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The Unsettled State of Pregnancy Discrimination Claims Under the Florida Civil Rights Act of 1992

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Florida's employment law practitioners are no doubt aware that employment discrimination actions may be brought under both Title VII of the Civil Rights Act of 1964 (Title VII),[1] and under the Florida Civil Rights Act of 1992 (FCRA).[2] Both sections contain similar verbiage,[3] and for years, courts have held the Florida Civil Rights Act be interpreted in conformity with Title VII.[4] However, the statutes differ in an important respect: While Title VII expressly forbids sex discrimination on the basis of pregnancy, the Florida Civil Rights Act of 1992 does not.

Pregnancy Discrimination Act

In *General Electric Co. v. Gilbert,* 429 U.S. 125, 145 (1976), the U.S. Supreme Court held that General Electric's disability-benefit plan, which did not cover pregnancy-related disabilities, did not violate Title VII. Two years later, in response to such decision, Congress amended Title VII to provide expressly that 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.[5]

In so doing, the relevant House and Senate committees expressly declared their disapproval of the majority opinion in *Gilbert*.[6] As a result of the amendment, it is now well settled under federal law[7] that discrimination on the basis of pregnancy, childbirth, or related medical conditions violates Title VII.

Does the Florida Civil Rights Act of 1992 Provide a Cause of Action for Pregnancy Discrimination?

The Florida Civil Rights Act of 1992 has never been amended to track or otherwise include the language of the federal Pregnancy Discrimination Act. Making matters worse, the Florida Supreme Court has declined to address the FCRA to determine whether pregnancy discrimination is prohibited.[8] As could be expected, the lack of Florida Supreme Court precedent and the lack of an express legislative amendment have given rise to a split in authority as to whether Florida law recognizes claims for pregnancy discrimination. This split in authority exists in both the state and federal courts.

The split in authority originates with *O'Loughlin v. Pinchback,* 579 So. 2d 788 (Fla. 1st DCA 1991). In that case, Pinchback was terminated from her position as a correctional officer based on her pregnancy.[9] After Pinchback filed a petition with the Florida Commission on Human Relations, the commission ruled that Pinchback's employer committed an unlawful employment practice when it terminated her based upon her pregnancy.[10] On appeal, the First District Court of Appeal affirmed such ruling and held that Pinchback was entitled to an award of back pay as a result of her employer's unlawful termination.[11] In support of its holding that Pinchback was entitled to backpay, the court reasoned in part that 1) Florida's Human Rights Act, the predecessor to the FCRA,[12] was patterned after Title VII; 2) Florida's Human Rights Act was not amended to track the passage of the Pregnancy Discrimination Act; and 3) Florida's Human Rights Act, §760.10, was "pre-empted by Title VII of the Civil Rights Act of 1984 [citations omitted] to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."[13]

A close reading of *O'Loughlin* shows that the First District did not hold that Florida law does not provide a cause of action for pregnancy discrimination. Rather, the narrow issue considered by the court was whether the commission erred in ruling that Pinchback's employer committed an unlawful employment practice when it terminated her based upon her pregnancy.[14] The court affirmed the ruling of the commission and remanded the matter back to the trial court for a determination of the amount of back pay owed to Pinchback.[15]

As part of its preemption analysis, the First District observed that "Florida's law offers less protection to its citizens than does the corresponding federal law."[16] Such statement has caused courts to reach different conclusions as to what *O'Loughlin* actually held.[17] For example, did the court intend to hold that the FCRA is unenforceable as to pregnancy claims? Or that, by contrast, the federal language would be incorporated into the FCRA, a result not traditionally a consequence of pre-

emption doctrine? Administrative decisions have also struggled to apply *O'Loughlin*. Some cite *O'Loughlin* for the proposition that §760.10 has been preempted by Title VII.[18] Another administrative decision cites *O'Loughlin* for the proposition that Florida law prohibits discrimination based on pregnancy.[19] In *Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So. 3d 848 (Fla. 2009), Florida's Fourth District Court of Appeal became the only district court of appeal to hold directly that Florida law recognizes a cause of action for pregnancy discrimination.[20] While *Carsillo* has been followed by two state administrative decisions, and while the commission has affirmed one of those decisions in Administrative Order 10-092, *Carsillo* has not been followed by any other state court.[21]

