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APPENDIX C – 3

Notice of proposed jury instructions in civil cases for unlawful discrimination:

The Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new instructions 000.1 through 000.10 on unlawful discrimination. These instructions are based on the Florida Civil Rights Act of 1992. *F.S.* 760.01-760.11.

Interested persons have until _____, to submit comments electronically to the chair of the committee, _____. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

000 UNLAWFUL DISCRIMINATION

000.1	Introduction
000.2	Summary of Claims and Defenses
000.3	Greater Weight of the Evidence
000.4	Discrimination: Disparate Treatment
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000.9	Unlawful Discrimination Damages
000.10	Affirmative Defense — Failure to Mitigate Lost Wages
000.11	Reduction of Damages to Present Value

NOTES ON USE FOR ____

The instructions in this section are based upon the Florida Civil Rights Act of 1992 (FCRA), which makes it unlawful for an employer to discriminate based upon race, color, religion, sex, national origin, age, handicap, or marital status. *F.S.* 760.01-760.11.

000.1 INTRODUCTION

Members of the jury, you have now heard and received all of the evidence in this case. I am now going to tell you about the rules of law that you must use in reaching your verdict. [You will recall at the beginning of the case I told you that if, at the end of the case I decided that different law applies, I would tell you so. These instructions are (slightly) different from what I gave you at the beginning, and it is these rules of law that you must now follow.] When I finish telling you about the rules of law, the attorneys will present their final arguments and you will then retire to decide your verdict.

NOTES ON USE FOR 000.1

1. When instructing the jury before taking evidence, use instruction 202.1 in lieu of instruction 000.1. See Model Instruction 1. Instruction 000.1 is for instructing the jury after the evidence has been concluded. Use the bracketed language in instruction 000.1 when the final instructions are different from the instructions given at the beginning of the case. If the instructions at the end of the case are different from those given at the beginning of the case, the committee recommends that the court point out the differences with appropriate language in the final instructions, including an explanation for the difference, such as when the court has directed a verdict on an issue.

2. *Fla.R.Civ.P.* 1.470(b) authorizes instructing the jury during trial or before or after final argument. The timing of instructions is within the sound discretion of the trial judge, to be determined on a case-by-case basis, but the committee strongly recommends instructing the jury before final argument.

3. Each juror must be provided with a full set of jury instructions for use during their deliberations. *Fla.R.Civ.P.* 1.470(b). The trial judge may find it useful to provide these instructions to the jurors when the judge reads the instructions in open court so that jurors can read along with the judge, as the judge reads the instructions aloud.

000.2 SUMMARY OF CLAIMS AND DEFENSES

The claim[s] [and defenses] in this case [is] [are] as follows: (claimant) **claims that** (defendant) **discriminated against [him] [her] by [discharging] [failing to hire] [(describe discriminatory treatment)]** (claimant) **because of** (claimant's) **[race] [color] [religion] [sex] [national origin] [age] [handicap] [marital status], and that the** (describe discriminatory treatment) **caused [him] [her] damage.**

(Defendant) **denies that claim [and also claims that** (claimant) (describe any affirmative defenses)].

[(Claimant)] **[The parties] must prove [his] [her] [their] claim(s) [and defense(s)] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

000.3 GREATER WEIGHT OF THE EVIDENCE

“Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTES ON USE FOR 000.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee recommends that no charge generally be given distinguishing circumstantial from direct evidence. *See Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960).

3. *“Preponderance of evidence” and “burden of proof.”* The committee recommends that no charge be given using these terms, which are considered not helpful to a jury and not necessary in a charge that otherwise defines “greater weight of the evidence” and instructs the jury on the consequences of its determining that the greater weight of the evidence supports or does not support the claim or defense of a party.

000.4 DISCRIMINATION: DISPARATE TREATMENT

To “discriminate” means to treat an [employee] [applicant] differently with regard to compensation, terms, conditions, or privileges of employment because of the [employee’s] [applicant’s] [race] [color] [religion] [sex] [national origin] [age] [handicap] [marital status].

NOTES ON USE FOR 000.4

1. This instruction is for disparate treatment claims, as opposed to hostile environment, pattern and practice, or disparate impact claims. See, *e.g.*, *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000) (explaining differences among disparate treatment, pattern and practice, and disparate impact claims of discrimination).

