL: SB 1272
 INTRODUCER: Senator Storms
 SUBJECT: Persons with Disabilities
 DATE: March 13, 2009 REVISED: 3/17/09 3/20/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	Fav/1 Amendment
2.			CF	
3.			JU	
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input checked="" type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

SB 1272 creates a new section to allow an employer who employs an individual who has a disability, as defined in the Americans with Disability Act, to escape liability for negligent or intentional acts or omissions by that individual.

The employer may not be held liable when:

- The employee has received supported employment services through a public or private non-profit provider;
- The employer relied in good faith on information about the employee provided by the supported employment service provider; and
- The employer does not have actual prior notice of the employee's propensity for the actions at issue.

SB 1272 creates an undesignated section of Florida Statutes.

II. Present Situation:

Americans with Disabilities Act (ADA):

“Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments.”¹ The ADA was most recently amended in 2008 by the Americans with Disabilities Act (ADA) Amendments Act of 2008.² Included in the amendments were changes to the definition of “disability” and related terms.

Under the ADA, “disability,” with respect to an individual, means:³

- (A) A physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment (as described in paragraph (3)).

“Major life activities” include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Further, a “major life activity” can involve the operation of a major bodily function like functions of the immune system, normal cell growth, digestive, etc.⁴ The limitation of one major life activity is enough to be considered a disability.⁵

Individuals who are “regarded as having such an impairment” are those individuals who establish that they have been subjected to an action prohibited under this act because of an actual or perceived physical or mental impairment whether or not the impairment actually limits or is perceived to limit a major life activity. However, this does not apply to impairments that are “transitory and minor.”⁶

The 2008 amendments also added language regarding the definition of “disability” to state that the definition of disability “shall be construed in favor of broad coverage of individuals.” Congress made findings in section 2 of the ADA Amendments Act of 2008, stating that the original intention of the ADA was that courts would interpret “disability” consistently with how they had applied the definition of a handicapped individual under the Rehabilitation Act of 1973; however, Congress found that several U.S. Supreme Court cases had in fact narrowed the “scope of protection intended to be afforded by the ADA.” Thus Congress states in the ADA Amendments Act of 2008 that their intent is to reinstate a broad scope of protection available under the ADA.⁷ Thus, the new federal definition of “disability” purposefully encompasses a large group of individuals to make them eligible for the provisions of the ADA.

¹ U.S. Equal Employment Opportunity Commission, at <http://www.eeoc.gov/types/ada.html> (last visited 3/2/2009).

² Changes became effective January 1, 2009. ADA Amendments Act of 2008, Pub.L. No. 110-325.

³ 42 U.S.C. s. 12102(1).

⁴ 42 U.S.C. s. 12102(2).

⁵ 42 U.S.C. s. 12102(4)(C).

⁶ “A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. s. 12102(3).

⁷ Section 2(a), ADA Amendments Act of 2008, Pub.L. No. 110-325.

Florida Statutory Definition of “Disability”:

“Disability” is a term that is defined in several different Florida Statutes.⁸ Most relevant are the definitions in s. 413.20, F.S. (Division of Vocational Rehabilitation of the Department of Education), and s. 393.063, F.S. (Agency for Persons with Disabilities).

Section 413.20(7), F.S., defines “disability” as “a physical or mental impairment that constitutes or results in a substantial impediment to employment.” The mission of the Division of Vocational Rehabilitation (DVR) is to “provide services to eligible individuals with physical and/or mental impairments that will enable an individual to achieve an employment goal and/or enhance their independence.”⁹ In part, the division administers an employment program assisting individuals with disabilities, including those with the most severe disabilities, to pursue meaningful careers appropriate for their abilities and capabilities.

Section 393.063, F.S., defines “developmental disability” as “a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.” The Agency for Persons with Disabilities (APD) has been specifically tasked with serving the needs of Floridians with developmental disabilities. The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities for supports and services.

Supported Employment Services:

Supported employment services are services offered to help an individual gain or maintain a job. Generally services involve job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines “supported employment services” as on-going support services provided by the designated state unit to achieve job stabilization.¹⁰

DVR specifically defines “supported employment services” as “ongoing support services and other appropriate services needed to support and maintain a person who has a severe disability in supported employment.”¹¹ The service provided is based upon the needs of the eligible

⁸ For example: Section 400.960(6), F.S. (“developmental disability”); Section 410.032(2), F.S. (“disabled adult”); Section 410.603(2), F.S. (“disabled adult”); Section 427.802(2), F.S. (“person with a disability”); Section 1004.02(7), F.S. (“adult with disability”); Section 1007.02(2), F.S. (“student with a disability”). Section 760.22(7), F.S., defines “handicap” for the Fair Housing Act, administered by the Florida Commission on Human Relations, as (a) a person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment; or (b) a person has a developmental disability as defined in s. 393.063, F.S.

⁹ “About DVR” at <http://www.rehabworks.org/index.cfm?fuseaction=SubMain>About> (last visited 3/3/2009).

¹⁰ 34 C.F.R. s. 363.6(c)(2)(iii). “What is the State Supported Employment Services Program? Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment. (Authority: 29 U.S.C. 795j).” 34 C.F.R. s. 363.1. See also, Supported Employment State Grants, at <http://www.ed.gov/programs/rsasupemp/index.html> (last visited 3/11/2009).

