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*Is Pregnancy Discrimination Covered under the FCRA, or Not?**

In a recent case, *Delva v. Continental Group, Inc.*, 2012 WL 3022986 (Fla. 3d DCA, July 25, 2012), the Third DCA held that the Florida Civil Rights Act ("FCRA") does not prohibit employment discrimination on the basis of pregnancy, a decision that is at tension with three other Florida appellate courts. Indeed, the Fourth DCA has ruled that pregnancy is fully protected under the FCRA, *Carsillo v. City of Lake Worth*, 998 So.2d 1118 (Fla. 4th DCA 2008), while the Second DCA allowed a retaliation claim—based, in part, on pregnancy discrimination—to survive a motion to dismiss, but declined to decide whether or not pregnancy was protected under the FCRA. *Carter v. Health Management Associates*, 989 So.2d 1258 (Fla. 2d DCA 2008). Prior to these decisions, the First DCA found that pregnancy is not protected under the FCRA but held that the FCRA was preempted by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. *O'Loughlin v. Pinchback* 579 So.2d 788 (Fla. 1st DCA 1991).

The *Delva* court relied on the reasoning in *O'Loughlin* and certified conflict with the Fourth DCA.

BACKGROUND

In 1976, the United States Supreme Court held that discrimination on the basis of pregnancy did not constitute sex discrimination and, therefore, was not covered under Title VII. *General Electric Company v. Gilbert*, 429 U.S. 125 (1976). In response to this opinion, Congress passed the Pregnancy Discrimination Act of 1978 ("PDA"). The PDA defined discrimination "because of sex" or "on the basis of sex" to include "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e (1978). The Florida legislature has not similarly amended the FCRA, and there continues to be disagreement among the appellate courts as to how the FCRA should be interpreted with respect to pregnancy discrimination claims.

The Florida Civil Rights Act ("FCRA") was originally modeled after Title VII of the Civil Rights Act of 1964 ("Title VII"), and the protections afforded on the state level were intended to reflect those on the federal level. In particular, Section 760.10 of the FCRA reflects the original language of Title VII's employment discrimination provisions and states that an employer cannot discriminate based on "race, color, religion, sex, national origin, age, handicap, or marital status." Fla. Stat. §760.10(1)(a). There is no explicit mention of pregnancy.

DISTRICT COURT OPINIONS

(a) *O'Loughlin*:

Plaintiff filed a charge of discrimination with the Florida Commission on Human Relations alleging she lost her job due to her pregnancy. The Commission determined that she suffered unlawful discrimination. On appeal, the First DCA found that because the FCRA was not amended to reflect the language of the PDA, pregnancy was not protected under the FCRA. *O'Loughlin v. Pinchback* 579 So.2d 788 (Fla. 1st DCA 1991). However, the court held that Title VII preempted the FCRA and affirmed the lower court decision finding the employer liable for pregnancy discrimination:

> Florida's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex-based discrimination. The protections afforded by Title VII and the PDA cannot be eroded by the Florida Act which does not contain a similar provision.

Id. at 792. Some federal cases have relied on *O'Loughlin* and reached opposite conclusions. *See, e.g., Wesley-Parker v. Kesier Sch., Inc.,* No. 3:05-cv-1068-J-25MMH, 2006 U.S. Dist. Lexis 96870 (M.D. Fla. Aug. 21, 2006) (pregnancy discrimination is covered under the FCRA); *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F. Supp.2d 1325 (S.D. Fla. 2011) (there is no cause of action under the FCRA; *O'Loughlin* is distinguished as based on Title VII preemption); *Whiteman v. Cingular Wireless, LLC*, 273 Fed. App's 8841 (11th Cir. 2008) (same); *Boone v. Total Renal Labs., Inc.,* 565 F.Supp.2d 1323, 1326 (M.D. Fla. 2008) (same).

(b) *Carsillo*:

Years later, the Fourth DCA considered this same issue. *Carsillo v. City of Lake Worth*, 998 So.2d 1118 (Fla. 4th DCA 2008). Carsillo sued her employer for sex discrimination on the basis of pregnancy. *Id.* at 1119. The court held that the allegations indeed constituted sex discrimination on the basis of pregnancy, but it reached this conclusion through a slightly different analysis than *O'Loughlin*. *Id.* at 1120. The *Carsillo* court did not consider federal preemption as contemplated in *O'Loughlin*. Instead, the court determined that because the language in the FCRA was patterned after Title VII, the FCRA *followed* the federal law and all of its amendments and should be given the "same construction as the federal statute." *Id.* at 1121. For this reason, the court stated, it was "unnecessary for Florida to amend its law [the FCRA]." *Id.* at 1120. And because

Congress originally intended Title VII to protect against discrimination on the basis of pregnancy, pregnancy discrimination was automatically covered under the FCRA as well. *Id.* As recently as 2011, federal courts have relied on this opinion as "clarify[ing] the ambiguity in *O'Loughlin*." *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011) (citing *Terry v. Real Talent, Inc.*, 2009 WL 3494476 at 2 (M.D. Fla. 2009)).