2. This instruction is based upon *F.S.* 760.10(1), which makes it 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” or “[t]o limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual’s status as an employee” “because of such individual’s race, color, religion, sex, national origin, age, handicap, or marital status.” This instruction can be modified to reflect the particular type of discriminatory treatment at issue. [add pinpoint cites]

000.5 LEGAL CAUSE — DISCRIMINATION

The (claimant's) [race] [color] [religion] [sex] [national origin] ~~[age]~~ ~~[handicap]~~ ~~[marital status]~~ is the legal cause of the employer's decision to [discharge] [fail to hire] [(describe discriminatory treatment)] if the (claimant's) [race] [color] [religion] [sex] [national origin] ~~[age]~~ ~~[handicap]~~ ~~[marital status]~~ was a motivating factor in (defendant's) decision. The (claimant's) [race] [color] [religion] [sex] [national origin] ~~[age]~~ ~~[handicap]~~ ~~[marital status]~~ need not be the only factor motivating (defendant's) decision.

[You may find that (claimant's) [race] [color] [religion] [sex] [national origin] ~~[age]~~ ~~[handicap]~~ ~~[marital status]~~ was a motivating factor in (defendant's) decision if you find (defendant's) stated reason(s) for its decision(s) [was] [were] not the real reason(s), but [was] [were] given to hide the discriminatory reason.]

NOTES ON USE FOR 000.5

1. This instruction is based upon *F.S. 760.10(1)*.
2. On the issue of causation,
3. This legal cause instruction does not apply to claims based on age, handicap or marital status. . . .
4. The second paragraph of 000.5 is a permissive inference pretext instruction. *See generally Feizi v. Dep't of Mgmt. Servs.*, 988 So. 2d 1192 (Fla. 1st DCA 2008) (reversing summary judgment where evidence was susceptible to a reasonable inference that the explanation offered by the defendant for eliminating plaintiff's job was pretextual). There is disagreement among the federal circuits as to whether a pretext instruction is required in employment discrimination cases. The weight of authority supports requiring a pretext instruction when the jury could find that the employer's explanation is false and could infer from the falsity that the employer is dissembling to cover up an unlawful purpose. *See Ratliff v. City of Gainesville*, 256 F.3d 355 (5th Cir. 2001). Other circuits do not require an instruction, but permit one in the trial judge's discretion. *See Palmer v. Bd. of Regents*, 208 F.3d 969 (11th Cir. 2000).

000.6 LEGAL CAUSE — DAMAGE

The [discharge] [failure to hire] [describe discriminatory treatment alleged] is the legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such damage, so that it can reasonably be said that, but for the [discharge] [failure to hire] [(describe discriminatory treatment)], the [loss] [injury] [or] [damage] would not have occurred.

NOTE ON USE FOR 000.6

1. This instruction is based upon *F.S. 760.10(1)*.

000.7 ISSUES ON PLAINTIFF'S CLAIM

The issues you must decide on the claim of (claimant) against (defendant) are whether (defendant) discriminated against (claimant) by [discharging] [failing to hire] [describe discriminatory treatment alleged] (claimant) because of (claimant's) [race] [color] [religion] [sex] [national origin] [age] [handicap] [marital status] and, if so, whether the [discharge] [failure to hire] [(describe discriminatory treatment)] was a legal cause of [loss] [injury] or [damage] to (claimant).

NOTE ON USE FOR 000.7

1. This instruction is based upon *F.S. 760.10(1)*.

000.8 BURDEN OF PROOF ON CLAIM

If the greater weight of the evidence does not support the claim of (claimant), then your verdict should be for (defendant).

However, if the greater weight of the evidence supports the claim of (claimant), [then your verdict should be for (claimant) and against (defendant)] [then you shall consider the defense[s] raised by (defendant)].

[If the greater weight of the evidence supports the defense, your verdict should be for (defendant). However, if the greater weight of the evidence does not support the defense, your verdict should be for (claimant) and against (defendant).]

000.9 UNLAWFUL DISCRIMINATION DAMAGES

If you find for (defendant), you will not consider the matter of damages. But if you find for (claimant), you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately compensate [him] [her] for such damage, including any such damage as (claimant) is reasonably certain to incur in the future. You shall consider the following elements of damages:

[any] [the difference between] lost wages and benefits to the date of trial [and what (claimant) earned during that time].