As could be expected, this lack of clarity in the state courts has led to a split in the federal courts.[22] Although several federal courts have found that the FCRA provides a cause of action for pregnancy discrimination,[23] many courts have concluded otherwise.[24]

Implications for Florida Employment Law Practitioners

In light of the unsettled state of pregnancy discrimination claims under the Florida Civil Rights Act of 1992, attorneys may find it easier to defend against claims of pregnancy discrimination in Florida's state courts than prosecuting such claims. Similarly, because federal courts throughout Florida are split on the issue, attorneys may also find it easier to defend against state law pregnancy discrimination claims filed in federal court. If an attorney prosecuting a claim of pregnancy discrimination is lucky enough to find that his or her case falls within the jurisdiction of the Fourth District Court of Appeal, that attorney may comfortably choose to proceed in state court. However, if the case arises outside of the jurisdiction of the Fourth, perhaps the safest course of action would be to forego a claim under Florida law altogether, and proceed in federal court under Title VII and the Pregnancy Discrimination Act.❑

Because federal courts throughout Florida are split on the issue, attorneys may also find it easier to defend against state law pregnancy discrimination claims filed in federal court.

[1] *See* 42 U.S.C. §2000e *et seq.*; 42 U.S.C. §2000e-2.

[2] *See* FLA. STAT. §760.10.

[3] *Compare* FLA. STAT. §760.10(1)(a) ("It is an unlawful employment practice for an employer . . . "[t]o 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."), *with* 42 U.S.C. §2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . 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....").

[4] *See Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008); *Patterson v. Consumer Debt Mgmt. and Educ, Inc.*, 975 So. 2d 1290, 1291 (Fla. 4th DCA 2008) (*citing Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1104 (Fla.1989)); *Jolley v. Phillips Educ. Group of Cent. Fla., Inc.*, No. 95-147-CIV-ORL-22, 1996 WL 529202, *6 (M.D. Fla. July 3, 1996) (adopting "the traditional statutory constructional rule that Florida laws which mirror federal laws will be construed identically").

[5] 42 U.S.C. §2000e(k); *see Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 670 (1983) (noting that Congress overruled *Gilbert*); *Frazier v. T-Mobile USA, Inc.*, 495 F. Supp. 2d 1185, 1186 (M.D. Fla. 2003) (noting Con-

gress responded to *Gilbert* by amending Title VII with the Pregnancy Discrimination Act).

[6] *See Newport News Shipbuilding and Dry Dock Co.*, 462 U.S at 678 n. 15, 16 (noting that the House of Representatives' report stated, "[i]t is the [c]ommittee's view that the dissenting Justices correctly interpreted the [a]ct," and that the Senate report similarly noted that such dissenting opinions "correctly express both the principle and the meaning of title VII").

[7] *See Newport News Shipbuilding and Dry Dock Co.*, 462 U.S 669; *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1317 (11th Cir. 1994) ("Both the legislative history and relevant caselaw support a conclusion that Congress intended the PDA to end discrimination against pregnant employees."). *See also* 29 C.F.R. §1604.10(a) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII"); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION COMPLIANCE MANUAL, §626.1, 2006 WL 4672822 (2009).

[8] *See Carsillo v. City of Lake Worth*, 995 So. 2d 1118 (Fla. 4th DCA 2008), *rev. den.*, 20 So. 3d 848 (Fla. 2009). *See also Du-Chateau v. Camp Dresser & McKee, Inc.*, No. 10–60712–CIV, 2011 WL 4599837, *6 (S.D. Fla. Oct. 4, 2011) (quoting *Wahl v. Seacoast Banking Corp. of Fla.*, No. 09-81382-CIV, 2011 WL 861129 *12 (S.D. Fla. March 9, 2011)) ("The issue of coverage for pregnancy discrimination under the FCRA has not been finally resolved by the Supreme Court of Florida."); *Boone v. Total Renal Labs., Inc.*, 565 F. Supp. 2d 1323, 1325 (M.D. Fla. 2008) ("surprisingly, there is not a definitive statement from a Florida state court regarding whether the act's prohibition on discrimination based on 'sex' includes pregnancy"); *Carter v. Health Mgmt. Assocs.*, 989 So. 2d 1258, 1266 (Fla. 2d DCA 2008) (noting that "the issue of coverage for pregnancy discrimination under the FCRA has not been finally resolved by the Supreme Court of Florida").

