IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FIRST DISTRICT

FLORIDA STATE UNIVERSITY
BOARD OF TRUSTEES,

Appellant/Cross-Appellee,

v. CASE NO. 1D07-2316
LT CASE NO. 2003 CA 000341

JOHN A. ESPOSITO,

Appellee/Cross-Appellant.
_____/

BRIEF AMICUS CURIAE OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER; AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES; AND FLORIDA EDUCATION ASSOCIATION

BRIEF IN SUPPORT OF APPELLEE/CROSS-APPELLANT
ON APPEAL OF A FINAL ORDER FROM THE
CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
THE HONORABLE JANET E. FERRIS PRESIDING

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Identity And Interest of Amici Curiae and Statement of Consent

The three amici curiae joining in this brief, the National Employment Lawyers Association, Florida Chapter (Florida NELA), the American Federation of State, County, and Municipal Employees (AFSCME), and the Florida Education Association (FEA) have set forth their interest and identities at length in the accompanying motion for leave to file this brief. Instead of repeating that, the three amici offer this short summary.

The roughly 200 employment lawyers in Florida NELA and their thousands of public employee clients, the roughly 115,000 public employees represented by AFSCME, and the roughly 200,000 teachers, professors, and other public employees represented by FEA share an interest in having this court certify conflict with the precedent that mandated the result challenged in the cross-appeal in this case.

The court below followed, as it must, a decision of the Second District Court of Appeal substantially gutting the remedies available in Florida law to public employees who suffer employment discrimination and retaliation. Because affirming the court below would threaten the ability and availability of lawyers to bring claims to remedy employment discrimination, would chill meritorious claims, and would further a radical departure from previously settled law, reversing the decision below and certifying conflict with the Second District so that the Supreme Court may

resolve this issue is a matter of substantial concern to all three amici, their members, and their clients.

Both parties have consented to the amicus curiae brief in this case.

SUMMARY OF ARGUMENT

The court below correctly found that the Florida Civil Rights Act, in incorporating the sovereign immunity damages cap, did not also incorporate the sovereign immunity attorney's fee cap.

However, by far the more substantial issue is the cross-appeal challenging the unavoidable reliance of the court below upon an infirm precedent from a sister court that interprets a narrow cap on damages as a comprehensive cap on all monetary recovery. Gallagher v. Manatee County, 927 So. 2d 914 (Fla. 2d DCA 2006). The Gallagher precedent reads Florida's principal civil rights act as capping the recovery of public employees in discrimination suits for lost wages and fees and costs as well as for compensatory damages. This flies in the face of what had been the common understanding, from 1992 to 2005, about the current Act and, from 1977 to 1992, about the predecessor Act.

The Gallagher court acknowledged that legislative history supported the conclusion that the statute capped only non-economic damages. But because the sentence imposing the cap used the words "total amount of recovery," the Gallagher court claimed that the "plain meaning" doctrine forbade any consideration of legislative history or any other matter outside the operative sentence. Ironically, the court in Gallagher needed to negotiate a convoluted obstacle course of dictionaries,

statutes, and case law to support the "plain meaning" it claimed. More ironically, the court twice had to resort to postulating a fictitious legislative history to justify its conclusion that the law forbade looking at the real legislative history.

The Gallagher court erred in applying the "plain meaning" doctrine under Florida law. The Supreme Court has explained, in a case under this very statute and another case under a related statute, that "plain meaning" does not entail looking with tunnel vision at a single sentence or sentence fragment in a statute. Instead, a court must seek to harmonize the language at issue with all the other provisions of the statute at issue as well as the provisions of related statutes that must be read *in pari materia* with that statute.

At least three other provisions of the contested statute militate against reading the law as capping economic damages. Five related statutes likewise militate against that reading.

The doubts about "plain meaning" that are thus created by following the guidance of the Supreme Court create at least enough ambiguity to warrant examination of legislative history. That legislative history eliminates all reasonable doubt that the legislature capped anything but non-economic damages.

ARGUMENT

Standard of Review

All questions presented for review in this brief are issues of statutory interpretation. They are pure-law issues, reviewed in this court under the *de novo* standard. *See, e.g.*, Maggio v. Florida. Department of Labor & Employment Security, 899 So. 2d 1074, 1076 (Fla. 2005).

I. The Court Correctly Declined To Apply A Fee Cap

The court below made no mistake in holding that the Florida Civil Rights Act, in incorporating the damages cap of § 768.28(5), Florida Statutes, did not also incorporate the fee cap of § 768.28(8). In deciding that the incorporation of the damage cap of § 768.28 excludes incorporation of the administrative exhaustion requirements of that statute, the Supreme Court has provided an indistinguishable and controlling precedent establishing that the incorporation of the damage cap likewise excludes incorporation of the fee cap. Maggio v. Florida. Department of Labor & Employment Security, 899 So. 2d 1074, 1080 (Fla. 2005).

II. Courts Are Not Required To Wear Blinders In Discerning The "Plain Meaning" Of Statutes

A. The Gallagher Court Misapplied The "Plain Meaning" Rule

The essential holding of Gallagher v. Manatee County, 927 So. 2d 914 (Fla. 2d

DCA 2006), is that the cap stated in § 760.11(5) encompasses every dollar of possible monetary recovery an employee may win under the Florida Civil Rights Act (FCRA) in public employee cases -- lost wages, compensatory damages, attorney's fees, litigation costs, and anything else. The court reached this conclusion by applying a misshapen and erroneous version of the "plain meaning" rule under which a court may consider neither legislative history nor rules of statutory construction where one part of a statute is phrased in words that seem to have only one plausible meaning.

The Gallagher court acknowledged that the legislative history of FCRA called for the statutory cap to apply only to compensatory damages. Id., 916 and n.2. Under the language of § 760.11(5), the term "compensatory damages" includes "mental anguish, loss of dignity, and any other intangible damages." Compensatory damages are thus distinguished from other recoveries addressed in that same statutory sub-section such as back pay, punitive damages, and costs, including attorney's fees.

Before Gallagher, from 1992 to 2005, there was no controversy that the "total amount of recovery" language in FCRA was intended to apply only to compensatory damages, not payments such as back pay and attorney's fees which had likewise been unlimited for the whole 15-year life (1977-1992) of the old statute. That was a common understanding throughout the legal community, including the courts. Klonis v. State of Florida, Dept. of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000) ("[t]he

cross-referenced provision, section 768.28(5), Florida Statutes (1997), immunizes 'the state and its agencies and subdivisions' from punitive damages and places limits on **compensatory damages**") (emphasis added); Jones v. Brummer, 766 So. 2d 1106, 1108 (Fla. 3d DCA 2000) ("Section 768.28(5), in turn, ... continues by additionally placing monetary limits on **compensatory damages** recovered in tort actions against the state, its agencies and subdivisions") (emphasis added).

The statutory provision at issue, § 760.11(5), provides victims of unlawful discrimination with injunctive and other affirmative relief, including back pay and fees and costs. In this regard, the Florida Civil Rights Act of 1992 is unchanged from its predecessor, the Florida Human Relations Act of 1977. The Human Relations Act imposed no limits on back pay or attorney's fees and costs, even against governmental defendants. Section 760.10(13), Florida Statutes (1991). The 1992 amendments were designed to expand the remedies by adding jury trials and compensatory damages against all defendants and limited punitive damages against private defendants. The compensatory damages added against public defendants were capped at the limits of § 768.28, Florida Statutes. In so providing, the legislature added the language at issue in this case:

> The total amount of recovery against the state and its agencies and subdivisions shall not exceed the limitation as set forth in s. 768.28(5).