[any wages and benefits to be lost in the future.]

[any mental anguish] [loss of dignity] and [(describe other intangible injuries)] experienced in the past or to be experienced in the future. There is no exact standard for measuring such damages. The amount should be fair and just in the light of the evidence.]

[any punitive damages warranted.]

NOTES ON USE FOR 000.9

1. *Lost wages and benefits.* The court may issue an order “providing affirmative relief from the effects of the discriminatory practice, including back pay.” *F.S.* 760.11(5). Under Florida law, back pay is a legal remedy decided by the jury, and front pay is an equitable remedy that does not include a right to jury determination. *O’Neal v. Fla. A&M Univ.*, 989 So.2d 6 (Fla. 1st DCA 2008) decided under Florida’s Whistle-blower Act).
2. *Compensatory Damages.* The court may award “compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and other intangible injuries...” *F.S.* 760.11(5). Examples of “other intangible injuries” for which damages have been awarded include “emotional distress,” *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000); “emotional injury,” *City of Hollywood v. Hogan*, 986 So.2d 634 (4th DCA 2008); “emotional and mental suffering,” *Garrett v. Dep’t. of Corrections*, 589 F. Supp. 2d 1289 (M.D. Fla. 2007); “humiliation and embarrassment,” *Melluzzo v. Pub. Advocate*, 2006 WL 5159197 (M.D. Fla. 2006); “pain and suffering,” and “loss of capacity for enjoyment of life experienced in the past or to be experienced in the future,” *Moses v. K-Mart Corp.*, 905 F.Supp. 1054, *aff’d* 119 F.3d 10 (S.D. Fla. 1995).
3. *Punitive Damages.* The court may award punitive damages not to exceed \$100,000. *F.S.* 760.11(5). Pending further development of the law, the committee takes no position as to whether the Florida standard or the heightened federal standard for holding an employer vicariously liable for punitive damages for the

conduct of its employee should apply. See *Speedway SuperAmerica, LLC v. DuPont*, 933 So.2d 75 (Fla. 5th DCA 2006), certifying the question of whether the state or federal standard applies, *review dismissed* 955 So.2d 533 (Fla. 2007).

000.10 AFFIRMATIVE DEFENSE — FAILURE TO MITIGATE LOST WAGES

[As a defense to (claimant’s) damages claim for lost wages and benefits, (defendant) claims that (claimant) could have reduced [his] [her] damages by making a reasonable effort to [seek] [retain] comparable employment. Comparable employment means alternative employment similar to (claimant’s) former job in the nature of the work, responsibilities and skills required. (Claimant) need not accept employment that is unsuitable or demeaning when compared with (claimant’s) former job.]

If the greater weight of the evidence supports (defendant’s) claim that there was comparable employment available to (claimant) and that (claimant) failed to make a reasonable effort to [seek] [retain] such employment, then you should reduce any lost wages and benefits you award to (claimant) by the amount that (claimant) could have earned from the comparable employment.

If however, the greater weight of the evidence does not support (defendant’s) claim that there was comparable employment available to (claimant) and that (claimant) failed to make a reasonable effort to [seek] [retain] that employment, then your verdict should be for (claimant) in the total amount of [his] [her] damages for lost wages and benefits.]

NOTES ON USE FOR 000.10

1. This instruction is given only if the defendant raised the affirmative defense of failure to mitigate in a discharge or failure to hire case.

2. As to plaintiff’s “duty to mitigate” damages in cases involving wrongful discharge, see generally *Zayre Corp. v. Creech*, 497 So.2d 706, 708 (Fla. 4th DCA 1986); *Juvenile Diabetes Research Foundation v. Rierman*, 370 So.2d 33, 36 (Fla. 3d DCA 1979); *Punkar v. King Plastic Corp.*, 290 So.2d 505, 508 (Fla. 2d DCA 1974). This instruction does not use the term “duty to mitigate” because this is more accurately an application of the doctrine of avoidable consequences. See *System Components Corp. v. Fla. Dept. of Transp.*, 14 So.3d 967, 982(Fla. 2009).