[9] *See O'Loughlin*, 579 So. 2d at 790.

[10] *See id.* at 791.

[11] *See id.* at 790, 795-796.

[12] Like the FCRA, Florida's Human Rights Act was also codified at FLA. STAT. §760.10. *See O'Loughlin*, 579 So. 2d at 792.

[13] *See id.* at 792.

[14] *See id.* at 791 ("After an administrative hearing, the hearing officer found, via his recommended order, that an unlawful employment practice was committed by the employer when Pinchback was discharged on the basis of her pregnancy. This determination was upheld by the [c]ommission in its order which is the subject of the instant appeal.")

[15] *See id.* at 796 ("However, the employee is entitled to an award of back pay, but a determination of when Sheriff O'Loughlin's term expired must be made in order to calculate the award of back pay and benefits. Accordingly, we *affirm* and *remand* for further proceedings consistent with this opinion.").

[16] *See id.* at 792. (*cf.* 42 U.S.C. §2000e-7) ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any [s]tate or political subdivision of a [s]tate, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.").

[17] *See, e.g., Jolley v. Phillips Educ. Group of Cent. Fla., Inc.*, No. 95-147-CIV-ORL-22, 1996 WL 529202 *6 (M.D. Fla. July 3, 1996) (finding that *O'Loughlin* "entertained a pregnancy-based discrimination suit brought under the Florida Human Rights Act of 1977"); *Carsillo v. City of Lake Worth*, No. 04-81198-CIV, 2005 WL 2456015 *1 (S.D. Fla. Feb. 9, 2005) (stating that *O'Loughlin* "construed the Florida Civil Rights Act to provide the same protection to pregnant women as would its [f]ederal counterpart," that *O'Loughlin* "did not hold that pregnancy discrimination was completely preempted by federal law or that such a claim could only be filed in federal court," and that "Pinchback was awarded back pay in that state case"); *Frazier v. T-Mobile USA, Inc.*, 495 F. Supp. 2d 1185, 1186 (M.D. Fla. 2003) (stating that in *O'Loughlin*, "the First District Court of Appeal held that the Florida Human Rights Act did not state a cause of action for discrimination based on pregnancy"); *Boone v. Total Renal Laboratories, Inc.*, 565 F. Supp. 2d 1323, 1326 (M.D. Fla.

2008) (noting that *O'Loughlin* "did not find that the FHRA prohibited pregnancy discrimination; rather, *O'Loughlin* held that the FHRA did not cover pregnancy discrimination and therefore was preempted by Title VII").

[18] *See Nichols v. Marcus Pointe Learning Center*, No. 10-10317, 2011 WL 884723 *3 (Fla. Div. Admin. Hrgs. March. 10. 2011); *Harris v. Advance America Cash Advance Center, Inc.*, No. 10-7922, 2010 WL 4601450 *3 (Fla. Div. Admin. Hrgs. Nov. 10, 2010); *Mercado v. TVI, Inc.*, No. 05-3280, 2006 WL 867210 *4 (Fla. Div. Admin. Hrgs. March 31, 2006).

[19] *See McKnight v. Sears Termite & Pest Control*, No. 00-3845, 2001 WL 634584 *5 (Fla. Div. Admin. Hrgs. June 6, 2001).

[20] In support of such holding, the Fourth District reasoned that 1) under *State v. Jackson*, 650 So. 2d 24 (Fla. 1995), courts are required to construe Florida statutes patterned after federal statutes in the same manner in which the federal statutes are construed; and 2) the Florida Legislature has stated that statute is to be liberally construed for victims of employment discrimination. *See Carsillo*, 995 So. 2d at 1120-1121.