§ 760.11(5), Florida Statutes.

If, in adopting this language, the legislature intended to abolish a 15-year-old regimen under which public-employee civil rights claimants could win unlimited back pay and attorney's fees, there would be considerable record of documentation, especially if that regimen were to be shrunk to one with a total recovery capped at the § 768.28 limits. There is instead a legislative history of an intent to leave all the old remedies intact and to add jury trials and non-economic damages. This being so, an assertion that the law is actually the contrary of the common understanding since 1977 justifies an examination of the record. But that examination is something the Gallagher court refused to undertake.

The central theme of Gallagher is the court's repeated insistence throughout the opinion that it's hands are tied by the "plain meaning" rule under which a court looks to legislative intent and rules of construction in statutory interpretation only where the meaning of a statute is unclear or ambiguous. The Gallagher court found the statutory provision at issue perfectly clear and thus not eligible for interpretation in light of legislative history, public policy, or rules of construction. The statute says the "total amount of recovery" shall not exceed the cap. "Total amount of recovery" means "total amount of recovery" and that is that, says the court.

This is strange in at least two ways.

First is the convoluted steeplechase through three dictionaries and numerous cases and statutes the court had to run to support its conclusion that the meaning was perfectly clear and without ambiguity. Gallagher 927 So. 2d at 917-918. The court goes through an enormous amount of work to show that it takes no work to interpret the statute. The opinion is completely without any sense of irony in that regard.

Second, the court mentions in passing, but never discusses, the crucial doctrine that courts are not bound by plain meaning where literal readings of statutes would lead to an unreasonable result or a result clearly contrary to legislative intent. Id., at 919, *citing*, State v. Burris, 875 So. 2d 408, 410 (Fla. 2004). The central error in Gallagher is to fail to apply this doctrine or even to pause to consider whether to apply it, though there were many signals that this was a case calling for use of that doctrine. It was only by wearing blinders that the court reached the conclusion it did.

The Gallagher opinion is self-contradictory. On the one hand the court cites Burris for the proposition that a court may depart from the "plain-meaning" rule where such a practice leads to "an unreasonable result or a result clearly contrary to legislative intent." On the other hand, the court says it may not look at legislative history because of the "plain-meaning" rule.

The court ends by speculating about legislative intent and getting it wrong:

> The statute at issue here unequivocally reflects that in weighing the relevant policy issues the legislature gave priority to the policy of

> placing strict limitations on the waiver of sovereign immunity. We are bound by the legislature's decision on this issue of policy.

Gallagher, 927 So. 2d at 919.

Actually, as shown below, the legislature did exactly the opposite. There is nothing in the history to support the court's claim. But the Gallagher court smuggles an incorrect postulate of legislative intent into an opinion that holds it improper to consider legislative intent because of the "plain-meaning" rule.

The Gallagher court likewise eschews use of principles of statutory construction because of the "plain-meaning"rule, but still indulges in a bit of that very thing that turns out, again, to be erroneous for lack of legislative history information.

> The statutory formulation itself recognizes that the construction of the statute must be "according to the fair import of its terms" and must take into account not only the general purpose of protecting against invidious discrimination but also the "special purposes" of the provision at issue. Here, of course, the special purpose of the provision at issue is to limit governmental liability.

Gallagher, 927 So. 2d at 919, n.3. Actually, the special purpose of the provision referenced is exactly the opposite – it is to increase governmental damage liability from zero to the amount of the cap in § 768.28, Florida Statutes, not to limit that liability. It is only through the court's self-imposed ban on looking at the real legislative history that the court is able to postulate a false one.

The "plain meaning" rule does not call for putting on blinders to focus on a few

words in a statute with no regard for surrounding context. Moreover, the exclusion of legislative history in the cases where the plain meaning rule does apply is certainly no mandate to conjure up a fictitious legislative intent and history to fill the vacuum left by exclusion of the real legislative history. Yet twice, in the passages quoted above, the Gallagher court purported to follow a legislative intent that is contrary to the real one which that court excluded under the rubric of "plain meaning."

These erroneous results flow from the court's erroneous premise that a linguistically clear sentence must be considered in complete isolation -- without regard to its history or even without regard to its conformity with the rest of the same statute or other statutes to be construed *in pari materia* with it.

B. Correct Application OF The "Plain Meaning" Rule In Florida

The Gallagher court itself acknowledged that a court is not shackled by the literal language of a statute where that language leads to an unreasonable result or a result clearly contrary to legislative intent. But even before reaching that point, the Florida Supreme Court instructs courts to look at the entire statute, not just the sentence or sentence fragment at issue, in situations where literal language is incongruous or implausible. The court even suggests making an interpretation that harmonizes the language at issue with related statutes, not just smoothing out internal inconsistencies within the statute.

> We have also stated that related statutory provisions should be read together to determine legislative intent, so that if from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature.

The Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000).

Nor is Gallagher the first time a court has made the identical mistake in reading FCRA. A sister court focused tunnel vision on a few isolated words of FCRA and held that the "plain meaning" rule tied its hands, compelling a harsh result that could be corrected only by statutory amendment. The Supreme Court corrected that error, explaining why rules of construction do not permit segregating a sentence in a statute from its context under the guise of "plain meaning."

> The resolution of this issue is properly reached by adherence to the rule of statutory construction that related statutory provisions must be read together to achieve a consistent whole, and that where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.

Woodham v. Blue Cross/Blue Shield of Florida, 829 So. 2d 891, 898 (Fla. 2002).

Following that mandate for purposes of the damage cap in § 760.11(5), one may look at the very next sub-section of the Florida Civil Rights Act, § 760.11(6). This sub-section awards unlimited money for lost wages and fees and costs to a public employee (or a private employee) who chooses an administrative hearing over a circuit court trial. One might ask why the Legislature would cap total recovery for

a circuit court case at $100,000 while allowing an unlimited recovery to the same plaintiff suing the same defendant on the same issues under the same statute in an administrative hearing.

So one looks for something to explain the difference. What springs immediately into view is that a circuit court trial under § 760.11(5) allows for a jury trial and compensatory damages in addition to the lost wages and litigation fees and costs that may be recovered in the administrative hearing under § 760.11(6). It is clear enough why there are no compensatory damages in the administrative hearing. Recovery of compensatory damages brings with it a right to a jury -- something that can be accomplished only in a court. Laborers' International, Local 478 v. Burroughs, 541 So. 2d 1160, 1162 (Fla. 1989) (right to non-quantifiable damages can be enforced only in court where jury trial is available, though administrative agencies may award back pay and attorney fees in discrimination case). But the comparison is still counter-intuitive. If circuit court affords more forms of recovery than an administrative hearing how is court recovery capped at $100,000 while administrative recovery is unlimited? Court recovery should be greater. And it is.