000.11 REDUCTION OF DAMAGES TO PRESENT VALUE

Any amount of damages that you allow for wages and benefits to be lost in the future should be reduced to its present money value, and only the present money value of those future economic damages should be included in your verdict.

The present money value of future economic damages is the sum of money needed now which, together with what that sum will earn in the future, will compensate (claimant) for these losses as they are actually experienced in future years.

NOTES ON USE FOR 000.11

1. Designing a standard instruction for reduction of damages to present value is complicated by the fact that there are several different methods used by economists and courts to arrive at a present value determination. Cf., e.g., Delta Air Lines, Inc. v. Ageloff, 552 So.2d 1089 (Fla. 1989) & Renuart Lumber Yards v. Levine, 49 So.2d 97 (Fla. 1950) (using approach similar to calculation of cost of annuity) with Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) & Loftin v. Wilson, 67 So.2d 185 (Fla. 1953) (lost stream of income approach); Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967) (total offset method); Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) & Seaboard Coast Line R.R. Co. v. Garrison, 336 So.2d 423 (Fla. 2d DCA 1976) (discussing real interest rate discount method and inflation/market rate discount methods); Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) (even without evidence, juries may consider effects of inflation).

2. Until the Florida Supreme Court or the legislature adopts one approach to the exclusion of other methods of calculating present money value, the committee assumes that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control the finding, that the jury will properly resort to its own common knowledge and by argument. See Seaboard Coast Line R.R. Co. v. Burdi, 427 So.2d 1048 (Fla. 3d DCA 1983).

TO: Sally Gertz
 FROM: Matthew Neff
 DATE: October 2, 2013
 RE: Age, Handicap, and Marital Status in the FCRA Instruction

Issue

Should “age,” “handicap,” and “marital status” be removed from the FCRA instruction because but-for causation applies rather than “a motivating factor?”

Age

The FCRA prohibits age discrimination in the workplace. Fla. Stat. § 760.10(1)(a). The FCRA is modeled after the federal law and “[f]ederal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA.” *City of Hollywood v. Hogan*, 986 So. 2d 634, 641 (Fla. 4th DCA 2008). Courts analyze age discrimination claims brought under the FCRA using the same framework used to decide actions brought pursuant to the ADEA. *Proe v. Facts Services, Inc.*, 491 F. Appx. 135, 136 (11th Cir. 2012).

Under the ADEA, to establish a disparate-treatment claim, the plaintiff must prove that age was the but-for cause of the employer’s adverse decision. *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 176 (2009) *see also*, *Saridakis v. S. Broward Hosp. Dist.*, 468 F. Appx. 926, 931 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 425 (U.S. 2012). In addition, the Eleventh Circuit’s pattern jury instructions for an ADEA claim provide the following but-for causation language:

“To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence: . . . [Name of defendant] took that action **because of** [name of plaintiff]’s age.” Pattern Civ. Jury Instr. 11th Cir. 4.10 (2013).

The FCRA legal cause instruction “000.5 Legal Cause – Discrimination” should not include age. The instruction is based on Title VII and uses “a motivating factor” standard of causation. “A motivating factor” instruction is available for claims of discrimination based on race, color, religion, sex, and national origin, but not age. For age claims, the FCRA follows the ADEA, and a different standard of causation applies. Claims of discrimination based on age require a showing that but-for the plaintiff’s age, the plaintiff would not have suffered an adverse employment action. Because but-for causation applies to these claims, age should be removed from the instruction. A different causation instruction should be drafted, and it should indicate that the “same decision defense” does not apply.

Handicap

Florida courts have recognized that actions under the Florida Civil Rights Act are analyzed under the same framework as the ADA. *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1221 (11th Cir. 2000). Federal law involving ADA claims is applicable to claims arising under the FCRA. *Fromm-Vane v. Lawnwood Med. Ctr., Inc.*, 995 F. Supp. 1471, 1475 (S.D. Fla. 1997). The Eleventh Circuit has found that the ADA requires but-for causation. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996). Since the statute imposes a but-for liability standard, courts require that a disability be shown to be a determinative factor. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334 (11th Cir. 1999).