[21] *See Williams v. Crown Wine and Spirits*, No. 09-7035, 2010 WL 2475803 *11 (Fla. Div. Admin. Hrgs. June 15, 2010) (citing *Carsillo* for the proposition that §760.10 prohibits discrimination based on pregnancy); *Mills v. Bay St. Joseph Care and Rehabilitation Center*, No. 09-0516, 2010 WL 3969644 *6 (Fla. Div. Admin. Hrgs. Oct. 7, 2010) (citing *Carsillo* for the proposition that the Florida Commission on Human Relations and Florida courts have determined that §760.10 prohibits discrimination based on pregnancy), *aff'd*, Florida Comm'n on Human Relations Admin. Order 10-092 (Dec. 15, 2010), *available at* http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2010/fchr_order_no_10_092.

[22] *See Carter*, 989 So. 2d at 1265-1266 (noting that the federal district courts in Florida have firmly split on the issue) (*collecting cases*).

[23] *See Constable v. Agilysys, Inc.*, No. 8:10-cv-01778-EAK-TGW, 2011 WL 2446605 *6 (M.D. Fla. June 15, 2011) (concluding that the FCRA provides a cause of action for pregnancy discrimination); *Holland v. Gee*, 719 F. Supp. 2d 1361, 1363-1369 (M.D. Fla. 2010) (entertaining claim of pregnancy discrimination under both the PDA and the FCRA); *Valentine v. Legendary Marine FWB, Inc.*, No. 3:09cv334/MCR/EMT, 2010 WL 1687738 *5 (N.D. Fla. April 26, 2010) (finding causes of action for pregnancy discrimination under the PDA and the FCRA); *Terry v. Real Talent, Inc.*, No. 8:09-cv-1756-T-30TBM, 2009 WL 3494476 *2 (M.D. Fla. Oct. 27, 2009) (concluding that "the FCRA, which is patterned after Title VII, covers an act of discrimination based on pregnancy") (citing *Carsillo*, 995 So. 2d 1118); *Jolley*, 1996 WL 529202 at *6 (recognizing Jolley's state law claim for pregnancy discrimination); *Kelly v. K.D. Const. of Florida*, 866 F. Supp. 1406, 1411 (S.D. Fla. 1994) (entertaining claim of pregnancy discrimination under both state and federal law).

[24] *Frazier*, 495 F. Supp. 2d at 1186 (finding that the FCRA does not provide a cause of action for pregnancy discrimination because the Florida Legislature passed the FCRA after *O'Loughlin*, and failed to include the language of the PDA); *DuChateau v. Camp Dresser & McKee, Inc.*, No. 10-60712-CIV, 2011 WL 4599837 *6-*7 (S.D. Fla. Oct. 4, 2011) (agreeing with other courts that the FCRA does not prohibit pregnancy discrimination); *Boone*, 565 F. Supp. 2d at 1327 ("Florida citizens may still bring suit under Title VII unfettered by the FCRA's provisions, but the FCRA does not provide a pregnancy-discrimination cause of action of its own."); *Westrich v. Diocese of St. Petersburg, Inc.*, No. 8:06-CV-210-T-30TGW, 2006 WL 1281089,*2 (M.D. Fla. May 9, 2006) (citing *O'Loughlin* for the proposition that "Florida law does not recognize a cause of action based on the premise that discrimination against pregnant employees is sex-based discrimination"); *Fernandez v. Copperleaf Gold Club Community Ass'n, Inc.*, No. 2:05-CV-286-FTM29SPC, 2005 WL 2277591 *1 (M.D. Fla. Sept. 19, 2005) (finding that pregnancy discrimination is not within the scope of the FCRA) (citing *O'Loughlin*, 579 So. 2d at 792); *Swiney v. Lazy Days R.V. Center, Inc.*, No. 8:00CV1356T26E, 2000 WL 1392101 *1 (M.D. Fla. Aug. 1, 2000) (finding that Title VII preempted the plaintiff's claim of pregnancy discrimination brought under the FCRA) (*citing O'Loughlin*, 579 So. 2d 788); *Walsh v. Food Supply, Inc.*, No. 96-677-CIV-ORL-18, 1997 WL 401594 *2 (M.D. Fla. Mar. 19, 1997) (finding that the claim of pregnancy discrimination brought under the FCRA was preempted by Title VII as amended by the Pregnancy Discrimination Act) (citing *O'Loughlin*, 579 So. 2d 788).

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