The answer is consistent with the legislative history. The caps must apply only to the compensatory damages. The lost wages and the litigation fees and costs must be uncapped in circuit court just the same as they were under the old statute and just

the same as they still are in the administrative hearing. That is the first result we get from following the "plain meaning" rule the Supreme Court tells us to use rather than the one the Gallagher court improvised.

Second, one might look within § 760.11(5) itself at the language providing for attorney's fees:

> It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

§760.11(5), Florida Statutes.

This can not be harmonized with a $100,000 cap on total recovery. The policy behind federal attorney's fee law is the doctrine of the "private attorney general" which embodies a policy of encouraging lawyers to take discrimination cases. This is to vindicate a policy of the highest priority by recruiting private lawyers to do the work that the attorney general lacks the staff and budget to cover.

Virtually all modern civil rights statutes rely heavily on private attorneys general. As the court explained in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (one of the earliest cases construing the Civil Rights Act of 1964, which includes Title VII as well as prohibitions on various kinds of discrimination in public accommodations and federally funded programs), Congress recognized that it could not achieve compliance solely through lawsuits initiated by the attorney general:

> A [public accommodations] suit is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Id. at 401–02. Thus, Piggie Park recognized the recruitment function of the Act: Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large. These private attorneys could reach into the nooks and crannies of illegal discrimination around the nation that the government could not police.

Later, the court explained that this public function exists even when a civil rights plaintiff asks for compensatory damages rather than injunctive relief. "Unlike most private tort litigants," the civil rights plaintiff "seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits." City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). Thus, when "his day in court is denied him," the congressional policy which a civil rights plaintiff "seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." Id. at 575 (internal quotation marks omitted).

Congress considered Title VII enforcement a policy of the "highest priority."

Piggie Park, *supra*. Florida courts have expressly adopted the concept of "private attorney general" in civil rights cases. Wesley Group Home Ministries, Inc. v. City of Hallandale, 670 So.2d 1046, 1048 (Fla. 4th DCA 1996) ("Generally, the purpose of attorney's fee provisions in civil rights statutes is to encourage an individual injured by discrimination to act as a 'private attorney general' and seek judicial relief on his own.").

Third one must consider the statutory and jurisprudential mandate of liberal construction of the Act. The Florida Civil Rights Act reflects an "overwhelming public policy" to encourage plaintiffs to bring suits to eradicate discrimination. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1103 (Fla. 1989). More recently, the Florida Supreme Court returned to that theme with even more specific reference to the legislative mandate articulated in § 760.01(3), Florida Statutes, that the act as a whole be "liberally construed" to further its general purposes as well as the special purposes of each section. Requiring a plaintiff's attorney to suffer financial losses on discrimination cases is not among the general or special purposes of the Act. That chills enforcement of the discrimination statutes by private plaintiffs and puts the burden of enforcement back on the taxpayers.

> Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.

Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). Access to the remedy is impaired rather than promoted where attorneys must donate all but a fraction of their services to represent public employees in discrimination cases.

Thus interpreting the statutory cap as a limitation on all financial recovery rather than just a limitation on compensatory damages can not be reconciled with uncapped recovery in an administrative hearing, nor with the mandate to read the attorney's fee provision in harmony with federal case law, nor with the requirement to interpret the statute liberally to provide access to the remedy.

Thus even though the "total amount of recovery" language in § 760.11(5) is not internally ambiguous within that sentence, we must follow the mandate of the Supreme Court to consider whether there is ambiguity when the disputed passage is read together with other parts of the same statute and other statutes. The Golf Channel v. Jenkins, 752 So. 2d at 564; Woodham, 829 So. 2d at 898. Such ambiguities warrant repairing to legislative history to discern the legislative intent.

The foregoing analysis demonstrates ambiguities within the statute. The following analysis looks at statutes that must be read *in pari materia* with § 760.11(5) as an additional basis for opening the door to consulting legislative history.

C. The Legal Landscape Upon Passage of The Florida Civil Rights Act

The Florida Civil Rights Act of 1992 replaced the Florida Human Relations

Act of 1977. The Human Relations Act allowed unlimited recovery for economic damages of all sorts -- lost wages, fees, costs, etc., but no non-economic damages. FCRA added non-economic damages and subtracted nothing. FCRA followed federal legislation, the Civil Rights Act of 1991. The federal act added limited non-economic damages to the unlimited economic damages that already existed under Title VII of the Civil Rights Act of 1964. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 847-848 (2001). The Legislature had every reason to expand recovery under Florida law and no reason to shrink it. This is shown by review of other discrimination and retaliation statutes applying to public entities and known to the Legislature at that time. There were at least five.

In the same year of passage of FCRA, the Legislature amended the Public Whistleblower Act of 1986 to provide for unlimited recovery of "lost wages, benefits, or other lost remuneration" and attorney's fees and costs. Section 112.3187(9), Florida Statutes. This statute has always been free of both the pre-suit regimen and the monetary caps of § 768.28. Florida Department of Education v. Garrison, 954 So. 2d 84, 86 (Fla. 1st DCA 2007) ("there was no legislative intent that *any* of the provisions of section 768.28 apply to a cause of action under the Act") (emphasis in original). There is no reason the Legislature in 1992 would add uncapped economic recovery to suits for retaliation against public employees under the Whistleblower Act

while taking away that same unlimited economic recovery for retaliation and discrimination against public employees under FCRA. This is more evidence that the cap applies only to non-economic damages.

Florida has prohibited sex discrimination in pay since 1969 under § 448.07, Florida Statutes. The possible defendants include "the state or any of its political subdivisions or instrumentalities." Section 448.07(1)(a). Recovery includes up to a year's lost wages and unlimited fees and costs.

Since 1984, public employees in proceedings before the Public Employees Relations Commission (PERC) have been able to recover unlimited amounts for back pay, fees and costs. Section 447.208(3), Florida Statutes.

Since 1976, Florida has allowed its public employees to sue for age discrimination under § 112.044 and to recover, without any cap, "such legal or equitable relief as will effectuate the purposes of this act." Section 112.044(4).

Students and employees of Florida colleges and schools have had the right to sue, since 1984, for discrimination under the Florida Educational Equity Act, § 1000.05(7), Florida Statutes (formerly § 228.2001(8), Florida Statutes (2001)), with no cap on the equitable relief or attorney's fees and costs provided by statute.

Neither the Gallagher court nor Florida State University have attempted to explain why the Legislature in 1992 would cap total recovery, including lost wages

and fees and costs, only for plaintiffs under FCRA in circuit court while, in that same year, either establishing or continuing unlimited recoveries for plaintiffs in administrative FCRA cases, whistleblower cases, pay discrimination cases, PERC cases, age discrimination cases, and educational equity cases. There is no way to make sense of it. Instead, it makes sense to conclude that the Legislature capped only non-economic losses in § 760.11(5), leaving unlimited economic recovery in FCRA in just the same fashion as in the other six situations discussed above.

III. Legislative History Limits The Damage Cap To Non-Economic Recovery

Following the correct application of the "plain meaning" rule as explained by the Supreme Court in The Golf Channel, 752 So. 2d at 564, and Woodham, 829 So. 2d at 898, we have seen that an examination of the rest of FCRA and an examination of other statutes that need to be read *in pari materia* with it shows that the "plain meaning" derived by the Gallagher court by looking at a single sentence with blinders is not the plain meaning at all. It is not even among the possible reasonable readings of the statute. At the very least, the examination we have undertaken here creates an ambiguity in the meaning of "total amount of recovery" for purposes of assessing exactly what recovery is capped.