In *Gross*, the U.S. Supreme Court did not allow a motivating factor instruction to be used in an ADEA case, reasoning that because Congress amended Title VII but not the ADEA, Congress did not intend the motivating factor instruction to be used outside of Title VII claims. *Gross*, 986 F. Appx. 167. This reasoning can be applied to ADA claims because the ADA contains language similar to the ADEA, and Congress refused to amend the ADA to include motivating factor causation. In addition, the Eleventh Circuit's pattern jury instructions for an ADA claim provide the following but-for causation language:

"To succeed on [his/her] claim, [name of plaintiff] must prove all the following facts by a preponderance of the evidence: . . . [Name of defendant] took that action **because of** [name of plaintiff]'s disability."
Pattern Civ. Jury Instr. 11th Cir. 4.11 (2013).

Handicap should not be included in the present FCRA causation instruction. A motivating factor instruction is available for claims of discrimination based on race, color, religion, sex, and national origin, but not handicap. The current language of "000.5 Legal Cause – Discrimination" contains motivating factor language. Claims of discrimination based on disability require a showing that but-for the plaintiff's disability, the plaintiff would not have suffered an adverse employment action. Because but-for causation applies to these claims, handicap should be removed from the instruction containing motivating factor language.

Marital Status

Under the FCRA, to prove a prima facie case of marital discrimination, the plaintiff must prove that marital status was a motivating factor of the adverse employment action. *Sanders v. Mayor's Jewelers, Inc.*, 942 F. Supp. 571 (S.D. Fla. 1996); *see also Nat'l Indus., Inc. v. Comm'n on Human Relations*, 527 So. 2d 894 (Fla. 5th DCA 1988). Marital status discrimination under the FCRA has received very little treatment from the courts. *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000).

Title VII protects individuals from discrimination based on their race, color, religion, sex, and national origin. Marital Status is not a protected class under Title VII, the ADA, or the ADEA. The only Federal law protecting marital status is the Civil Service Reform Act of 1978 (the "CSRA"). The CSRA protects federal employees or applicants from discrimination on the basis of marital status.

Claims of marital status discrimination require a showing that the employee's marital status was a motivating factor in the adverse action taken against the employee. Therefore, marital status should be included in the current instruction containing the motivating factor language.

To: Employment Subcommittee

From: Sally Gertz

Re: Causation standard for FCRA mixed-motive discrimination claim based on race, color, religion, sex, national origin

Date: 10/22/13

In 000.5 Legal Cause I think we should keep the causation standard “a motivating factor” and write a “same decision” defense for claims based on race, color, religion, sex, and national origin (the 5 Title VII classifications). I think that would accurately state what the law is. Below are my reasons.

1. There is no case squarely addressing what causation standard should apply to a FCRA mixed-motive discrimination claim based on race, color, religion, sex and national origin. I believe the reason for this oversight is that courts think the law is clearly established and doesn't need further explication--they think Title VII cases apply and there are plenty of Title VII cases directly on point. A case that demonstrates this reasoning is *Saridakis v. South Broward Hospital District*, 468 Fed. Appx. 926, 2012 WL 1033560 (11th Cir. 2012). The plaintiff asked the Eleventh Circuit to certify to the Florida Supreme Court the question of what causation standard applied to an **FCRA retaliation claim**. The court refused to certify the question because the court believed the law was clear:

“This court need not independently analyze whether the FCRA authorizes a same-decision defense to retaliation claims because the FCRA is patterned after Title VII and courts generally apply Title VII case law to retaliation claims brought under the FCRA.”

The policy reason for applying Title VII case law to FCRA claims is obvious. The claims frequently are brought together and managing them will be easier for judges and juries if one body of law applies.

2. At least four cases, listed below, have *de facto* applied “motivating factor” causation and the “same decision” defense to an FCRA mixed-motive discrimination claim. There are no cases applying a different causation standard. The four cases are in federal courts and involve Title VII claims and FCRA claims pled together.

a. *Saridakis v. South Broward Hospital District*, 2010 WL 2274955 (S.D. Fla. 2010) At this juncture, the case involved a gender discrimination claim under Title VII and the FCRA. The jury found the hospital proved it nonrenewed plaintiff for a reason “other than gender” and plaintiff asked the judge to amend the judgment and grant a new trial because the verdict form misstated the law. The judge denied the request. He explained that Title VII analysis requires “motivating factor” causation and “same decision” defense. He did not explicitly apply this analysis to the FCRA claim, but it is implicit in the order. He used the Title VII analysis to dispose of plaintiff’s objections under both claims.

