IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

AMY CARSILLO,

Plaintiff/Appellant,

v.

CITY OF LAKE WORTH,

Defendant/Appellee.
_____/

4DCACASE NO.: 4D07-4236
CASE NO: 50-2004-CA-010584-MB

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FLORIDA CHAPTER

BRIEF IN SUPPORT OF APPELLANT
ON APPEAL FROM THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

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Interest of Amicus Curiae and Statement of Consent

The National Employment Lawyers Association (NELA) is a nationwide non-profit, non-partisan organization of approximately 3,000 lawyers who regularly represent employees in civil rights and other employment-related litigation and who seek to protect the integrity of federal and state civil rights laws, rules, and regulations.

The Florida Chapter of NELA ("FL-NELA") was founded in 1993 and has approximately 200 member-attorneys practicing around the state. FL-NELA's amicus activity has focused intently upon the Florida Civil Rights Act ("FCRA") which is the statute at issue in the present appeal.

The Florida Supreme Court has previously accepted seven amicus briefs from FL-NELA and the organization has filed amicus briefs in the District Courts of Appeal throughout Florida including this court and in the U.S. Court of Appeals for the Eleventh Circuit. Since its inception 15 years ago, FL-NELA has filed more than 25 amicus briefs.

Appellant has consented to this brief while Appellee has not.

SUMMARY OF ARGUMENT

FL-NELA seeks to have this court reverse the court below and find that, as a matter of fundamental statutory construction, the Florida Civil Rights Act

("FCRA"), which is patterned after its federal counterpart Title VII, must be construed so as to include pregnancy as a form of sex discrimination based in large part upon the decision of State of Florida v. Jackson, 650 So.2d 24, 27 (Fla. 1995) which held that it is a fundamental statutory construction principle in Florida that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts.

Numerous state and federal courts, including but not limited to courts in Florida construing the FCRA, have interpreted state anti-discrimination statutes that do not expressly include the word "pregnancy" in their respective lists of protected characteristics to nevertheless protect employees from sex discrimination on the basis of pregnancy because those state statutes were patterned after the federal anti-discrimination law Title VII which does prohibit pregnancy discrimination as a form of gender discrimination and, therefore, the state laws must be construed to provide at least the same level of protection as the federal statute.

ARGUMENT

I. Standard of Review

All questions presented for review in this brief are issues of statutory interpretation. They are pure law issues which are reviewed in this court under the

de novo standard. See, e.g., Maggio v. Florida Dept. of Labor & Employment Security, 899 So.2d 1074, 1076 (Fla. 2005).

II. Purpose of FCRA.

The purpose of the FCRA is to "secure for all individuals within the state freedom from discrimination" and "to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against the domestic strife and unrest, to preserve the public safety, health and general welfare, and to promote the interests, rights and privileges of individual's within the state." See § 760.01(2), Fla. Stat. (1997). The Legislature has further noted that the act is to be construed in accord with the fair import of its terms and shall be liberally construed to further the general purposes stated therein. See § 760.01(3). Within the same piece of legislation, the Legislature created a provision enumerating unlawful employment practices. See § 760.10 which states in pertinent part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire 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.

As indicated in the Appellant's Brief, according to O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), there is a long-standing rule of statutory construction in Florida which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the Federal Courts to the extent that construction is harmonious with the spirit of the Florida legislature. *Id.* at 792. Because the FCRA, a state anti-discrimination law, is modeled after Title VII, the federal anti-discrimination law, a review of Title VII is appropriate.

III. Title VII.

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of, among other characteristics, sex which includes pregnancy. See 42 U.S.C. § 2000e-2 which states in pertinent part:

"Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

> **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin."

Title VII has a definitions section at 42 U.S.C. § 2000e which states in pertinent part:

"For the purposes of this subchapter--

> **(k)** The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise."

As O'Loughlin and Jackson instructs, and as a matter of statutory construction, the FCRA must be construed to provide at least the same protection to pregnant women as Title VII even though the FCRA does not expressly mention pregnancy.

IV. Policy reasons for finding that a prohibition against sex discrimination includes a similar prohibition against pregnancy discrimination.