The Gallagher court, in the course of explaining why it felt compelled to turn a blind eye to legislative history, acknowledged that the legislative record of FCRA

spoke not of limits on total recovery but provided instead that, "any recovery for compensatory damages shall be limited by the provisions of sovereign immunity." Gallagher, 927 So. 2d at 916 & n.2.

The quoted language appears in a legislative staff analysis completed shortly after passage of FCRA. The pertinent sentence in full is:

> Section 8 also provides that the state, it agencies, and subdivisions are not liable for punitive damages and that any recovery for compensatory damages shall be limited by the provisions of sovereign immunity.

Fla. H.R. Committee on Judiciary, CS for SB 1368 and 72 (1992) Staff Analysis (final April 13, 1992, p.5) (Appendix A hereto).

Nor is this just a retrospective staff analysis. The identical language appears in a staff analysis circulated shortly before passage of FCRA. Fla. H.R. Committee on Judiciary, CS for SB 1325 and 1121 (as revised by Committee on Appropriations) (1992) Staff Analysis (February 28, 1992, p.3) (Appendix B hereto).

In the Senate as well as the House, legislators knew that the remedies for discrimination suits by public employees would grow larger rather than shrink under FCRA.

> The bill appears to apply to all governmental entities, thereby increasing their exposure to potential liability.

Senate Staff Analysis & Economic Impact Statement, CS/Sb 1368 & 72 (February 18, 1992, p. 5) (Appendix C hereto).

Once the correct analysis removes the barriers to looking at legislative history, that history demonstrates a legislative intent to cap nothing other than compensatory damages -- not lost wages nor fees and costs -- in FCRA suits by public employees. That legislative intent, in combination with the other provisions of the statute, the language of related statutes, proper rules of statutory construction, an understanding of Florida public policy, and common sense, all demonstrate that John Esposito should be allowed to collect the full amount of his judgment.

CONCLUSION

This Court should affirm the decision below declining to incorporate the fee cap of § 768.28(8) into the florida civil rights Act. Further, and most importantly, this court should reverse the trial court in the cross-appeal and certify conflict with Gallagher.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave To File Amicus Brief has been furnished by U. S. Mail this 19th day of September, 2007, to John S. Derr, Esq., P.O. Box 3741, Tallahassee, FL 32315-3741; to Marie A. Mattox, Esq., 310 East Bradford Road, Tallahassee, FL 32303 and to William Amlong, Karen Coolman Amlong, and Jennifer Daley, Amlong & Amlong, P.A., 500 Northeast Fourth Street, Fort Lauderdale, Florida 33301.

_____
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.100(*l*), I hereby certify that this petition was prepared using proportionately spaced Times New Roman 14 point font.

_____
Richard E. Johnson

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STORAGE NAME: S1368z.jud **AS PASSED BY THE LEGISLATURE**
DATE: April 13, 1992 CHAPTER #: 92-177, Laws of Florida

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/SB 1368 and 72

RELATING TO: Civil Rights

SPONSOR(S): Committee on Judiciary and Senators Girardeau and Gordon

STATUTE(S) AFFECTED: Chapter 760, Florida Statutes

COMPANION BILL(S): HB 1325 and HB 1607

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1)
(2)
(3)
(4)
(5)

****

I. SUMMARY:

CS/SB 1368 and 72 amends chapter 760, Florida Statutes, to provide for the creation of the Florida Civil Rights Act of 1992. The bill expands the types of discriminatory practices that can be addressed by the act and includes discrimination relating to public lodging and food services. The bill expedites the administrative processes available to claimants pursuant to chapter 760, and it permits aggrieved persons the opportunity to proceed with their claims through either a civil or an administrative forum.

The bill also provides that it is unlawful for certain private clubs to discriminate because of race, color, religion, gender, national origin, handicap, age over the age of 21 or marital status in its membership.

The bill also provides that it is unlawful for such clubs to advertise, display, or post that its facilities discriminate against the above mentioned classes. The bill excludes fraternal or benevolent organizations, ethnic clubs, social clubs, or religious organizations where business activity is not prevalent. The bill also exempts religious clubs or organizations which limits membership to members of its religion.

The bill has a minimum state fiscal impact.

APPENDIX
A

Similarly, the Federal Civil Rights Act of 1964 contains provisions relating to discrimination in public accommodations, but specifically excluded its application to private clubs. 42 USC ss. 2000a(e). The United States Supreme Court has reviewed several cases relating to private clubs and recognized a competing interest exists between a state's compelling interest in preventing discrimination and a private club's freedom of association.

In 1984, the City of New York, after receiving extensive public testimony, enacted an amendment to its civil rights ordinance which prohibited private clubs, with membership greater than 400 and used for business purposes, from discriminating in its membership. The purpose of the ordinance was to give all citizens a fair and equal opportunity to participate in the business and professional opportunities of the community. Specifically, the New York City Council found that many women and minorities were barred from organizations where business deals were made and where personal contacts for business, employment, and professional advancement were made. The ordinance specifically exempted small businesses, benevolent orders, and religious organizations. (Note: The private clubs portion of CS/SB 1368 and 72 was modeled after the New York City Ordinance.) See New York State Club Assn. v. NYC, 487 U.S. 1 (1988)(Supreme Court upheld, against challenges of facial unconstitutionality based on freedom of expression, equal protection, and overbreadth, NYC ordinance prohibiting discrimination in private clubs where business is conducted).

B. EFFECT OF PROPOSED CHANGES:

The bill amends and reorganizes sections 760.01-.10, Florida Statutes, creating "the Florida Civil Rights Act of 1992." The bill expands the types of discriminatory employment practices that can be addressed pursuant to sections 760.01-10, Florida Statutes. The bill also provides that victims of violations of the Florida Civil Rights Act may recover punitive damages with a cap of $100,000.

The bill attempts to provide nondiscriminatory access to commercial opportunity. The bill provides that clubs with membership greater than 400, that serve regular meals, that receive payment directly or indirectly from nonmembers for business purposes may not discriminate in its membership. The bill excludes fraternal or benevolent organizations, ethnic clubs, or religious organizations where business activity is not prevalent. The bill also exempts religious clubs or organizations which limits membership to members of its religion.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends section 760.01, Florida Statutes, to provide that sections 760.01-11, and 509.092, Florida Statutes, shall be known as the "Florida Civil Rights Act of 1992."

Section 2 amends section 760.02, Florida Statutes, relating to definitions and adds a definition for "aggrieved person."

Section 3 amends section 760.03, Florida Statutes, to provide that the HRC shall employ an executive director.

Section 4 amends section 760.04, Florida Statutes, to provide that the HRC shall be assigned to the Executive Office of the Governor rather than to the Department of Administration.

Section 5 amends section 760.06, Florida Statutes, relating to the powers of the HRC and provides that the HRC may maintain offices anywhere in Florida, rather than exclusively in Tallahassee. The section provides that the HRC has the power to subpoena witnesses, compel attendance, compel production, and investigate complaints. The section eliminates all references to complaint procedures presently found in section 760.06, Florida Statutes, and moves those procedures to section 760.11.