¹¹ For DVR: “Supported employment” means competitive work in integrated working settings for persons who have severe disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of a severe disability. Persons who have severe disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work. Section 413.20(26), F.S. For APD: “Supported employment” means employment located or provided in an integrated work setting,

individual as specified in the person's individualized written rehabilitation program. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.¹²

Both DVR and APD provide supported employment services or connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to such services. However, these entities do not share information about their customers with the employers that employ their customers as supported employment. This is due to various reasons, including confidentiality concerns, or contract agreements between the employer and the organization.

Employer Liability:

Under common law principles, an employer is liable for acts of its employee that cause injury to another person if the wrongful act was done while the employee was acting within the apparent scope of employment, serving the interests of his employer. An employee is not acting within the scope of his employment, and thereby the employer is not liable, if the employee is acting to accomplish his own purposes, and not to serve the interests of the employer.¹³ "The test for determining if the conduct complained of occurred within the scope of employment is whether the employee (1) was performing the kind of conduct he was employed to perform, (2) the conduct occurred within the time and space limits of the employment, and (3) the conduct was activated at least in part by a purpose to serve the employer."¹⁴

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.¹⁵ An employer may be held liable for a negligent act of an employee committed within the scope of his employment even if the employer is without fault.¹⁶ An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label "employer" to impose strict liability under a theory of respondeat superior¹⁷ but instead look to the employer's control or right of control over the employee at the time of the negligent act."¹⁸ Employer fault is not an element of vicarious liability claims.¹⁹

with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance. Section 393.063(37), F.S.

¹² Section 413.20(27), F.S.

¹³ Gowan v. Bay County. 744 So.2d 1136, 1138 (1st DCA, 1999).

¹⁴ Id.

¹⁵ Garcy v. Broward Process Servers, Inc. 583 So.2d 714, 716 (4th DCA, 1991). The term "intentional" means done with the aim of carrying out the act. Black's Law Dictionary (8th ed. 2004), intentional.

¹⁶ "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer." Makris v. Williams. 426 So.2d 1186, 1189 (4th DCA, 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. Black's Law Dictionary (8th ed. 2004), negligent. A negligent act is one that creates an unreasonable risk of harm to another. Black's Law Dictionary (8th ed. 2004), act.

¹⁷ "Respondeat superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. Black's Law Dictionary (8th ed. 2004), respondeat superior.

¹⁸ Vasquez v. United Enterprises of Southwest Florida, Inc. 811 So.2d 759, 761 (3rd DCA, 2002).

¹⁹ Makris v. Williams. 426 So.2d 1186, 1189 (4th DCA, 1983).

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as “an employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person would be harmed.”²⁰ An action for negligent hiring is based on the direct negligence of the employer. However, in order to be liable for an employee’s act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury. “The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment.”²¹

In Williams v. Feather Sound, Inc., 386 So.2d 1238, 1239 - 1240 (2nd DCA, 1980), the 2nd District Court of Appeal in Florida, in a case regarding negligent hiring, discussed the responsibility of the employer to be aware of an employee’s propensity to commit an act at issue:

Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.

Section 768.096, F.S., signed into law in 1999, creates an employer presumption against negligent hiring, “if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general.”²²

There does not appear to be any existing provision in Florida law that would limit the liability of an employer if the employer has hired an individual with disabilities.

An omission is a failure to do something, especially a neglect of duty.²³ There do not seem to be any Florida cases which discuss employer liability for the negligent or intentional omissions of employees. Generally, there must be a duty to disclose or to act for an individual to be liable for an omission.

²⁰ Black’s Law Dictionary (8th ed. 2004), negligent hiring.

²¹ Anderson Trucking Service, Inc. v. Gibson. 884 So.2d 1046, 1052 (5th DCA, 2004).

²² Section 768.096, F.S., defines what a background investigation must include, like contacting references, interviewing the employee, and obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

²³ Black’s Law Dictionary (8th ed. 2004), omission.

III. Effect of Proposed Changes:

Section 1 creates an undesignated section, which states that an employer is not liable, under certain conditions, for negligent or intentional acts or omissions by an employee who has a disability, as defined by the ADA Amendments Act of 2008, Pub. L. No. 110-325.

The employer may not be held liable when:

- The employee has received supported employment services through a public or private non-profit provider;
- The employer relied in good faith on information about the employee provided by the supported employment service provider; and
- The employer does not have actual prior notice of the employee's propensity for the actions at issue.

Section 2 provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Employers' liability in hiring individuals with disabilities through supported employment service providers will be reduced. This may help employers feel more comfortable hiring individuals with disabilities.

In turn, more individuals using supported employment services may find employment opportunities available to them. An individual's liability for negligent or intentional acts or omissions will not change.

C. **Government Sector Impact:**

This will have an indeterminate or insignificant impact on agencies involved in supported employment services. APD stated that passage of this bill may make it easier for the agency's supported employment services to place clients with employers.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

APD suggested that the citation to the federal definition of "disability" under the ADA be changed from referencing only the public law, Pub. L. No. 110-325, to add a reference to the federal citation of 42 U.S.C s. 12102. This may be easier for readers of the bill to obtain the appropriate definition of the term "disability."

If organizations and agencies that provide supported employment services do not convey information concerning the individual to the employer, there may be a possibility that this change in liability law will place additional liability on the providers of those services. The bill would add language that an employer may escape liability if it relies in good faith on the information provided by the employment service provider about the supported employee. Section 728.68, F.S., waives agencies' sovereign immunity for torts.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

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

None.

B. **Amendments:**

Barcode 639342 by Commerce Committee on March 17, 2009:

This amendment makes a technical change to add the United States Code citation for the ADA definition of "disability," as identified in Related Issues above.