The strong national and state policies against sex discrimination in the workplace cannot ignore a basic distinction in biological gender roles; namely, the capacity to become impregnated and bear children. Ganzy v. Allen Christian School, 995 F.Supp. 340, 350 (E.D.N.Y. 1998)(discussing sociological interplay between the biological reality of sexual congress between the male and female

genders and its intended or unintended consequence of pregnancy and humanity's historical attempts to influence and regulate both the process and the outcome through the dispensation of religious theory and enactment of secular laws). Of course, only the female gender has the aforementioned biological capacities. As such, it is the exclusive province of women to become pregnant and then host the gestation process resulting in the propagation of the human race.

In addition to these biological attributes, pregnant women do participate in the workforce in our modern society and for many of them work is not a choice; instead, they must work in order to support themselves and their dependents. Partly because a woman can become pregnant thereby directly evidencing her sexual activity, females have historically been more frequently subject to condemnation than men particularly when the pregnant woman was not married. *Id.* at 351. Despite their increasing numbers as workers in modern society, women's subordinated roles have persisted due in large part to paternalistic views that women need to be "protected" from the daily rigors of work outside the home so that they may tend to their supposedly more natural function of caring for home and hearth. *Id.* at 355.

Recognizing that centuries-old employment practices placed women at an economic, legal, or social disadvantage as opposed to males and to eliminate

cultural bias against women (and other marginalized groups) the U.S. Congress enacted both Title VII and the Equal Pay Act in 1964 and 1963 respectively. *Id.* at 357.

These statutes sought to eliminate barriers to employment opportunities for women in the United States and, subsequently, individual states began enacting similar legislation such as the Florida Human Rights Act, which was the precursor to today's FCRA, which modeled the protections of Title VII.

Title VII, however, did not expressly indicate that pregnancy was a form of gender discrimination when it was originally enacted. As seen in the next section, upon the enactment of Title VII in 1964 virtually all federal and state courts that addressed this issue found that sex discrimination included the concept of pregnancy discrimination until twelve years later when the U.S. Supreme Court issued its General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) decision which was quickly legislatively remedied by the enactment of the Pregnancy Discrimination Act ("PDA") of 1978 which added subsection (k) to 42 U.S.C. § 2000e as set forth above thereby clarifying once and for all that Congress had intended to include the concept of pregnancy within the scope of Title VII's prohibition against gender discrimination.

V. Development of pregnancy discrimination law as a subset of gender discrimination.

The most succinct summary of the development in jurisprudence that Title VII prohibitions against gender discrimination included pregnancy discrimination from 1964 up until Gilbert in 1976 is set forth by the Massachusetts Supreme Court in Massachusetts Electric Company v. Massachusetts Commission Against Discrimination, 375 N.E.2d 1192 (Mass. 1978). In that opinion, the Massachusetts high court addressed the question of whether a state law that was patterned after Title VII included the concept of pregnancy as a subset of gender discrimination. The court held that the exclusion of temporary disabilities related to pregnancy from a comprehensive disability plan constituted unlawful sex discrimination in employment in violation of G.L. c. 151B, s 4 which was the Massachusetts state anti-discrimination law being examined.

The state law provided:

> "It shall be an unlawful practice: 1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, age, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification."

Just as in the originally enacted Title VII, Florida's FHRA, and later the FCRA, this Massachusetts state statute did not expressly include the word pregnancy. The

court addressed the then less-than-two-year-old *Gilbert* holding thusly:

> "In General Elec. Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the Supreme Court held that the exclusion of pregnancy-related disabilities from a temporary disability plan did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. ss 2000e-2000e-15 (1970). Because of the similarities between G.L. c. 151B, s 4, and Title VII the company contends that Gilbert should dictate the result of this decision. We disagree…[t]he major purpose of Title VII was 'to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.' Franks v. Bowman Transp. Co., 424 U.S. 747, 763, 96 S.Ct. 1251, 1263, 47 L.Ed.2d 444 (1976). An interpretation of G.L. c. 151B, s 4, requiring the inclusion of pregnancy-related disabilities in a comprehensive disability plan would impose a higher duty than that existing under present Federal law; such a construction, however, is certainly not inconsistent with the expressed purpose of Title VII of eliminating all practices which lead to inequality in employment opportunity. See Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa.Cmwlth. 103, 108, 373 A.2d 126 (1977)." *Id.* at 1198.