Section 6 creates section 760.07 and provides that any violation of any Florida Statute making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the area of education, employment, housing, or public accommodations gives rise to the remedies available in the Civil Rights Act of 1992 unless greater damages are expressly provided for.

Section 7 relates to unlawful employment practices and remains unchanged. The section, however, was amended to remove all references to procedure. Procedures before the HRC have been moved to section 760.11, Florida Statutes.

Section 7 (9) provides that the requirements relating to unlawful employment practices and the provisions relating to public accommodations shall not be applicable to religious organizations.

Section 8 provides the procedures to bring a complaint before the HRC. The most significant changes created by this bill are: (1) expanding the statute of limitations to 365 days, (2) expediting the requirement of the HRC to make a finding of reasonable cause, (3) providing redress in either an administrative or a judicial forum, and (4) creating punitive damages (with a cap of $100,000) in civil actions. Section 8 also provides that the state, its agencies, and subdivisions are not liable for punitive damages and that any recovery for compensatory damages shall be limited by the provisions of sovereign immunity.

Section 8 also provides for attorney's fees for the prevailing party as interpreted in a manner consistent with federal case law involving Title VII actions.

Section 8 also provides that in any civil action or administrative proceeding brought pursuant to chapter 760, Florida Statutes, where an employee of the state is or any governmental agency has been found to have violated section 760.10, Florida Statutes, such finding shall as a matter of law constitute just or substantial cause for dismissal.

Section 9 provides that all conciliation agreements pursuant to the "Fair Housing Act" must be agreed to by the respondent and complainant and shall be made public unless otherwise agreed to be kept confidential.

Section 10 amends section 509.092, Florida Statutes, to provide the remedy for violations of this section shall be a right of action pursuant to section 760.11, Florida Statutes.

Section 11 contains a severability clause and provides, in part, that in the event the cap on punitive damages is held invalid, punitive damages are still available as a remedy.

Section 12

Subsection (1) provides that it is unlawful to discriminate because of race, color, religion, gender, national origin, handicap, age over the age of 21 or marital status in the evaluation of membership applications to private clubs with more than 400 members, that provide regular meal service, that regularly receive payment of dues, and fees, directly or indirectly from nonmembers for business purposes.

The subsection further provides that it is unlawful for such clubs to advertise, display, or post that their facilities are denied to the above mentioned classes. The subsection specifically excludes fraternal or benevolent organizations, social clubs, ethnic clubs, or religious organizations where business activity is not prevalent. The subsection also provides that it is not applicable to any religious club or organization which limits membership to members of its religion.

Subsection (2) provides that persons discriminated against pursuant to subsection (1) may file an action with the Human Relations Commission (HRC) or with the Attorney General's Office of Civil Rights. The section provides time schedules for the HRC or the Office of Civil Rights to investigate and to informally resolve the complaint.

Subsection (3) provides further rules of procedure relating the filing of administrative complaints with the HRC and the filing of civil or administrative claims by the Office of Civil Rights.

Subsection (4) provides an effective date of January 1, 1993.

Section 13 provides that this act shall apply to conduct occurring on or after October 1, 1992.

Section 14 provides for an effective date of July 1, 1992.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Not Applicable

2. Recurring Effects:

In 1991, the Human Relations Commission received an appropriation of approximately $1.140 million from general revenue. Under the Governor's proposed budget for 1992, the HRC is scheduled to receive an additional $150,000 from general revenue.

small add'l $

The bill provides that the HRC may have offices outside Tallahassee. The bill is not specific as to the number of satellite offices and it is difficult to determine the fiscal impact at this time.

Fiscal effect relating to the Human Relations Commission relating to private clubs discrimination is indeterminable because there is no estimate on the number of claims that may be generated by the bill. Presently, however, claims relating to employment and housing discrimination are filed with the Human Relations Commission pursuant to Chapter 760. By creating a cause of action for discrimination relating to private clubs, the case load of the HRC will, with some certainty, increase. In addition, the bill places stricter, more demanding, time constraints on the HRC than are presently required under chapter 760, and additional staff personnel and investigators may be needed to process the increased and expedited case load.

at some time ~ caseload

3. Long Run Effects Other Than Normal Growth:

Not Applicable

4. Total Revenues and Expenditures:

See (2) above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Not Applicable

2. Recurring Effects:

Not Applicable

3. Long Run Effects Other Than Normal Growth:

Not Applicable

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

CS/SB 1368 and 72 creates an effective method for aggrieved persons to resolve discrimination complaints. Because CS/SB 1368 and 72 anticipates that the HRC will expeditiously make determinations of reasonable cause, aggrieved persons may be in a more advantageous position to seek administrative or civil remedies.

CS/HB 1368 and 72 expands remedies that are presently available in law, and provides that an aggrieved person may receive unlimited actual damages and punitive damages with a cap of $100,000.

2. Direct Private Sector Benefits:

The private sector will benefit because employees will be able to work in an environment that is free from discrimination and therefore be more productive in their positions.

The bill provides equal access to commercial opportunities for persons conducting business. No longer will persons not meeting the membership requirements of a private club, because of discriminatory standards, be excluded from use of those facilities and, therefore, those persons should have a more equitable opportunity to participate and compete for business.

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not Applicable

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not Applicable

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not Applicable

V. COMMENTS:

In December 1991, the United States Congress passed, and President Bush signed the Federal Civil Rights Act of 1991. One of the most significant changes created by the 1991 Civil Rights Act was the creation of capped compensatory and punitive damages in cases of intentional employment discrimination. Pursuant to the bill, an aggrieved party could receive punitive and compensatory damages up to $300,000.

Parity Fed/State

As a result of the federal changes to the Civil Rights laws, persons presently filing claims may seek redress in federal court. The adoption of CS/SB 1368 and 72 will act to create some parity between the Federal and state remedies.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:
Prepared by: Billy Buzzett

Staff Director: Richard A. Hixson

FINAL ANALYSIS PREPARED BY COMMITTEE ON JUDICIARY:
Prepared by: Billy Buzzett

Staff Director: Richard A. Hixson

STORAGE NAME: h1325s1a.ap
DATE: February 28, 1992

As Reported to Clerk

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
APPROPRIATIONS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 1325 and 1121

RELATING TO: Civil Rights

SPONSOR(S): House Committee on Judiciary and Representatives Logan, Burke, and Press

STATUTE(S) AFFECTED: Chapter 760, Florida Statutes

COMPANION BILL(S): SB 72 and 1368

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) JUDICIARY 11 YEA 7 NAY
(2) APPROPRIATIONS YEAS 24 NAYS 1
(3)
(4)
(5)

****

I. SUMMARY:

CS/HB 1325 and 1121 amends chapter 760, Florida Statutes, to provide for the creation of the Florida Civil Rights Act of 1992. The bill expands the types of discriminatory practices that can be addressed by the act and includes discrimination relating to public lodging and food services. CS/HB 1325 and 1121 expedites the administrative processes available to claimants pursuant to chapter 760, and it permits aggrieved persons the opportunity to proceed with their claims through either the civil or administrative forum.

CS/HB 1325 and 1121 has a state fiscal impact.