(c) *Carter:*

In *Carter*, the plaintiff sued for retaliation under the FCRA alleging she was fired for filing a gender and pregnancy discrimination claim against her employer. *Carter v. Health Management Associates*, 989 So.2d 1258 (Fla. 2d DCA 2008). The defense argued that there was no cause of action for pregnancy discrimination under Florida law, and plaintiff's former employer therefore could not be liable for retaliation. *Id.* The court remanded the case, finding that Ms. Carter's complaint adequately stated a cause of action for retaliation. *Id.* at 1266.

In rendering its opinion, the Second DCA took an entirely different approach—in large part because this case involved retaliation. First, the court acknowledged that the district courts are "firmly split" on the issue of pregnancy discrimination and that the Florida Supreme Court has yet to resolve the issue. *Id.* at 1265. Second, as this case involved a retaliation claim, the court did not take a position on whether pregnancy discrimination is covered by the FCRA. *Id.* at 1266. Instead, the court considered only whether or not the plaintiff had an "objectively reasonable belief" that the employer engaged in an unlawful practice. *Id.*

The Second DCA ultimately determined there to be an objectively reasonable belief based on then-recent administrative and judicial interpretations in Florida. First, the Florida Commission on Human Relations had stated that "pregnancy-based discrimination is prohibited by the [FCRA] within the context of 'sex discrimination.'" *Id.* at 1265 (citing *Bailey v. Centennial Employee Mgmt. Corp.,* F.C.H.R. Order No. 02-027 (Fla. Comm'n on Human Relations May 31, 2002)). Second, the court relied on *O'Loughlin*, which ultimately found the employer liable for unlawful discrimination. *Id.*

(d) *Delva*:

This year, a pregnancy discrimination claim came before the Third DCA. *Delva v. Continental Group, Inc.* 2012 WL 3022986 (Fla. 3d DCA July 25, 2012). According to the Third DCA, there was "no doubt" that plaintiff's factual allegations were sufficient for employment discrimination on the basis of pregnancy. *Id.* at 1. Despite this, the court, relying on *O'Loughlin* as the "better reasoned decision," determined that a cause of action for pregnancy discrimination is not legally cognizable under the FCRA because the Florida legislature has not amended it to include protections afforded under the PDA. *Id.* at 2.

The court also referred to federal court decisions rendered after *O'Loughlin* to reinforce its opinion that pregnancy is not protected under the FCRA. *See DuChateau v. Camp Dresser & McKee, Inc.*, 822 F. Supp. 2d 1325 (S.D. Fla. 2011); *Whiteman v. Cingular Wireless, LLC*, 273 Fed. Appx 8841 (11th Cir. 2008). The *Delva* court did not address federal preemption because the issue was not raised by the parties. *Id.* at 2.

CONCLUSION

Delva's holding that pregnancy is not protected under the FCRA stands in agreement with the First DCA's decision in *O'Loughlin* but conflicts with the Fourth DCA's holding in *Carsillo*. Consequently, until the Florida Supreme Court resolves the conflict, the treatment and outcome of a pregnancy discrimination claim will largely depend on the district where it is brought.

** This article was written by **Sherril Colombo**, a partner at Wilson Elser Moskowitz Edelman & Dicker LLP in Miami, and **Kelly Smith**, a summer law clerk for Wilson Elser's Miami office. Ms. Colombo is Chair of the Labor & Employment Law Section of The Florida Bar. Kelly Smith is a third year law student at Northeastern University.*

Section Calendar

SEPTEMBER 2012 THIS WEEK!

Location: Buena Vista Palace, Orlando
The Florida Bar Midyear Meeting

- **38th Public Employment Labor Relations Forum (1504R)**
  9/20/2012 to 9/21/2012
  To register for this course, please **call:** 850-561-5831 (credit card payment only), or go **on-line:** www.floridabar.org/cle (credit card payment only).
- **Executive Council Meeting**
  9/20/2012, 5:00 p.m. to 6:30 p.m.
- **Joint Reception with City, County & Local Government Section**
  9/20/2012, 6:30 p.m. to 8:00 p.m.

NOVEMBER 2012

Location: Hyatt Pier 66, Fort Lauderdale

- **Executive Council Meeting**
  11/1/2012, 5:00 p.m. to 6:00 p.m.
- **Litigating Employment Law Claims 2012 (1432R)**
  11/2/2012
  To register for this course, please **call:** 850-561-5831 (credit card payment only), or go **on-line:** www.floridabar.org/cle (credit card payment only).
- **Reception (after seminar)**
  11/2/2012, 5:00 p.m. to 6:00 p.m.