The court continued:

> "In considering whether the exclusion of benefits for pregnancy-related disabilities from a comprehensive disability plan violates G.L. c. 151B, s 4, the initial inquiry necessarily involves determining whether distinctions based on pregnancy are sex-linked classifications. Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex. General Elec. Co. v. Gilbert, 429 U.S. 125, 149, 97 S.Ct. 401, 414, 50 L.Ed.2d 343 (1976) (Brennan, J., dissenting) ("Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related' "). Id. at 161-162, 97 S.Ct. at 421 (Stevens, J., dissenting) ("By definition, . . . (placing pregnancy in a class by itself) discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male"). Gilbert v. General Elec. Co., 375 F.Supp. 367, 381 (E.D.Va.1974), reversed, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) ("(Pregnancy) is

undisputed(ly) and inextricably sex-linked. . . That (exclusion of pregnancy-related disabilities) is discriminatory by reason of sex is self evident"). See Black v. School Comm. of Malden, 365 Mass. 197, 209-211, 310 N.E.2d 330 (1974)." *Id.* at 1198.

The court then set forth its rationale:

"The exclusion of pregnancy-related disabilities, a sex-based distinction, from a comprehensive disability plan constitutes discrimination. While men are provided comprehensive coverage for all disabilities which will necessitate their absence from work, including male-specific disabilities, women are not provided the assurance of comprehensive protection from the inability to earn income during a period of disability. Pregnancy exclusions in disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force. Moreover, pregnancy exclusions reflect and perpetuate the stereotype that women belong at home raising a family rather than at a job as permanent members of the work force. Any argument that the exclusion of pregnancy-related disabilities is not discriminatory because pregnancy, unlike other disabilities, is voluntary is not persuasive. *Id.* at 1199 (internal cites and quotation marks omitted).

Finally, the court pointed to the overwhelming weight of authority that preceded both its analysis and the Gilbert decision to provide support for its conclusion that pregnancy discrimination is sex discrimination:

"Further, our determination that the exclusion of pregnancy-related disabilities from a comprehensive plan is sex discrimination in violation of G.L. c. 151B, s 4, is in accord with the conclusion of the majority of State courts which have considered whether pregnancy exclusions violate their State anti-discrimination laws after Gilbert. Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd., 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393 (1976); Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa.Cmwlth. 103, 373 A.2d 126 (1977); Time Ins. Co. v. Department of Indus., Labor & Human Relations, No. 154-423 (Wis.Cir.Ct., Dane County, Jan. 3, 1978). The six Federal Circuit Courts which considered whether

> pregnancy exclusions violated Title VII prior to Gilbert also concluded that such a practice was unlawful sex discrimination. Communication Workers v. American Tel. & Tel. Co., Long Lines Dep't, 513 F.2d 1024 (2d Cir. 1975), vacated, 429 U.S. 1033, 97 S.Ct. 724, 50 L.Ed.2d 744 (1977). Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), vacated, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), reversed, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976). Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975), vacated in part, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977). Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), vacated, 429 U.S. 1033, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977)." *Id.* at 1200.

Strikingly, this state court reached its conclusion that its state law (patterned after Title VII) included pregnancy discrimination as a subset of gender discrimination even before the U.S. Congress enacted the PDA in the same calendar year (1978) as the opinion. The PDA, of course, was designed to expressly overrule Gilbert and clarify Congress' original 1964 intent that the prohibition against sex discrimination included pregnancy discrimination under Title VII.

The state court was not constrained to follow what it viewed as an analytically erroneous U.S. Supreme Court opinion and instead substituted its own judgment as to its own state's statute. One could properly characterize the opinion as being intellectually courageous considering its departure from U.S. Supreme Court precedent on a similar (but federal) statute.

This Massachusetts Electric Company opinion shows that although a state

statute that is modeled after a federal statue must be construed to provide at least the same level of protection that the federal statute does, there is certainly nothing to prevent a state court, where appropriate and justifiable under principles of logic and rigorous legal analysis, from interpreting that a particular state statute actually provides more protection than what the federal courts interpret the federal statute to provide even though the language of the two statutes are substantially similar.

As seen in the next section, states that have addressed this issue after enactment of the PDA but whose state statutes were never expressly modified to include the term pregnancy as a subset of gender discrimination have nevertheless found that their state laws must provide at least the same level of protection that post-PDA enactment Title VII does.

VI. Courts have recognized that pregnancy discrimination is a form of sex discrimination even if not specifically stated in a state anti-discrimination statute.

The U.S. Supreme Court acknowledged that when Congress amended Title VII in 1978 through the PDA, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in Gilbert. Newport News Ship Building & Dry Dock v. EEOC, 462 U.S. 669, 678 (1983). It is therefore not surprising that state courts would decline to follow Gilbert.