APPENDIX
B

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Sections 760.01-.10, Florida Statutes, are known as the "Florida Human Rights Act of 1977." The act provides for the creation of a twelve member, part-time Human Relations Commission appointed by the Governor and subject to confirmation by the Senate. The HRC maintains, by statute, an office in Tallahassee, and it conducts investigations and hearings relating to unlawful employment practices. (Note: Sections 760.20-.37, Florida Statutes, "the Florida Fair Housing Act," authorizes the HRC to investigate complaints relating to discrimination in housing. PCS/HB 1121 and 1325 does not address housing discrimination.)

Section 760.10 relates to unlawful employment practices and provides that it is unlawful to discharge, hire, limit, segregate or otherwise discriminate against employees or applicants on the basis of race, sex, national origin, age, handicap or marital status. The section further provides a procedure for aggrieved persons to file complaints with the HRC.

Pursuant to section 760.10(10), Florida Statutes, any aggrieved person may file a complaint with the HRC within 180 days of the alleged violation. At this stage, the HRC is empowered to attempt to settle the matter. Upon receipt of a complaint the HRC makes a determination of reasonable cause. Rule 22T-9.004, Florida Rules of Administrative Procedure. After a finding of reasonable cause, a full investigation is performed. At any time after the reasonable cause determination, the statute provides that the HRC may attempt to conciliate the complaint. In the event the HRC fails to conciliate or to take final agency action within 180 days of filing, an aggrieved party may bring a civil action against the named employer. (Workshop testimony revealed that rarely, if ever, does the HRC reach final agency action within 180 days.)

In the event that the HRC or the court finds an unlawful employment practice has occurred, it shall issue an order prohibiting the practice and providing affirmative relief, including reasonable attorney's fees. No liability for back pay may be assessed from a date more than 2 years prior to filing the complaint.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 1325 and 1121 amends and reorganizes sections 760.01-.10, Florida Statutes, creating "the Florida Civil Rights Act of 1992." The bill expands the types of discriminatory employment practices that can be addressed pursuant to sections 760.01-10, Florida Statutes. CS/HB 1325 and 1121 also provides that victims of violations of the Florida Civil Rights Act may recover punitive damages with a cap of $300,000, and compensatory damages without a cap.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends section 760.01, Florida Statutes, to provide that sections 760.01-11, and 509.092, Florida Statutes shall be known as the "Florida Civil Rights Act of 1992."

Section 2 amends section 760.02, Florida Statutes, relating to definitions and adds a definition for "aggrieved person."

Section 3 amends section 760.03, Florida Statutes, to provide that the HRC may employ an executive director.

Section 4 amends section 760.04, Florida Statutes, to provide that the HRC shall be assigned to the Executive Office of the Governor rather than to the Department of Administration.

Section 5 amends section 760.06, Florida Statutes, relating to the powers of the HRC and provides that the HRC may maintain an office anywhere in Florida, rather than exclusively in Tallahassee. The section provides that the HRC has the power to subpoena witnesses, compel attendance, compel production, and investigate complaints. The section eliminates all references to complaint procedures presently found in section 760.06, Florida Statutes, and moves those procedures to section 760.11.

Section 6 relates to unlawful employment practices and remains unchanged. The section, however, was amended to remove all references to procedure. Procedures before the HRC have been moved to section 760.11, Florida Statutes.

Section 6 (9) provides that the requirements relating to unlawful employment practices and the provisions relating to public accommodations shall not be applicable to religious organizations.

Section 7 provides the procedures to bring a complaint before the HRC. The most significant changes created by CS/HB 1325 and 1121 are: (1) an expansion of the statute of limitations from 180 days to 365 days, (2) the HRC's expedited requirement to make a finding of reasonable cause, (3) the aggrieved parties availability to seek redress in either the administrative or judicial forum, and (4) the availability of punitive damages (with a cap of $300,000) and compensatory damages (uncapped) in civil actions. Section 7 also provides that the state, its agencies, and subdivisions are not liable for punitive damages and that any recovery for compensatory damages shall be limited by the provisions of sovereign immunity.

Section 7 also provides for attorney's fees in the event that the plaintiff is the prevailing party. (Should the defendant/respondent prevail, there is no provision for attorney's fees except as provided by section 57.105, Florida Statutes.)

Section 7 also provides that in any civil action or administrative proceeding brought pursuant to chapter 760, Florida Statutes, where an employee of the state is or any governmental agency has been found to have violated section 760.10, Florida Statutes, such

finding shall as a matter of law constitute just or substantial cause for dismissal.

Section 8 provides that all conciliation agreements pursuant to the "Fair Housing Act" must be agreed to by the respondent and complainant and shall be made public unless otherwise agreed to be kept confidential.

Section 9 amends section 509.092, Florida Statutes, to provide the remedy for violations of this section shall be a right of action pursuant to section 760.11, Florida Statutes.

Section 10 contains a severability clause and provides, in part, that in the event the cap on punitive damages is held invalid, punitive damages are still available as a remedy.

Section 11 provides for an effective date of July 1, 1992

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Not Applicable

2. Recurring Effects:

Indeterminate:

Although it is impossible to quantify the impact, this legislation will probably increase the workload of the HRC for the following reasons:

↑ HRC workload

-It increases the statute of limitations for bringing complaints before the HRC from 180 to 365 days.

-It amends S.509.092, F.S., (dealing with public lodging establishments & public food service establishments) to allow persons aggrieved by discriminatory practices of such facilities to seek remedies though the HRC & the state courts in accordance with the provisions of the Florida Civil Rights Act of 1992. Currently, Florida Statutes do not specifically provide such persons access to this form of mediation.

Additionally, this legislation may result in the filing of additional civil actions in Florida courts, since the potential awards to successful plaintiffs may be greater under certain circumstances under the state law than the federal law. For instance, the federal Civil Rights Act of 1991 establishes a ceiling of $50,000 for punitive damages against employers with

between 15 & 300 employees, to a cap of $300,000 for employers with over 500 employees. Since this proposed legislation allows punitive damages of up to $300,000 with no limitations, employees of companies with fewer than 500 employees could possibly receive higher awards for punitive damages in Florida courts than in the Federal courts. Further, this Legislation caps only punitive damages at $300,000, not compensatory damages. The staff analysis prepared by the House Judiciary Committee indicates that the federal law caps punitive and compensatory damages at $300,000.

3. Long Run Effects Other Than Normal Growth:

Not Applicable

4. Total Revenues and Expenditures:

See (2) above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Not Applicable

2. Recurring Effects:

Not Applicable

3. Long Run Effects Other Than Normal Growth:

Not Applicable

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

CS/HB 1325 and 1121 creates an effective method for aggrieved persons to resolve discrimination complaints. Because CS/HB 1325 and 1121 anticipates that the HRC will expeditiously make determinations of reasonable cause, aggrieved persons may be in a more advantageous position to seek administrative or civil remedies.

CS/HB 1325 and 1121 expands remedies that are presently available in law, and provides that an aggrieved person may receive unlimited actual damages and punitive damages with a cap of $300,000.

2. Direct Private Sector Benefits:

The private sector will benefit because employees will be able to work in an environment that is free from discrimination and therefore be more productive in their positions.