b. *Carter v. DiamondbackGold Club*, 2006 WL 2883260 (M.D. Fla. 2006) This was an order on plaintiff’s motion for attorney’s fees and costs. Plaintiff brought a religious discrimination claim on a mixed motive theory under Title VII and the FCRA. The jury found that religion was a “motivating factor,” but that defendant would have made the “same decision” to terminate in the absence of plaintiff’s religion. These jury findings were applied to both the Title VII and FCRA claims. The judge concluded the plaintiff was not a prevailing party and denied fees.

c. *McClurg v. Santa Rosa Golf & Beach Club, Inc.* 46 F. Supp.2d 1244 (N.D. Fla. 1999) At the parties’ request, one month before the jury trial began in a mixed motive, gender discrimination case under Title VII and the FCRA, the judge issued a pretrial order to clarify aspects of the law. The judge explained that the jury would be asked whether the plaintiff’s gender was “a motivating factor” in terminating her, and the jury would be instructed on the “same decision” affirmative defense.

d. *Kelly v. K.D. Const. of Florida, Inc.*, 866 F.Supp 1406 (S.D. Fla. 1994) This is an order containing the judge’s findings of fact and conclusions of law in a nonjury trial in a pregnancy discrimination, mixed motive claim under Title VII and the FCRA. The judge applied “a motivating factor” and “same decision defense” analysis to both claims. He said “Federal case law dealing with Title VII also applies to the Florida Human Rights Act, since the Act is patterned after Title VII.”

3. Many other cases have said that decisions construing Title VII are applicable to FCRA claims. These cases do not apply “motivating factor” and “same decision” analysis to the FCRA (because the issue was not before the court), but stand for the general proposition that Title VII cases are used to construe the FCRA. Here are a few recent examples.

Fuller v. Edward B. Stimpson, 2013 WL 4710863 (S.D. Fla 2013) “The same analysis is used to evaluate race discrimination claims brought under Title VII and the FCRA because the FCRA was patterned after Title VII.”

Smith v. Cith of New Smyrna Beach, 2012 WL 6721002 (M.D. Fla. 2012) “The Court will analyze the claims under Title VII as the Title VII analysis guides the FCRA analysis.”

Burns v. City of Cape Coral, 2012 WL 2179099 (M.D. Fla. 2012) “The FCRA is modeled after Title VII (cite omitted) and decisions construing Title VII are applicable to claims under the FCRA.”

Holland v. Gee, 677 F.3d 1047 (11th Cir. 2012) “Although Ms. Holland asserted a claim under the FCRA as well, ‘decisions construing Title VII guide the analysis under [that statute].’”

Hill v. Lazarou Enterprises, Inc., 2011 WL 1331272 (S.D. Fla. 2011) “The plaintiff asserts pregnancy discrimination claims under Title VII and the Florida Civil Rights Act. The undersigned’s analysis of the plaintiff’s Title VII claim also applies to the plaintiff’s discrimination claim under the Florida Civil Rights Act. ‘Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act.’ *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); see also *Carsillo v. City of Lke Worth*, 995 So.2d 1118, 1119 (Fla. 4th DCA 2008); rev. denied, 20 So.3d 848 (Fla. 2009) (unpublished table decision) (stating that “[i]t is well-established that if a Florida statute is patterned after a federal law, the Florida statute will be given the same construction as the federal courts give the federal act.”)(citing *State*

v. Jackson, 650 So2d 24 (Fla. 1995). Accordingly, the undersigned will only address the plaintiff's Title VII discrimination claim in this Report and Recommendation.

4. There are two main arguments for applying a different standard. First, the FCRA says "because" and some other Florida statutes that use "because," such as the private whistleblower statute, have been construed to mean "but-for" causation. Second, the Florida legislature didn't change the FCRA after Congress amended Title VII in 1992.

It would be helpful if the Florida Legislature clarified its intent, but "because" can be construed to mean "a motivating factor" and "same decision defense." That's what the majority of the U.S. Supreme Court decided in *Price Waterhouse* back when Title VII said "because." Also, assuming the Florida Legislature has considered the matter, similarly to the Eleventh Circuit, it may believe that the law is clear enough because of the many decisions stating that Title VII cases should be applied to the FCRA.