In addition to the examples already provided by the Appellant in her Brief,

i.e., Lapeyronni v. Dimitri Eye Center, Inc., 693 So.2d 236, 238 (La. App. 4th Cir. 1997) and Brennan v. National Telephone Directory, 850 F.Supp. 331, 343 (E.D. Pa. 1994), FL-NELA notes several other opinions that have held that pregnancy discrimination is gender discrimination under state law even where the state statute at issue does not expressly mention pregnancy. See, e.g., White v. University of Massachusetts at Boston, 574 N.E.2d 356, 358 (Mass. 1991)(State supreme court cites to its Massachusetts Electric Company supra decision and reasserts that a woman is a member of a protected group under state law where her claim is sex discrimination based on the trait of pregnancy); Ganzy v. Allen Christian School, 995 F.Supp. 340, 350-361 (E.D.N.Y. 1998)(Federal district court analyzed two New York state anti-discrimination statutes both of which prohibited sex discrimination and neither of which mentioned the word pregnancy and found that both statutes permitted a claim for pregnancy discrimination); Spagnoli v. Brown & Brown Metro, Inc., 2007 WL 2362602 *7 (D.N.J. 2007) citing Leahey v. Singer Sewing Co., 694 A.2d 609, 615-616 (N.J. Law Div. 1996)(State superior court ruled that discrimination against women by reason of pregnancy violates New Jersey statute prohibiting discrimination on the basis of sex); Gorman v. Wells Manufacturing Corp., 209 F.Supp.2d 970, 979-980 (S.D. Iowa 2002)(Claims of discrimination under Iowa state civil rights act for pregnancy discrimination are

treated as sex discrimination claims…state statute prohibits sex discrimination and does not expressly mention pregnancy but since state law is "patterned after Title VII" it is construed in same manner as federal law).

As seen in the cited cases from Massachusetts, New York, New Jersey, Pennsylvania, Louisiana, and Iowa, it is clear that Florida is not the only state to have a civil rights statute that prohibits pregnancy discrimination as a form of sex discrimination but does not expressly mention the word pregnancy in the statute itself. When Florida reenacted the FHRA as the FCRA in 1992, it was clearly modeled after the then-existing form of Title VII which had prohibited pregnancy discrimination as a form of sex discrimination since its inception in 1964 which was further clarified by Congress's enactment of the PDA in 1978 to expressly overrule the Gilbert opinion of 1976.

VII. Conclusion.

Florida permits a pregnancy discrimination claimant to sue and recover damages under the FCRA. The opinion set forth in O'Loughlin established that a state law like the FHRA (now FCRA) that is modeled after federal law (like Title VII in the area of employment discrimination) must be construed in the same manner as that federal law. In so holding, O'Loughlin found that the FHRA's definition of "sex" must include pregnancy when construed in light of Title VII

and affirmed the plaintiff employees' victory in the lower tribunal as to both liability and damages under the FHRA. The numerous subsequent decisions cited by the Appellant in her Brief have recognized that the O'Loughlin holding is logical and persuasive on the issue of whether an aggrieved employee in Florida may advance a claim and sue for damages under the FCRA for pregnancy discrimination. The very few cases to the contrary either expressly misconstrued the holding in O'Loughlin or relied on its preemption section in a vacuum without taking into consideration the statutory construction analysis and holding of the case. Moreover, in Jackson, the Florida Supreme Court endorsed without equivocation the fundamental statutory construction principle set forth in O'Loughlin.

Because (1) the FHRA/FCRA was modeled after Title VII which prohibits pregnancy discrimination as a subset of sex discrimination, (2) a state statute modeled after a federal statute on the same subject matter must be construed to provide at least the same level of protection that the federal statute provides, and (3) pregnant women in Florida deserve the protection of the FCRA for the policy reasons stated above, this Court should reverse the lower court's granting of

summary judgment as to the FCRA pregnancy discrimination claim and remand for further proceedings.

DATED this 12th day of February 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 12, 2008, a true and correct copy of the foregoing Motion for Leave to File Amicus Brief has been furnished via U.S. mail to: Isidro M. Garcia, Esq., Garcia Law Firm, P.A., 224 Datura Street, Suite 900, West Palm Beach, Florida 33401; and Susan Norton, Esq., Allen, Norton & Blue, P.A., 121 Majorca Avenue, Suite 300, Coral Gables, Florida 33134.

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