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS: Section 5 of the bill authorizes, but does not mandate, that the HRC may maintain offices in locations other than Tallahassee. If the Legislature elects to appropriate funds for additional field offices, the cost of funding the HRC could increase.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not Applicable

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not Applicable

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not Applicable

V. COMMENTS:

In December 1991, the United States Congress passed, and President Bush signed the Federal Civil Rights Act of 1991. One of the most significant changes created by the 1991 Civil Rights Bill was the creation of capped compensatory and punitive damages in the cases of intentional discrimination of employment. Pursuant to the bill, an aggrieved party could receive punitive and compensatory damages up to $300,000. As a result of the federal changes to the Civil Rights Law, persons presently filing claims may seek redress in federal court.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Judiciary Committee adopted a series of amendments to HBs 1325 and 1121. For purposes of clarity, each amendment is described according to the number it was assigned at the committee level.

Amendment #3 raised the cap on punitive damages from $100,000 to $300,000.

Amendment #7 created a severability clause.

Amendment #20 added to the damages that are available for violations of the act to include mental anguish, loss of dignity, and any other intangible injuries.

Amendments #21 and #22. The amendments are technical in nature and place the aggrieved party that initially received a finding of "no reasonable cause" but who subsequently requested a DOAH hearing and received a finding that a violation of the act occurred, in the same position as the aggrieved party that received a finding of "reasonable cause."

Amendment #27 exempted religious organizations from the requirements of the employment section or public accommodations section.

Amendment #29 clarified that commission members that make reasonable cause determinations may not participate in the hearing that renders the commission's final order.

Amendment #30 provided that the state and its agencies are exempted form the punitive damages section of the bill.

Amendment #31 provided that in any civil or administrative action brought under this bill that finds that an employee of the state or any governmental agency violated section 760.10, such violation shall constitute just or substantial cause for such person's discharge.

The Judiciary Committee also adopted an amendment that provides that if the respondent is the prevailing party in a civil cause of action under this bill, the court shall not award attorney's fees or costs, unless provided by section 57.105, Florida Statutes.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:
Prepared by:

Billy Buzzett

Staff Director:

Richard A. Hixson

COMMITTEE ON APPROPRIATIONS:
Prepared by:

John Newman

Staff Director:

Peter J. Mitchell

S. 368.

DUP

REVISED: February 18, 1992

DATE: February 6, 1992

BILL NO. CS/SBs 1368 & 72

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Wiehle	Lang	1.	JU	Fav/CS
2.	Magdalen	Fort	2.	CM	Fav/3 amend.
3.			3.	AP	
4.			4.		

SUBJECT:

Fla. Civil Rights Act of 1992

BILL NO. AND SPONSOR:

CS/SBs 1368 & 72 by Judiciary Senators Girardeau, Gordon, and others

I. SUMMARY:

A. Present Situation:

1. Employment Discrimination and Remedies

Sections 760.01-760.10, F.S., constitute the Human Rights Act of 1977. The Act creates the Human Relations Commission (HRC), which is made up of 12 part-time members appointed by the Governor and confirmed by the Senate. The HRC is to investigate, seek to conciliate, hold hearings on, and act upon complaints of discriminatory practices in employment based on race, color, religion, sex, national origin, age, handicap, or marital status.

Any person aggrieved by a violation of the Act may file a complaint with the commission within 180 days of the alleged violation. If the commission fails to conciliate or to take final action on a complaint within 180 days of the filing of the complaint, the complainant can institute a civil action in court.

The current law banning discriminatory employment practices, s. 760.10, F.S., is silent with respect to the award of punitive damages. The statute provides that when such a practice has been found, an order is to be issued by the Florida Commission on Human Relations or the court, depending upon the posture of the case, "prohibiting the practice and providing affirmative relief from the effects of the practice, including reasonable attorney's fees." s. 760.10(13), F.S. One court has held that this language does not support a claim for punitive damages. See Bennett v. Southern Marine Management, 531 F. Supp. 115 (M.D. Fla. 1982.) (In Bennett, the federal district court reviewed a pendant state claim for compensatory under the Florida Human Rights Act of 1977, the precursor to s. 760.10, F.S.. The court noted that the legislation did not mention punitive damages and that this omission was glaring when the Act is compared to Florida's equal pay statute, s. 725.07, F.S. Id. at 116. The equal pay statute specifically permits the recovery of punitive damages. Id. at 116).

2. Other Discrimination and Remedies

There are a number of prohibitions against discrimination in the Florida Constitution and Florida Statutes. Article I, section 2 of the Florida Constitution provides that no person may be deprived of any right because of race, religion, or physical handicap.

At least eight Florida Statutes prohibit discrimination in various areas on a number of bases. The remedies for such discrimination are inconsistent, ranging from no remedy at all to the possibility of recovering actual and punitive damages.

APPENDIX C

Some examples of the inconsistency in remedies are set out below.

There is no civil remedy for violating the Florida laws prohibiting discrimination in public lodging establishments and public food service establishments. See ss. 509.092, 509.141, and 509.142, F.S.

Under section 448.07, F.S., an employer may not discriminate between employees on the basis of sex by paying wages at differing rates to persons of the opposite sex who perform the same work. An employee harmed by such discrimination may file a civil action in a court of competent jurisdiction. The employer is liable to the employee only for the amount of the difference between what the employee was paid and what he or she should have been paid. A claimant may recover no more than an amount equal to his or her unpaid wages while so employed for one year prior to the filing of his or her claim.

Some of Florida's laws prohibiting discrimination already authorize the recovery of actual and punitive damages. Section 725.07, F.S., prohibits discrimination against a person based on sex, marital status, or race in the areas of loaning money, granting credit, or providing equal pay for equal services performed. A person upon whom such discrimination has been perpetrated may bring a civil action in a Florida court. Under the statute, such person is entitled to collect not only compensatory damages, but punitive damages as well.

Under Florida's laws prohibiting discriminatory housing practices, ss. 760.20 - 760.37, F.S., a court may order actual and punitive damages as affirmative relief. See Florida's Fair Housing Act, s. 760.35(2), F.S.

Some other statutes prohibiting discrimination with their remedies are as follows:

a. The provisions of s. 110.233, F.S., prohibit discrimination against state career service employees because of race, color, national origin, sex, handicap, religious creed, or political opinion or affiliation. No specific remedy is provided for in this section.

b. Section 112.042, F.S., prohibits various local government entities from engaging in employment practices which discriminate on the basis of race, color, national origin, sex, handicap, or religious creed. An individual first must appeal an unlawful employment practice to the local governmental entity. If the entity refuses to modify or rescind the practice, the person may seek relief in the circuit court of the county.

c. Section 112.043, F.S., prohibits state and county offices from engaging in age discrimination in employment. The section does not provide a remedy.

d. Section 228.2001, F.S., prohibits discrimination based on race, national origin, sex, handicap, or marital status against a student or employee of the state system of public education. Any person aggrieved by a violation of this provision has a right of action for equitable relief, costs, and attorney's fees.

e. Section 413.08, F.S., provides that physically disabled persons are entitled to full and equal accommodations and privileges in all common carriers and other public conveyances, at all lodging places and other places of public accommodation and at all places of amusement. The section further provides

that in all employment supported in whole or in part by public funds, no employer is to discriminate against physically disabled persons. Finally, the section provides that physically disabled persons are to be entitled to rent, lease, or purchase housing accommodations without discrimination. A violation of any of these provisions is a misdemeanor of the second degree.

B. Effect of Proposed Changes:

1. Employment Discrimination

a. Procedural

The bill would enact the Florida Civil Rights Act of 1992, which would make changes in the composition of the HRC, in its powers and complaint resolution procedures, and in the remedies available to an aggrieved person.

An aggrieved person could file a complaint with the HRC within 365 days of the alleged violation. The complaint must contain a short, plain statement of the facts describing the violation and the relief sought. The HRC could require additional information.

The HRC is to send a copy of the complaint to the person who allegedly committed the violation within 5 days of the filing of the complaint. That person then has 25 days from the filing of the complaint to file an answer.

The HRC is to investigate the complaint and, within 180 days of the date of the filing of the complaint, must make a determination of whether there is reasonable cause to believe that a discriminatory practice has occurred. When the determination is made, the HRC is to promptly notify both the complainant and the respondent of the result of the determination, the date the determination was made, and the options available.

If the HRC determines that there is reasonable cause, the complainant can either bring a civil action or request an administrative hearing. If the complainant elects to bring an administrative action pursuant to a determination that there is reasonable cause, the hearing is to be conducted pursuant to s. 120.57, F.S. The commission can either hear the case or request that it be heard by a hearing officer. If the commission elects to hear the case, it may be heard by a commissioner. If the commissioner or hearing officer determines that a violation has occurred, he is to enter a proposed or recommended order prohibiting the discriminatory practice and providing affirmative relief, including back pay. Within 45 days of the date the proposed or recommended order is issued, the HRC must issue a final order adopting, rejecting, or modifying the proposed or recommended order. An administrative action must be requested within 35 days after the date of the determination of reasonable cause. Costs and attorney's fees are to be awarded to the complainant if he prevails, but not to the respondent if he prevails.

If in its reasonable cause determination the HRC determines that there is no reasonable cause, it is to dismiss the complaint. The complainant then has 35 days from the date of the determination to request an administrative hearing in front of a hearing officer. If the hearing officer determines that a violation has occurred, he is to issue a recommended order prohibiting the practice and recommending affirmative relief, including back pay. Within 45 days of the date the recommended order is issued, the HRC must enter a final order adopting, rejecting, or modifying the

recommended order. Costs and attorney's fees are to be awarded to the complainant if he prevails but not to the respondent if he prevails. If the HRC in its final order determines that a violation has occurred, the complainant then has 1 year from the date of the final order to bring a civil action.

The bill would also change the composition of the HRC, providing that it is to consist of 6 advisory members and 3 full-time members. The full-time members would be paid annual salaries to be fixed by law. The HRC could maintain offices throughout the state instead of just in Tallahassee, as is now the case.

The bill would allow complaints to be filed with the HRC based on discrimination in public lodging establishments and public food service establishments based on race, creed, color, sex, physical disability, or national origin. See s. 509.092, F.S.

b. Remedies

In a civil action, the court can issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. The court can also award compensatory and punitive damages. The total amount of punitive damages awarded to a complainant cannot exceed $100,000. If the complainant prevails, the court is also to award costs and attorney's fees. If the respondent prevails, the court cannot award costs and attorney's fees. A civil action must be commenced within 1 year after the date of the determination of reasonable cause.

As is noted above, in an administrative action, the available remedies are an order prohibiting the discriminatory practice and providing affirmative relief, which may include back pay.

2. Remedies for Discrimination in Other Areas

The bill would create s. 760.07, F.S., which would provide a cause of action for any violation of any Florida statute which makes it unlawful to discriminate because of race, color, religion, gender, national origin, age, handicap, or marital status in the area of education, employment, housing, or public accommodations. The bill does not take the approach of amending existing remedy provisions in or adding remedy provisions to each of the relevant Florida Statutes prohibiting such discrimination.

The action would be for the relief and damages provided for in newly created s. 760.11(5), F.S., unless the statute which was allegedly violated expressly provided for greater damages. Thus, with statutes such as ss. 725.07 and 760.20-760.37, F.S., where punitive damages are available without a cap, the damages may be sought under these statutes, not s. 760.11(5), F.S.

If the discrimination statute which was allegedly violated provided an administrative remedy, the cause of action provided in s. 760.07, F.S., could only be initiated after the plaintiff had exhausted the administrative remedy.

The term "public accommodations" would not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically.

3. Effective dates

The bill would apply only to causes of action accruing on or after October 1, 1992.

The bill would take effect July 1, 1992, except as expressly provided otherwise.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The bill would establish a statutory right to compensatory and punitive damages, which would result in an indeterminable economic impact upon those persons receiving awards and those persons paying damages pursuant to a finding that they committed an unlawful discriminatory practice.

B. Government:

The bill provides that HRC commissioners are to be paid annual salaries to be fixed by law and that the HRC can maintain offices throughout the state. These costs are undetermined at this time.

The bill appears to apply to all governmental entities, thereby increasing their exposure to potential liability.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

1. Employment Discrimination

The bill would bring state law closer to that contained in the Federal Civil Rights Act of 1991. However, there is one important difference.

The Federal Act caps compensatory and punitive damages in cases of intentional discrimination in employment. The caps are graduated based on the number of employees employed by the employer. The caps apply to the total of compensatory and punitive damages. The cap in this bill applies only to the amount of punitive damages.

2. Discrimination in other areas

The bill would create section 760.07, F.S. The provisions of the newly created section are similar to a bill which passed the Legislature at the 1991 Regular Session but was vetoed by the Governor. See CS/SB 174 (1991). The Governor's reasons for the veto of that bill were as follows:

a. The bill is "vague and imprecise" and "fails to give clear guidance to lawyers, judges or even the individuals subject to the bill's provisions." Specifically, the Governor was of the opinion that the bill "seems likely to allow for an independent lawsuit in court without having to first seek conciliation in the administrative process."

b. The bill "permits the party to sue for punitive damages without any limitation on the amount of such damages." The Governor wanted to know "exactly which statutes give rise to such a claim, and what impact the bill will have on deterring unlawful discrimination."

c. The "legislation leads to costs so excessive that the overall interests of those who are subject to unlawful discrimination will likely be harmed."

Newly created section 760.07 addresses the Governor's concern with respect to clarifying that administrative remedies must be exhausted before going to court.

In 1989, the Legislature removed a $1,000 cap on punitive damages under Florida's Fair Housing Act. s. 8, ch. 89-321, Laws of Fla. The cap had been in existence since the Act became law in 1983. See s. 11, ch. 83-221, Laws of Fla.

Technical problems exist in the bill in its current form. The salaries of the three full-time members are to be "fixed by law". This reference is unclear as to what "law" or its specific provisions and effective date. Additionally, the duties and compensation of the six advisory members are undefined. It is unclear as to whether they receive a stipend, per diem or serve free of compensation.

V. AMENDMENTS:

#1 by Commerce:
The amendments seeks to rectify the technical problems that exist in the bill. The amendment changes the composition of the HRC, specifying that 12 members serve on the HRC instead of 3 full-time and 6 advisory members.

#2 by Commerce:
The amendment sets the quorum at seven instead of four, conforming to the composition of the commission.

#3 by Commerce:
The technical amendment conforms the language to reflect the composition of the commission and removes the budgetary concerns relating to the proposed salaries of commission members.